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UNPACKING TRADE & INVESTMENT

7 LEGAL RELATIONSHIP OF RTAs AND WTO

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The universe of international trade and investment agreements is multifaceted. The World Trade Organisation (WTO), established in 1995, has a number of multilateral trade agreements and currently 162 Members.[1] It is thus nearly global in reach. Aside from the WTO agreements, there are a significant number of bilateral or regional trade and investment agreements (in the following referred to as RTAs).[2]

Some of the latter have existed since before the WTO was established. Others were negotiated after, because parties were seeking more comprehensive and far-reaching rules on trade liberalisation and investment protection than what the WTO offers. Moreover, WTO negotiations have not led to far-reaching new rules on trade or investment in the past few years. More recently, several so called mega-regionals – far-reaching regional trade agreements between a small number of states, but covering a significant market – have been or are being negotiated. The Trans-Pacific Partnership (TPP)[3] between 12 countries on both sides of the Pacific and the Transatlantic Trade and Investment Partnership (TTIP), between the US and the EU, are important examples.

The coexistence of WTO law and RTAs raises a number of legal issues. This text explains these issues to non-lawyers who are interested in trade and investment. The text is structured as follows: Section 2 explains basic aspects of how international law works, since both WTO law and bilateral/regional agreements are a part of international law. Section 3 summarises the key content of WTO law and section 4 describes how the content of some of the more recent RTAs relates to it. Section 5 provides details on the legal relationship between WTO law and RTAs in general and section 6 deals with their respective dispute settlement mechanisms. Section 7 summarizes.

SOME BASICS ABOUT INTERNATIONAL LAW

The fact that both WTO law and RTAs are a part of international law means that general rules about how international law is created, its binding force and interpretation, as well as the hierarchy of different sources of international law apply to them. In particular, the following aspects are important.

International agreements are binding …

An international agreement becomes binding upon a state through ratification by the latter. This will require a decision by the political institutions of the respective state according to its constitutional law. For example, for the EU to ratify an international trade agreement that the Commission has negotiated, the Parliament and the Council both need to agree according to the Treaty of the Functioning of the EU (TFEU). Once the states, having negotiated an

1 See the list at WTO, Members and Observers, **https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm**

2 According to estimates by international organizations, there are more than 2500 international investment agreements and at least about 350 bilateral or regional trade agreements in force, see Lejárraga, I. (2014) 'Deep Provisions in Regional Trade Agreements: How Multilateral-friendly?: An Overview of OECD Findings', OECD Trade Policy Papers , No. 168, OECD Publishing, **http://dx.doi.org/10.1787/5jxvgfn4bjf0-en**, p. 8.

3 The parties to this agreement, which still needs to be ratified, are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, and Vietnam.

agreement, have ratified it (and other conditions have been satisfied, such as a certain number of states needed to ratify an agreement for it to enter into force), the agreement in its entirety becomes legally binding for the states that ratified it.

This does not mean, however, that all of the obligations contained in the agreement are of a very demanding or precise nature. An international agreement will often contain language that does not impose very strict obligations on states for example saying that the parties 'will consider...' or 'shall take into account where appropriate...'. Such clauses allow parties leeway in decision-making, while at the same time being legally binding.

Once a treaty has become binding on a state, the state will normally be bound by it for an indefinite period of time. Lawyers refer to this principle as *'pacta sunt servanda'* (meaning 'treaties are to be observed' in Latin).

... unless terminated or expired

However, some treaties, notably many bilateral investment treaties (BITs), contain clauses allowing any of the parties to terminate such agreements under certain conditions. For example, South Africa terminated in recent years a number of investment agreements it had concluded with various EU countries that it considered detrimental to its sustainable development.[4] Some BITs are also limited in duration. For example, the now expired South Africa – Netherlands BIT stated in Article 14 that it 'shall remain in force for a period of fifteen years' after entry into force.[5] However, usually there are clauses in BITs stipulating that some of the obligations of the parties remain in force for a certain period of time after termination or expiry. WTO law also allows Members to withdraw from the WTO[6], a possibility that has so far not been used.

Moreover, there are some more general rules in international law governing how a state can exit a treaty it is bound by. Like other general rules on the functioning of international treaties, they can be found in the Vienna Convention on the Law of Treaties (VCLT). According to the relevant rules in the VCLT, an important element for termination of an agreement or withdrawal of a party is that all parties agree.

