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The Trans Pacific Partnership (TPP)

V. S. Seshadri*

Abstract: The Trans Pacific Partnership (TPP) has emerged as a major regional initiative for trade and investment liberalisation and towards enhancing competitiveness of the twelve participant countries drawn from either side of the Pacific. The United States has taken a leadership role in advancing this initiative for which eighteen rounds of negotiations have already been held. This discussion paper dwells on the background surrounding this initiative, its principal elements and what its implications could be for India, if it is successfully concluded.

Key Words: TPP, Free Trade Agreements, Asia-Pacific Region.

1. Introduction

With Japan admitted as a member of the Trans Pacific Partnership (TPP) negotiations that are underway, TPP has now acquired more salience. Its 12 members¹ account for 38 per cent of world GDP and about 25 per cent of global trade. If TPP gets to be established as a ‘high standard’ ‘21st century agreement’ whose coverage will not only be trade or investment but also rules in a host of other areas, it is bound to have an influence on other free trade initiatives underway as also the Doha multilateral trade negotiations. US Vice President Joseph Biden said recently ‘Our goal is for high standards of Trans Pacific Partnership to enter the blood stream of the global system and improve the rules and norms’.

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¹ Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam.

US has taken a leadership role in the negotiations because it meets many of its interests. Having been unable or unwilling to make necessary concessions on market access, or in respect of agriculture subsidies, to enable the Doha negotiations to move forward, it had been looking for other trade liberalisation initiatives in which an asymmetric trade strategy will be successful where its contributions will be minimal and gains optimal. Its national strengths are in the areas of high technology, services and investment and it was seeking to push for rules beyond the WTO remit that would bring better and more assured returns to its businesses in these areas at a time when the world economy had moved on and dispersed production processes were rampant. To the extent possible these were to be based on its own national laws and regulations, reflecting a template that will be in tune with its interests, approach and values, even if it meant these rules will be intrusive and spill over into domestic policy making of the participant countries. Benefits accrue from exporting one's regulations, regulatory framework and standards to a wider group of economies, if not making them universal, and has been a well used trade policy strategy.

Earlier in the Noughties, US tried setting out its template by crafting a high standard Free Trade Agreement of the Americas (FTAA) and by also entering into bilateral FTAs with a few like minded countries. FTAA, however, got stalled following opposition from some countries including Brazil on inclusion of non-trade issues. The US Congress, spurred by agriculture, trade union and pharma lobbies, also imposed tough conditions for approving some of the bilateral FTAs concluded by the US Administration. This happened even as the feeling was gaining ground that US was getting left out of many Asian FTA deals.

It is in this context that US found it opportune to pick up in 2008 what was a relatively small four country agreement (Trans Pacific Strategic Partnership comprising Singapore, Brunei, Chile and New Zealand) that had certain ‘high standard’ elements that it was pushing for and sought to make it more comprehensive. Once US pitched for it (November 2009), Australia, Peru and Vietnam followed, presumably with a view to avoid getting left behind at a time when FTAs were rapidly growing. The negotiations which began in March 2010 were joined in by Malaysia in October 2010, Canada and Mexico in October 2012 and Japan this year.

President Obama conveyed in his State of the Union Address in February 2013 that his Administration planned to complete TPP negotiations to ‘boost American exports, support American jobs and level the playing field in the growing markets of Asia’. TPP is thus seen as providing that required edge to enable US and other TPP companies in reworking their production networks to effectively compete in some of the large markets like China, India and Indonesia. Unsaid here perhaps is also to help deal with China’s emergence as a major manufacturing assembly hub with intermediates and raw materials sourced from various countries. On the political plane, many commentators have also identified TPP as part of US rebalancing strategy and pivot towards greater engagement with the Asian region with a view to also contain China’s growing influence.

