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TPP AND INDIA LESSONS FOR FUTURE GAINS

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TPP and India: Lessons for Future Gains

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Summary

Till 2015, the Trans Pacific Partnership (TPP) was seen as a game-changer in the evolving international trade regulatory regime. It was evident, as expressed by India's Foreign Trade Policy 2015-2020, that it would not be possible for the country to accept the emerging agreement. The future of TPP is now uncertain, with the US, the largest economy in the TPP, withdrawing from the agreement. This is of some relief to India because the TPP would have eroded India's access to certain key international markets. The present situation, however, gives more than just relief: it creates several important opportunities for India. The text of the TPP agreement provides a template for potentially helping India with its domestic policy reform, its regional or multilateral collaborative initiatives (e.g. for regulatory coherence), and even with some ideas to mitigate the concerns arising in trade negotiations at the regional or WTO level.

Of particular interest could be, for instance, the good governance principles agreed under TPP, i.e. transparency of procedures and regulations, timely decision, processes to facilitate transactions, standards of review, and support to improve institutional capabilities. The TPP also establishes collaborative and consultative mechanisms amongst different countries, and identifies policies that are used to improve cost-effectiveness and efficiency of domestic production and trade. For regulatory regimes, the template includes provisions relating to the regime in general, as well as for certain specific product areas. Further, in view of the rapid evolution of international trade conditions, it would also be worthwhile to consider both the platform for discussion established by TPP, as well as the specific areas and mechanisms identified for its Committees to address emerging concerns and new issues.

India's concern with trade negotiations is largely with respect to tariff negotiations. In the case of TPP, the large tariff decline agreed under the negotiations would be impossible for India to accept. In this context, it is interesting that the TPP agreement also provides examples of a number of flexibilities to protect domestic industries if required, subject to specified conditions. Further, the extent of flexibility could be augmented by considering the various types of solutions agreed under TPP, ranging from soft disciplines (such as guidelines or best-effort agreement), to much more legally binding disciplines underlying the large tariff reduction by member countries. These possibilities could be examined to provide possible models or starting point for seeking flexibilities that may lead to mutually

acceptable solutions in trade negotiations for areas which otherwise would be a serious concern for India.

“I’m a free trader, but I’m also a fair trader. And free trade has led to a lot of bad things happening – you look at the deficits that we have and you look at all of the accumulation of debt.”

- President Donald Trump

“Our view is we want free trade, we want fair trade, we want a system that leads to greater market efficiency throughout the world.”

- Robert Lighthizer

“I believe that in negotiating a new trade agreement we should learn from, and build on, earlier negotiated trade agreements. In the case of NAFTA and TPP, there is much in TPP that goes well beyond NAFTA. So, in a renegotiation of NAFTA, we should consider incorporating those provisions as well as improving areas where we may be able to go beyond TPP.”

- Robert Lighthizer

Watching the developments relating to the Trans-Pacific Partnership (TPP) Agreement is like a progression of history as it unfolds, providing us with a peek into the future. As a trade negotiation, it was one of the most ambitious efforts in terms of its scope and coverage, a mega-regional trade agreement, with the 12 initial members who negotiated it covering 40 per cent of global gross domestic product (GDP) and a quarter of world trade. It included both developed and developing economies, with GDP per capita ranging from about US\$2,100 (Vietnam) to about US\$56,300 (Australia).² A next-generation aspirational agreement, it focuses on a number of areas of recent emphasis in international trade that aim to develop a level-playing field and pave the way for a new framework for trade agreements. For the United States, it was a model trade agreement for its other prospective trade regulatory systems. It is thus ironic that the United States is now out of the TPP, and the present US administration is focusing on bilateral trade agreements. Nonetheless, though the political emphasis of the US has changed, TPP still is a model for the future. In fact, the US Commerce Secretary, Will Ross, has said that the US will have several bilateral free trade agreements with Asian countries that will incorporate parts of the TPP.³ Further, TPP is now acknowledged by the US as a model for the North American Free Trade Agreement (NAFTA). It is significant that the rest of TPP

² The members of TPP included Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States (withdrawn), and Vietnam.

³ See Washington Trade Daily, 24th May 2017.

members (the TPP-11) are examining ways in which they can agree to give effect to this agreement. Given the nature of issues that are emphasised by TPP, including those preparing for international value chains, standards, e-commerce, regulatory co-operation, intellectual property rights, and building capacities for small and medium enterprises, it is very likely that the concerns addressed by TPP remain relevant for the US and other high-income economies.

A close examination of the TPP will also provide a basis for preparing for the kinds of trade-related disciplines that may arise in the next decade or so. For a country like India, which is fast moving towards becoming one of the top three economies in the next decade-and-a-half, it is useful to consider the disciplines embodied in the TPP which will broadly mimic those relevant to developed economies and a number of dynamic developing economies as well. To the extent that over time, India seeks a leadership position for regional or global trade and investment interactions, the TPP is a very good starting point for the country, in order to develop a strategy to incrementally prepare itself for the likely concerns that may arise in the future.

This is an important reason for India to focus on the TPP agreement. Though India would not be in a position to join TPP, at least not in the near future, it can still use a number of its provisions as a basis for policy initiatives to help promote relevant domestic reform, build bilateral or regional agreements, and take leadership in certain areas in the World Trade Organization (WTO).

Since the TPP was a US led initiative, it is worthwhile to begin by considering how the TPP was supposed to address several objectives or concerns of the US regarding the international trade system (Section 1 below). Domestic politics in the US has now changed. Section 2 discusses the current focus of the US and how it would likely amend the areas of focus in comparison to the present text of the TPP. For India, this could be important in at least three different ways.

First, it will indicate the areas which might be emphasised by the US, if and, when trade policy issues are discussed with India. Second, to the extent that certain areas remain relevant despite the change in political focus in the US, India could identify these areas as those with abiding relevance and interest. This would provide India with a basis to take initiatives both regionally and at the WTO (i.e. multilaterally). Third, in a world where

governments have begun to look inwards and focus on domestic concerns related to trade deficits and rise in imports, an understanding of the way the US seeks to address these concerns would help provide India with ideas on what may be useful ways to seek agreement with other countries. Sections 3 and 4 address these issues. Section 5 concludes the paper.

