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### The implications of the Trans-Pacific Partnership for SMEs: Opportunities and challenges

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# The Implications of the Trans-Pacific Partnership for SMEs: Opportunities and Challenges

\*Heng Wang

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## **Abstract**

*The Trans-Pacific Partnership (TPP) will have profound implications for small and medium-sized enterprises (SMEs) within and beyond the free trade area. SME issues get more attention in the TPP than previous FTAs. Since there is limited research on the impact of the FTAs on SMEs, it is of great significance to probe into the practical implications of the TPP for SMEs. The key question will be analyzed: what are the challenges and opportunities that the TPP hold for SMEs? It is argued that, first, the support to SMEs, tariff elimination or reduction, and the reduction of non-tariff barriers are major opportunities presented by the TPP. The key benefits to SMEs are enhanced market opening and increased predictability. However, such opportunities may have limited effects in improving market position for certain SMEs. Second, the TPP will pose major challenges such as insufficiency of the opportunities to SMEs, the complexity of rules, difficulties in rule interpretation and implementation, remained regulatory differences, disadvantaged positions of SMEs from developing TPP countries, and the impact on SMEs negatively affected by trade liberalization. There will be more challenges for SMEs from non-TPP parties. Nevertheless, if the TPP is properly managed, it should bring more opportunities than challenges to SMEs. The opportunities and challenges deriving from the TPP are intimately connected.*

**Key words (5 to 10 words):** TPP, SMEs, opportunities, challenges, mega FTAs, regulatory convergence, non-tariff barriers

## I . Introduction

Small and medium-sized enterprises (SMEs) are accounted for creating more than eighty percent of jobs during 2006-2010,<sup>1</sup> and they are likely to continue leading the job creation. They also play a pivotal role in trade and investment, but SMEs also encounter practical difficulties. Overhead costs could be spread out by large businesses over a large number of products, various export markets, or even subsidiaries or affiliated companies. However, unlike large businesses, SMEs generally can hardly do so and encounter a number of barriers. For example, in the U.S., SMEs often encounter: (i) domestic barriers, including U.S. government regulation (e.g., export controls, visas, tariffs on imported intermediate inputs), access to finance, transport costs, small scale of SME production (lack of economies of scale, limited capacity to supply large orders), and (ii) foreign barriers, including foreign government regulations (e.g., different labeling, certification, quality, and design requirements, costly SPS regulations, insufficient intellectual property protection, time-consuming customs clearance, tariff and non-tariff restrictions), knowledge of overseas markets (insufficient information regarding foreign markets, lack of access to foreign clients), and language and cultural barriers.<sup>2</sup> Therefore, SMEs are vulnerable to trade and investment barriers (e.g., complicated and opaque trade procedures), and often could not gain the optimal benefits from trade agreements.

SMEs are affected by trade law and have generated more attention of researchers, rule makers, and the general public. The norms of the World Trade Organization (WTO) have benefited SMEs in certain ways, including enhanced stability, confidence, predictability, market access, and access to information.<sup>3</sup> WTO's negotiation has also involved SME issues. In the WTO's negotiations on services, both developed countries and developing countries were concerned with trade barriers that are particularly burdensome to services SMEs, and SMEs internationalization became a permanent issue to WTO's services negotiation.<sup>4</sup>

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1) Eugenio Briales Gómez-Tarragona & Gómez-Altamirano Daniela, *The TPP: How to Facilitate Business Through Legislative and Regulatory Reform?*, 21 ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 369, 377 (2015).

2) United States International Trade Commission, *Small and Medium-Sized Enterprises: U.S. and EU Export Activities, and Barriers and Opportunities Experienced by U.S. Firms*, at xvi (2010), <http://www.usitc.gov/publications/332/pub4169.pdf>.

3) Kitsuron Sangsuvan, *Small Businesses in the WTO: Small Fish in a Big Pond or Globalization 3.0*, 23 MICHIGAN STATE INTERNATIONAL LAW REVIEW 372-377 (2015).

4) Daniela Persin, *Market Access for Small versus Large Service Enterprises: The Preferential and Multilateral Trade Liberalization Tracks Compared*, 45 JOURNAL OF WORLD TRADE 785, 786 (2011).

Moreover, free trade agreements (FTAs), particularly mega FTAs have become increasingly relevant to SMEs. In ongoing mega FTA negotiations, SME issues are important ones in the negotiations of the Transatlantic Trade and Investment Partnership (TTIP).<sup>5</sup> Regarding the Trans-Pacific Partnership (TPP) negotiations concluded in 2015, it builds on the rights and obligations under the WTO law in its preamble, and becomes increasingly relevant to SMEs. Generally, TPP sets much stricter requirements than WTO law, and also enters areas beyond the WTO regime (WTO-extra areas) including investment, state-owned enterprises (SOEs), designated monopolies, labor, and environment.

Attracting great attention, SME issues are among the cross-cutting trade issues in the November 2011 framework of the TPP,<sup>6</sup> and part of “horizontal” issues in the TPP negotiations.<sup>7</sup> In particular, SME issues have been highlighted by the U.S. in the TPP negotiations:

“Since the launch of the TPP talks, one of the United States’ core goals has been to promote and support American small and medium-sized enterprises entering global trade, and to address barriers that pose disproportionate challenges to small business exports. These include issues such as inaccessible or overly complex trade paperwork, opaque regulatory processes and corruption, inefficiency of customs administration, restrictions on Internet data flows, weak logistics services that raise costs, and slow delivery of small shipments.”<sup>8</sup>

The TPP is the first agreement negotiated by the U.S. that contains a specific chapter on SMEs. In addition, such chapter is the only chapter whose completion has been publicly announced by TPP parties until 2013.<sup>9</sup> According to the data of the International Trade Administration, 97 percent of exporters to TPP nations have less

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5) European Commission Directorate General for Trade, *EU, U.S. trade – Negotiators explore ways to help SMEs take advantage of TTIP, as fourth round of talks ends in Brussels* (2014), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1041>.

6) Office of the United States Trade Representative, *Outlines of TPP*, available at <https://ustr.gov/tpp/outlines-of-TPP>.

7) Deborah Kay Elms, *The Trans-Pacific Partnership Trade Negotiations: Some Outstanding Issues for the Final Stretch*, 8 *ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW AND POLICY* 379, 391 (2013).

8) Office of the United States Trade Representative, *Small and Medium-Sized Enterprises* (2015), available at <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Small-and-Medium-Sized-Enterprises.pdf>.

9) *TPP SME Chapter Includes Commitments to Set Up Websites, Committee*, 31 *Inside US Trade* (2013).

than 500 employees.<sup>10</sup> The TPP is the only mega FTA whose negotiations are concluded at the time of writing and it imposes strict rules in areas such as environment. Covering around 40 percent of the world economy,<sup>11</sup> the TPP will have substantial effect on a large number of SMEs of the 12 member countries such as Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam. The TPP explicitly acknowledges the important contribution of SMEs to economic growth and employment.<sup>12</sup> It is safe to conclude that SMEs are closely connected to and affected by the TPP.

A wide range of areas are recognized by the TPP as relevant for SMEs, including customs, intellectual property, technical regulations, sanitary and phytosanitary (SPS) measures, investment, business registration, employment, and taxation.<sup>13</sup> This is not an exhaustive list, since other areas (e.g., market access, movement of business persons) are also closely related to SMEs. Put it differently, the issues related to SMEs are addressed in a variety of TPP chapters, including customs administration and trade facilitation, e-commerce, intellectual property, SPS measures, technical barriers to trade (TBT), competitiveness and business facilitation, and rules of origin.

The TPP plays an important role in benefitting SMEs such as creating more business opportunities and assistance. However, it also challenges SMEs by increasing competition. Since there is insufficient research regarding the effect of FTAs on SME<sup>14</sup> this paper will analyze a number of questions that may arise from the operation of the TPP: what are the opportunities the TPP may hold for SMEs of TPP countries? What are the challenges encountered by SMEs under the TPP? The paper will not focus on assessing the substantive merits of the TPP rules<sup>15</sup> (e.g., the

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10) Raymond J. Keating, *What the Trans-Pacific Partnership (TPP) Means for U.S. Economic Growth and Small Business* (2015), available at <http://www.sbecouncil.org/2015/10/06/what-the-trans-pacific-partnership-tpp-means-for-the-u-s-economy-and-small-business/>.

11) David Ramli & Lynch Jared, TPP: What it means for Australian business, THE SYDNEY MORNING HERALD, October 6, 2015.

12) TPP art. 15.21.1.

13) *Id.* art. 24.1.3.

14) United States International Trade Commission, *Small and Medium-Sized Enterprises: U.S. and EU Export Activities, and Barriers and Opportunities Experienced by U.S. Firms*, E-8 (2010), <http://www.usitc.gov/publications/332/pub4169.pdf>.

15) The analysis here focuses on the main text of the TPP rather than annexes and associated documents.

concerns about the TPP including the criminalization of trade secret law and the extension of copyright term<sup>16</sup>). Instead, it will discuss the opportunities and challenges to SMEs, which will be examined in the following parts. The implications of the TPP for SMEs outside the free trade areas will also be discussed when necessary.

