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Article

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EU and US RTAs — Is There Common Ground?

The European Union and the United States are among the most important economies of the world and crucial trading partners for each other and for others. Moreover, they are forces shaping global trade law, mainly within the framework of the World Trade Organisation (WTO). On the other hand, however, they have also created hubs of regional trade agreements (RTAs), mainly concluded with smaller and/or less developed partners.

Therefore, the Transatlantic Trade and Investment Partnership (TTIP), which has been under negotiation since July 2013, is perceived as one of the most important RTAs ever.[1] Negotiations were supposed to be easy and concluded by the end of 2014. The reality proved otherwise and differences turned out to be deeper than anticipated. In order to uncover the differences between the perspectives of the EU and the United States on these RTAs, this paper analyses their content and legal enforceability,[2] which makes it possible to compare the scope and legal meaning of these agreements.

According to the WTO database, the EU is party to over 40 RTAs, while the United States has issued notice of only 14. This results from a completely different attitude towards regional, extra-WTO integration, reflecting the different aims of the EU and the US RTAs. Moreover, the degree of integration in the RTAs concluded by both parties varies by region and when finalised. While the EU, being an RTA itself, has been a proponent of regional integration since the 1960s, the USA joined the process in the late 1980s, but 12 of its 14 agreements now in force were only signed between 2000 and 2007. The EU has concluded RTAs throughout its history. The oldest ones currently in force were signed in the 1970s with its closest partners, namely Norway, Iceland, Switzerland and Lichtenstein. The rest of these RTAs have been concluded since 1995 (although previous ones have been replaced by new, more advanced RTAs or have expired due to EU accession). The majority of them are association agreements concluded on a special legal basis with the aim of integrating a third country into the EU legal system. The aim of such agreements is, therefore, much more political then economic and implies a far broader scope to such agreements. In other words, they are not restricted to economic issues, but cover such areas as political dialogue, cooperation in the promotion of human rights and in fighting crime.

Nevertheless, the EU has recently negotiated agreements with developed states along mainly economic objectives. It concluded what is probably the deepest RTA in its history to date with South Korea, which entered into force in 2011. It also has negotiated agreements with Singapore and Canada. These three agreements (which can be called 'new-type RTAs'), together with the Trans-Pacific Partnership (TPP), signed with the United States, are probably the best indicators of what we can expect from TTIP.

There are no doubts that the most important and significant part of TTIP is going to be so-called WTO+ areas (issues regulated by WTO law, but with a deeper level of liberalization). Enforceable provisions related to trade in goods, both industrial and agricultural, can be found in all of the RTAs concluded by both the EU and the United States. Even although trade in agricultural goods is not always fully liberalised, all of the RTAs contain some concessions related to the sector. Furthermore, almost all of the EU and US agreements negotiated after the creation of the WTO contain provisions related to trade in services, mainly Modes 1–3 of supply: cross-border trade, consumption abroad and commercial presence. Notification of such deals (13 for the United States and 14 for the EU) were sent to the WTO as economic integration agreements (EIA). Among the EU RTAs are nine (concluded with North African states) that cover trade in services, even although they were reported only as FTAs in the notifications. Likewise, interim agreements with some Africa, Caribbean and Pacific groups of states were also reported as FTAs, but with the ultimate aim of concluding a full economic partnership agreement (EPA) also covering trade in services. Contrary to the US approach, almost all of the EU agreements also cover Mode 4 of the supply of services: the presence of natural persons. In the EU agreements, it is quite common to supplement provisions on the right of establishment (investments) by enabling investors to hire key personnel and some highly qualified specialists. In some cases, free movement of trainees is also allowed. On the other hand, in the US RTAs (including TPP), any preferences as to the movement of workers related to investments are explicitly excluded. Therefore, it is doubtful that such provisions will be included in TTIP and any additional liberalization for entering US labour market is improbable.

All of the EIAs that include the EU and the United Sates also cover another WTO+ area: intellectual property. In the case of the United States, these RTAs are always enforceable. However, for the EU 20 out of 27[3] of its RTAs contain such provisions, but only 13 are enforceable. A very similar situation exists in public procurement. While 20 of the EU RTAs cover that area, only 12 are enforceable. In the US RTAs, provisions on public procurement are always present and are not enforceable in just one case (Jordan).

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1 The project is funded by the National Science Centre of Poland on the basis of the decision no. DEC-2013/09/B/HS4/01488.

2 The methodology of the research is based on Horn, H., P. Mavroidis and A. Sapir, "Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements," *The World Economy* 33, 1565-1588.

