

Singapore Management University

Institutional Knowledge at Singapore Management University

Research Collection Yong Pung How School Of
Law

Yong Pung How School of Law

5-2017

The Asian perspective on SMEs in international economic law: Opportunities and challenges arising from the TPP

Heng WANG

Singapore Management University, hengwang@smu.edu.sg

Follow this and additional works at: https://ink.library.smu.edu.sg/sol_research



Part of the [Asian Studies Commons](#), [Entrepreneurial and Small Business Operations Commons](#), and the [International Trade Law Commons](#)

Citation

WANG, Heng. The Asian perspective on SMEs in international economic law: Opportunities and challenges arising from the TPP. (2017). *Small and Medium-Sized Enterprises in International Economic Law*. 189-215.

Available at: https://ink.library.smu.edu.sg/sol_research/4491

This Book Chapter is brought to you for free and open access by the Yong Pung How School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection Yong Pung How School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email cherylds@smu.edu.sg.

An Asian Perspective on SMEs in International Economic Law

Opportunities and Challenges Arising from the TPP

*Heng Wang**

A. Introduction

Small and medium-sized enterprises (SMEs) play an increasingly important role in international trade and investment. For instance, more jobs will be created if SMEs increase their transboundary trade and investment. While large businesses are in a position to spread overhead costs over a large number of products, various export markets, and subsidiaries or affiliated companies, SMEs are rarely able to do so. Due to inherent capacity constraints, they are more intensely affected by trade and investment barriers. Taking the United States as an example, SMEs may in particular encounter: (1) domestic barriers, including US Government regulation (eg export controls, visas, and tariffs on imported intermediate inputs), domestic transport costs; and (2) foreign barriers, including foreign government regulations (eg different labelling, certification, quality, and design requirements, costly sanitary and phytosanitary (SPS) regulations, insufficient intellectual property protection, time-consuming customs clearance, tariff and non-tariff restrictions), and language and cultural barriers.¹ SMEs in other countries encounter similar barriers. SMEs are therefore vulnerable to trade and investment barriers, and accordingly have often not been able to gain optimal benefits from trade agreements.

SMEs are particularly affected by international trade law and have in recent years received more attention in that context. While the generally applicable norms of the World Trade Organization (WTO) have benefitted SMEs in certain ways,

* An earlier version of this chapter has been previously published under the title 'The Implications of the Trans-Pacific Partnership for SMEs: Opportunities and Challenges' (2016) 6 KLRI Journal of Law and Legislation 45.

¹ US International Trade Commission, 'Small and Medium-Sized Enterprises: U.S. and EU Export Activities, and Barriers and Opportunities Experienced by U.S. Firms' (Investigation No 332-509, USITC Publication 4169, July 2010) xvi <<http://www.usitc.gov/publications/332/pub4169.pdf>> accessed 20 January 2017.

including enhanced stability, confidence, predictability, market access, and access to information,² WTO negotiations have also involved specific SME issues. In the WTO negotiations on services, both developed countries and developing countries are concerned with trade barriers that are particularly burdensome to services SMEs, and internationalization of SMEs has become a permanent WTO services negotiation issue.³

Moreover, free trade agreements (FTAs) and in particular 'mega-regionals' have become increasingly relevant to SMEs. With respect to ongoing mega-FTA negotiations, SME issues play an important role in the negotiations of the Transatlantic Trade and Investment Partnership (TTIP).⁴ The Trans-Pacific Partnership (TPP) negotiations were concluded in 2015 and the TPP was signed on 4 February 2016. It has not yet entered into force since ratification by the TPP members has not been finalized. As indicated in its preamble, the TPP builds on the rights and obligations under WTO law, and is becoming increasingly relevant to SMEs. In general, it sets much stricter requirements than WTO law, and also enters WTO-extra areas, including investment, state-owned enterprises (SOEs), designated monopolies, labour, and the environment. Attracting great attention, SME issues were among the cross-cutting trade issues in the TPP,⁵ and part of 'horizontal' issues in the TPP negotiations.⁶ In particular, SME issues have been highlighted by the United States 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.⁷

The TPP is the first agreement negotiated by the United States that contains a specific chapter on SMEs. The SME chapter was also the only chapter the completion of which had been publicly announced by TPP parties by 2013.⁸ According to data of the US International Trade Administration, 97 per cent of exporters to

² Kitsuron Sangsuvan, 'Small Businesses in the WTO: Small Fish in a Big Pond or Globalization 3.0' (2015) 23 *Michigan State International Law Review* 372–77.

