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# The Origins and Evolution of the Trans-Pacific Partnership (TPP)

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*The agreement being negotiated by the US-led 12-nation regional trade bloc known as the Trans-Pacific Partnership (TPP) has engendered much controversy. Its origins can be traced to a little-known four-party free trade agreement concluded in 2005 by New Zealand, Chile, Singapore and Brunei. It was US participation and its subsequent hegemonic role in the later negotiations of this group (collectively known as the Pacific Four or P-4) that resulted not only in an expansion of its membership but also in the setting of an agenda for what critics charge is a 'corporate charter'.*

THE free trade agreement being negotiated by the regional bloc known as the Trans-Pacific Partnership (TPP) has provoked widespread opposition in the countries involved in its negotiation. Today the Trans-Pacific Partnership Agreement (TPPA) is rightly perceived and condemned as a US-led attempt to penetrate and dominate the economies of the region.

And yet in its origins, it was not a US-conceived treaty and initially the US was not even a party to it. When negotiations on the agreement (known originally as the Trans-Pacific Strategic Economic Partnership) were launched on the sidelines of the summit of the Asia-Pacific Economic Cooperation (APEC) forum in 2002, it was a tripartite affair involving New Zealand, Chile and Singapore. Dubbed the Pacific Three (P-3), they would soon become the Pacific Four (P-4) when Brunei joined the negotiations in 2005. The negotiations were concluded later that year and the agreement came into force in 2006 even though the negotiations on the financial services and investment chapters of the agreement were deferred for two years.

It was only in February 2008, when President Bush announced that the US would join the deferred P-4 negotiations on financial services and investment, that the US came into the picture.

One key reason for the US's interest in the trade talks is to be found in the US President's 2008 Annual Report on the Trade Agreements Programme. It says, in part, 'US participation in the TPP could position US businesses better to compete in the Asia-Pacific region, which is seeing the proliferation of preferential trade agreements among US competitors and the development of several competing regional economic integration initiatives that exclude the United States.'1 Apart from economic considerations, there are also geopolitical concerns, particularly with regard to the growing power and influence of China, something which became clearer with the Obama administration's policy announcement of a military and diplomatic 'pivot' or 'rebalance' towards Asia. As a research paper for the US Congress notes:

‘The TPP could have implications beyond US economic interests in the Asia-Pacific. The region has become increasingly viewed as of vital strategic importance to the United States. Throughout the post-World War II period, the region has served as an anchor of US strategic relationships, first in the containment of communism and more recently as a counterweight to the rise of China.’2

As noted above, US involvement began in March 2008 with its participation in the P-4 negotiations on financial services and investment. Later in September it announced its decision to participate in comprehensive negotiations for an expanded trans-Pacific agreement and thereafter took charge of the whole negotiations. It took the initiative to expand the membership of the proposed treaty by coupling its announcement of accession with an invitation to Australia, Peru and Vietnam to join the pact.

For Chile and Peru, two Latin American countries which had previously already concluded bilateral free trade agreements (FTAs) with the US, the leading role of the US in the negotiations for an expanded trans-Pacific agreement raised some legitimate fears. Soon after President Bush announced in 2008 his country’s intention to join the negotiations, one Chilean trade official complained that, with an FTA with the US already in place, ‘he could only expect greater, politically and perhaps economically difficult, demands from the Americans in a TPP’.3 This fear among Latin American countries which had already concluded FTAs with the US, that they might end up ‘paying twice’, was spelled out more fully by a Chilean economist:

‘Chile and Peru, as well as other Latin American potential TPP candidates, had to make several economically and politically costly concessions in their respective FTAs with the US. Some of those concessions were made even after the formal closure of negotiations, through amendments to the agreed texts. Commitments on intellectual property have been especially contentious, as they often involved going beyond TRIPS provisions. Such is the case, for example, of the increased protection afforded by FTAs to pharmaceutical and agrochemical products, as well as copyrighted matter; of the restrictions placed on certain flexibilities allowed by TRIPS such as mandatory licensing for medicines; and of the strengthening of enforcement provisions beyond TRIPS disciplines. Renegotiation within the TPP of existing commitments on issues such as IPRs [intellectual property rights], investment and environment involves for Latin American countries the risk of “paying twice” in areas of great political sensitivity and which relate to a broad range of public policies.’4

Malaysia, which was invited in 2010 to join the proposed pact, had been involved in negotiations for a bilateral FTA with the US. The talks however had become stalled because of disagreements on some issues. Interestingly, in explaining why an invitation had been extended to a country with which bilateral talks had proved abortive, the then United States Trade Representative (USTR) Ron Kirk, in his written notification to the US Congress of the President’s decision, claimed that ‘Malaysia, which is engaged in extensive domestic economic reform, has assured us that it is now prepared to conclude a high-standard agreement, including on these issues [which remained outstanding in the bilateral negotiations]’.5 If the claim is true, then the TPPA will afford the US a second opportunity to wrest from Malaysia what it could not secure in bilateral negotiations.