Whatever the motivations, the fact is that TPP today has a significant membership and the negotiations appear to be making headway with 18 rounds already held, the last one in Malaysia from 15-24 July 2013. While official information about progress in the negotiations that have been held very confidentially give

little idea about the intricacies, available reports on the net and the November 2011 statement of TPP leaders give a broad idea about the scope and direction.

2. TPP's Coverage

Compared to existing Free Trade Agreements (FTA), TPP will be one of the most ambitious attempted. Its participation stands quite broad now with membership spanning both large and small economies drawn from either side of the Pacific and also having developed, emerging economies and developing countries within its fold. As of now, however, it will be dominated by developed countries, particularly after Canada and Japan joining. The TPP is also open for accession by others from the Asia-Pacific region.

The disciplines it will cover are expected to not only scale up commitments on traditional market access, trade rules and intellectual property standards. It will also require participant countries to have a certain policy framework and openness, institutional infrastructure, regulatory coherence and efficiency levels that are deemed necessary to provide a competitive trade and investment environment including for Supply chains and regional production. Labour and environment standards are also expected to figure among the issues covered, all of which will be subject to TPP's dispute settlement process. While developing countries will not have any special and differential treatment, as in Doha agenda, they may get some capacity building assistance and negotiated implementation flexibilities. Mechanisms to help meet concerns of Small and Medium Enterprises to take advantage of the Agreement are also to be put in place.

In all, the TPP agreement is proposed to have 29 chapters dealing with both issues that normally figure in all FTAs, as also certain 'new and emerging trade issues' and some 'cross cutting' issues. These are

outlined below briefly along with certain sensitive aspects that may arise in them.

2.1 Market Access

The stated approach is to have comprehensive market access in goods that covers all tariff lines. It will, however, be interesting to see to what extent TPP will involve tariff liberalisation further to the commitments of the participating countries in their current FTAs involving each other wherever they exist.² Of particular interest will be the extent of tariff liberalisation in respect of sensitive items including several agricultural products (rice, beef, sugar and dairy products, in particular since they are of great interest to key agricultural exporters of TPP), automobiles, textiles and apparel and leather products that have only figured in a limited way in earlier FTAs. A related issue is also what rules of origin will be followed for textiles. US has already taken a somewhat defensive line on requests it has received for market access by saying that it will not be willing to reopen market access schedules it has agreed to with its FTA partners in their respective bilateral agreements. It is known to be negotiating so far only with Brunei, Malaysia, Vietnam and New Zealand (presumably it will now also include Japan) with all of which it does not have any FTA.

In the area of Services, TPP proposes to generally follow a negative list approach as against a positive list followed in the WTO and most other FTAs. (All our FTAs have followed a positive list approach.) This would certainly render it more comprehensive and make it challenging for developing countries and even emerging economy participants of TPP. Indications are that much will be

² Several TPP members already have FTA arrangements with others in TPP either bilaterally or as part of plurilateral arrangements. US, however, has no FTA tie-up with five TPP countries: Brunei, Japan, Malaysia, New Zealand and Vietnam. Vietnam has also no such tie-up with any of the five TPP members in the American continent.

expected on cross border (Mode 1) and commercial presence (Mode 3) modes. There is no clarity, however, of what the provisions will be on movement of natural persons (Mode 4). The new cross cutting regulatory coherence issue will also add to the complexity of negotiations here since the Services sector generally has very many domestic regulations that are seen as barriers. Both Financial Services and Telecom Services will also be covered in separate chapters. The interests of participating countries, particularly US, are huge in these sectors.

The Chapter on government procurement will seek to ‘broaden coverage to ensure the maximum access to each other’s government procurement markets’. There will doubtless be exemptions and thresholds that will need looking at. Whether Malaysia, for example, will be required to phase out special provisions for Bumiputra entities, an issue that stood in the way of it signing a US-Malaysia FTA earlier, will be carefully watched. Also of some sensitivity, including for US, will be if procurement by sub federal entities will be included.