³ Daniela Persin, 'Market Access for Small versus Large Service Enterprises: The Preferential and Multilateral Trade Liberalization Tracks Compared' (2011) 45 *Journal of World Trade* 785, 786.

⁴ 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' (1 May 2014) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1041>> accessed 20 January 2017.

⁵ Office of the US Trade Representative, 'Outlines of TPP' (2016) <<https://ustr.gov/tpp/outlines-of-TPP>> accessed 20 January 2017.

⁶ Deborah Kay Elms, 'The Trans-Pacific Partnership Trade Negotiations: Some Outstanding Issues for the Final Stretch' (2013) 8 *Asian Journal of WTO & International Health Law and Policy* 379, 391.

⁷ Office of the US Trade Representative, 'The Trans-Pacific Partnership: Leveling the Playing Field for American Workers & American Businesses' (2016) Chapter 24 <<https://ustr.gov/tpp/>> accessed 20 January 2017.

⁸ 'TPP SME Chapter Includes Commitments to Set Up Websites, Committee' (2013) *Inside US Trade* 31.

TPP nations have fewer than 500 employees.⁹ As the only mega FTA for which the negotiations have been concluded, the TPP covers around 40 per cent of the world economy¹⁰ and is likely to have a substantial effect on SMEs. At the same time, the important contribution of SMEs to economic growth and employment is explicitly acknowledged by the TPP.¹¹ It is safe to conclude that SMEs will be significantly affected by the TPP if it is approved. Even if the TPP is not ratified, the SMEs rules of the TPP may be relevant to the future trade agreements negotiated by the United States and other TPP countries, since these rules reflect the consensus in this respect.

A wide range of areas are identified by the TPP as relevant for SMEs, including customs, intellectual property, technical regulations, SPS measures, investment, business registration, employment, and taxation.¹² This is not an exhaustive list, as other areas (eg market access and the movement of business persons) are also closely related to SMEs. 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, to name but a few.

The TPP could play an important role for SMEs in opening up new business opportunities and providing assistance. However, it could also pose challenges to SMEs, including the increase of competition from abroad. Since little research has been conducted regarding the effect of FTAs on SMEs, and in particular on their export performance,¹³ this chapter will analyse a number of questions that may arise in this context: What are the opportunities the TPP may hold for SMEs from TPP countries? What are the challenges encountered by SMEs under the TPP? Research concerning the implications of the TPP for SMEs will be of great significance even if the TPP is not approved, since the TPP will have long-term effects on the development of FTAs and the TPP text could be seriously considered in future trade negotiations. The focus of this chapter¹⁴ is not on assessing the substantive merits of the TPP rules,¹⁵ but rather on an examination of the opportunities and challenges arising for SMEs. The implications of the TPP for SMEs outside the free trade area of the TPP will only be discussed when appropriate.

⁹ Raymond J Keating, 'What the Trans-Pacific Partnership (TPP) Means for U.S. Economic Growth and Small Business' (6 October 2015) <<http://www.sbecouncil.org/2015/10/06/what-the-trans-pacific-partnership-tpp-means-for-the-u-s-economy-and-small-business/>> accessed 20 January 2017.

¹⁰ David Ramli and Jared Lynch, 'TPP: What it Means for Australian Business' *The Sydney Morning Herald* (Sydney, 6 October 2015).

¹¹ Art 15.21.1 TPP. The version of the TPP text cited in the chapter is available at <<https://www.tpp.mfat.govt.nz/text>> accessed 20 January 2017.

¹² Art 24.1.3 TPP. ¹³ US International Trade Commission (n 1) E-8.

¹⁴ The analysis here focuses on the main text of the TPP rather than annexes and associated documents.

¹⁵ The TPP arouses concerns such as the criminalization of trade secret law and the extension of copyright terms, which may potentially affect the use of intellectual property by SMEs. See, for example, Terry Lavender, 'Not too Late to Mitigate TPP Effects, Minister of International Trade Chrystia Freeland Told' *University of Toronto News* (19 January 2016) <<http://news.utoronto.ca/not-too-late-mitigate-tpp-effects-minister-international-trade-chrystia-freeland-told>> accessed 20 January 2017.