## II . Opportunities

Different TPP provisions address the concerns of SMEs. These TPP provisions include: the preamble and chapters on SMEs, customs administration and trade facilitation, government procurement, electronic commerce, intellectual property, labour, regulatory coherence, development, transparency, environment, cooperation and capacity building, as well as competitiveness and business facilitation. The TPP will bring commercial opportunities to SMEs to access a much larger market with better conditions. These opportunities include the cooperation to support SMEs, tariff elimination or reduction, as well as the reduction of tariffs and non-tariff barriers (NTBs). Meanwhile, there are some opportunities that are only limited to a specific TPP country. For instance, some nonconforming measures permitted to Vietnam under the TPP SOEs chapter aim to help SMEs.<sup>17</sup> In practice, the SMEs of Vietnam rather than those of other countries are likely to benefit from these measures.

### A. Cooperation to support SMEs

Providing support to SMEs is highlighted in the TPP. The preamble of the TPP emphasizes the support to the development of SMEs by enhancing their capacity of participating in and benefitting from the TPP. Since participation of private sector is essential in cooperation and capacity building, the TPP recognizes that SMEs may need assistance in participating in world markets.<sup>18</sup>

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16) See, e.g., Terry Lavender, *Not too late to mitigate TPP effects*, Minister of International Trade Chrystia Freeland told (2016), available at <http://news.utoronto.ca/not-too-late-mitigate-tpp-effects-minister-international-trade-chrystia-freeland-told>.

17) Sean Miner, Commitments on State-Owned Enterprises, in *Assessing the Trans-Pacific Partnership, Volume 2: Innovations in Trading Rules* 98, (Jeffrey J. Schott & Cimino-Isaacs Cathleen eds., 2016), <http://www.piie.com/publications/briefings/piieb16-4.pdf>.

18) TPP art. 21.1.3.



A number of institutional arrangements are in place. Particularly the role of committee on SMEs under the TPP (SME Committee) is to identify ways to help SMEs exploring commercial opportunities arising from the TPP.<sup>19</sup> It provides assistance to SMEs such as seminars, workshops or other activities to assist SMEs to understand how to benefit from the TPP.<sup>20</sup> The SME Committee will also monitor the implementation of SMEs-related obligations under the TPP.<sup>21</sup> In addition, the Committee on Government Procurement will meet upon request to facilitate the participation by SMEs in government procurement.<sup>22</sup> The Committee on Competitiveness and Business Facilitation (CCBF) will provide to the Trans-Pacific Partnership Commission (Commission) recommendations to promote the participation of SMEs in supply chains in the free trade area,<sup>23</sup> and provide recommendations and encourage capacity building activities to assist SMEs' participation in regional supply chains.<sup>24</sup> For the latter, the CCBF will collaborate with experts in the private sector and international donor organizations.<sup>25</sup>

In addition, cooperation among TPP countries is specified in the TPP to support SMEs in electronic commerce, labour, government procurement, and development. TPP members are encouraged to help SMEs overcome obstacles in using electronic commerce.<sup>26</sup> TPP members could cooperate to promote improvements in business and labour productivity in SMEs.<sup>27</sup> Providing for facilitation measures and cooperation, the TPP highlights the importance of promoting the participation of SMEs in government procurement.<sup>28</sup> Therefore, the TPP parties strive to cooperate in facilitating SMEs' participation in government procurement as suppliers.<sup>29</sup> Moreover, for the broad-based economic growth, TPP parties may take policies associated with the promotion of market-based approaches to improve trading conditions and access to finance for SMEs.<sup>30</sup>

Entities other than governments could also support SMEs. TPP parties may take

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19) *Id.* art. 24.2.2(a).

20) *Id.* art. 24.2.2(c).

21) *Id.* art. 24.2.2(h).

22) *Id.* art. 15.23(b).

23) *Id.* art. 22.2.3(c).

24) *Id.* art. 22.3.2.

25) *Id.* art. 22.3.2.

26) *Id.* art. 14.15(a).

27) *Id.* art. 19.10.6(f).

28) *Id.* art. 15.21.1.

29) *Id.* art. 15.22.2(a).

30) *Id.* art. 23.3.4.



action to encourage other actors (i.e., professional associations and other non-governmental organisations), if appropriate, to help SMEs develop internal controls or other measures to prevent bribery and corruption.<sup>31</sup> Private sector and international donor organizations may be involved in the capacity building activities to assist SMEs' participation in supply chains in the TPP area, which may take the form of seminars and workshops.<sup>32</sup> In the rules on development, joint development activities include the promotion of public-private partnership that enables SMEs to utilize their capacities in cooperative ventures with governmental bodies to support development goals.<sup>33</sup> Such capacity includes expertise and resources, and generally the joint development activities with multilateral institutions.<sup>34</sup> Among them, the capacity building is likely to be the key. SMEs may benefit directly through the capacity building of SMEs,<sup>35</sup> or indirectly from the capacity building of TPP parties.<sup>36</sup>

## **B. Tariff elimination or reduction**

Trade barriers are disproportionately burdensome for SMEs due to their fewer resources to overcome them than larger businesses, and even small increases in the cost of goods due to tariff may lead to losing a sale for small firms in the competitive market.<sup>37</sup> According to previous FTAs, tariff reduction under the FTAs concluded by the U.S. has substantially benefitted American SMEs by better market access.<sup>38</sup> Under the TPP, tariff eliminations or reductions are provided in rules for trade in goods, including chapters on national treatment and market access for goods, and electronic commerce. In certain specific circumstances, SMEs are given special consideration. Customs duties will not be assessed on express shipments valued at or below a fixed amount set under TPP parties' domestic law. In the periodical

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31) *Id.* art. 26.10.1(b).

32) *Id.* art. 22.3.2.

33) *Id.* art. 23.6.2(c).

34) *Id.* art. 23.6.2.

35) *Id.* art. 22.3.2.

36) *Id.* art. 24.2.2(d).

37) Office of the United States Trade Representative, *T-TIP Opportunities for Small and Medium-Sized Enterprises* (2015), 8, <https://ustr.gov/sites/default/files/TTIP%20Brochure%20v3%20%284-16-15%29FINAL.pdf>.

38) United States International Trade Commission, *Small and Medium-Sized Enterprises: U.S. and EU Export Activities, and Barriers and Opportunities Experienced by U.S. Firms* 5-5, 5-6 (2010), <http://www.usitc.gov/publications/332/pub4169.pdf>.

review of this fixed amount, the impact on SMEs may be considered as a relevant factor.<sup>39</sup>

Under the TPP, tariffs faced by industrial goods will be eliminated and reduced,<sup>40</sup> and so do tariffs for agricultural goods.<sup>41</sup> Regarding tariff benefits, whether they are new or existing, will not be contingent on the performance requirements (e.g. local content percentage<sup>42</sup>).<sup>43</sup> Meanwhile, export duties, taxes or other charges are generally proscribed unless otherwise provided.<sup>44</sup> In electronic commerce, the TPP prohibits imposition of customs duties on electronic transmissions,<sup>45</sup> and the use of local computing facilities as the condition for conducting business in a TPP country.<sup>46</sup> Such prohibitions help competitive SMEs thriving in the online markets if everything goes smoothly.

Generally, tariff reductions and eliminations are available to larger businesses and SMEs. On the one hand, tariff benefits with more FTA parties would be much larger than those under bilateral FTAs. Unlike a typical bilateral FTA, the TPP involves 12 signatories and will probably have other countries (e.g., Korea) acceded in the near future. Thus, SMEs may benefit from tariff reduction or elimination from multiple foreign markets. For instance, the import taxes on U.S. textiles and apparel exports imposed by Japan, Vietnam, Malaysia, and New Zealand will be eliminated immediately or within a set time period.<sup>47</sup> On the other hand, the tariff reduction cannot be exaggerated. For instance, SMEs conducting international trade may already have managed to avoid tariffs (e.g., by categorizing products differently or by exporting free-on-board shipping to require buyers pay for possible duties), and therefore tariffs are not the main concern for them in certain circumstance.<sup>48</sup>

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39) TPP art. 5.7.1(f).

40) *See, e.g., id.* art. 2.4.2 and Annex 2-D.

41) Office of the United States Trade Representative, *Summary of the Trans-Pacific Partnership Agreement* (2015), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership>.

42) TPP art. 2.1 (2015).

43) *Id.* art. 2.5.

44) *Id.* art. 2.16.

45) *Id.* art. 14.3.

46) *Id.* art. 14.13.2.

47) International Trade Administration, *Opportunities for the U.S. Textiles and Apparel Sector* (2015), available at <http://trade.gov/fta/tpp/industries/pdfs/textile.pdf>.

48) Martina Battisti & Perry Martin, *Creating Opportunity for Small-Firm Exporters Through Regional Free Trade Agreements: A Strategic Perspective from New Zealand*, 14 AUSTRALASIAN JOURNAL OF REGIONAL STUDIES 275, 281 (2008).