2.2 Rules

As for rules such as on SPS measures, standards, customs facilitation and trade remedies (against subsidies, dumping or surge in imports) the Agreement is expected to have WTO plus provisions for better compliance, transparency, etc. The SPS chapter is to have a series of new commitments on science, transparency and equivalence. The US will be seeking to put its stamp here by insisting on science based determination, leaving less scope for precautionary principles, that is more in tune with EU’s approach on food safety (e.g. GMOs). The Agreement will also have a common set of rules of origin to determine whether a product originates in the TPP region to qualify for TPP’s concessionary access. Working these out will, however, not be easy, as it involves painstaking technical work.

2.3 IPRs

The TPP agreement will be seeking to enhance standards of treatment in respect of patents, copyrights, trade marks and trade secrets all of which are areas where US has strong interests. According to leaked copies of the text of IPR chapter, the proposals on Patents provide for five years of data exclusivity, patent linkage, patent extension on further discoveries on the patented product, compensation for time taken for patent approval, etc. On copyrights, again, the proposals are extensive including lengthening the duration of copyright protection to a minimum of 95 years after creation against the WTO's copyright period of 50 years. On the other hand, in respect of Geographical Indications, US will want to limit protection and may in fact want to seal a precedent here before the Trans Atlantic partnership negotiations with the EU gets to rule making on this subject.

2.4 Investment

This will be an important chapter where the attempt will be to raise the standard of protection for the foreign investor and foreign investments. It can be expected that investor state dispute settlement will be provided for, although some countries like Australia are opposed to it. Will some safeguards be added? How 'expropriation' and 'acts amounting to expropriation' will be defined can be expected to be intensely negotiated. Yet another issue would be how concerns relating to the ability of governments to impose controls on capital outflows, in times of financial crisis, will be dealt with. There are also indications that those who are party to FTAs may be looking to see if they can have some of the reservations for specific sectors entered into by their FTA partners removed in TPP, e.g. Australia that is seeking to remove some restrictions on mining in US, etc.

2.5 New Issues

Chapters on Labour and Environment with enforcement obligations will be new elements in TPP. The chapter on labour will seek to commit adherence to the five principles of freedom of association, effective recognition of right to collective bargaining, elimination of all forms of compulsory or forced labour, effective abolition of child labour and elimination of discrimination in respect of employment and occupation, all of which are principles enshrined in the ILO 1998 Declaration on Fundamental Principles and rights at work. The chapter, as per one report, would also go further by indicating how these principles will be implemented by requiring countries to have labour laws related to minimum wage requirements, work time and occupational health and safety.

The chapter on environment will require members to adhere to seven major multilateral agreements dealing with Trade in endangered species, Montreal Protocol on Ozone depletion, convention on marine pollution, Tuna conventions, Ramsar Convention on wetlands, convention on whaling and conservation of Antarctic marine living resources. Specific disciplines are also expected on illegal logging, marine fisheries and endangered species.

While many of these provisions on labour or environment *per se* may not be so objectionable, their figuring in a trade agreement is something that we have firmly opposed.

Disciplines on competition will be requiring establishment of national competition laws, authorities and procedural fairness aimed at providing a level playing field for TPP companies. It can further require state owned entities to operate in a commercially neutral way, a new and challenging element in the agreement, particularly for developing countries to accept.

E-Commerce will also likely throw up issues as there are apparently proposals prohibiting countries from blocking cross border flows of data over the internet. Otherwise issues here would deal with customs duties, authentication of electronic transactions, consumer protection, etc.

2.6 Horizontal Issues

Regulatory coherence is being billed as a key new cross cutting issue in TPP with issues relating to it covered in various chapters dealing with SPS, TBT, services, etc., as also in a stand alone chapter. A US Congressional Research Service Report notes that the Regulatory Coherence chapter will recommend establishing domestic regulatory structures similar to the US Office of Information and Regulatory Affairs in the Office of Management and Budget, a body to vet proposed regulations. The body will also conduct Regulatory Impact Assessment (RIA) that would assess the need for a given regulation, conduct cost-benefit analysis and assess alternatives to regulation. There will also be a regulatory coherence committee among TPP members. If prior notification or consultation vis-à-vis the committee is required by a TPP member before adoption of a national regulation, this could be a sensitive issue.