B. Opportunities

Several TPP provisions address, to a greater or lesser degree, the specific concerns of SMEs. These include the preamble and the chapters on SMEs, customs administration and trade facilitation, government procurement, electronic commerce, intellectual property, labour, regulatory coherence, development, transparency, environment, cooperation and capacity building, competitiveness, and business facilitation. The TPP will bring opportunities to SMEs to access a much larger market with better conditions. These opportunities include cooperation to support SMEs and tariff elimination or reduction, as well as the reduction of non-tariff barriers (NTBs). This section will analyse the opportunities for SMEs from TPP countries. It should be noted, however, that some opportunities are largely limited to SMEs from specific TPP countries, such as the non-conforming measures permitted to Vietnam under the TPP SOE chapter aiming to assist SMEs.¹⁶ In practice, only the SMEs of Vietnam rather than those of other countries are likely to benefit from these measures.

I. Cooperation to support SMEs

The preamble of the TPP emphasizes support for the development of SMEs by enhancing their capacity to participate in and benefit from the TPP. Since the participation of the private sector is essential in cooperation and capacity building, the TPP recognizes that SMEs may need assistance in participating in world markets.¹⁷

A number of institutional arrangements are in place under the TPP, in particular the Committee on SMEs (SMEs Committee). The role of the SMEs Committee is to identify ways to help SMEs to explore commercial opportunities arising from the TPP.¹⁸ It will also provide other assistance to SMEs, including seminars and workshops to inform SMEs how to benefit from the TPP.¹⁹ Furthermore, the SMEs Committee will be involved in monitoring the implementation of SME-related obligations under the TPP.²⁰ In addition, the Committee on Government Procurement will meet upon request to facilitate the participation by SMEs in government procurement.²¹ The Committee on Competitiveness and Business Facilitation (CCBF) will: (1) provide recommendations to the TPP Commission ('Commission') to promote the participation of SMEs in supply chains in the free trade area;²² and (2) provide recommendations and encourage capacity-building activities to assist SMEs' participation in the regional supply chains.²³ With respect to the latter, the CCBF will collaborate with experts such as private sector and

¹⁶ Sean Miner, 'Commitments on State-Owned Enterprises' in Jeffrey J Schott and Cathleen Cimino-Isaacs (eds), *Assessing the Trans-Pacific Partnership*, Vol 2: *Innovations in Trading Rules* (Peterson Institute for International Economics 2016) 98.

¹⁷ Art 21.1.3 TPP.

¹⁸ Art 24.2.2(a) TPP.

¹⁹ Art 24.2.2(c) TPP.

²⁰ Art 24.2.2(h) TPP.

²¹ Art 15.23(b) TPP.

²² Art 22.2.3(c) TPP.

²³ Art 22.3.2 TPP.

international donor organizations.²⁴ It remains to be seen whether these recommendations are directed at other actors or at SMEs. The relationship between these two categories of recommendations is not clarified in the TPP.

In addition, cooperation among TPP countries is aimed at supporting SMEs in electronic commerce, labour, government procurement, and development. TPP members are encouraged to help SMEs overcome obstacles in using electronic commerce²⁵ and to cooperate in promoting improvements in business and labour productivity, particularly with regard to SMEs.²⁶ The TPP highlights the importance of increasing the participation of SMEs in government procurement,²⁷ and provides for facilitation measures and cooperation. SMEs' participation in government procurement as suppliers will also be encouraged.²⁸ Moreover, for broad-based economic growth, TPP parties may pursue policies associated with the promotion of market-based approaches to improve trading conditions and access to finance for SMEs.²⁹ This is a soft obligation and it will need to be seen whether and how these market-based approaches will benefit SMEs.