## C. Reduction of non-tariff barriers

Tariff reductions mainly affect trade in goods, since services trade and investment *per se* are usually not subject to tariffs. In contrast, NTBs affect not only goods, but also services trade and investment. For instance, EU-Singapore FTA contains a stand-alone on NTBs to trade and investment in renewable energy generation.<sup>49</sup> Regulations, such as opaque procedures, could be burdensome. For many small firms, the clarity and certainty of market access rules are frequently a greater concern than tariff rates.<sup>50</sup> The reduction of NTBs is of great significance to SMEs. This paper analyzes the main forms of NTBs reduction that are relevant to SMEs and their implications. Although the reduction of NTBs could be found throughout the TPP, it is argued that opportunities of reduced NTBs are mainly attributable to specific and general transparency rules, procedural fairness, regulatory coherence, and other governance requirements.

To ensure the effectiveness in reducing NTBs, the dispute settlement procedure is highlighted in the TPP. To help promoting fair competition, the TPP competition rules explicitly provide for the private right of action,<sup>51</sup> and businesses such as SMEs can benefit by having legal redress against the violation of national competition laws.<sup>52</sup> The procedures are also in place to address complaints by a supplier about the violation of TPP government procurement rules.<sup>53</sup> In the chapter on SOEs, the courts of a TPP party will have jurisdiction over civil claims against an enterprise controlled by a foreign country arising from a commercial activity in this TPP party.<sup>54</sup> Regarding investment, the dispute settlement system covers general investor-state investment arbitration, and investment disputes in financial services. These dispute settlement mechanisms help businesses including SMEs to manage their risks.

### 1. Transparency rules

#### 1) Specific transparency rules

Transparency rules are provided in chapters on SMEs and government procurement to provide information for SMEs. As a key component of SME chapter,

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49) *See, e.g.*, EU-Singapore FTA: Chapter 7: Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation art. 7.4.

50) Battisti & Martin, AUSTRALASIAN JOURNAL OF REGIONAL STUDIES 284 (2008).

51) TPP art. 16.3.

52) *Id.* art. 11.22.

53) *Id.* art. 15.19.

54) *Id.* art. 17.5.1.

information sharing is specially tailored for SMEs. Each TPP signatory must provide a website to provide information directly and indirectly.

For the direct information provision, the website offers the TPP text and summary, and the information tailored for SMEs. It publicizes the TPP text, including all annexes, tariff schedules, product-specific origin rules, and the summary of the TPP.<sup>55</sup> In particular, the website needs to offer information “designed for SMEs,” including the description of TPP provisions relevant to SMEs, and additional information useful for SMEs to reap the TPP opportunities.<sup>56</sup> The additional information provision may in turn depend on the capacity of the TPP countries.

In addition, there are weblinks that provide information that are not directly provided by the website. Such links are equivalent websites of other TPP countries,<sup>57</sup> and the websites of its government bodies or entities that offer information that they deem useful for actors in trade, investment, or business.<sup>58</sup> Such information may include tax information, business registration procedures, and regulations concerning several areas (i.e., customs, intellectual property rights, investment, and technical barriers to trade, SPS issues, and employment).<sup>59</sup> Procedures concerning customs and intellectual property rights may be included as well.<sup>60</sup> Both direct and indirect information sharing must be accurate and current, and regularly reviewed by the TPP members.<sup>61</sup>

Generally, government procurement, including its eligibility criteria, is the possible measure granting preferential treatment to SMEs; and such procurement need to be transparent.<sup>62</sup> Specifically, the “best endeavours” clause calls for the provision of comprehensive information related to procurement including a definition of SMEs in an electronic portal.<sup>63</sup> These rules will reduce the information acquisition costs, and help SMEs to obtain contact information for relevant agencies of different TPP parties.

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55) *Id.* arts. 24.1(a), 24.1(b).

56) *Id.* art. 24.1.1(c)(i).

57) *Id.* art. 24.1.2(a).

58) *Id.* art. 24.1.2(b).

59) *Id.* art. 24.1.3.

60) *Id.* arts. 24.1.3(a), 24.1.3(b).

61) *Id.* art. 24.1.4.

62) *Id.* art. 15.21.2.

63) *Id.* art. 15.21.3(a).

## 2) General transparency rules

The TPP's transparency standards are one of the strongest among FTAs.<sup>64</sup> Transparency requirements are stipulated in a special chapter, but it also is mentioned in nearly all chapters.<sup>65</sup> Transparency is generally required for trade in goods and services as well as intellectual property. For instance, information regarding trade in goods will be promptly published, including those related to import and export procedures, duty rates, classification rules, fees and charges.<sup>66</sup> They also expand to WTO-extra areas such as government procurement, competition (e.g., a written competition law final decision with fact findings and reasoning<sup>67</sup>), and investment (e.g., transparency of investment arbitration proceedings<sup>68</sup>). In addition, transparency rules target regulatory measures or administrative procedures, such as the public availability of telecommunications licensing requirements,<sup>69</sup> and documentations required for application to supply financial services.<sup>70</sup> Although general transparency rules apply equally regardless of the size of businesses, certain categories of new developments may be particularly important for SMEs. These new developments are public input requirements, and stricter requirements on information provision.

Public input requirements consist of the following provisions: (i) the notice-and-comment opportunities; (ii) the response to comments received; and (iii) public submission and engagement opportunities. The notice-and-comment requirement is imposed as a best endeavor clause in the transparency chapter that applies throughout the TPP.<sup>71</sup> In several areas, similar or stricter requirements are provided. TPP members would seek to provide comment opportunities for an interested person regarding proposed financial regulations.<sup>72</sup> Such opportunities are required for different areas, including science and risk analysis,<sup>73</sup> as well as proposed measures regarding SPS,<sup>74</sup> TBT,<sup>75</sup> and telecommunications issues.<sup>76</sup> In the TBT area, the

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64) Ministry of Trade and Industry of Singapore, *Trans Pacific Partnership Free Trade Agreement (TPP): 7 Things You Should Know*, available at [https://www.mti.gov.sg/MTIInsights/SiteAssets/Pages/TPP/Seven%20things%20you%20should%20know%20about%20the%20TPP%20\(Final\).pdf](https://www.mti.gov.sg/MTIInsights/SiteAssets/Pages/TPP/Seven%20things%20you%20should%20know%20about%20the%20TPP%20(Final).pdf).

65) E.g., TPP arts. 2.30.3, 5.11, 7.13, 11.13, 12.6, 16.7, 17.10, 18.9 (2015).

66) TPP art. 2.19.

67) *Id.* art. 16.7.

68) *Id.* art. 9.23.

69) *Id.* art. 13.18.1.

70) *Id.* art. 11.13.8.

71) *Id.* art. 26.2.2.

72) *Id.* art. 11.13.3(b), Annex 11-B, Section E.

73) *Id.* art. 7.9.4(b).

74) *Id.* arts. 7.13.1, 7.13.4.

parties are also encouraged to provide sufficient time interval between the comment period and the adoption of TBT measures to consider the comments.<sup>77</sup> After the collection of comments, the written comments or their summary needs to be publicly available for proposed SPS measures.<sup>78</sup>

Furthermore, the response to comments may be necessary. The responses to “significant or substantive issues presented in comments received” shall be publicly available regarding proposed TBT measures.<sup>79</sup> TPP parties are also encouraged to make written response to substantive comments from interested persons on proposed financial services regulations.<sup>80</sup>

Public submission and engagement opportunities may also be available. In accordance with the domestic procedures, persons of TPP signatories may make written submissions on labour matters, identifying the issue that is directly associated with the chapter on labour and affects trade or investment.<sup>81</sup> It demands consideration and a timely response by the relevant TPP member.<sup>82</sup> Similar public submissions are possible regarding environmental matters.<sup>83</sup> Also, public engagement is provided for labour matters,<sup>84</sup> competitiveness and business facilitation,<sup>85</sup> as well as regulatory coherence.<sup>86</sup> Taking regulatory coherence as an example, the input from interested persons would be taken into consideration when regulatory measures are developed,<sup>87</sup> and engagement with interested persons is provided to collect inputs regarding regulatory coherence improvement.<sup>88</sup>

Information provision requirements deal with the clarity and sufficiency of information regarding procedures concerning geographical indications,<sup>89</sup> explanation

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75) *Id.* art. 8.7.14.

76) *Id.* art. 13.22.1.

77) *Id.* art. 8.7.15.

78) *Id.* art. 7.13.5.

79) *Id.* art. 8.7.14(c).

80) *Id.* art. 11.13.4.

81) *Id.* arts. 19.9.1, 19.9.2(a), 19.9.2(c).

82) *Id.* art. 19.9.3.

83) *Id.* art. 20.9.

84) *Id.* art. 19.14.

85) *Id.* art. 22.4.

86) *Id.* art. 25.8.

87) *Id.* art. 25.2.2(d).

88) *Id.* art. 25.8.

