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Megaregionals: Protecting Third Parties?

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I. Introduction

Treaties such as the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) are, at first sight, fairly regular treaties. True, they bring some of the more powerful economic actors together (this applies especially to TTIP), and true enough, they may cover a considerable portion of global trade, but at the end, one might think, these are regular treaties, creating more or less balanced and reciprocal rights and obligations between the parties. The megaregionals may be exceptional in the magnitude of what they cover (hence the prefix 'mega'), but are unexceptional in their structure. The law of treaties, in other words, is likely to treat them as it treats other treaties.

It is a truism of the law of treaties that agreements to prevent genocide are to be dealt with in the same way as a treaty between minor powers on trade in light bulbs. More to the point, it has even been difficult to suggest that normative instruments ('legislative' treaties, in yesterday's terms) such as human rights treaties ought to be treated in ways that are different from how contractual undertakings are treated. Attempts to rationalize the intuition that there is something special about normative treaties have occasionally been presented, but the more thoughtful reflections remain skeptical themselves.[1]

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[1] See, e.g., Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS (1994), 221-384; Matthew Craven, *Legal Differentiation and the Concept of the Human Rights Treaty in International Law*, 11 EUR. J. INT'L L. 489-520 (2000).

Hence, as a starting point, it seems clear that the megaregionals are simply to be seen as ever so many regular treaties subject, to be sure, to the Vienna Convention on the Law of Treaties (VCLT) or what is customarily held to be its customary law alter ego.[2] This entails the following three propositions, which can all be imperiously phrased in Latin terms. First, it entails that the megaregionals are to be considered legally binding on their parties: *pacta sunt servanda*. Second, it entails that each megaregional treaty is to be seen as *res inter alios acta*—a thing between the parties. And third, from this it follows that the megaregionals are not to affect, in law, the position of third parties: *pacta tertiis nec nocent nec prosunt*. *Quod erat demonstrandum*.

And yet, there seems to be something rather special about the megaregionals, and this special character owes much precisely to the magnitude of the undertakings. For, it turns out, in the real world of the global political economy, the megaregionals have real effects on third parties. In form, they may be regular treaties; in substance, however, they force other states to change positions and strategies; to do things they might not otherwise have considered doing. In a sense, this applies to most treaties: even a treaty between A and B on trade in light bulbs may lead to trade diversion, away from state C or D. And in a sense, the law of treaties is by and large unable to address this as long as it remains focused on considerations of form, rather than substance.

The effects on third parties may not merely be generic in the sense described above (having to change their positions, e.g.), but may also be very real. Rob Howse provides a useful example relating to regulatory cooperation: what if Japan, having a stable position on the United States market with regards to a specific product but not on the European Union (EU) market due to regulatory differences, all of a sudden sees itself confronted with an agreement applying the EU's standard also to the U.S.? Clearly, Japan would be hurt by this; it would lose its market share in the United States.[3]

All this raises the question whether, and if so to what extent, international law protects the legal position of third parties (as opposed to their concrete and tangible legal rights). This is complicated fare, if only because several regimes intersect. The megaregionals are about trade and

[2] Given the residual nature of many of the provisions of the Vienna Convention, it may appear doubtful whether they can constitute the basis of customary international law to begin with. Still, this consideration is not often heeded to, and many proceed on the assumption that the possibility of the Vienna Convention reflecting or crystallizing into customary international law need not be interrogated. For an example, see MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES (1985).

[3] See Robert Howse, *Regulatory Cooperation, Regional Trade Agreements and World Trade Law: Conflict or Complementarity?*, 78 LAW & CONTEMP. PROBS. 137-151 (2015), at 142.

investment, predominantly, but are not only about trade and investment. They also contain environmental clauses, labour protection clauses, *et cetera*. In what follows, I will not address the compatibility (*vel non*) of the megaregionals and their regulatory cooperation with the law of the World Trade Organization (WTO), as Howse has done so with subtlety and cogency. I will, instead, devote a few words to what the megaregionals themselves say, and then raise further questions from a generalist perspective, focusing on the general law of treaties, in particular the institutions of treaty modification between parties *inter se*, and the notion of 'objective regimes'.

