The full implications of the establishment of the United States-led Trans-Pacific Partnership Agreement need to be considered carefully by the global community. The proposed agreement could act as a trigger for the setting of a "new normal" in economic integration between countries, whose terms would be significantly tougher as compared to those existing under the multilaterally negotiated rules of the World Trade Organization.

Currently, 12 countries in the Asia-Pacific region are negotiating the TPP. These countries are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States (US) and Vietnam. There is a possibility that two more countries, Korea and Taiwan, could also join the grouping. The countries currently involved in the negotiations accounted for just over 29% of the total global trade in 2014.

US-Driven

The more significant aspect of the TPP is that the negotiations are effectively being driven by the US with two clear objectives. First, the TPP is being projected as an integral part of President Barack Obama’s agenda to help American “farmers and small businesses increase their exports” (White House 2010). According to the US Trade Representative (nd), the US is “negotiating the [TPP], a 21st century trade agreement that will boost US economic growth, support American jobs, and grow Made-in-America exports to some of the most dynamic and fastest growing countries in the world.”

The US’s second objective of negotiating the TPP was that through this agreement, it would seek to expand its economic footprint in the East Asian region, the most dynamic region of the world during the past quarter of a century. More recently, the Obama administration officially announced the intensification of its role in the Asia-Pacific region (Donilon 2011).
The TPP is viewed as an important element in the US “rebalancing” towards the region (Fergusson 2015a).

The idea of the TPP took shape in 2008 when the US decided to provide leadership to an initiative taken by Chile, New Zealand, Singapore and Brunei (the so-called P-4) to form a free trade agreement (FTA). The US has therefore driven the negotiating agenda of the formation as well as its process. The US has viewed the TPP as a trade agreement which would “unlock opportunities for American manufacturers, workers, service providers, farmers, and ranchers—to support job creation and wage growth” (Office of the USTR nd). The US’s negotiating objectives have been articulated thus:

TPP will be a comprehensive deal, providing new and meaningful market access for goods and services; strong and enforceable labor standards and environmental commitments; groundbreaking new rules designed to ensure fair competition between state-owned enterprises (SOEs) and private companies; commitments that will improve the transparency and consistency of the regulatory environment to make it easier for small- and medium-sized businesses to operate across the region; a robust intellectual property (IP) rights framework to promote innovation, while supporting access to innovative and generic medicines and an open Internet; and obligations that will promote a thriving digital economy, including new rules to ensure the free flow of data (office of the USTR nd).

One of the more pertinent observations that has been made in this regard is that the TPP “provides the United States with the opportunity to project its trade interests by negotiating a ‘comprehensive and high standard’ FTA with provisions that build on those in FTAs the US concluded throughout the 2000s, especially the most recent FTAs, such as the US-Korea (KORUS) FTA” (Fergusson 2015a: 6).

Obama’s Imperative

The insistence that the TPP would be a trade agreement that would bear the distinctive footprint of the US was a legislative imperative for the Obama Administration. Under the US Constitution, the Congress has the authority over the regulation of foreign trade. But while Article I of the Constitution states that the Congress has the power to “regulate commerce with foreign nations...” and to “…lay and collect taxes, duties, imposts, and excises...,” thus assigning no specific responsibility for trade to the President, Article II, gives the President the exclusive authority to negotiate treaties and international agreements and exercises broad authority over the conduct of the nation’s foreign affairs. The Congress addresses this chasm between the powers of the executive and the legislature in the realm of trade by authorising the administration to engage in trade negotiations. This authority is granted through the Trade Promotion Authority (TPA) and is better known as the “fast track approval.” The most recent of these authorisations from the Congress was granted to the Bush Administration (Fergusson 2015b: 7), which expired in 2002. Significantly, the Obama Administration was not granted the Congressional authorisation to negotiate trade deals.
Therefore, while engaging in the TPP negotiations, the Obama Administration tried to convince Congress that these negotiations would not require the US to change its laws and regulations. In other words, the administration conveyed the message that the TPP would accept the norms and standards that the US legislations have adopted. This was also a signal to the TPP partners that they would be negotiating under the broad directions of US laws and regulations.

The framework of the TPP was adopted in the 2011 meeting of the trade ministers. Accordingly, the TPP was to include the following broad areas: (i) comprehensive market access—removal of both tariff and non-tariff barriers in all areas; (ii) a regional agreement that facilitates trade and the development of production and supply chains among TPP members; (iii) holistic, agreement-wide approach to specific areas: regulatory coherence, competitiveness and business facilitation, small- and medium-sized enterprises, and development; and (iv) addresses emerging trade issues such as those caused by new technology.

**IPR Provisions**

The weight of US interests in the TPP negotiations held thus far are clearly visible in the draft texts on intellectual property rights (IPRs) and investment. As regards IPRs, the overarching objective of the US is to conclude an agreement that reflects a “standard of [intellectual property] protection similar to that found in US law.” The implication of this objective is that the US is seeking to introduce standards of IPRs that are significantly higher than those available under the WTO’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). More specifically, the US is seeking to ratchet up the TRIPS standards by expanding the coverage of patentable subject matter through the inclusion of patenting of plants and animals, extending the term of patent beyond 20 years. However, the KORUS FTA had recognised the use of the provisions of the Doha Declaration on TRIPS and Public Health for protecting public health and there are indications that the TPP would follow suit.