89) *Id.* arts. 18.31(c) (the procedures being "clearly" set out and sufficient information being provided), 18.31(d) (sufficient information for the public understanding of procedures).

regarding temporary people entry requirements through the internet,<sup>90</sup> response to inquiries from interested persons on measures concerning financial services,<sup>91</sup> and explanation of proposed and final measures' purpose and rationale.<sup>92</sup> For trade facilitation, an importer, exporter or producer may also request for advice or information concerning issues such as quotas and duty drawbacks. Moreover, the TPP members should expeditiously respond to such requests.<sup>93</sup> For the regulatory coherence, subject to domestic laws, TPP parties should make sure that the information on new regulatory measures are available to the public, and preferably available online as well.<sup>94</sup> Similarly, TPP members are encouraged to provide an annual public notice of all regulatory measures that are to be adopted.<sup>95</sup>

For SMEs, the cost of identifying the requirements in trade and investments are reduced by easier access to information about regulatory requirements. SMEs may also participate in the rulemaking process when possible. These transparency requirements offer a chance to comments on proposed measures, lead to more serious consideration of the comments by regulators, and enable the interaction with regulators.

## 2. Procedural fairness

The general TPP-wide procedural fairness requirements apply to administrative proceedings as well as the review and appeal process, including the opportunity to support positions.<sup>96</sup> Sector-specific procedural fairness provisions apply to import licensing,<sup>97</sup> tariff rate quotas (TRQs) administration,<sup>98</sup> telecommunications licensing,<sup>99</sup> financial services,<sup>100</sup> competition law enforcement, government procurement (e.g., time period<sup>101</sup>), labor law enforcement,<sup>102</sup> trademark examination and registration

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90) *Id.* art. 12.6(a)(i).

91) *Id.* art. 11.13.7.

92) *Id.* arts. 26.2.4(c), 26.2.5(b).

93) *Id.* art. 5.4.

94) *Id.* art. 25.5.5.

95) *Id.* art. 25.5.7.

96) *See, e.g., id.* arts. 26.3(b), 26.4.2(a).

97) *Id.* art. 2.13.8.

98) *See, e.g.,* TPP art. 2.30.2.

99) *Id.* art. 13.18.2(a).

100) *Id.* art. 11.13.9.

101) *Id.* art. 15.14.1 (sufficient time for suppliers to get tender documents and submit a responsive tender).



procedures,<sup>103</sup> the listing for new pharmaceutical products or medical devices for reimbursement purposes,<sup>104</sup> procurement process,<sup>105</sup> trade remedy proceedings,<sup>106</sup> trade facilitation,<sup>107</sup> and investment.<sup>108</sup> These provisions usually require explanation of reasons for negative decisions for applicants, the opportunity to contest the refusal, the independency of the judicial and administrative tribunals, and the time frame for the decision-making. Some requirements are quite detailed. For instance, the rules on competition law enforcement provide for a reasonable opportunity to be represented by counsel,<sup>109</sup> and to consult with competition authorities regarding significant legal, factual or procedural issues.<sup>110</sup> These rules also set written procedures for national competition law investigations,<sup>111</sup> rules of procedure and evidence for enforcement proceedings,<sup>112</sup> and the opportunity to seek review of the sanction or remedy.<sup>113</sup> These requirements may improve predictability, and reduce market risks as well as volatility for SMEs.

### 3. Regulatory coherence

Within the chapter on regulatory coherence there are two SME-specific provisions. In the process of regulatory impact assessments (RIA), the possible impact of the proposed regulation on SMEs may be taken into account.<sup>114</sup> TPP parties may cooperate to interact (i.e., information exchange, dialogues or meetings) with SMEs of TPP member countries.<sup>115</sup>

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102) *Id.* art. 19.8.3.

103) *Id.* art. 18.23.

104) *Id.* Annex 26-A, para. 26-A.2.

105) *Id.* art. 15.15.1.

106) The TPP will yield due process through recognition of best practices. Office of the United States Trade Representative, *Summary of the Trans-Pacific Partnership Agreement* (2015), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership>.

107) TPP art. 5.5.

108) *Id.* art. 9.6.2(a) (compliance with due process regarding adjudicatory proceedings in minimum standard of treatment).

109) *Id.* art. 16.2.1(b).

110) *Id.* art. 16.2.9.

111) *Id.* art. 16.2.2.

112) *Id.* art. 16.2.3.

113) *Id.* art. 16.2.4.

114) *Id.* art. 25.5.3.

115) *Id.* art. 25.7.1(b).

Regulatory coherence requirements cover a very wide range of areas, and extend to the whole process of regulatory measures, starting from planning, designing, issuing, to implementing and reviewing.<sup>116</sup> The RIA should evaluate the need for regulatory proposals, investigate feasible regulatory alternatives, explain the reasons for the chosen alternative, and utilize best reasonably available information.<sup>117</sup> Tilting in favor of light-handed regulation,<sup>118</sup> regulatory coherence promotes consistency among different regulations through mutual learning, rule conciseness, among others. While planning new regulatory measures, regulatory agencies are encouraged to consider regulatory measures in other TPP signatories and the development in multilateral and regional fora.<sup>119</sup> New covered regulatory measures need to be “plainly written...., clear, concise, well organised and easy to understand.”<sup>120</sup> Regulatory measures may later be streamlined or repealed after review.<sup>121</sup> SMEs may benefit from regulatory coherence by having their concerns heard, and accessing regulations that are streamlined and less difficult to be understood.

#### 4. Other governance requirements

The reduction of NTBs also happens in services and investment (e.g., removal of services market access restrictions, standstill mechanism and ratchet mechanism for services trade,<sup>122</sup> negative-list approach in investment and cross-border services, minimum standard of treatment,<sup>123</sup> most-favoured–nation treatment<sup>124</sup>), SOEs (non-discriminatory treatment and commercial considerations requirement<sup>125</sup>), e-commerce (e.g., removal of location requirement of computing facilities,<sup>126</sup> non-discriminatory treatment of digital products<sup>127</sup>), government procurement

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116) *Id.* art. 25.2.1.

117) *Id.* art. 25.5.2.

118) Gómez-Tarragona & Daniela, *ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 375 (2015).

119) TPP art. 25.5.8 (2015).

120) *Id.* art. 25.5.4.

121) *Id.* art. 25.5.6.

122) Global Affairs Canada, *Cross-Border Trade in Services Chapter* (2015), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/09-CrossBorderTradeIn.aspx?lang=eng>.

123) TPP art. 9.6.

124) *Id.* art. 9.5.

125) *Id.* art. 17.4.

126) *Id.* art. 14.13.2.

(e.g., rules regarding conditions for participation,<sup>128</sup> the qualification of suppliers<sup>129</sup>), export subsidies,<sup>130</sup> TBT measures (e.g., annexes on wine, and information and communications technology products), anti-corruption standards,<sup>131</sup> import quotas, and people mobility. For instance, in agriculture, import quotas will be created by TPP countries such as Australia, Canada, Japan and Mexico.<sup>132</sup> Cooperation on visa processing will be conducted, and nearly all TPP countries have made commitments on access for business persons in country-specific annexes.<sup>133</sup> Enhanced people mobility provisions would expedite the service provision by SMEs in export markets such as installation and after-sale services.

Among them, one TPP provision on government procurement is designed to benefit SMEs. This special article is incorporated to facilitate the participation of SMEs in government procurement. Best endeavours clauses under this provision call for the free provision of tender documentation, conduction of procurement through electronic means or other new technologies, and consideration of the design of the procurement, including the possible subcontracting by SMEs.<sup>134</sup>

Several governance requirements, which benefit businesses at large including small businesses, are analyzed below. These requirements are either commonly encountered by SMEs (i.e., trade facilitation, origin rules), or exist across several areas (i.e., standards harmonization and equivalence of foreign regulations).

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127) *Id.* art. 14.4.

128) *Id.* art. 15.8.

129) *Id.* art. 15.9.

130) *Id.* art. 2.23.2 (export subsidies on agricultural goods are prohibited).

131) The TPP has the “strongest” anti-corruption standards of any FTA. Ministry of Trade and Industry of Singapore, *Trans Pacific Partnership Free Trade Agreement (TPP): 7 Things You Should Know*, 3.

132) Bloomberg News, *TPP Trade Deal: Who Stands to Gain, Suffer in Asia-Pacific* (2015), available at <http://www.bloomberg.com/news/articles/2015-10-06/tpp-trade-deal-who-stands-to-benefit-suffer-in-asia-pacific>; *Trans-Pacific Partnership Agreement Outcomes: Goods Market Access* (2015), available at <https://dfat.gov.au/trade/agreements/tpp/Documents/outcomes-goods-market-access.pdf>.

133) Cooperation on visa processing will be conducted, and nearly all TPP countries commit on access for business persons in country-specific annexes. *See, e.g.*, TPP art. 12.4 (2015).

134) TPP art. 15.21.3.