Almost all international agreements are of equal weight, but there are rules on conflict

In international law, all agreements are (with few exceptions[7]) of equal weight. This means that WTO law is not more important and does not take precedence over RTAs. However, once a state is bound by a specific international agreement, it is legally prohibited from becoming a party to another treaty that conflicts with the first one. For example, once a WTO Member negotiates an RTA it is legally obliged to ensure that the latter is in conformity with WTO law. Yet, the latter obligation is not always observed. Moreover, given that international agreements are often vaguely worded, it is sometimes not clear whether an agreement is actually in conflict with a second one.

There may be situations where a state has assumed conflicting international legal obligations. There are some rules that apply in cases of such conflicts. Sometimes these rules are contained in a treaty, defining the relationship between it and other international treaties. For example, some RTAs contain a clause that they should not be read to prohibit the parties from complying with their obligations under multilateral environmental agreements. There are also more general rules in international law on what happens in cases of conflict. In particular, a later treaty on a topic between the same parties supersedes an earlier treaty, and a more specific treaty supersedes a general one.

4 For an overview of South Africa's BITs see UNCTAD, Investment Policy Hub, **http://investmentpolicyhub.unctad.org/IIA/country/195/treaty/2652**

5 The text of the agreement is available at **http://investmentpolicyhub.unctad.org/Download/TreatyFile/2082**

6 See Art. XV of the WTO Agreement, available at **https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm**

7 In international law, there are few so called *ius cogens* rules, i.e. rules that are peremptory and that states cannot deviate from. An example is the prohibition on genocide.

In sum, while most international legal rules, including WTO law and RTAs, are prima facie of equal significance and rank, there are some rules applicable in cases of conflict. The termination of a treaty by one party or withdrawal from a treaty are subject to specific rules.

WTO LAW – IMPORTANT ELEMENTS

In order to understand the relationship between WTO law and RTAs, it is important to know what WTO law does and does not cover. WTO law consists mostly of multilateral agreements that are binding for all WTO Members; however, there are also some so-called plurilateral agreements that are only binding for those WTO Members that have chosen to embrace them. One example is the Agreement on Government Procurement (GPA).

Multilateral WTO agreements contain rules on the following topics:

Trade in goods

The General Agreement on Tariffs and Trade (GATT) governs trade in goods. A central rule is Article I. It stipulates that any trade advantage granted to one WTO Member in relation to trade in goods must also be granted to every other WTO Member. This is the so-called "most-favoured nation" principle. GATT also contains an obligation for WTO Members to reduce import tariffs according to agreed schedules. Another core rule is a prohibition on discriminating against imported products as compared to domestic 'like' products.

Trade in services

The General Agreement on Trade in Services (GATS) contains rules on the liberalisation of services. The overarching rules on services are in some respects similar to the ones contained in GATT for trade in goods. Moreover, WTO Members have negotiated schedules on how they grant other WTO Members access to their services markets. WTO Members have made concessions on various sectors and service-delivery modalities. GATS thus has a bottom-up approach, according to which each WTO Member may decide in which sectors and to what extent to liberalise.

Investment

The Agreement on Trade-Related Investment Measures (TRIMS) contains only a limited number of provisions that basically extend the non-discrimination provisions of GATT to investments.

Intellectual property

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) obliges WTO Members to grant certain types of intellectual property in their national legal orders (patents, for example). It contains minimum rules defining under which conditions these intellectual property rights must be granted and the content and character of the intellectual property rights granted.

Sanitary measures and technical standards

Sanitary and phytosanitary (SPS) measures, i.e. measures aimed at human, animal and plant health, are dealt with in the WTO SPS Agreement. This agreement stipulates that SPS measures deviating from international standards must be based on a scientific risk assessment, be necessary to achieve the level of health protection a WTO Member wishes to achieve, and that the level of health protection envisaged in comparable situations must be consistent. The Agreement on Technical Barriers to Trade (TBT) has many provisions that are similar to those of the SPS Agreement, but applies to technical standards, including, but not limited to, provisions on labelling. The most important difference between both agreements is that the TBT does not require technical standards to be based on a scientific risk assessment.

