

# Trans-Pacific Partnership

## What It Portends

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Negotiations towards concluding the Trans-Pacific Partnership agreement have reportedly reached an endgame phase. The participating countries are now negotiating market access for sensitive agricultural products, even as a wide gulf in positions exists on several rules and regulatory framework issues. Will the TPP countries be able to finalise the agreement this year? Will the US Congress ensure smooth passage of the TPP deal? This article examines these questions and the effect the TPP will have on the multilateral trading environment if it is successfully concluded.

Negotiations have been under way for more than four years to conclude a “high standard” Trans-Pacific Partnership (TPP) agreement. What began as an attempt to forge a comprehensive free trade and investment initiative among eight countries led by the US in Melbourne in March 2010 has now expanded to 12 countries that account for a quarter of international trade and 40% of the world’s gross domestic product (GDP).<sup>1</sup> Claims have been made that the negotiations have reached the final stages with some assessing it as 80% done even as there are reports about still unresolved issues and a continuing gulf in positions on several sensitive and critical areas. The chief negotiators and the trade ministers of TPP countries are now meeting every other month. These are being supplemented by bilateral meetings and frequent gatherings of subject matter specialists.

What distinguishes the TPP from the more than 400 free trade agreements (FTAs) globally under implementation or under negotiation is its size, scope, and depth of proposed concessions.<sup>2</sup> It is seeking to take a more comprehensive approach towards market access by eliminating tariffs and non-tariff barriers on goods, and by adopting a negative listing approach to services commitments. More significantly, it is proposing to cover many behind the border measures aimed at disciplining state-owned enterprises (SOEs), observing competition rules, ensuring regulatory coherence, facilitating supply chains, setting out labour and environment standards, and securing more protection for intellectual property rights (IPRs), including patents and copyrights.

An earlier discussion paper on the TPP by this author had dwelt on the background of the initiative, its principal elements, and its possible implications

for India (Seshadri 2013). This article seeks to focus on the present state of play on the main outstanding issues in the TPP negotiations. What are the prospects for a deal being successfully concluded? If it does so, how could it affect the international trading environment?

Before proceeding further, however, it must be stated that the TPP negotiations are being held most secretly and textual proposals are not being revealed except to those intimately involved in the negotiations. This article is therefore based on press reports (substantially from the Inside US Trade website) and interviews, submissions made by stakeholders, leaked texts, and published literature. Piecing together such information provides a broad picture and the general trend.

Of the three broad areas – market access, trade rules, and domestic regulations – that will cover the 29 chapters of the proposed agreement, it is market access in certain sensitive products that appears politically most challenging since the potential impact of a concession given or gained is immediately obvious. Trade rules of a World Trade Organisation (WTO) plus character such as a higher level of protection for patents and copyrights than the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement or disciplines in newer areas such as SOEs, environment and labour standards, and the scope for dispute settlement are also proving difficult, particularly for developing countries such as Malaysia and Vietnam. On the other hand, issues like regulatory coherence and competition, or aspects relating to sanitary and phytosanitary (SPS) standards and technical barriers to trade (TBT) do not find prominence in the TPP reporting, and it will not be surprising if these chapters are concluded on the basis of templates suggested by the US that align with its own domestic legislation or regulation.<sup>3</sup>

### Market Access

On market access for goods, discussions have moved to the stage of countries negotiating on their sensitive items. The US and Japan, the two largest TPP economies, are currently discussing what

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Japan's most sensitive agriculture products (beef and pork, sugar, dairy products, rice, wheat, and barley) are and the auto sector.<sup>4</sup> The us has made it known that it will take up market access issues with Canada, in particular for dairy and poultry, soon after. It regards securing market access concessions from both of them as key to making further progress. During President Barack Obama's visit to Japan in April 2014, no breakthrough was reported even though the issues were taken up and great pressure mounted by both sides.<sup>5</sup> The joint statement at the conclusion of the visit did, however, claim that they have "identified a path forward on important bilateral TPP issues" but no details were given.