The Chapter on State Owned Enterprises (SOEs) is expected to include provisions that SOEs operate on a commercial basis. Competitive neutrality whereby SOEs receive no competitive advantages beyond those enjoyed by private sector companies, will likely be a principle incorporated. Reports suggest that determination about SOE's neutrality may be based on an injury test similar to that in the WTO subsidies agreement.

2.7 Competitiveness and Supply Chains

It is expected that this issue will again find reflection in many of the other chapters, particularly on Customs Facilitation, Technical Barriers

to Trade, etc. But there will also be a stand alone chapter that would address issues like harmonisation of standards, adequate port and other infrastructure to facilitate trade, greater customs efficiency, etc.

3. TPP Members' Sensitivities and Concerns

While the scope of the TPP Agreement is vast, it is the depth and comprehensiveness of each chapter, as finally agreed, that will determine its high standard. This will in turn depend on how sensitivities and concerns as well as ambitions of each member get addressed.

Reliable information in this regard is scanty. But New Zealand, for example, has conveyed its keen interest in getting greater access for its dairy products in the US, Canada and Japanese markets. It has also indicated that it will not effect any changes to its Pharmaceutical Management Agency (PHARMAC) programme without reciprocal concessions by US to federal or state level drug pricing or reimbursement programmes for Medicare.

Australia is seeking to reform the issue of sugar access to the US market that had been kept out of the earlier US-Australia FTA. Australia is also strongly opposed to including an investor-state dispute settlement mechanism.

Vietnam is calling for a simple rule of origin that will enable it to source fabric from nearby markets for its apparel exports to the US market, a proposal that will be resisted by Peru, Chile and Mexico (as also domestic US textile producers) which are benefitting from the yarn forward rule under NAFTA and the bilateral FTAs. How will the chapter on SOEs affect an economy like Vietnam that still has almost 40 per cent of its economy dominated by SOEs is another aspect. Indeed even many of the developed TPP members

have SOEs that enjoy special status (Temasek in Singapore, Postal services in Japan and US). Also of interest would be the provisions on competition chapter that deal with large monopolies. Will it also cover agriculture? Agreement on TRIPS plus provisions including on patents and copyrights will also not be easily agreed to as also compromises to be made in health care programmes.

US and Japan have exchanged letters recently (as part of price paid by Japan to join TPP negotiations) to address in parallel to TPP negotiations a number of key non-tariff measures in the areas of insurance, transparency/trade facilitation, investment, IPR, standards, government procurement, competition policy, express delivery and SPS. They have further agreed on a set of terms of reference for discussing various concerns in the automobile sector. Interestingly, US has made it clear that its tariffs on motor vehicles will be phased out in accordance with the longest staging period in the TPP negotiations and will be back loaded to the maximum extent and that such treatment will be substantially extended than that provided in Korea-US FTA for US tariff on motor vehicles. (Some may ask where the high standard is?)

Furthermore, the letters note that the two sides look forward to working closely together on TPP negotiations on rules and market access, while recognising both countries have bilateral trade sensitivities, such as agricultural products for Japan and manufactured products for US. Are these the indicators that market access breakthroughs on sensitive items may not be significant?

4. Conclusion Date of Negotiations and Likelihood of More Members

Will the negotiations get concluded by the end of this year as planned? The general feeling is that it is unlikely. Considering the number of

unresolved issues and the fact that a large economy like Japan, which also has no earlier FTA with US, is entering the negotiations now, will likely prolong the negotiations at least till the next year. Is it possible that more countries may get added on before this agreement is signed? Korea, if it decides in favour, could be accepted since it has already signed an FTA with US only recently with many TPP like provisions. On the other hand, negotiations could get prolonged if they took on Thailand that has already shown some interest. With its strong interest in agriculture, even bilateral consultations with all members and getting their endorsement could take several months. TPP member countries will likely weigh the added clout and lure the agreement may have with any addition to its membership at the present stage against the delay it may entail in conclusion.