### 1) Standards harmonization and equivalence of foreign regulations

Standard harmonization is closely connected to international standards. These requirements are mainly concerned with telecommunications, TBT measures, and government procurement. Global compatibility is explicitly highlighted regarding telecommunications through international standards.<sup>135</sup> The TPP also calls for greater alignment of national standards with international standards in TBT areas,<sup>136</sup> facilitation of greater use of international standards as the basis for TBT measures,<sup>137</sup> and the use of international standards regarding the procedures dealing with the release of goods.<sup>138</sup> In government procurement, technical specifications need to be based on international standards if appropriate.<sup>139</sup> The customs also seek to follow international standards regarding the procedures for the release of goods.<sup>140</sup>

Moreover, with the effect of reducing barriers, the TPP calls for the recognition of the equivalence of SPS measures.<sup>141</sup> The TPP also encourages the acceptance of technical regulations of other TPP members as equivalent.<sup>142</sup> On a related note, the TPP also highlights the recognition in cross-border services trade and financial services,<sup>143</sup> particularly regarding the recognition of professional qualifications, licensing or registration.<sup>144</sup> All these rules help to pursue greater regulatory alignment as highlighted in the TBT area.<sup>145</sup>

### 2) Trade facilitation

Customs administration and trade facilitation rules would bring the faster delivery of goods by businesses, large or small, and easier interaction with the customs. Rules on trade facilitation streamline and simplify customs procedure through, inter alia, the efficient release of goods,<sup>146</sup> expedited customs procedures for express shipments,<sup>147</sup> advance rulings,<sup>148</sup> and automation.<sup>149</sup> These rules help to address red tape and

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135) *Id.* art. 13.25.

136) *Id.* art. 8.9.2(b).

137) *Id.* art. 8.9.2(c).

138) *Id.* art. 5.6.1(a).

139) *Id.* art. 15.12.2(a).

140) *Id.* art. 5.6.1(a).

141) *Id.* art. 7.8.

142) *Id.* art. 8.9.2(d).

143) *Id.* arts. 10.9, 11.12.

144) *E.g., id.* Annex 10-A, para. 1.

145) *Id.* art. 8.9.2.

146) *Id.* art. 5.10.1 (simplified customs procedure for the efficient release of goods).

147) *Id.* art. 5.7.

unreasonable delay in trade. Small firms are among the biggest winners for trade facilitation rules as they face the greatest difficulties in navigating these trade rules,<sup>150</sup> and are vulnerable to financial and administrative burden of customs formalities.

### 3) Origin Rules

TPP origin rules enable SMEs within the free trade area to better access markets. Such occasion resulted in the U.S.–Dominican Republic–Central America Free Trade Agreement (DR-CAFTA). The DR-CAFTA contains “yarn forward” rule of origin under which the essential component for imports of most textile and apparel shall be made from inputs produced in the FTA usually from the yarn stage forward; without such rule many American SME textile businesses facing low-cost Asian counterparts would not operate in commerce.<sup>151</sup> Having similar effects, the TPP’s “yarn forward” origin rules could benefit textile SMEs within the region, since the products need to have the inputs from TPP signatories to enjoy the TPP benefits. Under the exceptional “short supply list” mechanism, certain non-originating materials may be treated as originating for only 5 years after the TPP comes into force.<sup>152</sup> Moreover, the accumulation of inputs is provided so that inputs from one TPP signatory will be regarded as a good from other TPP members when certain conditions are met.<sup>153</sup> Notably the certification of origin could also be waived for imports of low value,<sup>154</sup> which is useful for SMEs’ generally low-value trade.

## D. Conclusion

First, the cooperation to support SMEs, tariff elimination or reduction, and the reduction of NTBs are the major opportunities presented by the TPP for SMEs. These opportunities should bring enhanced market opening and predictability. Covering tariffs and non-tariff issues, the support to SMEs will help SMEs to better utilize the TPP. The tariffs and NTBs “across substantially all trade” will be eliminated or reduced in the TPP.<sup>155</sup> They cover a wide range of areas, involving

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148) *Id.* art. 5.3.

149) *Id.* art. 5.6.

150) Sangsuvan, MICHIGAN STATE INTERNATIONAL LAW REVIEW 394 (2015).

151) United States International Trade Commission, *Small and Medium-Sized Enterprises: U.S. and EU Export Activities, and Barriers and Opportunities Experienced by U.S. Firms* 5-8, n.28 (2010), <http://www.usitc.gov/publications/332/pub4169.pdf>.

152) TPP art. 4.2.9 (2015).

153) *Id.* Annex art. 10.

154) *Id.* art. 3.23.

border measures and behind-the-border measures. In these areas, the absolute levels of tariff and NTBs are crucial for SMEs since they usually are neither able nor fully prepared to invest overseas to manufacture in foreign markets.

Meanwhile, the opportunities may produce limited effects in improving the market position of certain SMEs. Often these opportunities for SMEs are also available to larger businesses. Thus, there are concerns that the TPP does not provide concrete benefits and increases inequality by favoring the large corporations.<sup>156</sup> Moreover, the opportunities may be limited in certain circumstance such as tariff benefits for some SMEs from TPP members other than the U.S. It is because that the average applied tariff in the U.S. is 1.4 percent, and nearly 70 percent of imports entering the U.S. are not subject to any tariffs.<sup>157</sup>

Second, the reduction of NTBs, if implemented properly, is likely to benefit SMEs most. The adoption of good practices (e.g., enhanced transparency) is highlighted, and it helps to provide equal footings for small businesses. SMEs are particularly vulnerable to regulatory measures and their implementation including procedures hedged about with red tape, and inconsistency in trade policy and regulations. The TPP seems to pursue regulatory convergence or at least regulatory compatibility, which could lead to market consistency and enhance cost-effectiveness. The reduction of NTBs may also benefit SMEs outside the free trade area if they also apply to SMEs.

Finally, although nowadays SMEs get more special attention and support than before, this support cannot be exaggerated. The new stand-alone SME chapter and other chapters in the TPP (e.g., regulatory coherence, government procurement, development, and trade facilitation) provide the support to SMEs. They also establish institutional arrangements for joint efforts of TPP parties. TPP members have committed to consider the possible impacts of trade measures on SMEs in certain circumstances, or to provide support to SMEs. However, the provisions directly benefitting SMEs remain limited, and the SME chapter, for instance, contains only three articles including one on non-application of dispute settlement.

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155) Office of the United States Trade Representative, *Summary of the Trans-Pacific Partnership Agreement* (2015).

156) The TPP is criticized for increasing imbalance through “enshrining power among big corporates.” See, e.g., Zoe Daniel, *Malcolm Turnbull and Barack Obama hold White House talks; PM urges powerbrokers to back TPP* (2016), available at <http://www.abc.net.au/news/2016-01-20/turnbull-and-obama-hold-white-house-talks/7099808>.

157) Office of the United States Trade Representative, *Leveling the Playing Field*, available at <https://ustr.gov/sites/default/files/USTR-Tariff-Information-by-Sector-6115.pdf>.

### III . Challenges

In trade and investment, SMEs face both internal challenges (e.g., limited expertise, fewer personnel and financial resources) and external challenges (e.g., tariffs, NTBs including market access restrictions and obstacles to investment). Regarding internal challenges, the TPP devotes efforts to provide support to SMEs through capacity building and other assistance. Regarding external challenges, the TPP may create conditions favoring SMEs particularly through tariff reduction, and improvement and harmonization of regulations. This should bring a more predictable business environment. Meanwhile, there are still a number of thorny questions ahead.

#### A. Insufficiency of the opportunities to SMEs

FTAs could bring opportunities for SMEs, but SMEs are often incapable to capitalize on them in export practice.<sup>158</sup> Usage rate remains low for many FTAs,<sup>159</sup> and SMEs are usually less capable of utilizing FTAs compared with larger businesses. SMEs may not be capable to fully exercise the rights and extract benefits from the TPP due to their capacity and other limitations. As indicated in the preamble of the TPP, the development of SMEs will be supported through the enhancement of their capacity of “participating in and benefitting from” the opportunities under the FTA.<sup>160</sup> However, there are remaining questions about whether TPP rules are sufficient to enable small businesses to fully engage in trade.

First, the special support under the SME chapter may not be enough to meet the needs of SMEs. SME issues are among the most difficult issues in FTAs, and the TPP has not made much development regarding its SME chapter.<sup>161</sup> The SME chapter provides the support mainly through the information sharing via websites, and the activities of the SME Committee. The information provided by the websites may not be sufficient for SMEs to fully understand regulatory requirements, or the information

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158) Battisti & Martin, AUSTRALASIAN JOURNAL OF REGIONAL STUDIES, 284 (2008).

159) E.g., the average usage rate of the more than 50 FTAs surveyed is 26%, see HSBC Global Connections, *FTA usage rates are low* (2014), available at <https://globalconnections.hsbc.com/singapore/en/articles/fta-usage-rates-are-low>.

160) TPP, Preamble.