Other participating countries are keenly waiting to see if exceptions will be provided to Japan from tariff reduction/elimination, which can then be used as precedents for sheltering their own sensitive products. On the other hand, both Australia and New Zealand, who are major agricultural exporters, are very keen to secure additional market access for their products to the us, Canada, and Japan, and it has to be seen if they will take kindly to the us cutting a separate deal with Japan if its benefits are not extended to them.<sup>6</sup> Also, if the us is insistent on a "high standard" market access offer from Japan, Australia and New Zealand could seek similar "high standard" access to the us for their sugar, dairy, and meat products. The us has, however, been taking the line that it will not enter into further market access negotiations with Australia and other TPP countries with which it already has FTAs. What is interesting to note in the TPP is that market access negotiations are not likely to arrive at one tariff reduction/elimination schedule for each member that will apply to all the other participants. The final tariff reduction/elimination schedule for each country may be a hybrid, where certain tariff lines may see a common treatment extended to other members, whereas in other cases, particularly for sensitive items, it may vary for each country. It has also to be seen how the us reconciles its position of seeking high standards from others

while its own agricultural lobbies are not keen at all to open up their market any further.

### Labour-intensive Products

Textiles, apparel, footwear, and other labour-intensive products that generally attract higher tariffs in developed markets, including the us, will be other sensitive areas. A mutually acceptable deal between Vietnam and the us on access to the us market for apparel items will be critical here. The us, in its offer to Vietnam, has reportedly grouped all textile and apparel items into three baskets, depending on their sensitivity. The most sensitive items that could consist of Vietnam's 100 top textile and apparel exports will be subjected to an initial duty reduction (say 35% or 50%), but further tariff reductions on this basket of items will take place only nearer the tariff elimination period of 10 or 15 years. Of the other two baskets, tariffs on the least sensitive basket could be eliminated immediately, while the more sensitive one could see a linear phase-out in a five-year period. The us is, however, insisting on maintaining its "yarn forward" rule that now applies to its FTAs with Latin American countries, which will require Vietnam to source raw material from yarn onwards from TPP countries for securing concessionary access. This provision significantly benefits us yarn and fabric producers.<sup>7</sup> The us has offered a limited exception from this rule only for a few items that are deemed to be in short supply.

Vietnam is not satisfied with this offer since it is looking to substantially expand its labour-intensive exports in return for the many concessions it will be required to make for joining the TPP. On the other hand, Mexico, also a large supplier of garments to the us, has been keen to limit the short supply list and suggested the inclusion of certain items only on a temporary basis. The latest on this issue is the Mexican economy secretary claiming after the TPP ministerial on 20 May 2014 that the us, Mexico, and Vietnam are close to an agreement, but there was no confirmatory word from Vietnam. (Indian garment and footwear exporters will need to closely

follow the negotiations on tariffs and its phase out because the concessions made will affect them. Vietnam was already the second largest supplier, after China, to the us of apparel that amounted to \$8 billion and of footwear that totalled \$2.92 billion in 2013.)

### Government Procurement

Government procurement is another market access chapter where issues are pending. Malaysia and Vietnam would be making commitments in this area for the first time in an FTA.<sup>8</sup> As per a report, government procurement in Vietnam exceeded \$22 billion in 2010, accounting for more than 20% of its GDP. Malaysia has indicated that it has been able to carve out build-operate-transfer arrangements from the scope of commitments. It is also seeking a long transition phase for bringing the threshold on construction services down to a common threshold, which itself is still not agreed. (Under the Agreement on Government Procurement or GPA of the WTO, the threshold for construction services is SDR 5 million.) Malaysia has also reportedly excluded areas of interest to Bumiputras and small and medium-enterprises (SMEs) from its initial offers. Whether it will be able to sustain these positions and what it may have to concede in lieu in other areas remains a question.<sup>9</sup> Exceptions and thresholds in this chapter will be closely watched, as also to what extent procurement by sub-federal entities will be included. The us itself has a strong Buy American Act and has committed on procurement by federal states, somewhat minimally under the GPA.