Subsidies and trade remedies

In several agreements, the WTO includes rules on subsidies and dumping. Both can lead products from a certain country to become cheaper and thus more competitive on the world market. There are also rules on counter-measures that can be taken by WTO Members when faced with dumped or subsidised products.

Furthermore, the WTO has a dispute settlement mechanism allowing WTO Members to bring cases if they hold the view that another WTO Member has violated WTO law. There are also some sectoral agreements, e.g. on agriculture. Finally, there are some rather 'technical' agreements on how trade flows are administered, e.g. on rules of origin, customs valuation and pre-shipment inspections.

As can be seen from the above overview, there are many issues that WTO law does not regulate comprehensively. For example, there are only few and not very far-reaching rules on investment protection. Rules on government procurement are agreed only between some WTO Members, and there are not many specific rules for specific sectors.

RECENT REGIONAL AND BILATERAL AGREEMENTS – IMPORTANT ELEMENTS

Given that WTO law does not regulate international trade comprehensively, many RTAs continue to be concluded. Often, these agreements build on existing WTO rules, where such rules exist, and even reiterate WTO clauses verbatim. A notable example is GATT Article XX, which allows WTO Members to take measures in pursuit of certain public policy objectives that would otherwise be illegal under GATT. However, those RTAs negotiated between WTO Members after the establishment of the WTO always go beyond WTO law – this is the basic rationale for why they are concluded. Areas where bilateral or regional agreements typically go beyond WTO law are the following:

Investment

As described above, WTO law does not contain very detailed or far-reaching rules on investment. Conversely, many international investment treaties normally contain at least a core set of rules on how host states must and must not treat foreign investments.[8] These core rules include a prohibition against treating foreign investors worse than domestic investors, a prohibition on expropriations and an obligation that the host state must treat investors fairly and equitably. Moreover, many existing investment treaties include rules on investor-state arbitration. Investors are provided possibilities to directly bring claims against a host state for violating investment protection rules before an international arbitration panel or, according to some very recent agreements,[9] before an international investment tribunal. Within the WTO legal system, there is only a system for the resolution of conflicts between states, without direct access for individuals or companies.

SPS and TBT chapters

SPS and TBT chapters of the more recent RTAs usually build on the respective WTO agreements, including the definitions used in the latter. Additional rules may concern the recognition of the equivalence of SPS measures and conformity assessments[10] between the parties, the details of customs procedures, transparency on the respective national measures, or the necessity to base measures on scientific evidence.

8 However, there are some investment agreements which follow a different model, notably some of the recent agreements that Brazil has concluded.

9 Some of the recent investment treaties that the EU has concluded replace the existing system for investor-state arbitration in which three *ad hoc* arbitrators decided about investors' claims by a public investment court. Examples are the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada and the EU-Vietnam Free Trade Agreement, which are both not yet in force.

10 In a conformity assessment the compliance of a product with a certain technical requirement is evaluated.

Intellectual property

RTAs may contain more detailed or far-reaching rules on intellectual property than what is contained in the WTO's TRIPS Agreement, often referred to as 'TRIPS+' provisions.

Services

Some RTAs include rules on specific service sectors that go beyond GATS, for example financial services or telecommunication.

Topics that WTO law does not deal with

More recent EU and U.S. RTAs normally also contain rules on some issues that WTO law does not deal with in either separate chapters or side agreements. These concern sustainable development, environmental matters or labour issues and their relationship with trade. For example, clauses are included obliging parties to effectively enforce their environmental legislation.

Sectoral or product-specific rules

RTAs sometimes also contain rules on specific sectors or groups of products.

WTO LAW AND RTAS

The relationship between WTO law and RTAs is governed by the same principles of international law described above. In principle, WTO agreements and RTAs are of equal weight. This raises the question of whether legal conflicts may arise between them and, if so, how they are resolved.

As shown in section 4, RTAs normally build on WTO law. They regulate matters not contained in WTO law and create more far-reaching obligations for the parties in relation to trade liberalisation and investment protection than WTO law does. In other words, they are 'WTO-plus' agreements. This is legally problematic against the abovementioned 'most-favoured nation' clauses contained in several WTO agreements. To recall, most-favoured nation clauses require that all trade concessions granted to one WTO Member must be granted to all other WTO Members as well. However, RTAs are precisely aimed at granting more or more far-reaching trade-related advantages in the relationships between limited numbers of WTO Members.