161) Elms, ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW AND POLICY 384, 391 (2013). (the SME chapter has “basically become a website to help smaller firms take advantage of TPP rules”).



concerning regulatory requirements of local governments is lacking. SMEs of the EU struggle to keep an overview of the regulatory developments in various the U.S. states, and the government website may demand further contacts to fully understand the regulation, which require expertise on the procedures.<sup>162</sup> Such situation may also exist for SMEs under the TPP. For SMEs, comprehensive and user-friendly trade databases in all TPP countries, including frequently updated information on tariff and export control, more detailed information on export process, and other relevant information (e.g. guidance on how to trade with and in other countries) should be useful.

The assistance provided by the SME Committee is usually recorded in general and soft languages. The SME Committee will ascertain ways to assist SMEs to exploit business opportunities,<sup>163</sup> exchange and examine best practices in supporting SME exporters in the relevant aspects (e.g., training programs, trade finance, finding business partners, and establishing business credentials),<sup>164</sup> and develop seminars and other activities to inform SMEs of the TPP benefits.<sup>165</sup> Other relevant activities of the SME Committee include the exploration of capacity building opportunities to help TPP members provide better SME export counseling and assistance,<sup>166</sup> recommendation of information for sharing, facilitation of program development to assist SMEs to engage in the supply chain.<sup>167</sup>

However, the assistance to SMEs provided by the SME Committee may not be sufficient. As an example, financial barriers, along with tariff and NTBs, are deemed to be three main themes why SMEs do not utilize the FTAs.<sup>168</sup> A study by Organisation for Economic Co-operation and Development indicates that the shortage of working capital to finance export is one of the top two barriers to SME access to international markets.<sup>169</sup> Such barriers remain as a key challenge for SMEs (particularly for start-up SMEs). The volatility of the currency and the problem of bank support and the taxation of overseas income constitute financial barriers for SMEs, although they may not be directly related to FTAs.<sup>170</sup> These funding,

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162) European Commission, *Small and Medium Sized Enterprises and the Transatlantic Trade and Investment Partnership*, 22 (2015).

163) TPP art. 24.2.2(a).

164) *Id.* art. 24.2.2(b).

165) *Id.* art. 24.2.2(c).

166) *Id.* art. 24.2.2(d).

167) *Id.* art. 24.2.2(g).

168) Battisti & Martin, *AUSTRALASIAN JOURNAL OF REGIONAL STUDIES*, 280 (2008).

169) *Removing Barriers to SME Access to International Markets*, 10, 36 (2008).

170) Battisti & Martin, *AUSTRALASIAN JOURNAL OF REGIONAL STUDIES*, 281 (2008).

currency and taxation issues are largely outside the coverage of the TPP. The side deal on currency policy reached among TPP members on November 5, 2015 does not require signing, which is to take the form of a “Joint Declaration of the Macroeconomic Policy Authorities of Trans-Pacific Partnership Countries”.<sup>171</sup> The SME Committee will exchange the experiences and best practices in areas such as trade finance.<sup>172</sup> However, these issues are not completely solved and could still pose major impediments for SMEs to utilize the TPP in the future. In addition, some concerns of SMEs are not fully addressed in the TPP, including the possible support to employees of SMEs negatively affected by trade liberalization.

Second, special support to SMEs in other chapters is insufficient. In addition to the SME chapter, special provisions on SMEs exist in areas including government procurement,<sup>173</sup> considerations relating to express shipment,<sup>174</sup> and possibly small-scale fisheries.<sup>175</sup> The support to SMEs available under these provisions remains rather limited. Regarding government procurement in which support is provided to SMEs, SMEs may still face difficulties in violation of TPP rules. If there is a breach of government procurement chapter, the compensation for loss could be limited to the costs incurred in preparing the tender and/or the complaint.<sup>176</sup> As another example, TPP members seek to help SMEs overcome obstacles in using electronic commerce.<sup>177</sup> SMEs still face substantial difficulties in conducting electronic commerce. Besides the difficulties of operating electronic marketplaces, SMEs from developing countries are less visible online and could hardly benefit from international e-commerce.<sup>178</sup> For instance, USAID tried to establish B2B e-marketplaces to engage SMEs online but it encountered sustainability issues.<sup>179</sup> Regarding the financial barriers discussed above, TPP development rules encourage members could take policies “related to the promotion of market-based approaches aimed at improving trading conditions and access to finance for ...SMEs.”<sup>180</sup>

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171) *Legal Scrub of TPP Side Letters Still Underway; Currency Deal Won't Be Signed*, 34 *INSIDE US TRADE* (2016).

172) TPP art. 24.2(b).

173) *Id.* art. 15.21.

174) *Id.* art. 5.7.1(f).

175) *Id.* art. 20.16.1.

176) *Id.* art. 15.19.4.

177) *Id.* art. 14.15(a).

178) Martin Labbé, *Harnessing Information and Communication Technologies for Development: The Trade-Related Technical Assistance Perspective*, in *TRADE GOVERNANCE IN THE DIGITAL AGE* 425-426, 430 (Mira Burri & Cottier Thomas eds., 2012).

179) *Id.* at 430.

However, such general provision is probably not enough for address the financial barriers. Therefore, other chapters of the TPP are not able to provide special support to fully solve the lack of resources faced by SMEs.

Third, for opportunities common to SMEs and larger businesses, limited progress is made in certain areas. In goods, trade in many “sensitive” products is not liberalized or is liberalized only slightly.<sup>181</sup> Certain reductions of NTBs seem to mainly benefit larger businesses such as motor manufacturers.<sup>182</sup> The TPP calls for the agreement in WTO on agricultural export state trading enterprises, which should eliminate trade distorting restrictions on agricultural export authorization and special financing, and enhance transparency.<sup>183</sup> Given the stalemate in WTO negotiations, it is unlikely that such an agreement could be reached in the near future. The disadvantaged positions of SMEs in this context may remain unchanged for some time. Moreover, few new disciplines are imposed regarding anti-dumping and countervailing duties, and these areas fall outside the scope of the TPP dispute settlement system.<sup>184</sup> In services, the subsidies and grants by the TPP members (e.g., loans supported by the government, insurance and guarantees) for services and financial services are not subject to the disciplines on cross-border services trade.<sup>185</sup> For investment, few articles deal with the special support to SMEs. In respect to competition, under-resourced SMEs encounter difficulties in exercising the private right of action under the TPP involving domestic competition law,<sup>186</sup> since it could be costly and complicated. These provisions lack explicit relevant support for SMEs in the TPP. For public participation, opportunities to comment or response to the comments on proposed measures may apply on a best endeavours basis<sup>187</sup> or are not explicitly required.<sup>188</sup> Their effect remains to be observed, and the SMEs may lack the resources (e.g., funding, time, or expertise) to effectively participate in such comment process involving proposed SPS, TBT measures and financial regulations. Regarding dispute settlement, the TPP does not grant the right of action under domestic law against the TPP-inconsistent measures.<sup>189</sup>

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180) *Id.* art. 23.3.4.

181) Simon Lester, *The TPP's Contribution to Public International Law*, 19 ASIL INSIGHTS (2015).

182) US-Japan Letter Exchange on Certain Auto Non-Tariff Measures, <https://ustr.gov/sites/default/files/TPP-Final-Text-US-JP-Letter-Exchange-on-Certain-Auto-NTMs.pdf>.

183) TPP art. 2.25 (2015).

184) *Id.* art. 6.8.3.

185) *Id.* arts. 10.2.3(d), 11.2.5.

186) *Id.* art. 16.3.

187) *Id.* arts. 11.13.3(b), 11.13.4.

188) *Id.* art. 7.13.5.

Finally, rules closely related to SMEs are often “without teeth,” and this increases the difficulties in enforcement. Four chapters on capacity building, competitiveness and business facilitation, development, and SMEs are relatively short and general, and all of those chapters are not subject to TPP dispute settlement system.<sup>190</sup> Although the chapter on regulatory coherence contains more specific provisions, it is not subject to the dispute settlement mechanism of the TPP as well.<sup>191</sup> Many of the provisions concerning SME are largely “soft” or best endeavours clauses. The effect of these provisions on small businesses is yet to be seen.

## B. Complexity of rules

Although some TPP provisions take SMEs into account, the TPP does contribute to the proliferation of FTAs. The TPP will co-exist with existing FTAs, and will not necessarily result in an overall simplification of trade and investment rules.<sup>192</sup> As observed by a trade law expert, the TPP rules are “very complex” and it is time-consuming to fully digest it.<sup>193</sup> The lengthy TPP is unprecedented in terms of its scope and complexity.<sup>194</sup> Besides the TPP agreement, there exist around 120 side letters.<sup>195</sup> The TPP rules related to SMEs cover a very wide range of issues, and SMEs face the difficulty in understanding complicated TPP rules. For instance, regarding the rules of origin (including product-specific rules of origin) and procedures,<sup>196</sup> they are very complex especially when businesses change from one market to another under a FTA.<sup>197</sup> As seen in other FTAs, SMEs may encounter impediments emerging from the rules of origin.<sup>198</sup> In addition, the understanding of relevant domestic law of TPP members is not easy although efforts are made to

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189) *Id.* art. 28.22.

190) *Id.* arts. 21.6, 22.5, 23.9, 24.3.