No major sensitive issue has come to the fore in investment and services on the market access front even as commitments are expected to be made on a negative list basis. But application of the Investor State Dispute Settlement (ISDS) provisions invited reservations from several countries, including Australia, and many civil society groups in TPP countries, including the us. It seems unlikely, however, that this will be excluded considering that the TPP is largely being shaped by industry interests. At best, some safeguards in the form of tighter rules on transparency, selection of arbitrators, and

so on may be put in place to placate the countries showing concern. Whether certain public policy areas such as the environment, government procurement, and SOEs will be kept out of the ISDs will be closely watched. After a change in government, Australia has conveyed readiness to agree to the ISDs in the TPP if it gets a strong outcome in market access. Emergency provisions to deal with large investment outflows and the US demand for free movement of data are other sensitive aspects. It is unclear how these are being resolved.

### Rules

Coming to the chapters under the rubric of “Rules”, disciplines in the new area of SOEs have attracted wide reservations from Vietnam, which has 40% of its economy dominated by SOEs. Competitive neutrality had been proposed as a principle, and this can unsettle many SOEs even in developed economies (like Japan Post and Freddie Mac and Fannie May in the US). Malaysia has pressed for country-specific flexibilities, arguing that SOEs play an important role in its economy. Strong concerns resulted in an agreement at the TPP ministerial in Singapore in February 2014 that disciplines will not prevent governments from providing support to their SOEs when they provide services in the domestic market. This will still allow enforceable disciplines on SOEs that deal in goods. Coverage will also include the international activities of SOEs in services. Sovereign wealth funds like Temasek of Singapore may also be covered in this context even as discussions in the TPP reportedly continue on how to define an SOE (what equity percentage or extent of control by the government will determine SOE status?) and whether sub-national (state-level) SOEs will also be covered.

The chapter on IPRs has perhaps become the most contentious in the TPP negotiations. Leaked copies of the draft text of the IPR chapter proposed by the US in 2011 revealed that the proposals on patents were modelled on the basis of US law, and required five years of data exclusivity (with a longer period for biologics), patent linkage, patent extension

on further innovation on the patented product even if it does not result in enhancing efficacy, compensation for the time taken to accord patent approval, expanding the scope of patentable items to plants and animals, and therapeutic, surgical, and diagnostic procedures that are explicitly exempt from patenting in the TRIPS agreement, and banning any pre-grant opposition process. Many of these WTO-plus provisions were deliberated on during the negotiations leading to the TRIPS agreement before arriving at a carefully balanced set of rights and obligations. Clearly, the balance is to be reworked. On copyright protection, the protected period is sought to be extended in the TPP to 70 years from the death of an author or 95 years from publication, against the WTO-stipulated minimum period of 50 years after the death of an author or after publication. Tighter enforcement provisions are also known to be under consideration, including the banning of parallel imports of copyrighted works.

Uproar from international public health groups and non-governmental organisations (NGOs), and strong reservations from several TPP countries who suggested many amendments, prompted the submission of a revised proposal by the US (and Japan) in November 2013, which removes the ban on pre-grant opposition processes but apparently not much else.<sup>10</sup> It provided some flexibility, however, from the higher standard of protection to countries that are not high-income ones (a threshold of \$12,616 in line with World Bank criteria has been mentioned). For Malaysia and Mexico, which are already close to the income threshold, this would mean only a brief respite. As per reports, these countries are supportive of a uniform single set of obligations pegged at a level they can accept with a phase-in period. On the other hand, Vietnam would prefer the November 2013 proposal that may give it more time. Among TPP members, the US and Japan may be the only ones that fully endorse strong IPR protection. But with big pharma companies aggressively pushing for such provisions, it is to be seen if others will be bullied into acceptance. Press reports earlier indicated that there

will also be an “Annex on Transparency and Procedural Fairness for Healthcare Technologies”, whose objective is to eliminate price controls and reference pricing for pharmaceutical products that now feature in the Medicare programmes of TPP countries. Civil society groups from Australia and New Zealand have raised strong concerns.