1. TPP Addresses Many Trade Related Concerns of the US

The US, which was the prime mover of TPP negotiations, has withdrawn from that agreement. There is discussion amongst the other 11 TPP members on their strategy in the months ahead. Recalling the reasons why the US had emphasised TPP would be worthwhile for the other TPP countries, as well as non-members.

For the US, the main thrust of TPP was to develop mechanisms to address at least three major concerns.⁴

1.A. Three Key Concerns Addressed By The US In TPP

(a) Addressing the emerging “non-level playing field” for US producers in international markets

At the November 2016 APEC leaders meeting, President Obama “discussed his support of high-standard trade agreements like TPP, which level the playing field for American workers and advance our interests and values in the economically dynamic and strategically-significant Asia-Pacific region.”⁵

In January 2016, the United States Trade Representative (USTR) Michael Froman⁶ explained the main reasons for US emphasis on TPP. These include, for instance: “Trade policy is one of our primary tools for revitalizing the open, rules-based order we’ve led for over seven decades. ... In recent years, a series of forces—globalization, technological change, and the rise of emerging economies—have reshaped, and continue to reshape, the global landscape. At the same time, some nations are offering alternative visions for trade and investment, including many of those who have benefited most from the open,

⁴ The first section of this paper is drawn substantially from Singh (2015), “TPP and India: Introduction and Background”, in Singh (ed.), 2015, TPP and India, Wisdom Tree, New Delhi.

⁵ See Washington Trade Daily, 21st November 2016, page 3.

⁶Remarks by Ambassador Michael Froman at the Woodrow Wilson International Center for Scholars, 13 January 2016. For the text of the statement, please see the USTR website.

rules-based system. ... Instead of recognizing that labor and environmental protections are key to achieving balanced and sustainable growth, these alternatives sacrifice long-term interests for short-term gains. Rather than promote fair competition, they encourage a gaming of the system with excessive and unfair subsidies. Instead of building bridges to unlock humanity's collective potential, they raise national walls to block the flows of data and ideas."

(b) Further develop trade rules that help prolong the competitive advantage of the US

In his speech of January 2016, USTR Froman stated that: *"Consider the alternative path to leading on trade: TPP fails and the rest of the world moves on. Markets that would have been open to us remain closed, while our competitors eat away at our current position. Rather than launching a race to the top, we find ourselves in a race to the bottom, without strong labor and environmental protections, without disciplines on state-owned enterprises, without rules to keep the Internet open and free, and without protections for our innovators."*

(c) Consolidate US strategic geo-economic interests by building coalitions to address the rise of China

In his January 2016 statement, USTR Froman has explained that: *"Our national security and foreign policy experts—U.S. Secretaries of Defense and State, National Security Advisors, Generals, Admirals, and others—are all saying that TPP is a strategic imperative. ... But they also appreciate that TPP is strategic in the broader sense of the word. TPP is the economic centerpiece of our rebalancing to Asia and a concrete manifestation of America's ability to show global leadership.... I was thinking the other day about our friend, Sandy Berger, who said it best last year: The future of the Asia-Pacific region is still being written. They are two possibilities: Will it be China-centric or Trans-Pacific in nature? That is what is at stake, economically and strategically."*

1.B. How TPP Addresses These Concerns

- 1) TPP reflects the US economic strategy and emphasis on reducing tariffs in other economies to bring them more in line with the relatively lower tariffs in the US.
- 2) The sensitive areas for the US in negotiations, such as market opening for automobiles, have been addressed by flexibilities and very long transition periods, much more than any other large trade agreement.

- 3) Senior US Congress members⁷ and those in the US administration⁸ had given considerable thought on the methods by which US concerns that are not yet reflected in the TPP's legal text could be addressed in the process of implementation of the agreement.
- 4) The TPP Agreement has provisions that:
- Establish mechanisms in export markets to address concerns arising due to non-tariff barriers, in terms of regulatory conditions, lack of transparency or addressing delays in trade transactions in a collaborative and timely manner;
 - Assert the importance of environmental and labour standards in international trade and domestic production, focusing on the level playing field;
 - Establish a framework of disciplines to curb potential arbitrary use of, hitherto, unaddressed trade-related policy areas such as competition policy, and the relative advantage provided through government support given to state-owned enterprises. The objective was to limit policies that adversely affect 'competitive neutrality';
 - Promote the concept of competitive neutrality and address this aspect through common understanding or disciplines in various areas, such as state enterprises and competition policy;
 - Reduce the constraints imposed by governments on internet-based trade and investment in general; and,
 - Establish higher levels of disciplines in the area of intellectual property rights applicable to new technologies, including the area of digital trade.
- 5) TPP is not just an economic agreement, but also a geopolitically strategic agreement for its members, particularly since China has risen as an alternative centre of power. TPP is one of the mechanisms for providing an additional basis for US leadership in the Asia-Pacific region.
- 6) Furthermore, the TPP agreement is accompanied by a Joint Declaration of the Macroeconomic Policy Authorities of Trans-Pacific Partnership Countries, which

⁷ See, Inside US Trade, "Sources: Administration close to reaching biologics solution with Hatch", 3rd November 2016.

⁸ See, for example, 'Froman: Implementation Plans One Way To Address Lawmakers' TPP Demands', Washington Trade Online, 20th January 2016; and 'Vetter Signals TPP Implementation May Be Used To Address Lawmakers' Objections', Washington Trade Online, 19 January 2016.

contains a framework for disciplines on exchange rate regimes.⁹ This Declaration becomes effective for each Authority immediately after entry into force of TPP for the country of that Authority.

- 7) TPP provides a framework for further negotiations of new issues. In this context, some parts of the TPP agreement explicitly state that further negotiations will be undertaken after a specified time¹⁰, and some others have tasked the relevant committee to look into determining the future negotiating agenda by determining the priority areas for such work.¹¹

2. Current US Concerns, the Likely Future of TPP and Other Free Trade Agreements Involving the US

The US is the largest economy in the world, and a top trading country, as well as a major recipient and provider of foreign direct investment (FDI). Its views on trade regulations will significantly impact the global trading regime, be it in the WTO or for regional trading arrangements (bilateral or plurilateral).