II. Megaregionals

At least two agreements can claim to be called megaregionals. The first of these is the Trans-Pacific Partnership (TPP), a large-scale agreement involving twelve states on the Pacific Rim, including big trading powers U.S. and Japan, and a number of smaller trading nations: New Zealand, Australia, Malaysia, Peru, Chile, Mexico, Vietnam, Canada, Brunei and Singapore. Of course, any trade agreement involving the U.S. and Japan would be deserving of the prefix 'mega', but the TPP is also 'mega' in the sense that it purports to regulate most walks of economic life. It deals with trade in goods and services (as trade agreements are wont to do), but goes further in that it also comprises investments, competition policy, intellectual property, labour, environment, regulatory coherence, and things such as transparency and corruption. There is eventually hardly any element of economic life, broadly conceived, that remains out of reach, and the TPP is expected to have a major effect on the regulatory powers of the participating states. Those domestic regulatory powers, in a word, will be seriously hemmed in – TPP marks the victory of markets over politics, as one might glibly put it.[4]

TPP is not yet in force. What is in force, since 2006, is a smaller agreement between Chile, New Zealand, Singapore and Brunei, which acted much as pilot project for TPP, albeit somewhat less ambitious. Nonetheless, TPP has already attracted the attention (and perhaps envy) of other states in the area, and major players such as South Korea, Thailand, and Indonesia have reportedly expressed an interest in joining the regime, as has the most conspicuous absentee, China.[5]

[4] It would be more accurate to suggest that it marks the victory of one ideology over rival versions.
[5] See Voice of America, *China Edging Closer to Accepting TPP Reality* (22 April 2016) (last accessed 25 April 2016), available at http://www.voanews.com/content/china-edging-closer-to-accepting-tpp-reality/3298082.html.

Similar to TPP, the TTIP involving the U.S. and the EU is not yet in force—indeed negotiations have not been concluded just yet. Nonetheless, it is clear that a coming together of the world's two major trading powers is bound to be massive, both in terms of volume and symbol. The symbolic message is directed at the WTO, with its failed Doha Round and its inability to create any new trading disciplines: the WTO is useful to the EU and U.S. as a dispute settlement mechanism, but not as a generator of new rules and disciplines—rules and disciplines that should serve the interests of European and American market actors. The upshot, obviously, is that all other WTO members are affected by TTIP, if only because it marks a departure from the WTO. Concluding bilateral agreements on economic matters may or not amount to a violation of the rules of the WTO, but at least it seems to go against the organization's spirit.

TPP and TTIP are the largest megaregionals, but not, it seems, the only ones. A similar comprehensive agreement has been negotiated between the EU and Canada (in 2014), and an earlier Central American Free Trade Agreement, while less grandiose in terms of volume covered, is nonetheless comprehensive in terms of topics covered. In addition, there are negotiations under way to establish a free trade area among the ten ASEAN member states and the six states with which ASEAN has existing PTAs (dubbed 'Regional Comprehensive Economic Partnership') and for a Continental Free Trade Area in Africa.[6]

Most of the negotiations are still under way, and final texts not yet available—this obviously complicates legal analysis considerably. Still, from what has been available so far, it seems that the megaregionals themselves pay rather little attention to their relationship to other agreements. The TPP is perhaps most outspoken—without saying much. Its preamble expresses a desire for expansion: the parties encourage 'the accession of other States or separate customs territories in order to further enhance regional economic integration and create the foundation of a Free Trade Area of the Asia Pacific'.[7] Beyond this, article 1.2, paragraph 1, discusses the relationship to other agreements, but in fairly non-committal terms:

> Recognizing the Parties' intention for this Agreement to coexist with their existing international agreements, each Party affirms: (a) in relation to existing international agreements to which all Parties are party, including the WTO Agreement, its existing rights and obligations with respect to each other; and (b)

[6] The Asian treaty would then cover the ten ASEAN member states as well as Australia, China, India, Japan, South Korea and New Zealand.
[7] TPP Preamble, final recital, available at https://www.tpp.mfat.govt.nz/text (signed on 4 February 2016).

> in relation to existing international agreements to which that Party and at least one other Party are party, its existing rights and obligations with respect to such other Party or Parties, as the case may be.