The section on “Geographical Indications (GIs)” in the IPR chapter is likely to see a diluted provision, except perhaps for wines, in view of the US, Australia, and New Zealand being against giving GI protection to many agricultural products, including cheese varieties that they consider to be generic. The three countries have also reportedly pushed for a cheese annexe in the market access chapter to safeguard the tariff concessions they win for cheese tariff lines in the TPP from being undermined by provisions in some of the FTAs signed by other TPP members with the European Union (EU). The US will doubtless like to also shore up its position in the TPP before it gets into negotiating on this subject in the Transatlantic Trade and Investment Partnership (TTIP) with the EU.

Chapters on labour and the environment with enforcement obligations will be new elements in the TPP. On labour, the provisions will seek to commit adherence to the core International Labour Organisation principles of labour, including freedom of association and collective bargaining. The chapter on environment will require members to adhere to seven major international environment agreements. Reaffirmation of these commitments may not be a major issue for TPP countries. Some of them, however, have shown concern over subjecting such commitments to the dispute settlement mechanism of the TPP and have proposed alternative consultative mechanisms.

### Political Dynamics

The TPP endgame will also be politically driven. For the US to secure the passage of the TPP through both houses of Congress, it will require passing a Trade Promotion Authority (TPA) bill to prevent Congress from suggesting amendments to individual TPP provisions rather

than confining itself to a yes or no vote. A draft TPA bill has already been submitted to the Congress but action on it is being delayed. There is concern among Democrats that bringing such a bill in an election year will be divisive and force them to take positions that their leadership is reluctant to adopt. The general assessment is that the best chance of a bill getting through will be in the lame duck sessions after the election in November this year before the next Congress assumes office. Leaving it to the next Congress is risky since both the houses are expected to have a Republican majority by then.

Will the TPP be finalised before the end of the year? Or will other TPP members be reluctant to make their final offers until the TPA outcome is known? There are still many imponderables. It cannot be ruled out that the Congress may insist on the inclusion of certain other provisions that have been raised by a few members in congressional hearings at the stage of passing the TPA bill.

What effect will such a development have on other TPP members? As it is, public outcry against the secretly negotiated TPP remains high in several TPP countries. If the final deal, when revealed, confirms their fears, such as the possible adverse impact on public access to affordable medicines or TPP tribunals overruling the verdicts of domestic courts, acceptance will not be easy. Owing to domestic pressure, the Malaysian prime minister has said that he will implement the TPP only after it is passed by the country's parliament although this is not a constitutional requirement.

### How Do They Add Up?

Several issues, including what could even be potential deal-breakers for certain countries, still remain to be resolved. This author's assessment is that the chances of a TPP agreement are somewhat higher with the limited exceptions flexibility now under discussion for non-high income countries in the IPR chapter, and carving out domestic services from SOE disciplines.

Arriving at a successful market access package may not be easy since the

sensitive products on the table at this stage of the talks are all intensely political issues in Australia, Canada, Japan, New Zealand, and the US. Meeting at least a part of Vietnam's expectations on labour-intensive products would also be important. The US is currently working on a strategy of generating sufficient market access concessions for itself so that domestic support can be assured. Will Japan and Canada give in? Will the US also work to address some of the expectations and concerns of other countries that may require further opening of the US market in areas such as sugar, dairy, beef, and labour-intensive sectors? If a "high standard" market access package does get successfully negotiated, countries may show more flexibility in respecting rules, including on IPRs and labour and environment standards.<sup>11</sup> If such a deal with large agricultural market access in sensitive products helps in weakening entrenched lobbies in developed countries, it could also help to move the Doha negotiations in agriculture. On the other hand, is it likely that there will be some climbdown in the final stage of negotiations from high standards in areas such as IPRs and the application of the ISDs? Such an outcome may be positive from the point of view of the TPP attracting a wider membership. In any case, all this appears unlikely to be resolved by the end of this year, and the prospect of TPP negotiations going into 2015 is high.