The recent political stance in the US regarding trade reflects the relatively low wages and high unemployment experienced since the major global economic decline in 2009. Interestingly, unemployment rate started falling in late 2015 and has been below 5 per cent for most months in 2016 and 2017.¹² In fact, this unemployment rate is close to that

⁹ The main aspects of the Declaration relate to inter alia exchange rate policy, transparency and reporting, macroeconomic policy consultations and independent inputs. The text on exchange rate policy states: “Each Authority confirms that its country is bound under the Articles of Agreement of the International Monetary Fund (IMF) to avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage. Each Authority is to take policy actions to foster an exchange rate system that reflects underlying economic fundamentals, and avoid persistent exchange rate misalignments. Each Authority will refrain from competitive devaluation and will not target its country’s exchange rate for competitive purposes.” See, “Joint Declaration of the Macroeconomic Policy Authorities of Trans-Pacific Partnership Countries”.

https://www.treasury.gov/initiatives/Documents/TPP_Currency_November%202015.pdf

¹⁰ TPP’s Chapter 17 on State-owned Enterprises and Designated Monopolies, Article 17.14, states that: ‘Within five years of the date of entry into force of this Agreement, the Parties shall conduct further negotiations on extending the application of the disciplines in this chapter in accordance with Annex 17-C (Further Negotiations).’

¹¹ This includes, for instance the Committee on Technical Barriers to Trade, whose functions include: ‘deciding on priority areas of mutual interest for future work under this chapter and considering proposals for new sector-specific initiatives or other initiatives’. (Article 8.11.3(c))

¹² The highest rate has been 5 per cent, for three months during 2016. See National Employment Monthly Update, at <http://www.ncsl.org/research/labor-and-employment/national-employment-monthly-update.aspx>

before the economic crisis; the average unemployment rate in 2016 and 2017 has been significantly lower than any other year after 2007.¹³

Nonetheless, there was a major perception in the US during the 2016 elections that the country's unemployment levels were high. This was perhaps because of the high unemployment rate that prevailed for most years since 2009, and while overall employment has increased since the major recession of 2008-09, the growth has come largely in low-wage jobs which do not pay enough to cover basic needs.¹⁴ For instance, the US Bureau of Labor Statistics' U-6 labour underutilisation rate has been high (for example, it was 9.5 in October 2016).¹⁵

The low income and high unemployment are attributed by many in the US to a “flooding of” cheap imports from China, immigration of cheap labour, exchange rate manipulation by certain countries, and investment going out from the US to other countries with lower wages and, in some cases, weaker standards regimes. In addition, certain countries are perceived as gaining an unfair competitive advantage through government support for their state enterprises, which adversely affects “competitive neutrality” in global markets for others.¹⁶

In this background, the prevailing view in the US is that the “unfair practices” of other nations need to be addressed by negotiating bilateral trade deals that are “free, fair and reciprocal”. It is interesting that the aim of the US in TPP too was to address unfair practices and the non-level playing field in global trading conditions.

The emphasis on reciprocity is also reflected in the view that the US has opened up its market much more than others, but is not getting reciprocal treatment from other nations

¹³ See US Bureau of Labor Statistics. <http://data.bls.gov/timeseries/LNS14000000>

¹⁴ See <https://thejobgap.org/job-gap-2015-low-wage-nation/2015-low-wage-nation-national-findings/>

¹⁵ See <http://www.bls.gov/news.release/empsit.t15.htm>. The U-6 labor utilisation rate, considered by many economists to be a more complete measure of joblessness in America than the standard unemployment rate, includes the unemployed, those without jobs who are not considered part of the labour force, and involuntary part-time workers.

¹⁶ Competitive neutrality is a concept highlighted in general by OECD members and industry in these economies. For example, a paper of the Business and Industry Advisory Committee (BIAC) submitted to the OECD shows a major emphasis on addressing prevailing conditions so as to have competitive neutrality. See the BIAC paper titled, ‘A Proactive Investment Agenda for 2016, especially pages 6 and 7. <http://biac.org/wp-content/uploads/2015/10/FIN-2015-10-proactive-investment-agenda-2016.pdf>

with respect to its own exports or investment. Peter Navarro has said that: *“While we have the lowest tariffs and barriers in the world. foreign capital enters this country with few restrictions, American exporters, service providers, and investors are not afforded the same treatment. Most, if not all countries we run significant trade deficits with. ... At least in the Trump administration, we see tax, regulatory and energy policy reforms along with eliminating currency manipulation and other forms of trade cheating.”*¹⁷

A key US administration criterion for selecting bilateral free trade agreement (FTA) partners is to identify countries with a substantial trade surplus with the US. Significantly, the White House National Trade Council Director, Peter Navarro, has referred to the trade deficit as a national security threat, and has identified in particular China, Japan, Mexico, and Germany as countries for special focus. Interestingly, his list also includes India, Ireland, Vietnam, Indonesia, Malaysia, Taiwan, Thailand, Italy, South Korea, France, and Switzerland among countries with high bilateral trade surplus with the US, which needs to be addressed.¹⁸ The underlying notion seems to be that among the significant reasons for the US trade deficit are the unfair practices of the economies with whom the trade deficit arises. Regarding the non-level playing field and the perception that other countries are creating that level playing field, Navarro stated that: *“whether it is with a cheating competitor or difficulty within our own bureaucracy or anything in between, every day as the requests for assistance come in, I am amazed by how hard it is for our companies to compete on a level playing field. ... One of the major goals of the Trump administration is to reclaim all of the supply chains and manufacturing capabilities that would otherwise exist if the playing field levels.”*¹⁹ (emphasis added)

The US’ aim is to address this situation by leveraging its economic power through bilateral trade agreements, to create greater market access for US exports: *“At the same time, if the U.S. uses its leverage in the world’s largest market to persuade India to reduce its notoriously high tariffs and Japan to lower its formidable nontariff barriers, we will surely sell more Washington apples, Florida oranges, California wine and Wisconsin cheese and Harley Davidson motor cycles.”* (op. cit.)

¹⁷ <https://www.c-span.org/video/?424924-3/peter-navarro-outlines-trump-administrations-trade-policy-economic-policy-conference>

¹⁸ See Washington Trade Daily, 7 March 2017.