WTO law contains clauses dealing with this issue, in particular Articles GATT XXIV and GATS V.[11] According to these clauses, a subset of WTO Members can agree on more far-reaching trade-liberalising rules than contained in WTO law in relation to goods and services. However, such agreements are permissible only under certain conditions. Notably, there is a requirement that 'substantially all trade' is liberalised between those countries wishing to rely on GATT Art. XXIV, and that an agreement needs to have substantial sectoral coverage to be compatible with GATS Art. V.

The above Articles also contain an obligation for WTO Members to notify the WTO of RTAs. However, in practice this does not always happen.[12] At the WTO, the Committee on Regional Trade Agreements is tasked with verifying whether the RTAs notified to the WTO comply with the conditions of GATT and GATS. However, the Committee has issued a very limited number of examination reports stating that RTAs notified to the WTO are in compliance. Thus, there is often no final decision that these RTAs comply with WTO law,[13] which results in considerable legal uncertainty.

11 In addition, there is the so called Enabling Clause allowing WTO Members to treat developing countries more favourably than other WTO Members on trade-related issues.

12 See for example, Synopsis of 'systemic' issues - related to regional trade agreements, Note by the Secretariat, WT/REG/W/37, 2 March 2000, para. 15.

13 The status of consideration of the agreements by the competent WTO committees can be obtained from the WTO's RTA database, accessible at **http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx**

JUDICIAL DECISIONS

The area where the relationship between WTO law and RTAs has most practical relevance is in dispute settlement decisions. Like the WTO, most RTAs have a state-to-state dispute settlement mechanism. So far, the majority of RTAs notified to the WTO have provisions on dispute settlement that allow parties to choose between the use of the RTA's dispute settlement mechanism and the WTO's in case a party considers an act of another to violate both the RTA and WTO.[14]

In practice, states have tended to use the WTO dispute settlement mechanism rather than those of RTAs when they had a legal choice. There are several reasons for this. Notably, the WTO dispute settlement mechanism has two instances and a secretariat supporting the work of the judicial decision-makers (RTA dispute settlement mechanisms typically have neither). The WTO dispute settlement system has a sanctioning mechanism; a WTO Member winning a dispute can be authorised to suspend certain trade concessions it has granted to the losing WTO Member. In practice, this means that the winning WTO Member in a case is authorised by the WTO to, for example, impose certain custom duties on imports from the other country.

Parties to an RTA can in principle also resort to its dispute settlement mechanism and sometimes do. In the future, given that recent RTAs are geared towards much 'deeper' trade liberalisation, the RTA dispute settlement mechanisms are likely to be used more frequently. This may raise legal issues. For example, it is conceivable that a judicial decision taken under an RTA may be seen as conflicting with WTO law by WTO dispute settlement bodies. Moreover, a country having unsuccessfully brought a claim before an RTA dispute settlement mechanism could choose to resort to the WTO's dispute settlement mechanism (or vice versa). It is unclear how such situations would be handled by the WTO or RTA dispute settlement mechanisms. There are no clear rules on this issue in WTO law.

Some past WTO disputes show that such situations are not merely theoretical in nature. In the Brazil Re-treaded Tyres case, the WTO dispute settlement bodies were called upon to decide on an import ban by Brazil on re-treaded tyres.[15] The ban contained exceptions for parties of MERCOSUR, a regional trade agreement between several Southern American states, and the exceptions had been integrated into Brazilian legislation in order to comply with a prior ruling of a MERCOSUR tribunal. The EU subsequently filed a complaint against Brazil's import ban at the WTO. The Appellate Body of the WTO held that the Brazilian measure violated WTO law, due to the fact that MERCOSUR countries' re-treaded tyres were treated differently from other countries'.

SUMMARY

While it is clear that there is no hierarchy between WTO law and RTAs in principle, many issues concerning the legal relationship between WTO law and RTAs remain open. More recent RTAs tend to go further in their liberalising efforts than WTO law does, which in some instances may lead to conflicts with WTO law. How the judicial bodies created by WTO law and RTAs would deal with such conflicts is, however, largely unresolved.