With Malaysia as its ninth member, a formal announcement of the emergence of this trading bloc (now known as the TPP with the dropping of the words ‘strategic’ and ‘economic’) was made by the parties at the APEC leaders’ meeting in Honolulu in 2011. In the same year, the US’s partners in the North American Free Trade Agreement (NAFTA), Canada and Mexico,

indicated their intention to join the grouping and they made their debut at the 15th round of the TPPA negotiations in Auckland in December 2012.

South Korea had been invited to join the grouping in 2010 but rather prudently declined. But it is the decision to invite its economic rival Japan and the decision of that country to become the latest, 12th member (it participated in the 18th round of TPPA talks in Kota Kinabalu, Malaysia, in July) that is somewhat perplexing. As Wilson Center Senior Policy Scholar William Krist observed in his 2012 paper on the TPPA prepared for the Center, 'there is some strong opposition to Japan's participation within the United States; for example, the US auto industry opposes Japan's participation in the negotiations at this time, arguing that Japan's market access barriers cannot be remedied in a free trade agreement'.6 There was equally strong opposition within Japan from the country's small but influential agricultural lobby to joining the TPP.

While geopolitical considerations have been an important factor in overriding opposition in both countries, the Obama administration obviously believes that it can still wrest significant concessions from Japan on the automobile issue through the TPPA. US trade officials have already begun talks with their Japanese counterparts on this issue and, at the time of writing, the new USTR Michael Froman is scheduled to hold further talks on 19 August during a one-day stopover in Tokyo on his way to Brunei for the 19th round of TPPA negotiations.7

**From the P-4 to the TPPA: The great transformation**

As noted above, soon after the US became a party to the P-4 negotiations, it announced its decision to participate in comprehensive negotiations for an expanded trans-Pacific agreement. For the original P-4 parties and the other new participants, it must soon have become evident that the US drive to transform the P-4 agreement into the TPPA was going to be a costly exercise involving stringent commitments and concessions from the other countries.

Taking the P-4 agreement as a point of departure for the TPPA negotiations, the chasm between the P-4 agreement and the TPPA is huge. While clearly designed to give greater impetus to the process of economic liberalisation and while it does make inroads in opening up more space for market forces to operate, the P-4 agreement is nevertheless hedged with provisions conferring on member governments discretionary powers to safeguard national priorities (see box for an analysis of the P-4 agreement). It is evident even from the preamble of the agreement that the intention of the parties is to preserve and protect the right to regulate the liberalisation process. The preamble, which informs all the 20 chapters of the agreement, explicitly recognises:

(1) 'the rights of [the four] governments to regulate in order to meet national policy objectives'; and

(2) 'their flexibility to safeguard the public welfare'.8

What this means is that, however liberally the agreement is interpreted as furthering the process of economic liberalisation, it cannot be construed as sanctioning the undermining of the right of the governments to safeguard national policy objectives and public welfare. This clearly sets a limit on the liberalisation drive and preserves the role of the state in national development and in protecting public welfare.

No such constraint appears to inform the drive by the US to mould the P-4 agreement into (in the words of Obama) 'a 21st century trade agreement'. To ensure that the liberalisation process is pushed to its limits, the US has pressed for the adoption of a 'negative list' approach in the negotiations for the TPPA. The point is that a negative list approach has an inherent bias in favour of liberalisation as it requires parties to specify the sectors that will not be covered by commitments. All those sectors not so specified are deemed to have been subjected to market opening.

Although the TPPA negotiations are completely shrouded in secrecy, it would appear from leaked drafts that one of the agreement's key objectives is to undermine the role of the state in national development. One of the main targets is the state-owned enterprise (SOE). The pressure for this move comes from US Big Business. '[T]here is strong pressure from the American business community to tackle what it perceives as discriminatory state capitalism through the TPP talks. In April 2011, six industry associations sent a letter to USTR Kirk requesting binding obligations on SOEs that would curb unfair advantages vis-a-vis private companies.'9 This push to 'level the playing field' for foreign capital can have serious repercussions for many developing countries in which SOEs play an important role in their development. For example, Vietnam has some 1,000 SOEs and restructuring them to conform to free-market rules can have a major impact on the country's economy.10

Another provision which seeks to whittle away the role of the state in economic development is the TPPA's procurement chapter. Government procurement contracts have been useful tools for states to promote local businesses and domestic industrial development. They have also been used to assist disadvantaged and economically weaker communities. The TPPA's procurement chapter would however weaken the state's capacity to play such a role as it would require all firms operating in any signatory country to be provided equal access as domestic firms to government procurement contracts over a certain threshold.