¹⁹ <https://www.c-span.org/video/?424924-3/peter-navarro-outlines-trump-administrations-trade-policy-economic-policy-conference>

Thus, the idea is not to disengage from other countries, but to negotiate bilateral agreements.²⁰ The objective is to engage with other countries in order to create more “free, fair and reciprocal” conditions for the US. Thus, Navarro clarifies: *“Let me be abundantly clear, the broader goal of the free-trade policy based on fairness and reciprocity is not to raise either terrace or nontariff barriers rather, it is simply to encourage our trading partners to lower theirs.”*

The above point has been made also by Lighthizer, the USTR designate, during his confirmation meetings. He acknowledged, for example, that US agriculture has been put at a disadvantage by the decision to withdraw the United States from the TPP. That is why the US administration was looking to negotiate bilateral trade agreements with TPP countries – starting with Japan. Lighthizer has emphasised enforcing US trade laws, as well as thinking about new tools and more imaginative solutions in the World Trade Organization and elsewhere.

The above-mentioned perspectives indicate the direction of change which the US may seek in trade agreements (including the WTO). However, as we show below, these evolving regulatory topics are likely to overlap with, or be based upon, those included in the TPP.

3. The TPP is Dead; Long Live the Revised “TPP”

As promised during the campaign, US President Donald Trump gave notice of US’ withdrawal from TPP on his first day in office. The other TPP countries are discussing the way ahead for their agreement, but as yet there is no consensus on how to move ahead. Without the US, a major fulcrum of the Agreement has vanished. However, this does not mean that the TPP text is meaningless now, or has no relevance. Among the ideas being considered range from the TPP taking effect amongst at least five nations including Japan, Australia, and New Zealand,²¹ to a possible agreement amongst the 11 countries other than the US that negotiated the TPP.²²

²⁰ This would be supplemented also by establishing policies that make it more difficult for domestic US firms to move their investment abroad.

²¹ See Washington Trade Daily, 5 May 2017, page 2.

²² See <http://asia.nikkei.com/Politics-Economy/International-Relations/Talks-kick-off-on-TPP-11-pact-minus-US>

There are several reasons for a continued life for the TPP.

(a) The underlying concerns which propelled the US to focus on TPP will continue to prevail. Thus, it is quite likely that we will see TPP’s re-emergence over time, though in a revised form or under a different nomenclature, taking account of different parts of the agreement, and in multiple fora. Initially, this was evident in statements by important advisors or officials of the Trump administration, including a list of 24 key elements of a model trade agreement submitted in the context of NAFTA re-consideration, to the US Senate Finance Committee during discussions with administration trade officials (Table 1 below)²³.

Table 1. The issues to be considered in model trade agreements submitted to the US Senate Finance Committee, in the context of NAFTA re-consideration

Rules of Origin Percentages & Loopholes	Trade Deficit Reduction	Dumping, Diversionary Dumping, and Evasion of AD/CVD Duties
Currency Manipulation	Strict Environmental and Labor Standards	Intellectual Property Protection
Restrictions on State-owned and State-financed Enterprises	Investor State Dispute Resolution	Review and dispute settlement in anti-dumping and countervailing duty matters
Non-Tariff Barriers	Government Procurement	Joint Cooperation on Issues Related to the WTO
Enforcement, Monitoring, and Compliance	Corruption	Country of Origin Labeling
Evasion of Antidumping and Countervailing Duties	Forced technology transfer	Geographical Indications to restrict trade
Quotas	Phytosanitary standards	Processed foods
Stumpage	Tax rebates on exports	Technology transfers

The relevance of TPP issues is evident also from their overlap with the concerns expressed by both the present administration and the Democratic Party of the US; the latter two can be seen, for example, from the Draft NAFTA Notice sent by the US administration to the

²³ See Inside World Trade Online of 22 March 2016, “Top Trump agriculture advisor says expanding exports a key priority”, and “Checking Navarro’s list (twice)”.

US Congress²⁴, and the list of Democratic Trade Principles and proposals compiled by Congressman Bill Pascrell Jr., of the Committee on Ways and Means, Subcommittee on Trade.²⁵ Thus, it is clear that several concerns that formed the basis for the US negotiating the TPP still remain relevant.

(b) TPP creates many facilitating mechanisms for its members to address their concerns relating to non-tariff measures (NTMs) and regulatory barriers. Significantly, these measures are today considered more relevant for market access and trade facilitation than tariffs. Countries will continue to address these concerns, similar to the efforts made within the TPP.

(c) The US trade officials, currently focusing on NAFTA, have emphasised that in a number of areas TPP would be the basis for moving ahead and even to move beyond TPP. For instance, Lighthizer has said that renegotiation of NAFTA would build inter alia on the commitments made by Canada and Mexico in TPP, and could go beyond them in some areas.²⁶ Similarly, Peter Navarro has said that there are some good features in the TPP that can be used in other agreements, but not the rules-of-origin; Likewise, US Commerce Secretary Ross has stated that, *“there were some good aspects to the TPP and as we negotiate further agreements, our intention is to return some features, such as market access, and to push others even further. The gains achieved in TPP need not backslide, and one way to achieve this will be to pursue multiple bilateral trade deals.”*²⁷

(d) US industry is insisting that certain parts of TPP, in particular ecommerce, should be quickly embodied in other trade agreements.²⁸

(e) The TPP combines bilateral agreements as well as plurilateral and multi-lateral ones. Thus, for example, US and Japan have a bilateral agreement involving Japanese import

²⁴See Inside World Trade Online of 29 March 2016, “Draft NAFTA notice shows administration’s intent to address core complaints, including Chapter 19”.

²⁵ Inside World Trade Online of 27 March 2016, “House Democrats call for greater congressional authority, more enforcement in future deals”

²⁶ Inside World Trade Online of 20 March 2016, “Lighthizer says renegotiated NAFTA could go beyond TPP provisions”.

