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# TPP and RCEP: Implications of Mega-FTAs for Global Governance

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Free trade agreements (FTAs) have been a feature of the international trade landscape for decades. Their rapid proliferation over the course of the still-incomplete World Trade Organization (WTO) Doha Round of negotiations has given rise to concerns that such agreements are stumbling blocks rather than stepping stones along the path to further multilateral trade liberalization. The difficulties identified with FTAs include that they divert capital and human resources away from negotiating in the WTO; they make concluding the Doha Round more challenging because they often exclude sensitive sectors such as agriculture, leaving the most difficult areas to liberalize on the WTO table without the easier concessions left as a sweetener; and that FTA dispute settlement poses a risk of fragmenting international trade jurisprudence by reaching decisions inconsistent with those reached by WTO panels and the Appellate Body. Such concerns are more driven by the sheer

volume of FTAs than by any individual agreement, per se. Indeed, FTAs have, until recently, had a number of similarities. First, with a few exceptions, FTAs have primarily tracked the WTO in terms of subject coverage, with new areas, if any, generally limited to hortatory, “best endeavors” language and excluded from dispute settlement. Second, FTAs have been overwhelmingly bilateral (treating the EU as one). And third, FTAs have sometimes combined a large economy with a smaller economy, and sometimes two smaller economies with each other, but the largest economies were not forming FTAs with each other. Thus no one FTA captured a particularly large percentage of world trade. There have been striking changes, however, in the past few years, with several “mega” FTAs now under negotiation. These include the Trans-Pacific Partnership (TPP), the Regional Comprehensive Economic Partnership (RCEP), the Trans-Atlantic Trade and Investment Partnership (TTIP), the China-Japan-Korea FTA (CJK), and the EU-Japan FTA. The new mega-FTAs have a number of implications – in addition to those identified above – for global governance. This piece will focus on the TPP and the RCEP, with some references to other mega-FTAs as appropriate. It will first briefly describe the TPP and the RCEP in the context of a new generation of mega-FTAs, and second, discuss three implications of the new mega-FTAs for global governance: the lack of developing country participation; the potential for inconsistencies in dispute settlement outcomes; and the challenges of returning to the WTO negotiating table.

## **I. Features of the Mega-FTAs**

The new mega-FTAs differ from their twentieth century counterparts in a number of respects. First, these agreements are linking large economies with each other for the first time. The United States is negotiating with the EU in the TTIP; Japan and the United States are negotiating together in the TPP; Japan, China and Korea are negotiating together in CJK and the RCEP; and Japan and the EU are negotiating a bilateral FTA.

Second, some of the agreements are linking a large number of countries: the RCEP negotiations include 16 countries, and the TPP comprises 12 countries. Third, each of these negotiations is capturing a much higher percentage of global GDP than any previous FTA. The TTIP is estimated to encompass 37 percent of world GDP; the TPP will account for 31.5 percent; and the RCEP for 30 percent. Fourth, some of these agreements – particularly the TTIP and the TPP – are addressing new issues such as regulatory coherence, competition, and state-owned enterprises.

#### **A. The TPP**

The TPP negotiations have their origins in the Trans-Pacific Strategic Economic Partnership Agreement entered into by Brunei, Chile, New Zealand, and Singapore in 2005. This agreement, known colloquially as the P-4 Trade Agreement or just “P-4,” was an effort by its members to create a high standards agreement that would serve as a model for a future FTA of the Asia-Pacific (Lewis 2009; 2011). The P-4 countries committed to bringing tariffs to zero on all tariff lines – a marked difference from most FTAs, in which agriculture and other sensitive sectors are generally excluded in whole or in large part from liberalization commitments. The P-4 also features an open accession clause, which permits other countries to accede to the agreement subject to the approval of the existing members.

The P-4 provided that, two years after coming into force, additional negotiations would commence to broaden the scope of the agreement to include financial services and investment. At the time those additional negotiations were about to start, the United States indicated its interest in observing the negotiations. Officials from the United States Trade Representative office made it known that if they found the negotiations of sufficient interest, they would seek to join the agreement. When that statement of interest became public, Australia, Peru, Malaysia, and Vietnam quickly indicated they would also like to participate. Shortly thereafter, the original P-4 countries plus the five newcomers formed a nine-country negotiating group.

The United States signaled that the countries would be negotiating a new trade agreement, the Trans-Pacific Partnership, rather than the newcomers acceding to the P-4. Nonetheless, the TPP’s origins clearly lie in the P-4. From the start, the TPP has been touted as a “twenty-first century trade agreement” (United States Trade Representative; Lim, Elms and Low 2012). The negotiations began with the premise that there would be no *per se* market access exclusions. In addition, the breadth of the agreement is broad, with several chapters covering topics not included within the scope of the WTO, including state-owned enterprises, investment, and regulatory coherence.