Another issue of grave concern is the high standards of protection that would be afforded by the TPPA to holders of intellectual property – copyright, patents, trademarks etc. – obliging signatory states to amend their laws to grant a virtual monopoly to such holders. They go well beyond the level of the commitments in the World Trade Organisation (WTO)'s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and pose a serious threat to access to medicines. Here again the hand of Big Business is evident; Big Pharma views the TPPA as an important vehicle to impose stringent rules to limit the production of cheap generic medicines.

But the intellectual property provisions under the TPPA will affect not only medical patients but also citizens at large. For example, the TPPA seeks to extend the duration of copyright beyond the current 50 years after the death of the author. If the US has its way, the duration may be extended up to 120 years after the author's death. This will impact adversely not only on library digitisation programmes but also ultimately on people's access to knowledge.

Leaked drafts of the investment chapter of the TPPA reveal that the US financial industry has also had a hand in shaping its contents. The chapter sanctions the liberalisation of financial inflows and outflows, and places severe restrictions upon the ability of TPPA member governments to restrict or curb such flows by the use of capital controls. The dangers of the unfettered flow of speculative capital were painfully illustrated in the 1990s during the Asian financial crisis and the object lesson it provided helped to persuade even the International Monetary Fund (IMF), long a strident advocate of the free flow of capital, to

give a qualified approval for the use of capital controls. The investment chapter of the TPPA is thus not only a threat to the financial stability of signatory nations, but a retrograde attempt to embellish failed neoliberal dogma in an international agreement.

Lastly, the TPPA's dispute settlement chapter contains a highly controversial provision (dubbed 'investor-state dispute settlement' or ISDS) which empowers a foreign investor (either a corporation or an individual) to bring a claim directly against the host state for losses allegedly suffered. One particular cause of action which investors have invoked under the ISDS provision in some existing free trade agreements is 'expropriation'. The elastic definition of the term in such treaties has enabled investors to haul up governments before an international arbitration tribunal for any move (e.g., a new regulation or policy fully justified in the interests of public health or other social concerns) which may be seen to deprive them of expected future profits. The usual fora for such adjudication are the tribunals conducted by the International Centre for Settlement of Investment Disputes (ICSID), an integral part of a 'self-serving' international arbitration industry which, as a damning international report has exposed, 'has a vested interest in perpetuating an investment regime that prioritises the rights of investors at the expense of democratically elected national governments and sovereign states'.11

While some countries such as Australia and Vietnam are strongly opposed to the inclusion of an ISDS clause in the TPPA, the US appears adamant on incorporating such a clause. To buttress its case, it has argued that the US Congress will not ratify the TPPA unless it includes an ISDS clause.12

In light of the many pitfalls that confront any developing country that is a party to the TPPA talks, the issue is not whether it can successfully negotiate these dangers. The real question is why any developing country should choose to become locked in negotiations which hold out so many risks and perils. In any case, it is apparent that the issues involved are too weighty to be left only to policymakers and political leaders to decide. The time has come for greater public participation so as to ensure that the people have a voice in determining the outcome of the TPPA negotiations. A first and essential step must therefore be an end to the secrecy surrounding the talks.

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**Notes**

1. Cited in Deborah Elms (2011), 'From the P4 Agreement to the Trans-Pacific Partnership: Explaining expansion interests in the Asia-Pacific region', in Simon J Evenett et al. (eds.), Trade-led Growth: A Sound Strategy for Asia, UN Economic and Social Commission for Asia and the Pacific, and Asia-Pacific Research and Training Network on Trade, p. 145.

2. Ian F Fergusson, William H Cooper, Remy Jurenas and Brock R Williams (2013), 'The Trans-Pacific Partnership negotiations and issues for Congress', Congressional Research Service Report for Congress, 17 June, p. 9.

3. Elms, op. cit., p. 144.

4. Sebastian Herreros (2011), 'The Trans-Pacific Strategic Economic Partnership Agreement: A Latin American perspective', UN Economic Commission for Latin America and the Caribbean Serie Comercio Internacional No. 106, March, p. 34.

5. Letter by US Trade Representative Ambassador Ron Kirk to The Honorable Nancy Pelosi, Speaker, US House of Representatives, 5 October 2010.

6. William Krist (2012), 'Negotiations for a Trans-Pacific Partnership Agreement', Wilson Center Program on America and the Global Economy, p. 6.