14 Hillman, J. (2009), 'Conflicts between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO - What Should the WTO Do,' **Cornell International Law Journal** 42:2, p. 196.

15 The documents relating to these case are accessible at WTO, Brazil — Measures Affecting Imports of Re-treaded Tyres, **https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm**

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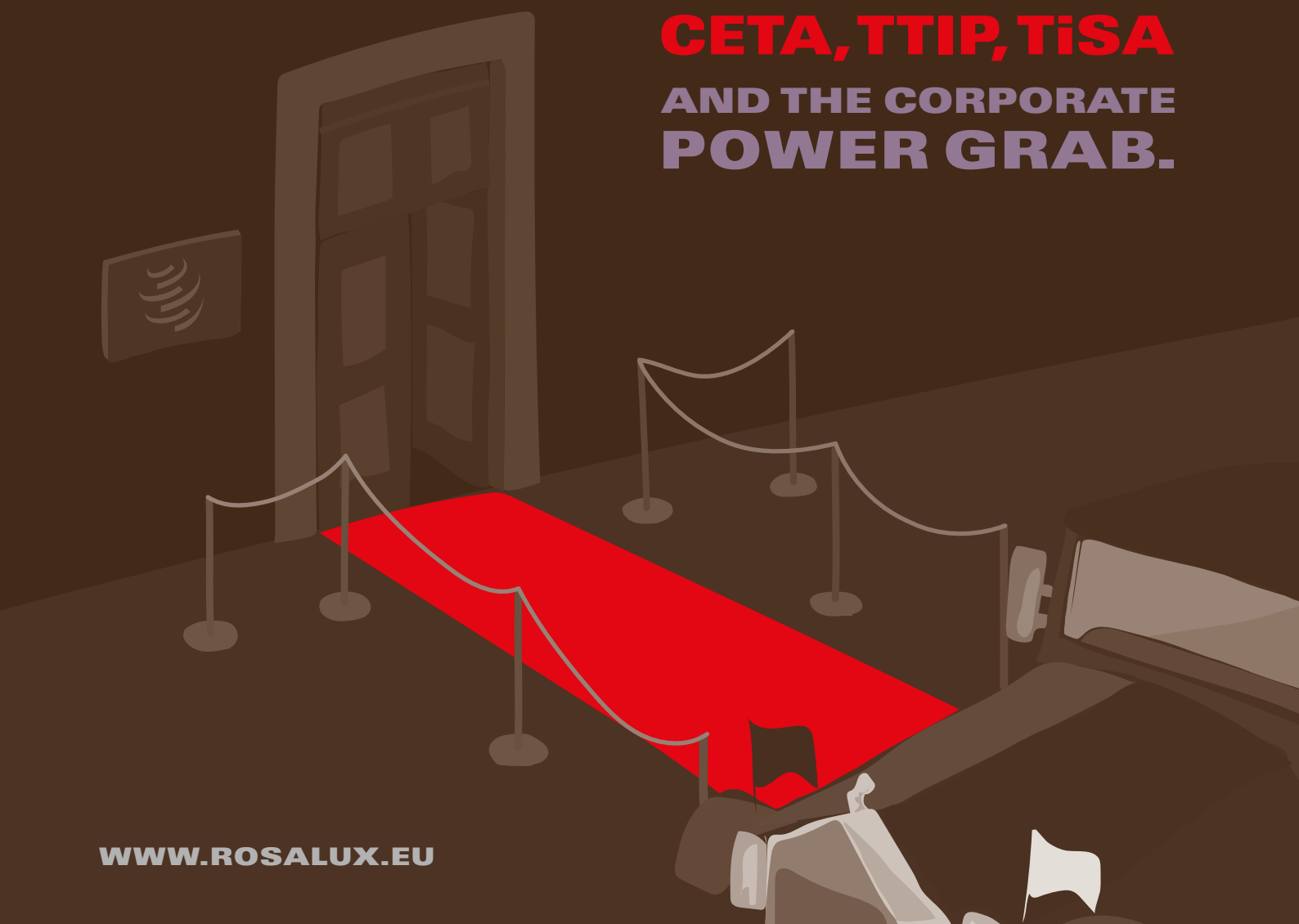

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