Entities other than governments can also be involved in providing support for SMEs. TPP parties may take action to encourage other actors (such as professional associations and other non-governmental organizations), if appropriate, to help SMEs develop internal controls or other measures to prevent bribery and corruption in trade and investment.³⁰ Private sector and international donor organizations may be involved in capacity-building activities to assist SMEs' participation in supply chains in the TPP area, which may take the form of seminars or workshops.³¹ With regard to the rules on development, joint development activities include the promotion of public-private partnerships that would enable SMEs to utilize their capacities in cooperative ventures with governmental bodies in order to support development goals.³² Such joint development activities may also involve multilateral institutions.³³ Among the joint development activities, capacity building is likely to be the key. SMEs may thus benefit directly through capacity building,³⁴ or indirectly from the capacity building of TPP parties with regard to SME export advice, assistance, and training programmes.³⁵

II. Tariff elimination or reduction

Trade barriers are disproportionately burdensome for SMEs because they have fewer resources to overcome them than larger businesses, and even a small increase in the cost of a good due to tariffs may lead to the loss of a sale for small firms in a competitive market.³⁶ Tariff reductions under previous FTAs concluded by the

²⁴ *ibid.* ²⁵ Art 14.15(a) TPP. ²⁶ Art 19.10.6(f) TPP.

²⁷ Art 15.21.1 TPP. ²⁸ Art 15.22.2(a) TPP. ²⁹ Art 23.3.4 TPP.

³⁰ Art 26.10.1(b) TPP. ³¹ Art 22.3.2 TPP. ³² Art 23.6.2(c) TPP.

³³ Art 23.6.2 TPP. ³⁴ Art 22.3.2 TPP. ³⁵ Art 24.2.2(d) TPP.

³⁶ Office of the US Trade Representative, 'Transatlantic Trade & Investment Partnership: Opportunities for Small and Medium-Sized Enterprises' (2015) <<https://ustr.gov/sites/default/files/TTIP%20Brochure%20v3%20%284-16-15%29FINAL.pdf>> accessed 20 January 2017.

United States, for example, have substantially benefitted American SMEs in terms of market access.³⁷ Under the TPP, tariff eliminations or reductions are provided for in the rules for trade in goods, in particular in the chapters on national treatment and market access for goods,³⁸ and on electronic commerce. In certain circumstances, SMEs may be 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 review of this amount, the impact on SMEs may be considered as a relevant factor.³⁹

In electronic commerce, the TPP prohibits the imposition of customs duties on electronic transmissions⁴⁰ and the use of local computing facilities as a condition for conducting business in a TPP country.⁴¹ These rules should particularly help competitive SMEs thriving in online markets.

The tariff benefits granted under the TPP will be much larger than those granted under bilateral FTAs. In contrast to a typical bilateral FTA, the TPP involves twelve signatories and will probably be acceded to by other countries (eg Korea) in the near future if everything goes smoothly. SMEs may therefore benefit from tariff reduction or elimination from multiple foreign markets. For instance, the import taxes on US textiles and apparel exports imposed by Japan, Vietnam, Malaysia, and New Zealand will be eliminated immediately or within a set time period.⁴² Both SMEs and larger businesses will benefit from such tax elimination. However, the effect of tariff reductions on SMEs should not be overestimated. SMEs conducting international trade, for instance, may have already managed to avoid tariffs (eg by categorizing products differently or by exporting free-on-board shipping to require buyers to pay for possible duties), and therefore in certain circumstances tariffs are not their main concern.⁴³

III. Reduction of non-tariff barriers

Tariff reductions mainly affect trade in goods since services trade and investment per se are not usually subject to tariffs. In contrast, NTBs affect not only goods, but also services trade and investment.⁴⁴ Complex regulations and opaque procedures

³⁷ US International Trade Commission (n 1) 5–5, 5–6.

³⁸ See, for instance, Art 2.4.2 and Annex 2-D TPP (most tariff elimination in industrial goods will be implemented immediately, with tariff elimination of certain products to be implemented over longer time frames), Art 2.5 TPP (tariff benefits, new or existing ones, will not be contingent on the local content percentage and other performance requirements), Art 2.15 TPP (export duties, taxes or other charges are generally proscribed unless otherwise provided).

³⁹ Art 5.7.1(f) TPP. ⁴⁰ Art 14.3.1 TPP. ⁴¹ Art 14.13.2 TPP.

⁴² US Department of Commerce, International Trade Administration, 'Opportunities for the U.S. Textiles and Apparel Sector' (November 2015) <<http://trade.gov/fta/tpp/industries/pdfs/textile.pdf>> accessed 20 January 2017.