191) *Id.* art. 25.11.

192) Patrick B. Fazzone, *The Trans-Pacific Partnership--Towards a Free Trade Agreement of Asia-Pacific?*, 43 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 695, 740 (2012).

193) Lester, ASIL INSIGHTS (2015).

194) Donald Robertson, *Impact of Trans-Pacific Partnership on the Energy Sector* (2015), available at <http://www.herbertsmithfreehills.com/insights/legal-briefings/impact-of-trans-pacific-partnership-on-the-energy-sector>.

195) INSIDE US TRADE (2016).

196) TPP chapter 3 (2015).

197) Viviane De Beaufort, *The European Union and the new face(s) of international trade*, 1 INTERNATIONAL BUSINESS LAW JOURNAL 39 (2015).

198) Fazzone, GEORGETOWN JOURNAL OF INTERNATIONAL LAW 718-719 (2012).

encourage TPP members to ensure new domestic regulatory measures are “plainly written and are clear, concise, well organised and easy to understand.”<sup>199</sup> The complexity of rules may also lead to difficulty in enforcing rules as discussed below.

### C. Difficulties in interpretation and implementation

The interpretation and implementation of TPP rules may encounter challenges regarding, among others, demand for expertise and experience, term ambiguity, and coordination within and among agencies. The higher legal and regulatory requirements of the TPP demand more expertise and experience, and makes it more challenging for smaller and developing TPP members.

Moreover, it is not easy to interpret soft or vague TPP rules. Certain opportunities are expressed in soft language (e.g., “should encourage”,<sup>200</sup> “endeavour to”<sup>201</sup>) and needs to be consistent with domestic law (e.g., the consideration of regulatory measures of other TPP parties in planning regulatory measures,<sup>202</sup> the annual public notice of new regulatory measures<sup>203</sup>). Other rules may be subject to domestic law, such as the requirement regarding the publicity of new covered regulatory measures.<sup>204</sup> A number of terms (e.g., a “reasonable opportunity” to be represented by counsel,<sup>205</sup> a “reasonable opportunity” to consult with competition authorities,<sup>206</sup> “the opportunity” to seek review of the sanction or remedy<sup>207</sup>) may be subject to different interpretations. Certain mechanisms, such as the imposition of transitional safeguard measure,<sup>208</sup> including the interpretation of its conditions, also deserve attention. At the very least, the implementation and interpretation of the TPP could benefit from more clarity.

The coordination within and among different agencies is crucial for SMEs to cut regulatory compliance costs and obtain support. Divergent regulatory frameworks could make an enormous impact on the trade costs for businesses and in particular SMEs.<sup>209</sup> The costs of regulatory compliance may even exceed the profits of export

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199) TPP art. 25.5.4 (2015).

200) *Id.* art. 25.5.8.

201) *E.g., id.* art. 5.6.1(a).

202) *Id.* art. 25.5.8.

203) *Id.* art. 25.5.7.

204) *Id.* art. 25.5.5.

205) *Id.* art. 16.2.1(b)

206) *Id.* art. 16.2.9.

207) *Id.* art. 16.2.4.

208) *Id.* art. 6.3.

by SMEs. Within the same regulator, it is not rare to find SMEs facing regulatory process that is interpreted without consistency.<sup>210</sup> Thus, coordination within an agency is of great significance. TPP rules related to SMEs may also involve the joint efforts of a huge range of governments, businesses, trade associations, international organizations, and other actors. The government agencies in 12 countries include the legislatures, trade ministries, the customs, the administration for small businesses, and other agencies responsible for finance, standards (e.g., licensing, inspection) as well as intellectual property, just to name a few. The TPP contains certain requirements including increased domestic interagency consultation and coordination.<sup>211</sup> TPP obligations (e.g., equivalence of SPS measures<sup>212</sup>) may require the efficient coordination among countries of different development level, which can be more challenging. It remains to be seen how TPP member countries fulfill regulatory improvement commitments (e.g., possible amendment of laws) and how regulatory developments are made in reality.

These challenges may co-exist regarding the same TPP obligation. Taking information sharing as an example, the first issue is whether it needs to be implemented through certain domestic procedures. The second issue is the interpretation of the scope of information useful for private actors, and the information sharing is a self-judging provision here.<sup>213</sup> The third issue is the language in which the information sharing is to be made, as TPP parties will seek to rather than being required to provide the information to SMEs in English.<sup>214</sup> It also encounters other issues such as inter-agency coordination, since the websites and its links could involve a large number of government agencies and other entities due to the wide coverage of the TPP.

#### **D. Other challenges**

Other challenges include, *inter alia*, the impact on SMEs negatively affected by trade liberalization, and less capacity of SMEs in affecting trade policy making compared with larger firms. After the implementation of the TPP, the impact of market opening on SMEs of importing countries or SMEs that currently export to

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209) Gómez-Tarragona & Daniela, *ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 372 (2015).

210) *Id.* at 373.

211) TPP art. 25.4.

212) *Id.* art. 7.8.

213) *Id.* art. 24.1.2(b).

214) *Id.* art. 24.1.3.



related markets could be severe. Market opening and increased investment should bring more competition to these SMEs. It remains to be seen how the TPP may directly or indirectly affect SMEs in certain sectors whose liberalization has been made for the first time. This is the case in Mexico regarding the permission of foreign participation in its energy sector, which may affect various areas such as exploration, extraction and production.<sup>215</sup> In Malaysia, government procurement has been addressed for the first time in the TPP among the FTAs concluded by Malaysia, which may involve the concerns of local businesses.<sup>216</sup> In the same vein, for instance, there are concerns that global e-commerce giants may cause “problems for local brick and mortar retailers” under the TPP.<sup>217</sup> Two challenges deserve attention here.

### 1. Remained regulatory differences

Regulatory improvements under the TPP will reduce the regulatory differences but it will not be able to eliminate all the differences. The chapter on regulatory coherence is among the most relevant rules to eliminate regulatory differences. But this chapter does not affect TPP parties’ right to regulate for public health, security, safety, and other public interest considerations.<sup>218</sup> This chapter is also subject to other chapters in the case of conflict.<sup>219</sup> Thus, regulatory differences will continue to exist in the balance between trade and legitimate regulatory objectives (e.g., health, environment, and safety), with the latter concerning the protection level that a TPP member deems appropriate. For instance, different SMEs may take inconsistent positions, such as those between pharmaceutical SMEs in one country and generic medicines SMEs in other countries.<sup>220</sup> TPP members would need to address the differences, and different countries may not adopt the same approach. As another example, SPS and TBT requirements of different TPP countries could be different, although regulatory convergence is to be pursued. For SMEs, the

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215) Robertson, *Impact of Trans-Pacific Partnership on the Energy Sector* (2015).

216) SME Corporation Malaysia, *TPPA-Its Benefits and Challenges*, available at <http://www.smecorp.gov.my/vn2/node/597>.

217) Ramli & Jared, *THE SYDNEY MORNING HERALD*, 2015.

218) Office of the United States Trade Representative, *Summary of the Trans-Pacific Partnership Agreement* (2015).

219) TPP art. 25.10 (2015).

220) For an analysis of different positions of American SMEs and Australian generic medicines SMEs, see Thomas A Faunce & Townsend Ruth, *The Trans-Pacific Partnership Agreement: challenges for Australian health and medicine policies*, 194 *THE MEDICAL JOURNAL OF AUSTRALIA* 83, 83-85 (2011).



compliance costs may jeopardize small scale exports. The TPP rules seem to be insufficient to address these regulatory differences. Some writers have proposed that small scale trade could be excluded from regulations which otherwise would constitute insurmountable barriers, and administrative processes be developed to assist the access for frequent small volume exports which are vulnerable to excessive compliance costs related to regulations.<sup>221</sup>

## 2. Disadvantaged positions of SMEs from developing TPP members

SMEs from developing TPP countries may encounter additional challenges. On the one hand, SMEs from developing countries could be less capable to utilize TPP rules. They may encounter difficulties in reaping benefits due to limited resources (e.g., expertise, experience). The disadvantaged position of SMEs from developing countries seems to exist under the North American Free Trade Agreement (NAFTA), which bears certain similarities with the TPP such as tariff reductions.<sup>222</sup> Market access benefits for American SMEs have been seen in the NAFTA after whose implementation the U.S. SMEs exports to Canada and Mexico rose significantly.<sup>223</sup> In contrast, Mexican SMEs encounter difficulties in obtaining the benefits from the NAFTA due to the lack of financial resources, planning, management and obsolete techniques.<sup>224</sup> It is possible that TPP could bring similar results as above. For instance, SMEs from developing countries may also be in disadvantaged position in e-commerce due to the lack of infrastructure (e.g., e-marketplaces), funding, and expertise. In certain areas such as financial services in which substantial progress has been made under the TPP, SMEs in developing countries are also less likely to utilize these complicated rules. As another example, trade associations may help SMEs to efficiently utilize TPP provisions that provide support to SMEs. However, trade associations in developing countries may not be fully developed.