### Multilateral Trading Environment

A successful conclusion of the TPP could generate pressure for introducing similar "high standard" disciplines in the WTO. Such a move will get a boost if the TTIP is finalised with similar features. There is already a renewed push to conclude an Information Technology Agreement-II (ITA-II), which is intended to cover far more products than ITA-I on which duties will be eliminated by participating countries. Attempts are also being made to conclude a similar zero duty agreement on environmental products. Twenty-three countries have separately begun drawing up a plurilateral Trade in Services Agreement (TISA) outside the WTO.

Most developing countries are not participants in these trade initiatives. Among the BRICS countries – Brazil, Russia, India, China and South Africa – only China has shown an interest in joining TISA, and is also negotiating the product coverage of ITA-II. While a statement was put out in May 2013 that China was studying the TPP, there is no indication if it will eventually apply to become a member.

On the other hand, Western trade majors, who are participating in these initiatives, are not showing much interest in successfully concluding the Doha Round. A revived interest that was hoped for after the limited success of the Bali WTO ministerial in December 2013 has not materialised, and devising a work programme to take the Doha negotiations forward is proving complicated. Unable or unwilling to make the necessary concessions required of them to liberalise trade in agriculture as mandated in the Doha Round, which will also require them to scale down their domestic subsidies (reduction of these subsidies incidentally is not part of the TPP and TTIP mandates), they are blaming the developing countries for the Doha stalemate and instead pursuing a selective trade agenda suited to their interests.

Against this background, the professed intentions of the US, the EU and certain other developed TPP members to seek to multilateralise such "high standard" rules and disciplines cannot be taken lightly even as many of those disciplines are not part of the Doha agenda. Admittedly, as globalisation progresses, international rule making has to keep pace. It may be difficult to insist that they should not impinge at all on the domestic policy space. There are also evolving global best practices for national regulations or rule making in a variety of areas, including government procurement, supply chains, and SOEs, that developing countries need to continually update themselves on and adapt to their needs. What the TPP is seeking to do, unlike the Asia-Pacific Economic Cooperation (APEC) forum, which is based on an open liberalisation model, is to put them all in a package, be it trade or non-trade issues,

in the form of enforceable disciplines at a standard that is in keeping with us laws and practices, with at best a few years to phase in. A carrot in the package is better market access in the partner countries, but that also comes with a higher level of protection for intellectual property that can significantly increase costs. Pushing to multilateralise this model can be detrimental to developing countries' interests and have a divisive impact. Malaysia and Vietnam may have decided to join the TPP because they do not want to be left out when their neighbour is in, or they possibly consider it useful to have external pressure for undertaking internal reforms.<sup>12</sup> These cannot be the driving factors for all countries.

Developing countries, including India, will need to carefully consider the various options and work out room for manoeuvre and not get forced into a situation where they have to make sub-optimal choices. Striving to revive the Doha agenda should be actively pursued. At the same time, conducive international trade and investment liberalisation models should be developed without (a) the intrusive elements of the TPP that will limit development policy options; (b) the WTO-plus levels of IPR protection that will come at the cost of public interest; and (c) the linkages between what are non-trade issues such as labour and environment standards with market access, simply because trade sanction as a tool is available for the enforcement of such standards. The proposed Regional Comprehensive Economic Partnership agreement among the Association of Southeast Asian Nations 10 plus six partners could provide a good forum for developing such a model since the guidelines appear to have taken the above considerations into account. As for India, to shore up its position, fresh efforts should be made to conclude the India-EU FTA. If the Indian economy shows revival and takes to an accelerated growth path, the large and growing market will be a draw and could persuade the EU. India would also need to actively follow the development of global best practices in forums such as the OECD and APEC.