In any case, there does not appear to be much of a prospect for an economy like China entering the negotiations at present because of the potential commitments involved and the nature of the Chinese economy. This is even as TPP is expected to have several disciplines that will facilitate supply chain competitiveness, an area that could be of particular interest to China.

US also may not agree for China to join TPP at present amidst continuing political cries domestically about China manipulating its currency, subsidising its products, practicing unfair labour standards, lacking transparency, etc. This is unless China agrees to meet many of the demands that US may put forward, as it happened at the time of its WTO accession, accepting which may not be easy.

There is a recent statement from China saying that it is studying the proposed agreement. It may want to wait to fully understand the implications and also perhaps to see how an erstwhile centrally planned economy like Vietnam gets treated.

5. Prospect of TPP Getting Concluded and Signed

Considering that all participants had a broad idea of what the scope of this negotiation will be before they began negotiating, the prospect of an agreement emerging appears very likely. That the negotiators are meeting for two weeks every alternate month with also stakeholders being consulted closely implies the countries remain committed and the negotiations have acquired a certain momentum. That said, however, it does not seem likely that US will be willing to grant too many concessions on the market access front. This is likely to have some impact on the commitments that others will be willing to make particularly in respect of IPRs, or other issues that would be domestically difficult for them.

While TPP appears to generally have bipartisan support in US Congress (this initiative began during the term of a Republican President followed by President Obama picking it up) the agriculture and trade union lobbies will be closely watching the concessions granted. With no fast-track TPA at present it cannot be ruled out that some amendments get proposed when it comes to the US Congress for approval complicating matters further with other participants . But should a TPP deal seem likely, then businesses will move quickly to cash in by making suitable investments or other preparations even as the completion of formalities for implementation is underway.

6. Implications for India

- It is felt that there is no immediate prospect of India joining such an agreement. We may not be able to meet many commitments such as in respect of supply chain management or regulatory coherence to mention just a couple of them. Also, it may not be in our interest to agree to TRIPS plus commitments. It is also not clear if we will now be prepared to make available investor-state dispute settlement provisions even as we agreed to them in some

earlier agreements. This is quite apart from the huge demands that may be made on us on the market access front.

- It does not also appear that any existing TPP member has as yet suggested India's participation. The November 2011 statement refers to TPP being open to countries in the Asia-Pacific region. Will it mean prospective members have to be an APEC member or will it include others as well from Asia? This is unclear.
- If TPP comes into being, we may lose some market share in TPP markets as a result of trade diversion. The extent affected and the specific sectors where this could happen depends on concessions finally agreed. Generally speaking, however, the negative fall out may not be very significant. For one, we already have FTAs with some TPP participants – Japan, Malaysia, Singapore and with ASEAN as a whole. Secondly, we are also negotiating FTAs with Australia, Canada and New Zealand. Presumably, our negotiators dealing with these FTAs will also seek concessions in those areas where TPP could make us somewhat vulnerable. There is also the opportunity of the Regional Comprehensive Economic Partnership (RCEP) negotiations to build on this further. Our main loss on market access would, therefore, come from US market where Vietnam and Malaysia (and any other developing country that gets to become a TPP member in future) could be particular beneficiaries in products such as textiles, apparel, leather goods, etc., where US's MFN tariffs are higher. In the services sector, our IT and Telecom companies that are competing well globally may be placed at a disadvantage in TPP markets depending on the concessions made available to TPP companies.
- International corporates could in future invest in TPP countries in preference to India because they offer better supply chain infrastructure and a more conducive trade and investment environment. Vietnam and Malaysia, again, could be beneficiaries in our region. But India, in any case, has some way to go to

strengthen its infrastructure before becoming a serious competitor to other Asian countries in this area. As of date investors primarily come to India for its domestic market even if some among them also manage to develop an export profile.