The article discusses the relations between TPP parties *inter se*; it does not say a word on the position of third parties under agreements other than TPP. It does not specify whether and when those other agreements shall prevail (if only to protect the position of third parties) or whether they shall be deemed subordinate to TPP. The latter position would be difficult to justify, but the former is by no means impossible, as article 351 TFEU illustrates.[8]

There are, to be sure, isolated references in TPP to other agreements,[9] but these, at first sight, do not do an awful lot to protect third parties.[10] Thus, article 29.1.4 TPP respects the right to take action following authorization from the WTO's Dispute Settlement Body or other dispute settlement panels—but this relates first and foremost to the TPP parties *inter se*. Likewise, article 17.7.6 (on confidentiality in technical consultations relating to sanitary and phytosanitary measures) seems to protect the rights of TPP parties under other international agreements, rather than those of third parties.[11]

III. Objective regimes

If the megaregionals themselves do little to spell out their relationship to third parties, the question arises whether international law at large has something to say which can protect existing regimes. The law of treaties offers two prisms. The first, regulated in article 41 of the Vienna Convention, is the modification of a treaty by some of its parties *inter se*. This is considered

[8] Treaty on the Functioning of the European Union (TFEU), Article 351 is generally seen as protecting the rights of third parties under treaties concluded with EU member states prior to the creation of the EU or its entry into force for those who acceded later. While the provision does not always work to the benefit of third parties (the Court of Justice of the European Union has been creative in finding ways to leave it without application), at least it does suggest that some kind of third party protection is not impossible. For discussion, see JAN KLABBERS, TREATY CONFLICT AND THE EUROPEAN UNION (2008).

[9] Not all of these are immediately geared to the protection of anyone's interests or rights. For instance, article 26.6.4.TPP orders parties to join the 2003 UN Convention against Corruption.

[10] Perhaps the provision most sensitive to other rules of international law is tucked away in a footnote: footnote 6 to article 19.6 TPP holds that TPP parties cannot depart from TPP, the WTO, or other trade agreements when it comes to discouraging forced or compulsory labour. One way to interpret this is that the parties are not allowed unilaterally to be more labour-friendly than TPP or other trade agreements allow, which is perhaps not quite the progressive cause one would hope it to be.

[11] The wording is rather ambivalent, suggesting that the lifting of confidentiality shall be 'without prejudice to the rights and obligation of any Party under this Agreement, the WTO Agreement or any other international agreement to which it is a party.' The reference to 'any Party', it seems, is a reference to any TPP party, not to others.

acceptable, provided the rights of other parties are respected and provided the modification does not concern provisions derogation from which would be incompatible with the treaty's object and purpose. The second is the so-called 'objective regime', the idea behind which is to protect a common interest against intrusion. This has not found regulation in the VCLT—it proved too difficult to fit the protection of common interests into the essentially contractual and formal framework endorsed by the Convention (witness also the endless uncertainties about *jus cogens*).[12]

Examples of both exist. The modification *inter se* plays a large role within the EU, with its dispersion into various sub-regimes, e.g., on monetary union or border control.[13] There are also recognized examples of objective regimes. Perhaps most well-known is the Antarctic regime, set up in 1959 by a number of interested states.[14] Several states have proclaimed zones of peace or environmental protection zones, demanding (and receiving) respect from others.[15] And in the mid-1990s, Finland, Sweden and Estonia created such a regime when declaring the wreck of a passenger ship, including the corpses of some 900 people, a maritime grave.[16]

These objective regimes have two things in common. First, they are established (or can be presented as such) with some version of the common interest in mind: they do not reflect the untrammeled pursuit of self-interest. And second, they have come to be accepted by many as an objective regime, i.e. as something that should not be interfered with. Both elements are somewhat unstable: after all, the Antarctic regime can also be presented as a self-interested move of the twelve original parties. Still, the point is that it has channeled territorial claims in a peaceful manner, and has come to be accepted by many. Conversely, the grave of the *M/S Estonia* has not been formally recognized by many, but is generally seen as pursuing reflecting some kind of community value, in this case best summarized perhaps as respect for the victims of a disaster.

How then does this relate to the megaregionals? First, it seems clear that the megaregionals themselves cannot claim protection as objective regimes—they lack even the pretense of acting in the common interest, however defined. What is clear is that the

[12] The Vienna Convention is based on two epistemological assumptions: treaties are conceptualized as contracts (rather than legislative instruments), and as instruments (rather than substantive obligations).
[13] The classic study, though outdated, is FILIP TUYTSCHAEVER, DIFFERENTIATION IN EUROPEAN UNION LAW (1999). Note that the EU Treaties enable and sometimes encourage differentiation, in line with article 41 VCLT.
[14] See, e.g., Bruno Simma, *The Antarctic Treaty as a Treaty Providing for an "Objective Regime"*, 19 CORNELL INT'L L. J. 189-209 (1986).
[15] The main general studies are ECKART KLEIN, STATUSVERTRÄGE IM VÖLKERRECHT (1980) and SURYA SUBEDI, LAND AND MARITIME ZONES OF PEACE IN INTERNATIONAL LAW (1996).
[16] See Jan Klabbers, *Les cimétières marins sont-ils etablis comme des regimes objectifs?* 11 ESPACES ET RESSOURCES MARITIMES (1997), 121-133; Marie Jacobsson & Jan Klabbers, *Rest in Peace? New Developments Concerning the Wreck of the* M/S Estonia, 69 NORDIC J. INT'L L. 317-322 (2000).