²⁷ See, “Ross: TPP progress will be maintained through symmetric bilaterals”, World Trade Online, 26th May 2017

²⁸Inside World Trade Online of 6 April 2016, “Industry, trade analysts: TPP digital trade provisions must quickly be secured in other deals”

quotas for rice²⁹. On the other hand, much of the agreement provides the same benefits to all members. For example, once fully implemented, the tariff reductions agreed by each member will be available to all TPP members. In certain cases, such as transparency requirements to provide information on the website, the provisions have potentially a multilateral reach.

(f) Though the US already has existing bilateral trade agreements with a number of TPP partners, it is significant that the TPP has several chapters that have not been included in various previous US bilateral FTAs. These would need to be incorporated in future trade agreements. The topics include state-owned enterprises, temporary entry of businesspersons, cooperation and capacity building, competitiveness and business facilitation, development, small and medium-sized enterprises, and regulatory coherence.³⁰

(g) It is significant that the viewpoint of the new US administration is evolving, with positions becoming somewhat more conciliatory. For instance, Chile's ambassador to the US has stated that: *"we believe that we have received signs that the U.S. is interested in developing relationships and treaties that can maintain the same standards and the same basic disciplines that were included in previous treaties. This is extremely important to us."*³¹

(h) Several parts of the TPP specifically mention that further work will continue within the framework of TPP. Therefore, some of the parts could be treated as a combination of agreed text and that which involves work in progress.

(i) The TPP has a number of flexibilities, such as inordinately long transition periods and possibility of safeguards during the transition phase. It provides a model for "out-of-the-box" thinking on flexibilities, which are crucial for reaching agreement on issues which are

²⁹ For example, the USITC study on TPP states, "The TPP bilateral agreements to reduce nontariff measures, primarily with Japan, would be the most important factor in higher U.S. exports", page 31. Similarly, US has three bilateral labour agreements (Brunei, Malaysia, Vietnam). There are several other such agreements as well to address bilateral trade concerns. <https://www.usitc.gov/publications/332/pub4607.pdf>

³⁰ See USITC, op.cit., page 47.

³¹ This view was expressed a few days after the Presidents of the US and Chile had exchanged views on the US-Chile FTA during a phone call. See Inside World Trade Online of 23 March 2016, "U.S. wants to keep TPP standards in bilateral deals: Chilean Ambassador".

particularly difficult in any negotiation. The TPP has, thus, opened the door to work with both existing flexibilities (within TPP and the WTO³²), and examine possibilities of new flexibilities that may address some of the key concerns emerging in a world where nations have become more inward oriented.

4. Implications for India

India needs to be an active player in both international trade and in the discussions that lead to the evolution of regional or global trade rules. This requires improving competitiveness through domestic policies, as well as engagement in trade negotiations that lead to new international trade rules.

The TPP potentially provides India with frameworks which could be used for initiatives ranging from domestic policy reform, to regional or multilateral negotiations, to develop common understanding or rules on trade policy. In this context, it is worthwhile to keep in mind that TPP provisions range from “soft” law to “hard” law, thus showing a whole range of options encompassed in the agreement.

Of course, there are a number of areas where TPP disciplines are not easy to accept for India, given its political considerations. These areas include the large tariff decrease under TPP³³, and certain provisions relating to IPR, government procurement, investment, e-commerce, and labour. At the same time, there are parts of the TPP which provide a good basis for both domestic reform as well as trade agreements.

Therefore, India could first identify the parts which it may find relatively easier to accept. For those parts which are relatively more difficult to accept, India may consider the possibility of moving ahead within a framework that combines flexibilities together with legal obligations.

It would be useful to conceptually categorise the types of initiatives that India could consider using provisions from the TPP agreement, namely:

³² A number of provisions in the WTO Agreements on Safeguards, and of Subsidies and Countervailing Measures could be considered to generate combinations of flexibilities and conditional disciplines.

³³ See for example, Table 2 on page 6 of Richard Baldwin, et. al. (2016), “Will the Trans-Pacific Partnership Agreement Reshape the Global Trade and Investment System? What’s In and What’s New: Issues and Options”, World Economic Forum, Geneva.

- (a) Domestic Policy Reform
- (b) Bilateral/regional initiatives outside a trade agreement
- (c) WTO initiatives without trade negotiations
- (d) Bilateral/regional trade negotiations
- (e) WTO trade negotiations

The TPP disciplines cover a number of (overlapping) areas which could be considered for one or more of the above-mentioned initiatives, e.g.:

- (i) Good Governance related provisions:
 - a. Transparency of procedures, regulations, and laws.
 - b. Inclusive systems with clearly specified due procedure.
 - c. Timeliness, or quick redressal of trade concerns.
 - d. Processes that facilitate transactions to improve cost-effectiveness.
 - e. Other aspects of good governance, such as:
 - i. notifying the relevant information or putting it on the web.
 - ii. providing reasonable time period for comments by interested stakeholders.
 - iii. consideration of the comments received.
 - iv. publishing a reasoned policy conclusion.
- (ii) Developing collaborative and consultative mechanisms.
 - a. Regulatory co-operation/coherence
 - b. Other forms of collaborative mechanisms, for instance, a forum or mechanisms for ad hoc discussions to address important trade related concerns.³⁴
- (iii) Preparing regulatory regimes for new or emerging technologies.³⁵
- (iv) Supporting Small and Medium Enterprises (SMEs)
- (v) Negotiation of market access.
- (vi) Provisions ranging from soft disciplines (guidelines, best-effort) to hard disciplines (legally binding disciplines). The “soft” provisions could be

³⁴For example, TPP Article 2.9.2 in the Goods Chapter on issues such as non-tariff measures that may adversely affect goods trade. It is noteworthy that a majority of trade-related concerns in WTO are settled within the consultation phase itself. A similar experience is evident in the standards related Committees of the WTO, where several concerns are addressed through discussion and additional information regarding the measure.

³⁵ This includes, for example, recognizing that with technological change and evolution of commercial and production processes, the supply chain relationships change over time. Thus, amendments and modifications to improve the administration of rules of origin are part of TPP (TPP Article 3.32.3).

considered as a form of flexibility provided in a legal agreement to move ahead on topics of mutual interest, without adopting high levels of difficult to implement legal obligations.

- (vii) Various forms of flexibilities that are provided to:
 - a. ease implementation (longer period of implementation, step by step implementation over time, lower obligations for some)
 - b. provide breathing space when imports create difficulties for domestic industry
 - c. Reconsider existing disciplines through a review.