- Much of TPP is about rule making. Normally their benefits should become applicable on MFN basis even for non-TPP Countries. (As per Article XXIV of GATT, an FTA can only offer concessions to its members on restrictive regulations of commerce.) For example, if trade facilitation gets to improve customs efficiency or SOEs are disciplined in Vietnam and Malaysia, these should also benefit Indian companies active in those markets. The only drawback here is that if the trade and investment environment improves in those countries following TPP, even Indian companies may flock to them, in preference to investing in home country.
- If TPP succeeds in weakening the strong agriculture lobbies (rice, sugar, dairy products) in the TPP developed economies and in dismantling their protectionist structures, this may have a positive impact towards fairer trade in agriculture. Could it also bring in greater flexibility of developed country positions in the Doha Round?
- If TPP is successful, US would, with support of other TPP members, seek to bring in TPP type disciplines to the Doha Round. Should the just commenced Trans-Atlantic Partnership Negotiations also end in a similar deep integration agreement, EU could also join the bandwagon. There may also be attempts by some TPP members who are also participants in RCEP (Regional Comprehensive Economic Partnership – ASEAN ten plus Australia, China, India, Japan, Korea and New Zealand) negotiations for including TPP type disciplines in RCEP.
- The above will require careful handling and strategising as we participate in RCEP negotiations for which the Guidelines and

Objectives have already been agreed upon. The Guidelines recognise the diverse circumstances of participant countries. They further recognise ASEAN's centrality in the emerging regional economic architecture and the interest of ASEAN's FTA partners in supporting and contributing to economic integration. Within the parameters set out, and it does not include Labour and Environment Standards, it should be possible for us to build support among other participants for a balanced even if ambitious outcome. We would need to meanwhile also explore internally how we can approach subjects like Investment and competition apart from market access issues, that can both meet the region's expectations and our interests, and yet allow us to retain adequate domestic policy space. Additionally, we would also need to work with like minded participant countries to see that the delicate balance in the WTO agreements between rights of an IPR holder and public welfare is not undermined. In all these, we could possibly secure cooperation from countries like Indonesia, China, Philippines and Thailand who may have similar interests.

- It would be a good idea if India were to gain admission as a member of APEC that is based on open regionalism. APEC in fact has been an incubator for several trade and investment liberalisation initiatives and has been serving well as a forum for developing new approaches and fostering good practices. We have a good case to be a member and this would be worth pursuing as part of our efforts towards closer cooperation and integration with the Asia Pacific region.

7. Conclusion

With Japan joining, TPP has now acquired more critical mass. With negotiations on fast track and gathering momentum, the chances of an agreement emerging appear high in a year or so even as the negotiations themselves will be difficult, particularly towards the final

stages. While it remains to be seen how high a standard it will set, it will certainly breach current FTA formats and disciplines and will carry many behind the border commitments. Whether these will be accepted meekly by civil society and various political interests in those countries, when the results of the highly secretive negotiations become known, remains to be seen. All of these will no doubt affect other trade liberalisation initiatives including the ongoing Doha agenda. If US and some of the other TPP members start pushing the envelope towards fashioning TPP type disciplines in the Doha agenda or in other FTA initiatives in Asia, it could divide the region into two blocks on trade issues, just as we have seen in South America, a prospect that was earlier commented on by Professor Jagdish Bhagwati. How China will eventually react also remains to be seen. India could be impacted negatively by TPP but it may be inadvisable to join in at present. But our incremental approach towards FTAs including by taking a constructive and pro-active approach towards RCEP should largely safeguard our interests. Gaining membership to APEC too would be useful.

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