In the past, the US negotiators have insisted on the inclusion of two other elements in the standards governing intellectual property in its bilateral FTAs. The first of this says that “patents shall be available for any new uses or methods of using a known product” (Korea–US FTA Chapter 18 Article 18.8.1), which means that a patent can be granted on a minor improvement of an existing patented product. Many countries like India do not allow granting of such patents since this can result in “ever-greening of a patent” and therefore perpetuation of rent-seeking. The second element is the grant of a period of “market exclusivity” for a period of at least five years to a pharmaceutical manufacturer that is first to obtain the marketing approval for a new product (Korea–US FTA Chapter 18 Article 18.9.1(a)). This “market exclusivity” that is to be granted in addition to the patent term, can
be used to prevent early entry of generics once the patent term has expired.

**Investment Provisions**

The investment agreement that the TPP members are currently negotiating “generally are based on the current iteration of the US model bilateral investment treaty (BIT).” Of all the issues that are being considered, the investor-state-dispute-settlement (ISDS) mechanism has been the most contentious given the varying responses of the participating countries. The ISDS mechanism allows a foreign investor to litigate against its host government using private international arbitration mechanisms under the rules of the International Centre for Settlement of Investment Disputes (ICSID) or United Nations Commission on International Trade Law (UNCITRAL).

A significant trigger for the disputes that the investors have brought against the states has been actions by government authorities to prevent abuse of public interest by foreign investors, which have been labelled as “indirect expropriations.” The draft negotiating text of the investment chapter of the TPP has clarified that “[n]on-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations, except in rare circumstances.” Although this definition provides some policy space to the public authorities to challenge the investors’ actions in their territories on ground of public interest, some observers have commented that the threat of disputes that an investor could initiate may have a “chilling effect” on the nation states, and they would therefore desist from taking any action against the foreign investor (Tienhaara 2010).

**WTO Plus**

Several other substantive issues that the TPP negotiations are considering, which include labour rights, environmental regulations, government procurement and competition policy, are making it clear that this agreement will far exceed the coverage of areas under the WTO. Inclusion of these areas was rejected by the WTO membership and it seems unlikely that the majority of the developing country members of the organisation would consider including these areas. Even in the two conventional areas of market access, namely, for goods and services, the ambition levels for the removal of trade barriers set by the TPP members are considerably higher than those seen in the WTO negotiations. The likely exceptions in this regard could be agriculture and trade in services. While Japan has been resisting unfettered liberalisation of agriculture, in the latter instance, movement of people as one of the modes of service delivery (the so-called Mode 4) is not a part of the US template for FTA negotiations (Fergusson 2015a: 19–20).

At the same time, however, participating countries may not readily find common ground in the ambitious area of “regulatory coherence,” which aims to “ease the conditions and costs of trade between TPP countries while affirming the rights of TPP countries to regulate their
economies to promote legitimate policy objectives” (Fergusson 2015a: 42). This area was included with the explicit objective of promoting regional value chains within the TPP member states, but its eventual outcome would once again depend on how proactively the two larger countries of the grouping, namely, the US and Japan, are able to provide direction.

The implications of the establishment of the TPP need to be considered carefully by the global community. The proposed agreement could act as a trigger for the setting of a “new normal” in economic integration between countries, whose terms would be significantly tougher as compared to those existing under the multilaterally negotiated rules of the WTO. Moreover, in the multilateral forum, the developing countries have been trying to ensure that the extant rules are modified so that they can better respond to their development needs. This has, in fact, been the core of the negotiating agenda of the Doha Round. In contrast, TPP is setting the rules that are dictated by the dominant economic power, with an explicit intent to serve the interests of a set of high- and middle-income countries. The critical question therefore is that if the future trade agreements are tailored to serve the interests of the stronger economies, how should those that are excluded cope with this new challenge?

Notes

1 In 2013, negotiations for formalising two more mega-regional trading blocs were initiated. These are the Regional Comprehensive Economic Partnership and the Trans Atlantic Trade and Investment Partnership. The former is an initiative taken by the Association of South East Asian Nations to consolidate the free trade agreements the grouping has entered into with its six partner countries in its immediate neighbourhood, namely, China, Japan, South Korea, Australia, New Zealand and India. The latter is an economic partnership agreement proposed between the US and the members of the European Union.

2 The ultimate goal, according to the then National Security Advisor Tom Donilon, is to promote US interests by helping to shape the norms and rules of the Asia-Pacific region, to ensure that “international law and norms be respected, that commerce and freedom of navigation are not impeded, that emerging powers build trust with their neighbors, and that disagreements are resolved peacefully without threats or coercion,” see Donilon, Tom (2011).

3 The first of these approvals came in the aftermath of the Smoot Hawley Tariff Act of 1930. In order to overcome the damaging impact of this legislation on US commerce, the Congress enacted the Reciprocal Trade Agreements Act and authorised the President to enter into reciprocal trade agreements that reduced tariffs within the range approved by it. In 1974, the remit of this authorisation was expanded to cover non-tariff issues as well.

5 This was the objective included in the Bipartisan Trade Promotion Authority Act (BTPA) of 2002, the last “fast track approval” that an Administration had received from the Congress in 2002.

6 Korea–US FTA, Intellectual Property Rights, Chapter Eighteen, Article 18.11. The Doha Declaration was agreed to in 2001 in the Fourth WTO Ministerial. It emphasised that “the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health”. For details, see, WTO (2001).


8 These provisions were included in KORUS FTA.

9 The authority was included in the Bipartisan Trade Promotion Authority Act (BTPA) of 2002. For details see, Fergusson, Ian F (2015b).

10 ICSID is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and nationals and legal persons of other States. It is a multilateral treaty formulated by the Executive Directors of the World Bank, which came into force in 1966.

11 UNCITRAL provides the rules for commercial arbitration, including investor-state dispute resolution. These rules were first adopted in 1976.

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