3 RTAs concluded with EFTA states (Norway, Switzerland and Lichtenstein, Iceland) are excluded from further analysis as they are too closely linked to the EU to be compared to other RTAs, or those with mini-European states (Andorra and San Marino) and with non-independent countries such as the Faroe Islands.

All of the areas covered by WTO law are also covered by the new-type of EU RTAs, as well as by TPP. All of these agreements cover liberalization of trade in goods and services, as well as intellectual property and public procurement (except for the EU-South Korea RTA where the latter is non-enforceable); even although all of the parties of these new-type RTAs are also parties to the WTO's Government Procurement Agreement, which has concrete provisions. Therefore, the covering of public procurement in TPP might be of greater importance, as not all of the TPP parties are parties to GPA. Nevertheless, we can expect all of these areas to be present in TTIP as well.

More interesting is the fact that WTO+ seems to be extra-WTO (WTO-X) areas related to the economy. They should be the best indicators of what to expect in TTIP besides merely a deepening of WTO integration. Coverage and enforceability of provisions in WTO-X categories is presented in the table below.

Obviously, the most 'popular' is environmental protection, which is also widely enforceable in the US RTAs. This area very often covers issues such as general sustainable development and/or climate change. On the other hand, provisions on environmental protection in the EU RTAs are rarely enforceable (they are vaguer then the US RTAs and there is a broad variety of the respective EU provisions; the US RTAs are very similar and contain obligations related to the potential for environmental regulations that conflict with trade-related measures, the relationship between the RTA and multilateral trade agreements, or consultations between parties).

Conversely, in two areas, almost all of the provisions present in the various EU RTAs are enforceable. These are competition policy and movement of capital. On free movement of capital, it is almost always limited to direct investment, while portfolio investments are excluded. In this case, the provisions in the US RTAs are similar and always enforceable as well. This coincidence might be explained by the fact that they are strongly related to investments and the cross-border supply of services. In fact, provisions that enable the transfer of capital related to foreign direct investment are an inevitable part of the liberalization of trade in services. On the other hand, competition provisions in the US RTAs are never enforceable. In the EU RTAs, they usually mirror exactly the relevant provisions of the TFEU (current articles 101 and 102, as well as 108 in relation to state aid). They simply widen the scope of EU competition policy to its partners.

If we compare areas covered by the EU and the US agreements here, the differences are significant. The only areas that seem to be common ground are environmental protection and working conditions, despite the fact that they are enforceable far more frequently in the US RTAs. Nevertheless, when we compare only new-type EU RTAs, their scope is much more similar to the US RTA model than to the usual EU RTA (that is, those used for concluding political agreements with less-developed states). Moreover, if we take into account the example of competition policy, we might see that its presence in TTIP looks possible – it is covered in all three of the new-type RTAs and by TPP. One of the most controversial parts of TTIP is going to be investments, but it is obvious from the negotiation mandate for TTIP that they are going to be included. Investment chapters are also always present in the US agreements, as well as in TPP.

To conclude, one may say that taking into account only the scope and enforceability of the agreements, the differences between the EU RTAs and the US RTAs seem to be significant. But the majority of these discrepancies concern WTO-X areas included in association agreements with the EU. That difference is not significant to TTIP, as the majority of these areas will not be included in the TTIP negotiating mandate. TTIP will probably be similar to RTAs such as the EU's with South Korea, Canada and Singapore (new-type). If we only compare the EU's new-type agreements with the US RTAs and TPP, the differences become much smaller in scope.

Table 1

Areas covered under the EU and US RTAS

Area covered	EU		US	
	Number of provisions	Enforceable provisions	Number of provisions	Enforceable provisions
Agriculture	18 (0*)	1 (0)	0 (0)	0 (0)
Competition policy	21 (3)	17 (3)	7 (1)	0 (1)
Consumer protection	13 (0)	1 (0)	2 (0)	0 (0)
Data protection	13 (0)	8 (0)	0 (0)	0 (0)
Development aid	13 (0)	4 (0)	0 (0)	0 (0)
Economic cooperation	19 (0)	0 (0)	0 (0)	0 (0)
Environmental laws	24 (3)	5 (0)	13 (1)	13 (1)
Financial cooperation	16 (0)	1 (0)	0 (0)	0 (0)
Industrial cooperation	19 (0)	0 (0)	0 (0)	0 (0)
Investment protection and promotion	15 (2)	0 (2)	11 (1)	11 (1)
Movement of capital	22 (2)	19 (2)	12 (1)	12 (1)
Working conditions	10 (3)	4 (3)	13 (1)	13 (1)

* Brackets indicate areas covered by the three 'new-type RTAs' for the EU, and TPP for the United States.

Source: Author's compilation.