## NOTES

- 1 The TPP traces its origin to the much smaller Trans-Pacific Strategic Economic Partnership (P4) among four small countries, Brunei, Chile, New Zealand, and Singapore, that came into force in 2006. The US showed interest in joining the initiative during October 2008. Following this, the Barack Obama administration pitched for making it more comprehensive and "high standard". Australia, Peru, and Vietnam followed, joined by Malaysia in October 2010, Canada and Mexico in October 2012, and Japan in March 2013. Korea has expressed an interest to join. It is unlikely, however, that any new member will be admitted before the TPP is concluded.
- 2 Negotiations also began in June 2013 between the European Union (EU) and the US on concluding a similar ambitious Transatlantic Trade and Investment Partnership (TTIP) between these two large economic entities, which account for close to 30% of world trade and 45% of global economic output. Five rounds of negotiations had been held till May 2014 and some preliminary offers exchanged. But discussions are still largely at a conceptual phase. Among the many FTAs are also 23 bilateral FTAs between different TPP member countries. In addition, there are five regional FTAs (ASEAN FTA, NAFTA, ASEAN-Australia-New Zealand FTA, ASEAN-Japan FTA and the P4 Agreement in which more than two TPP countries are members).
- 3 The chapter on regulatory coherence is expected to require TPP members to set up a mechanism such as the US Office of Information and Regulatory Affairs to conduct a cost-benefit analysis of new rules. The proposed disciplines may also require prior notification to a regulatory coherence committee of the TPP about proposed new domestic regulations. The SPS chapter is also expected to be based on a science-based determination for food safety and not on the precautionary principles of the European Union (EU).
- 4 The US and Japan had exchanged letters before Japan's entry to the TPP that had already set out the terms of reference for bilateral resolution in the auto sector. The US was keen to address non-tariff barriers in the Japanese automobile market, which it has long felt is preventing greater access. It had also been agreed by both that the US will bring down its tariffs in this sector for Japan (2.5% for cars and 25% for trucks) over a very long staging period that is also backloaded to the maximum extent.
- 5 A bipartisan group of 63 members of US Congress pushed for a strong market access deal with Japan in the TPP on the eve of President Obama's visit. On the other hand, the Japanese Diet passed a resolution last year asking the government to exclude the five categories of products – pork and beef, dairy, sugar, rice, and wheat – from liberalisation in the TPP.
- 6 Australia and Japan announced conclusion of a bilateral FTA on 7 April 2014, during Prime Minister Tony Abbott's visit to Japan. It was a good package for Australia in the Japanese market, including beef, horticulture, and seafood items, but did not significantly improve access in dairy, sugar, grains, pork, and rice.
- 7 US exports of yarn and fabrics totalled \$13.56 billion in 2012, much of it going to Central America Free Trade Agreement (CAFTA) and North American Free Trade Agreement (NAFTA) partners.
- 8 Provisions on government procurement already figure in bilateral FTAs between US and certain TPP partners (Australia, Chile, Peru, Canada, Mexico and Singapore). Singapore,

Japan and Canada are also members of the limited GPA under the WTO that has recently been expanded in scope. The four-member Trans-Pacific Strategic Economic Partnership Agreement between Brunei, Chile, New Zealand, and Singapore also had government procurement provisions.

- 9 In a joint press conference with President Barack Obama, during his visit to Malaysia on 27 April 2014, Prime Minister Najib Razak said, "He (Obama) fully understands our sensitivities", and that the two sides will try to work out a deal in the near future.
- 10 A leaked version of the IPR chapter revealed a counter-proposal by New Zealand, Canada, Singapore, Chile, and Malaysia that did not contain many WTO-plus elements such as data exclusivity, patent term extension, and patent linkage.
- 11 Some business sources in New Zealand, for example, have speculated that New Zealand could accept some US demands on national drug pricing and reimbursement programmes of the Pharmaceutical Management Agency (PHARMA) in return for an offer on dairy market access. Australia has indicated that it would accept the ISDS if it gets a strong outcome in market access. Malaysia, on the other hand, could show flexibilities if the exception for Bumiputras could be provided on government procurement.
- 12 Stephen Olson (2014) of the Economic Strategy Institute has rightly pointed out that while countries normally pursue FTAs with each other because they broadly subscribe to similar economic principles, south-east Asian countries are increasingly joining RTAs/FTAs because they do not want to be left out when a neighbour and potential competitor gains enhanced market access to one or more key markets. The TPP, he said, is a case in point where Malaysia and Vietnam possibly have joined not because they fully subscribe to its ambitious tenets, but because they do not want to be left out.

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