The flexibilities in TPP could be taken together with those in WTO for a more detailed set of flexibilities that could be examined by India to consider ways of reaching mutual agreements on trade policy, regulatory or collaborative, regimes with other countries.³⁶

For India, negotiations on market access, especially for goods, are the most difficult. The way forward in these types of negotiations may be to add acceptable forms of flexibilities, including various “soft” legal agreements. The TPP has used such options in a number of its chapters to get common agreement from its members.

It is noteworthy that a number of the focus areas from (i) to (vii) above are relevant to more than one of the above-mentioned initiatives (see Table 2). However, the specific policy within any specific area, e.g. good governance, may differ across initiatives, e.g. domestic reform or WTO negotiations may focus on different forms of good governance. Therefore, the details of policies will need to be further elaborated when a specific initiative is to be considered.

³⁶ For more detail, see a forthcoming paper on flexibilities, by the author.

Table 2. Relevance of Different Areas of TPP for Initiatives Ranging From Domestic Reform to WTO Negotiations

Initiatives → Policy Areas ↓	Domestic Reform	Trade Negotiation: Bilateral or regional	Other Bilateral or regional initiatives	Trade Negotiation: WTO	Other WTO Initiatives
Good Governance	Yes	Yes	Yes	Yes	Yes
Collaboration/consultation	Yes (Internal)	Yes	Yes	Yes	Yes
Preparing regulatory regimes for new technologies	Yes	Yes	Yes	Yes	Yes
Supporting SMEs	Yes	Yes	Yes	Yes	Yes
Negotiations of market access		Yes		Yes	
“Soft” to “hard” provisions	Yes	Yes	Yes	Yes	Yes
Other flexibilities	Yes	Yes	Yes	Yes	Yes

4.A. Domestic Reform: India is implementing several domestic reforms to achieve good governance through initiatives such as ease of doing business, trade facilitation, self-certification, simplifying forms and processes, and introducing e-governance. Good governance is a system-oriented reform, which would benefit all aspects of governance. This requires a general focus on developing transparent due procedures and inclusive systems that take into account comments of stakeholders; providing timely response to enquiries, requests and reviews; and applying these good governance principles both to regulatory practices as well as general work of the Government.

Two important aspects of TPP are relevant in the context of domestic reform. One, this would not involve accepting any legal agreement with another nation. Thus, there would be less pressure when considering parts of TPP as a basis for improving the domestic policy regime. Two, there are several parts of TPP which overlap with the ongoing policy reform in India. The TPP provides a systematic and organized template for the reform to be more comprehensive and based on internationally accepted principles.

The TPP agreement gives major emphasis to good governance, for example through Article 8.9 (Cooperation and Trade Facilitation in the Chapter on Technical Barriers to Trade), Article 25.5 (Implementation of Core Good Regulatory Practices), Articles 25.7 to

25.9³⁷, and provisions focusing on transparency in many Chapters.³⁸ It is noteworthy that TPP also has provisions relating to the regulations and procedures of local governments directly below the central government (Articles 8.3 and 8.10).

India would also need to carry out domestic reform to prepare for new and emerging technologies, support SMEs, skill-building, with domestic systems that improve communication and allow different parts of the government to co-ordinate with relevant Government departments and other stakeholders. The various chapters of TPP, the specific tasks identified for different committees, and a recognition that technological changes will need revamped and changed regulatory regimes, are relevant for the requisite domestic reform.

Consider for instance, replacing the term “TPP members” by “domestic stakeholders”, then several of the functions of various committees become relevant for the domestic context as well. For instance, in the chapter on Technical Barriers to Trade (TBT), the Committee’s functions include encouraging cooperation between the TPP members (Article 8.11.3(d)), facilitating the identification of technical capacity needs (Article 8.11.3(f)), and taking any other steps the TPP members consider will assist them in implementing this chapter and the TBT Agreement (Article 8.11.3(i)). In this regard, a relevant model within India is the Task Force established for implementing the WTO Trade Facilitation Agreement.

Likewise, TPP mentions specific requirements for e-commerce, such as the legal regime required for e-commerce (e.g. Article 14.5), online consumer protection (Article 14.7), personal information protection (14.8), and regulation of unsolicited commercial electronic messages (Article 14.14). Moreover, since internet erodes borders and almost seamlessly links different countries, these processes should be developed in a manner broadly consistent with developments in other major economies. The TPP text could provide an indication of the kind of steps that may need to be taken for this purpose.³⁹

³⁷ Article 25.9 is particularly interesting as it provides a list of the tasks to be implemented.

³⁸ For example, Annex 6-A, Articles 7.13, 8.7, 10.11, 13.22, 16.7 and 24.1.

³⁹ In this context, it is worth recalling the previous information in this paper that industry in the US wants the e-commerce Chapter of TPP to be in all its trade agreements.

In the context of new technologies, it is, however, worth keeping in mind that the pace of change may have gone beyond the TPP itself. For example, provisions on e-commerce would not anticipate or prepare the system for changes arising due to machine-to-machine (M2M) and 3D printing technologies. Thus, India would need to establish greater collaboration amongst regulators of different countries and mutually learn from that process to develop greater collaborative or coherent mechanisms. Such mechanisms may range from “soft” (e.g. guidelines) to “hard” (e.g. legislative or regulatory requirements).

4.B. Building bilateral, regional or multilateral collaborative arrangements⁴⁰: Just as transparency, facilitation, and regulatory coherence or collaboration are important for good governance domestically, they are very significant in the bilateral, regional, and multilateral contexts as well. A collaborative framework for a number of other areas could be agreed with other nations, including systems to address non-tariff measures, the evolving conditions due to new technology, for sharing information, success cases, and capacity building initiatives.

An important point to bear in mind is that larger the number of participants in the arrangement, more varied the conditions that need to be dealt with. With a larger group, we need to consider different types of flexibilities to address different requirements. The TPP is a good model for this purpose because its members cover a large range of income and development conditions; for other nations, which have lower income levels or different needs in their development processes, flexibilities from WTO agreements could be combined with those of TPP.