On the other hand, developing TPP countries may not be able to provide sufficient assistance to their SMEs to benefit from the TPP as compared with developed TPP countries. To provide effective support and assistance, countries need to figure out the number of SMEs are exporting and investing overseas, barriers they encounter in FTA partners, and their competitiveness. It will not be an easy job given the large

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221) Battisti & Martin, AUSTRALASIAN JOURNAL OF REGIONAL STUDIES 284 (2008).

222) Bill Curry, *The ABCs of TPP*, THE GLOBE AND MAIL, Nov. 5, 2015.

223) United States International Trade Commission, *Small and Medium-Sized Enterprises: U.S. and EU Export Activities, and Barriers and Opportunities Experienced by U.S. Firms* E-8, n.35 (2010), <http://www.usitc.gov/publications/332/pub4169.pdf>.

224) Francisco J. Reyes Avila & Preiss Amy, *Strategic Management: A Survival Need for Mexican SMEs*, 6 BUSINESS MANAGEMENT AND STRATEGY 65, 67 (2015).

number of SMEs and a full range of areas that are involved. The TPP SME chapter does not provide for special treatment for developing countries. In a broader perspective, developing countries could also support SMEs through broad-based economic growth, sustainable development and the reduction of poverty,<sup>225</sup> all of which are recognized by the TPP to be related to SME issues. However, it is observed that the TPP's role in generating economic growth and poverty reduction is "not at all certain."<sup>226</sup>

## E. Conclusion

First, the major challenges to SMEs are the insufficiency of the opportunities to SMEs, the complexity of rules, difficulties in rule interpretation and implementation, remained regulatory differences, and disadvantaged positions of SMEs from developing TPP countries, and the impact on SMEs negatively affected by trade liberalization. Some of these challenges (e.g., the complexity of rules and difficulties in interpretation and implementation) are common to large and small businesses, but SMEs may suffer more from them. As a key issue, one may argue that the TPP has not provided for sufficient opportunities, including concrete binding requirements of the assistance to SMEs. It is particularly the case for SMEs in developing countries and micro-sized enterprises.<sup>227</sup> The insufficiency may stem from TPP requirements and the capacity of the TPP nations, particularly developing TPP countries. The support to SMEs often appears to be largely confined to hortatory pronouncements and relatively feeble measures. In reality, larger businesses may take more advantage of commercial opportunities.

Second, the challenges of the TPP to SMEs are not the same with those of older FTAs. The TPP is much more complicated, and may bring more difficulties for SMEs (e.g., the understanding of rules). However, the TPP may provide more assistance to SMEs than previous FTAs that do not have a SME chapter, and SMEs could learn by doing. A larger number of businesses and stakeholders are likely to get involved in the TPP practice compared with a typical bilateral FTA with smaller trade benefits and fewer participants. They could help SMEs to gain their experience at higher speed. Since the TPP is a mega FTA with greater benefits (e.g., a larger number of FTA partner countries), more SMEs may know of the TPP. Thus, SMEs also have more incentives to learn and utilize the TPP. For instance, it is interesting

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225) TPP art. 23.3.4 (2015).

226) Raj Bhala, *Trans-Pacific Partnership or Trampling Poor Partners? A Tentative Critical Review*, 11 MANCHESTER JOURNAL OF INTERNATIONAL ECONOMIC LAW 2, 3 (2014).

227) TPP art. 1.3 (SMEs include micro-sized enterprises).

to observe whether the usage rate of the TPP by SMEs will be higher than that of other FTAs.

Finally, when looking beyond the TPP there will be more challenges for SMEs from non-parties than those from TPP members. TPP rules aim to level the playing field, but they come with inherent flaws of bringing unequal footing between SMEs in and outside of the TPP. For instance, the TPP will eliminate over 18,000 tariffs on U.S. exports, benefitting sectors like manufacturing, automotive, agriculture, as well as information and computer technology.<sup>228</sup> These benefits are largely confined to SMEs of TPP countries. The TPP also develops the regional value chain and encourages businesses to source inputs within the region. The TPP's yarn forward provision would negatively affect Chinese businesses in textiles and apparel.<sup>229</sup> The TPP's TRQs rules only apply to TRQs in the TPP schedules of the TPP parties rather than those set out in their WTO schedules.<sup>230</sup> According to a recent World Bank report, the export of non-TPP members may fall in the post-TPP era in contrast with the increase of export of another TPP member: the exports of Thailand possibly decreasing 2 percent after the TPP operation in contrast with the 30 percent increase of Vietnam.<sup>231</sup>

## IV. Conclusion

Based on the above analysis, some conclusions could be drawn here. First, the key benefits the TPP bring for SMEs are enhanced market opening and more predictability. These benefits stem from the major opportunities: the cooperation to support SMEs, the elimination or reduction of tariffs, and the reduction of unwarranted NTBs. Compared to the previous FTAs, the TPP pays more attention to special constraints to exporting encountered by SMEs in trade and investment. SME-specific benefits exist due to a few of special provisions tailored for SMEs, including the new stand-alone SME chapter and rules specifically related to SMEs in a number of other chapters. The reduction of NTBs is likely to benefit SMEs most.

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228) Keating, *What the Trans-Pacific Partnership (TPP) Means for U.S. Economic Growth and Small Business* (2015).

229) Chris Devonshire-Ellis, *The U.S. TPP "Yarn Forward" Program and Implications for China & Vietnam* (2015), available at <http://www.china-briefing.com/news/2015/11/04/the-u-s-tpp-yarn-forward-program-and-implications-for-china-vietnam.html>.

230) TPP art. 2.30.1, n.15.

231) Peter Martin, *TransPacific Partnership will barely benefit Australia, says World Bank report*, THE SYDNEY MORNING HERALD, January 12, 2016.

Good governance rules are ubiquitous in the TPP, and will lead to regulatory improvements that should reduce compliance costs of small businesses. In particular, transparency and regulatory compatibility are to play a vital role.

Most of these benefits to SMEs are also available to larger businesses, while the challenges could be more difficult for SMEs to overcome. Since the assistance provided by the TPP may not be sufficient, SMEs still face difficulties due to their capacity limitation (e.g., expertise, funding). Thus, these opportunities may have limited effects in improving market position of certain SMEs.

Second, serious challenges continue to exist for SMEs, but the challenges brought by the TPP are not the same for different SMEs. The challenges include, inter alia, the insufficiency of the opportunities to SMEs, the complexity of rules, difficulties in rule interpretation and implementation, remained regulatory differences, disadvantaged positions of SMEs from developing TPP countries, and the impact on SMEs negatively affected by trade liberalization.

Among the SMEs of the TPP parties, SMEs from TPP countries with better assistance capacity will likely get a better position than those from other TPP countries. Some TPP countries have already provided certain support to SMEs and highlighted SME issues in the TPP negotiations. They may provide more support to their SMEs under the TPP. For instance, the U.S. has provided online Free Trade Agreement (FTA) Tariff Tool including a searchable database,<sup>232</sup> which helps American SMEs to better understand tariff rates in FTA partners of the U.S. Also, the U.S. supports American SMEs as one of its core goals in TPP negotiations.<sup>233</sup> However, SMEs from non-TPP parties are likely to encounter much more serious challenges and could not directly benefit from the TPP. The TPP may provide level playing field regarding certain aspects for SMEs of TPP countries, resulting in competitive advantage over counterpart of non-TPP countries.

Third, the TPP, if properly managed, should bring more opportunities than challenges to SMEs. The opportunities and challenges are closely linked to each other. As examples, the review of the customs-duties-exempt threshold regarding express shipments may consider the impact on SMEs,<sup>234</sup> and the RIA may consider the proposed regulation's potential impact on SMEs.<sup>235</sup> Both provisions bring opportunities. However, the TPP neither requires that such impact must be evaluated nor provides how the impact is to be considered. Thus, it is also a challenge for SMEs

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232) Office of the United States Trade Representative, *Small Business* (2015), available at <https://ustr.gov/issue-areas/small-business>.

233) Office of the United States Trade Representative, *Small and Medium-Sized Enterprises* (2015).

234) TPP art. 5.7.1(f).

235) *Id.* art. 25.5.3.

to have their needs catered for. Similarly, many SME-related TPP provisions are vague or not subject to dispute settlement system (e.g., regulatory coherence provisions related to SMEs). Therefore, the TPP could help internationalizing the SMEs, but it will depend on the interpretation and implementation of the TPP. Of course, further efforts are needed (e.g., trade finance, and the capacity building of developing countries).

Finally, given the unique nature of the mega FTA, the opportunities and challenges to SMEs under the TPP may not always be the same with those under bilateral FTAs. As an example, the TPP may bring more opportunities to the SMEs to access much larger markets, but also involve more complex rules and a wider range of actors. Although SME issues get attention in the TPP, they remain as a difficult topic. The TPP parties seem to hesitate to make concrete obligations concerning SMEs. As the TPP is likely to have a profound impact on regional and even multilateral trade law, it will be interesting to closely observe the impact of the TPP on SMEs and its implications beyond the free trade area in the long term.

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