⁴³ Martina Battisti and Perry Martin, 'Creating Opportunity for Small-Firm Exporters through Regional Free Trade Agreements: A Strategic Perspective from New Zealand' (2008) 14 *Australasian Journal of Regional Studies* 275, 281.

⁴⁴ For instance, the EU–Singapore FTA contains a stand-alone on NTBs to trade and investment in renewable energy generation. See, for instance, EU–Singapore FTA, Chapter 7: Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation, Art 7.4.

can be particularly burdensome for small firms and the clarity and certainty of market access rules are frequently a greater concern than tariff rates.⁴⁵ The reduction of NTBs is therefore of enormous significance to SMEs. The following analysis concerns the main forms of NTB reduction that are relevant for SMEs and their implications. Although the reduction of NTBs can be found throughout the TPP, it is argued that the opportunities provided for SMEs by reducing NTBs are mainly attributable to specific and general transparency rules, procedural fairness, regulatory coherence, and other requirements.

To ensure effectiveness in reducing NTBs, dispute settlement procedures are highlighted in the TPP. These dispute settlement mechanisms help businesses, including SMEs, to manage their risks. With regard to investment, the dispute settlement system covers general investor–state investment arbitration,⁴⁶ and investment disputes in financial services,⁴⁷ although investment is often made by larger businesses. With a view to promoting fair competition, the TPP competition rules explicitly provide for the private right of action,⁴⁸ under which businesses such as SMEs can benefit by having legal redress against the violation of national competition laws. Procedures are also in place to address complaints by a supplier about the violation of TPP government procurement rules.⁴⁹ According to 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 the territory of the TPP party in question.⁵⁰

1. Transparency

Transparency rules will reduce the information acquisition costs and help SMEs to obtain contact information for relevant agencies of different TPP parties. Meanwhile, transparency requirements will also relieve SMEs of the potential costs of trading and investing resulting from the lack of access to necessary information.

(a) General transparency rules

The TPP transparency standards are the strictest among FTAs.⁵¹ Transparency requirements are stipulated in a separate chapter,⁵² but can also be found in nearly all other chapters.⁵³ By virtue of the transparency requirements described below, SMEs are given the opportunity to participate in rule-making in connection with certain matters affecting trade and investment. This may offer them the chance to

⁴⁵ Battisti and Martin (n 43) 284. ⁴⁶ Chapter 9, Section B TPP.

⁴⁷ Art 11.22 TPP. ⁴⁸ Art 16.3 TPP. ⁴⁹ Art 15.19 TPP. ⁵⁰ Art 17.5.1 TPP.

⁵¹ Ministry of Trade and Industry of Singapore, 'Trans Pacific Partnership Free Trade Agreement (TPP): 7 Things You Should Know' (2016) <[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)> accessed 20 January 2017.

⁵² Chapter 26, Section B TPP.

⁵³ For instance, Arts 2.32, 2.28.3, 5.11, 7.13, 11.13, 12.6, 16.7, 17.10, 18.9 TPP.

comment on proposed measures, which, in turn, could lead to more serious consideration of their interests, and enable closer interaction with regulators.

Transparency is generally required for trade in goods and services, as well as intellectual property. For instance, information regarding trade in goods needs to be promptly published, including information relating to import and export procedures, duty rates, classification rules, fees, and charges.⁵⁴ Transparency requirements also expand to areas such as government procurement, competition (eg publication of final decisions in competition law proceedings with findings of fact and reasoning⁵⁵), and investment (eg transparency of investment arbitration proceedings⁵⁶). In addition, transparency rules target regulatory measures and administrative procedures such as the public availability of licensing requirements for public telecommunications⁵⁷ and documentation required for applications to supply financial services.⁵⁸

Although general transparency rules apply equally regardless of the size of businesses, certain new developments may be particularly important for SMEs, in particular public input requirements and heightened requirements on information provision.