This implies that we need to combine both the basic principles of good governance and the relevant flexibilities that would help bring them into effect through bilateral and multilateral arrangements. The “softer” arrangements may be similar to those established by groups such as APEC, with in-built flexibilities because the decisions are in the form of guidelines combined with transparent processes established to learn from each other.

⁴⁰ This sub-section is based significantly upon the text in Singh (2015), “TPP and India: Introduction and Background”, in Singh (ed.), 2015, TPP and India, Wisdom Tree, New Delhi.

To examine which parts of TPP may be useful for India's efforts to develop collaborative arrangements with other nations, India could examine the TPP provisions and identify those which it would:

- like to implement domestically for improving governance,
- show a clear need for cooperation or collaboration with others (e.g. regulatory coherence/cooperation), and
- areas where arrangements with other nations would help augment capacities, market opportunities, and domestic competitiveness.

An important focus of the collaborative arrangement could be to address problems in market access arising due to non-tariff measures used by India's trade partners (e.g., Article 2.9.2, or Chapter 8 on TBT). Some other possible areas of emphasis addressed by TPP provisions are discussed below. This process could also provide India with some of the benefits that it was seeking through its application for APEC membership.

4.B.i Technical Barriers to Trade (TBT): TPP provides that companies will need to have their goods undergo conformity assessment procedures only once before being able to sell them in TPP markets. The TPP members will give 'national treatment' to one another's conformity assessment bodies, i.e. testing and certification performed by another party's qualified conformity assessment body will be accepted as confirmation that its products, services, or systems meet requirements of the other party. Mechanisms have been created for providing technical advice and assistance to improve efficiency and effectiveness of technical regulations, standards and conformity assessment procedures, and to facilitate the greater use of international standards as a basis for technical regulations and conformity assessment procedures (Article 8.9.2).

The tasks of the committee established under TPP for TBT include strengthening joint work relating to standards, technical regulations, and conformity assessment procedures with a view to facilitate trade. In this context, the committee's functions include encouraging cooperation between the TPP members (Article 8.11.3(d)), facilitating the identification of technical capacity needs (Article 8.11.3(f)), and taking any other steps the TPP members consider will assist them in implementing provisions relating to TBT (Article 8.11.3(i)). TPP also includes specific obligations for certain selected sectors to encourage cooperation, information sharing, and steps to avoid duplication in regulatory

practice in these product areas⁴¹. In addition to the above, the new transparency requirements, including public consultation requirements early in the development of new measures, provide the possibility of vetting trade-related concerns and to address any concerns before new measures are finalised.⁴²

A similar framework is provided for sanitary and phytosanitary measures (SPS). For SPS, of particular interest may be Article 7.15 which emphasises cooperation, in order to *explore opportunities for further cooperation, collaboration and information exchange between the Parties on sanitary and phytosanitary matters of mutual interest, consistent with this Chapter. Those opportunities may include trade facilitation initiatives and technical assistance.*

4.B.ii Regulatory Coherence: TPP provisions aim to establish consistency of procedures through consultation and coordination in the processes for developing regulatory measures, based on effective interagency coordination and review procedures (Articles 25.4 and 25.9).⁴³ Importantly, the Committee on Regulatory Coherence has to ‘establish appropriate mechanisms to provide continuing opportunities for interested persons of the parties to provide input on matters relevant to enhancing regulatory coherence’ (Article 25.8).

4.B.iii Customs Administration and Trade Facilitation: Provisions include advance rulings on tariff classification, rules of origin and valuation, to facilitate the situation for producers to determine the relevant tariff category (Article 5.3)⁴⁴; rulings issued as quickly as possible (no later than 150 days) after receiving a request (with these rulings to remain in place for at least three years); introduce greater clarity and certainty, including through automation (Article 5.6), and to respond quickly to requests for information or advice to deal with customs related issues such as information requirement for quotas, application of duty drawback, or of origin markings (Article 5.4); expedited clearance procedures for

⁴¹The sectors are wine and distilled spirits, ICT products, pharmaceuticals, cosmetics, and medical devices.

⁴²Improved transparency also is created for the regulations and procedures of local governments directly below the central government. See for example, Article 8.7.5bis.

⁴³ See also, “BOX 4.1.1 Regulatory convergence in mega-regional trade agreements” on pages 230-231 of “Global Economic Prospects”, January 2016, The World Bank.

⁴⁴The higher extent of certainty for TPP members can be seen, for example, by comparing this provision of advance rulings under TPP, with Articles 8 and 9 of the WTO Trade Facilitation Agreement (TFA).

express shipments (Article 5.7)⁴⁵; simplified clearance and movement of low-risk goods (Article 5.9); and to prevent delays in cases where customs officials have not made a decision on the amount of duties or fees owed, the TPP agreement specifies that such goods can be released on bond or payment of duties, subject to appeal.

4.B.iv Supporting SMEs: To facilitate linking up SMEs with international supply chains, TPP has a specific chapter which focuses on improving their commercial opportunities in TPP markets. For instance, the committee established under Article 24.2 aims inter alia, to identify ways to assist SMEs from TPP members to take advantage of the commercial opportunities under the Agreement, explore opportunities for capacity building to assist the members in developing and enhancing SME export counselling, facilitate assistance and training programs to assist SMEs to participate and integrate effectively into the global supply chain.

In addition to the above, there are other parts of TPP which establish processes for cooperation with others, or common approaches and support for capacity augmentation (e.g., chapter 21 on Cooperation and Capacity Building).

4.B.v Conditions Affecting Digital Trade: Digital trade would be affected by several parts of TPP, such as cross-border trade in services, financial services, temporary entry for business persons, telecommunications, IPR, and electronic commerce.⁴⁶ The most evident impact, however, is through the provisions relating to e-commerce (Chapter 14). They cover several issues, which could be considered for preparing the nation for internet services, such as establishing certainty of market conditions in terms of the principle of non-discrimination generally applying to e-commerce; avoiding any unnecessary regulatory burden on electronic transmissions; facilitating electronic authentication and electronic signatures; facilitating use of cloud-computing services; protection of personal information; protection of cross-border flow of information (including personal information protection); and co-operation amongst the parties to the TPP Agreement on sharing experiences, exchanging information, assisting SMEs to overcome obstacles,

⁴⁵For example, Article 5.7 (d) states that: ‘under normal circumstances, provide for express shipments to be released within six hours after submission of the necessary customs documents, provided the shipment has arrived.’