In 2012 and 2013, Canada, Mexico, and Japan joined the negotiations bringing the total parties to 12. While it now seems likely that a few sensitive products will be excluded from meaningful market access commitments, the TPP will nonetheless feature a range of commitments not found in other FTAs.

#### **B. The RCEP**

The RCEP is a negotiation that combines the ten countries of the Association of Southeast Asian Nations (ASEAN) with six countries that already have “+1” FTAs with ASEAN – China, Japan, Korea, Australia, New Zealand, and India.<sup>1</sup> Because ASEAN already has “hub and spoke” FTAs with each of the +1 countries, the real trade gains from the RCEP will result from new linkages amongst the spokes – i.e. from the +1 countries linking with each other. In particular, China, Japan, and Korea are currently negotiating an FTA (“C-J-K”) which will facilitate the RCEP negotiations. The RCEP is, however, more significant as a geostrategic matter rather than as a trade agreement. While the RCEP is not expected to be particularly novel as a trade agreement, it is of strategic importance that Japan, China, and Korea – countries with a long history of chilly relations – will come together and bring their economic and political power to this 16-country collaboration. The RCEP can also be viewed as China’s answer to the TPP. While the TPP and RCEP have seven countries in common, China is only in the RCEP and the United States is only in the TPP.

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<sup>1</sup> Australia and New Zealand negotiated collectively in forming an FTA with ASEAN, thus their agreement is also considered a “+ ”

## II. Implications of the New Mega-FTAs for Global Governance

The new mega-FTAs such as the TPP, RCEP, and TTIP have many implications that extend beyond the reaches of the agreements themselves to the global trading community. Below I highlight three such implications.

### A. Legitimacy Concerns due to Lack of Developing Countries

As noted above, the new mega-FTAs are linking large developed economies for the first time. This will concentrate a significant degree of economic might in each agreement. To the extent the negotiations are covering new issues, it is likely that the global rules of the future will emerge from mega-FTA negotiations. This is particularly true for the TTIP and TPP processes, which have more ambitious negotiating agendas than the RCEP. If the mega-FTAs do indeed give rise to the rules and standards of the future, some may find this outcome raises legitimacy concerns. While the TTIP and TPP both comprise large shares of world GDP, most of the world's countries are excluded from these FTA negotiations with poorer developing countries the most notably absent. Developing countries are therefore likely to be asked to adopt standards established in TTIP and/or the TPP, without having had any opportunity to have input into those rules.

### B. Potential for Dispute Settlement Inconsistencies

To the extent mega-FTAs include chapters and other provisions that go beyond the scope of the WTO, there is an increased potential for inconsistent dispute settlement rulings. For countries that have formed FTAs that largely mirror the WTO in coverage, the parties have generally opted to take their disputes to the WTO rather than to the FTA dispute settlement mechanism. This choice may not be available for certain disputes arising out of the new mega-FTAs, however. If a dispute involves a commitment that does not overlap with the WTO – for example, an issue relating to state-owned enterprises – that dispute cannot be said to be covered by the WTO agreements, and a WTO dispute settlement panel would likely decline to resolve the dispute. Thus such disputes would need to be brought to FTA dispute settlement. Where the risk of conflicting decisions aris-

es is if the disputes involving FTA-only issues also involve issues with WTO overlap, such as alleged breaches of the most-favored nation obligation or national treatment. It is unlikely that parties would bring two separate disputes, one in the WTO and one within the FTA dispute settlement process. Instead, the FTA arbitrators will end up resolving issues that would in the past have been resolved within the WTO. Conflicting decisions are not inevitable, but do become more likely with mega-FTAs.

### C. Increases Difficulty in Returning to WTO Negotiating Table

A final implication the mega-FTAs have for global governance is their impact on the participants' willingness to engage at the WTO negotiating table. In the past, while FTAs posed challenges for the WTO, at least the major economies saw the WTO as the forum in which they could obtain trade concessions from each other. Now, however, with the U.S. partnering with Japan in the TPP and Europe in the TTIP; Europe and Japan forming their own FTA; and China, Japan, and Korea linking in the RCEP and the C-J-K FTA, the big players are obtaining important market opportunities from each other outside the WTO framework. This dynamic suggests that it is going to be even harder, going forward, to get the WTO's largest economies to see enough potential benefits to return to the multilateral negotiating table.

## References

- Lewis, Meredith Kolsky. 2009. "Expanding the P-4 Agreement into a Broader Trans-Pacific Partnership: Implications and Opportunities." *Asian Journal of WTO & International Health Law & Policy* 4: 401-422.
- Lewis, Meredith Kolsky. 2011. "The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?" *Boston College International & Comparative Law Review* 34: 27-52.
- Lim, C.L., Deborah Elms, and Patrick Low (eds.). 2012. *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement*. Cambridge: Cambridge University Press.
- Office of the United States Trade Representative. n.d. "Trans-Pacific Partnership." [www.ustr.gov/tpp](http://www.ustr.gov/tpp).