megaregionals are to serve the interests of the states concluding them (and those of their businesses, and perhaps citizens). While it is probably the case that every particularist project can be dressed up in universalist garb with some plausibility, the megaregionals do not even try.

Conversely though, an argument can be made according to which the megaregionals undermine existing regimes, either based on article 41 of the Vienna Convention or based on the notion of objective regimes. As noted, the megaregionals touch upon many things and issue areas, including labour, trade, and environment. As for labour, the ambition is to reflect the ILO's minimum standards, even though the argumentation is parochial: the U.S. government, explaining the TPP, suggests that the relevance of TPP resides in raising labour standards to U.S. levels, so as to create a "level playing field for American businesses".[17] Here then it can probably not be claimed that the TPP undermines an existing regime, at least not if the ambition to reflect the ILO standards is realized.[18]

Things may be different with environment and trade. If it can be argued that the environmental and trade regimes can be considered objective regimes, then an argument can possibly be made that they should be protected against erosion. So, what would such an argument look like?

First, it would claim that it is generally accepted that both environmental protection and a liberal trading regime serve the global common interest. Some particular interests might be better served than others, but the free trade aficionados should perhaps be held to their oft-rehearsed mantra that "a rising tide lifts all boats."[19] On that theory, it is not implausible to claim that both free trade and environmental regimes are intended to serve some global common good. Moreover, both are also generally accepted. The WTO presently has 162 members, representing the "vast majority of the members of the international community", as the ICJ put it when establishing the objective legal personality of the UN.[20] Likewise, while the global environmental regime is highly fragmented, many of its fragments have attracted a wide following. The ozone layer protection regime, e.g., has attracted 197 ratifications, as has the Climate Change Convention. In a world of some 200 states, this counts as widespread adherence. Even if

[17] TPP – Made in America, *Chapter 19 Labour*, available at https://medium.com/the-trans-pacific-partnership/labour-66e8e6f4e8d5#.gkqcmiy1y, text prepared, it seems, by the USTR (last visited 11 April 2016).
[18] It cannot be excluded that particular ILO-sponsored conventions suffer.
[19] At least all those on the same waters – the excluded might not be lifted, but possibly fall victim to the waves. On the ways in which expertise affects WTO politics, see generally EXPERT KNOWLEDGE IN GLOBAL TRADE (Erin Hannah, James Scott & Silke Trommer, eds., 2016).
[20] *Reparation for injuries suffered in the service of the United Nations: Advisory Opinion,* I.C.J. Reports 1949, p. 174, at 185.

disagreement persists on protecting the environment, there is clear recognition that something must be done.

Second it would demonstrate that the megaregionals undermine existing regimes, making it difficult for the excluded to achieve their goals as laid down in those existing regimes. With respect to trade, this seems plausible indeed: the megaregionals will result in trade diversion, affect the fundamental most-favoured-nation norm, and distinguish between parties and others when it comes to such things as developing standards.[21] Hence, whether as modification *inter se* or as eroding an objective regime, the megaregionals are difficult to justify.[22] With respect to environmental matters, much depends on how the megaregionals' environmental norms play out in practice, but it seems clear that they would need to be at least as strict as those of the global regimes so as not to cause justificatory problems.

IV. To Conclude

The above is, quite obviously, only the beginning of an argument—it aims to suggest that international law is not completely silent when it comes to the activities of the great powers, and offers something of a vocabulary for contestation, however embryonic and tentative. What international law cannot do is rewind that discussion: it is noticeable that the very idea of megaregionals has already transformed the discussion beyond recognition. Those who were critical of, say, the WTO, or thought the climate change regime does not go far enough, now come to defend these regimes—they will be replaced by something that may be a lot worse for many people.

[21] See, e.g., article 8.7 TPP on technical barriers to trade, providing that TPP partners can be involved in the development of each other's technical regulations and standards.
[22] This, in turn, may raise tricky questions about *lex specialis*, self-contained regimes and the like, should it be concluded that the megaregionals are justifiable under the WTO Agreement.