7. Eric Bradner (2013), 'USTR headed to Japan to attack auto trade barriers', www.politico.com, 9 August.

8. The full text of the P-4 agreement is available at www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/0-P4-Text-of-Agreement.php. All subsequent references in this article to the provisions of the agreement are sourced from here.

9. Mireya Solis (2011), 'Last train for Asia-Pacific integration?: US objectives in the TPP negotiations', Waseda University Organisation for Japan-US Studies Working Paper No. 201102, p. 14.

10. Krist, op. cit., p. 19.

11. Corporate Europe Observatory and Transnational Institute (2012), 'Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom', November, p. 7.

12. Inkyo Cheong (2013), 'Negotiations for the Trans-Pacific Partnership Agreement: Evaluation and implications for East Asian regionalism', Asian Development Bank Institute Working Paper No. 428, p. 7.

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**ANNEX**

## The P-4 agreement

THE main object of the P-4 agreement was to eliminate all tariffs between the parties by 2015. The 20 chapters of the agreement not only deal with trade in goods and services but cover many of the staple issues of contemporary free trade agreements including intellectual property protection, competition policy, government procurement, sanitary and phytosanitary measures, trade remedies and dispute settlement. The agreement is accompanied by two memoranda of understanding on environment and labour cooperation.

There is no doubt that in some of its provisions, the P-4 agreement commits parties to obligations beyond those required under the current World Trade Organisation (WTO) agreements. Thus, with regard to government procurement, the parties are obliged to afford foreign nationals the right to enter the domestic market and grant them the same treatment as locals. Under the provisions, a party cannot discriminate in favour of locals. It must be noted that attempts by the rich countries to incorporate similar provisions into a multilateral WTO agreement on government procurement were rejected by the developing countries. Although the issue of government procurement was introduced into the WTO agenda at the 1996 WTO ministerial meeting in Singapore (hence it is known as one of the 'Singapore issues'), attempts to make it the subject of a multilateral WTO agreement binding on all member states have hitherto been stymied by stiff resistance from the developing countries. As a result, the WTO agreement on government procurement is only a plurilateral accord to which parties can voluntarily choose to adhere.

Another 'Singapore issue' rejected as the subject of a multilateral WTO agreement but which the P-4 agreement incorporates is competition policy. However, the P-4 commitments are a far cry from those previously envisaged by developed-country proponents of a WTO agreement on competition policy. The idea of the proponents in the WTO was to embody a competition policy framework in a WTO agreement which would, in the words of a European Union paper, provide 'effective equality of opportunity of competition' in the local market for foreign firms. Countries which breached the policy could be hauled up before the WTO's dispute settlement system. In contrast, the P-4 agreement only requires each party to set up a national competition authority to 'proscribe anti-competitive business conduct'. While parties are obliged to adopt competition laws which 'shall apply to all commercial activities', there is express recognition of the right of each state to 'exempt specific measures or sectors from the application of their general competition law'. The only condition is that any such exemption must be 'transparent and undertaken on the grounds of public policy or public interest'. Clearly, this provision provides the flexibility which a country needs to devise its own appropriate model of competition law and policy.

The same competition policy chapter attempts to broach the sensitive issue of 'public enterprises and enterprises entrusted with special and exclusive rights, including designated monopolies'. While the parties are required to ensure that 'such enterprises shall be subject to the rules of competition' and 'no measure is adopted or maintained that distorts trade in goods or services', this is subject to the overriding and unchallengeable power of governments to designate or maintain 'public or private monopolies according to their respective laws'. Not only does this proviso make it clear that this power is unfettered; a further proviso in the same chapter puts any such decision beyond judicial challenge by imposing a blanket prohibition on 'recourse to any dispute settlement procedures for any issue arising from or relating to this Chapter'. Clearly this chapter does not undermine the role of public enterprises and public monopolies in economic development.

On some key issues such as intellectual property, there is little that is controversial about the P-4 agreement. While it recognises the importance of providing intellectual property protection, it specifically affirms 'the need to achieve a balance between the rights of right holders and the legitimate interests of users and the community with regard to protected subject matter'. The parties merely affirm their commitment to the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and 'any other multilateral agreement relating to intellectual property to which they are a party'. Significantly, the P-4 agreement specifically recognises the right of parties 'to establish appropriate measures to protect traditional knowledge'.

On the resolution of disputes which may arise under the agreement, the arbitral tribunal (comprised of three arbitrators, one appointed by each side and the third to be mutually agreed) is designated as the general forum for resolution of such disputes. However, the agreement also recognises the right of countries to have recourse to dispute settlement under any other agreement to which both disputing countries are parties (including the WTO agreements). While this affords a measure of 'forum shopping', there is no provision (as there is in the TPPA) for investors to sue states.

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