⁴⁶ Of course, the provisions relating to goods also impact upon internet-based commerce since international supply chains comprise both goods and services, including the use of internet-based services.

encouraging self-regulation by private sector, building capabilities to address cyber security matters. The TPP breaks new ground in securing international data flows, by prohibiting restrictions while also creating unprecedented obligations to protect consumers from fraud and protect privacy. These dual obligations on importing and exporting countries represent a model for regulatory cooperation that could elicit greater market opening if applied to other areas.

Some provisions, however, would be difficult for India, such as Article 14.13.2 which states that, “No Party shall require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory.” Interestingly, the TPP agreement itself contains flexibilities which may provide the requisite comfort. For instance, Article 14.13.3. of the Electronic Commerce chapter of TPP states: “Nothing in this Article shall prevent a party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:

(a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and

(b) does not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective.”

Thus, India could consider a similar provision to examine whether its concerns may be addressed. These may be supplemented by other forms of flexibilities, e.g., agreement in terms of guidelines, possibility of sequentially covering larger and larger parts of the agreed provisions, possibility of alleged breach of the discipline to be addressed through a review by a body (e.g. a committee), supplemented with a process for sharing possible solutions in case of implementation difficulties, and providing support for facilitating implementation⁴⁷.

4.B.vi WTO: In this section, we are not considering proposals for negotiations per se. Thus, India could consider proposals that may be submitted for discussions within WTO committees. The discussion may clarify the best way to get incremental acceptance of the relevant disciplines within the WTO system.

⁴⁷ This is similar to those chapters in TPP which do not have dispute settlement other than through consultations and review.

The consideration of different provisions may first deliberate those TPP provisions which may be domestically implemented without the need of collaborative efforts. These provisions may be accommodated within committees, in the form of decisions or guidelines. A soft version of the agreement could also be considered in the form of a list of policy steps, prepared for voluntary implementation, together with transparency and different forms of dispute settlement (ranging from review, good offices, or binding legal dispute settlement). An existing model for “soft” provisions could be the Reference Paper on Telecom, based on which several WTO members have included the provisions in their schedules, while a number of others implement them in their domestic procedures without accepting them within a framework of legally binding schedules. Of course, the conventional flexibility of providing a longer transition period for those who may need it, is always possible. After the Trade Facilitation Agreement, this flexibility has been supplemented with financing improvement of capacities and, thereby, enabling acceptance of certain conditions that might initially be difficult to adopt.

4.C. Negotiations for market access: Negotiations of tariff reduction on goods have historically been difficult for India, while India itself seeks greater market access from others. If India has to engage with the rest of the world and seek better market access conditions, it would have to offer market opening when requesting others to reduce tariffs on Indian exports.

In considering the limits to what may be feasible for India, two relevant factors must be part of the analysis. One, recent work shows that India’s weighted average applied tariff is far lower than is the common perception. A detailed analysis of the data shows that India’s weighted average applied tariff during recent fiscal years has ranged between 1.7 to 2.3 per cent.⁴⁸ This implies that there is a possibility for improving transparency, reforming that tariff regime using the space available due to the difference between scheduled and applied tariffs, and using this space during trade negotiations.

Second, these negotiations may be approached together with a knowledge of the areas of market emphasis of other nations (e.g. indicated by TPP), and preparing a set of flexibilities based on the TPP and WTO that would potentially address difficult negotiating situations. Several such flexibilities have been mentioned earlier in the discussion. In

⁴⁸ See Table 9 of Harsha Vardhana Singh, 2017, “Trade Policy Reform in India Since 1991”, Working Paper 02, March 2017, Brookings India.

addition, there could also be a provision to review the agreed disciplines with possibility of amendment or easing the implementation period.⁴⁹

5. Conclusions

The TPP is going through an uncertain phase, with the US out of the agreement. This, however, does not mean that the TPP is no longer relevant for the trading system likely to emerge in the future. The TPP-11 are examining ways of reviving the agreement, the US administration has recognised the TPP as a basis to use in NAFTA negotiations, and the agreement contains several provisions which are an important basis for addressing new and emerging trade policy concerns.

TPP provides India with options for selecting those provisions, which it would find useful, in its various initiatives. This would help improve domestic governance and reform, leading to cost-effectiveness and competitiveness of its enterprises, and facilitate India's preparation for emerging technologies. The TPP is a plurilateral agreement, which also provides a basis for India to develop collaborative initiatives on a bilateral or regional basis. These efforts may be supplemented as well with regional trade negotiations, based on the flexibilities in TPP which ease the possibility of getting agreement for otherwise difficult levels of legal obligations. Such effort, both for negotiations or for collaborative mechanisms, may also be made by India in the WTO. This will help energise the WTO process and also make India emerge as a leader in certain WTO activities. This paper has discussed these issues in some detail. It provides a basis for India to begin this process of examining the TPP for its own benefits in diverse fora, ranging from domestic to regional to multilateral.

It is interesting that the areas within the TPP to consider for all these initiatives overlap. India can, therefore, consider a sequential approach whereby it begins with domestic reform, then develops collaborative bilateral/regional initiatives, and finally considers the possibility of trade negotiations in a manner that would provide it with the requisite comfort and policy space.

The proposition in this paper, however, is not that India should consider membership of TPP or the group that is reviving TPP, because at present India would not find it feasible

⁴⁹ Of particular interest may also be the models of flexibility that are included in WTO Subsidies and Countervailing Measures Agreement, Articles 27.4 to 27.6.

to accept several parts of the agreement. Nonetheless, that does not stop India from identifying those parts which are both acceptable and useful for it, to give a new meaning to its own efforts to link the domestic reform process with a new emerging framework for an international trade regime which combines measures at the border as well as inside it, within a framework which includes measures that may restrict trade but also those which facilitate trade and address the larger concerns that arise due to non-tariff measures and regulatory requirements in other economies. This paper shows that the TPP provides a very rich source for India to develop mechanisms which would help address these several concerns.

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