Public input requirements consist of the following provisions: (1) notice and comment opportunities; (2) the response to comments received; and (3) public submission and engagement opportunities. The notice and comment requirement is imposed as a best endeavour clause in the transparency chapter, which should apply across the TPP.⁵⁹ In several areas, similar or stricter requirements are provided. TPP members should seek to provide for interested persons opportunities to comment regarding proposed financial regulations.⁶⁰ Such comment opportunities are also required for other areas, including science and risk analysis,⁶¹ as well as proposed measures regarding SPS,⁶² TBT,⁶³ and telecommunications issues.⁶⁴ With regard to SPS measures, any written comments received need to be made publicly available either in full or in summary form.⁶⁵

Furthermore, a response to comments received may be necessary. Regarding proposed TBT measures, the responses to key issues presented in comments have to be made publicly available.⁶⁶ TPP parties are also encouraged to respond in writing to substantive comments from interested persons on proposed financial services regulations.⁶⁷

The TPP also provides for public submission and engagement opportunities. In accordance with domestic procedures, persons of TPP parties may make written

⁵⁴ Art 2.16 TPP.

⁵⁵ Art 16.7.4 TPP.

⁵⁶ Art 9.24 TPP.

⁵⁷ Art 13.18.1 TPP.

⁵⁸ Art 11.13.8 TPP.

⁵⁹ Art 26.2.2 TPP.

⁶⁰ Art 11.13.3(b), Annex 11-B, Section E TPP.

⁶¹ Art 7.9.4(b) TPP.

⁶² Arts 7.13.1, 7.13.4 TPP.

⁶³ Arts 8.7.14, 8.7.15 TPP (the parties are encouraged to provide a sufficient time interval between the comment period and the adoption of any TBT measures to consider the comments).

⁶⁴ Art 13.22.1 TPP.

⁶⁵ Art 7.13.5 TPP.

⁶⁶ Art 8.7.18(c) TPP (public availability of 'responses to significant or substantive issues presented in comments received').

⁶⁷ Art 11.13.4 TPP.

submissions on labour matters, identifying the issue directly associated with the labour chapter and the way in which it affects trade or investment.⁶⁸ The relevant provisions demand consideration of the submission and a timely response from the TPP member in question.⁶⁹ Similar public submissions are possible regarding environmental issues.⁷⁰ In addition, public engagement is provided for labour matters⁷¹ and competitiveness and business facilitation,⁷² as well as regulatory coherence.⁷³ Taking regulatory coherence as an example, the input from interested persons shall be taken into consideration when regulatory measures are developed,⁷⁴ and engagement with interested persons shall be established in order to collect input with a view to improving regulatory coherence.⁷⁵ Public engagement procedures differ from public submissions. For instance, public engagement can be conducted by both the TPP parties and a Labour Council established by the TPP members.⁷⁶ Public submissions are only collected and considered by the TPP parties.⁷⁷ However, the relationship between public engagement and public submissions will need to be further elaborated.

Heightened requirements on information provision pertain, among others, to the clarity and sufficiency of information regarding procedures concerning geographical indications,⁷⁸ the online publication, if possible, of explanatory material regarding temporary entry requirements for business persons,⁷⁹ the response to enquiries from interested persons on measures concerning financial services,⁸⁰ and, to the extent possible, an explanation of the purpose and rationale of a proposed or final regulation likely to affect trade or investment.⁸¹ With regard to trade facilitation, an importer, an exporter, or a producer may request advice or information concerning issues such as quotas and duty drawbacks. The TPP members shall expeditiously respond to such requests.⁸² For the regulatory coherence, subject to domestic laws, TPP parties should ensure that the information on new regulatory measures is available to the public, and where practicable online.⁸³ In the same vein, TPP members are encouraged to provide an annual public notice of all regulatory measures that they expect to adopt within the following twelve-month period.⁸⁴

(b) Specific transparency rules

Rules to provide information for SMEs are set forth in the chapters on SMEs and government procurement. The specifically applicable information requirements will reduce the cost of identifying the regulatory requirements in trade and investments by providing easier access to information. As a key component of the SME chapter, TPP members must provide a special website to provide information directly and indirectly to SMEs.

⁶⁸ Arts 19.9.1, 19.9.2(a), 19.9.2(c) TPP. ⁶⁹ Art 19.9.3(a) TPP.
⁷⁰ Art 20.9 TPP. ⁷¹ Art 19.14 TPP. ⁷² Art 22.4 TPP. ⁷³ Art 25.8 TPP.
⁷⁴ Art 25.2.2(d) TPP. ⁷⁵ Art 25.8 TPP. ⁷⁶ Arts 19.14.1, 19.14.2 TPP.
⁷⁷ For instance, Art 19.9.1 TPP.
⁷⁸ Art 18.31(c) TPP (the procedures being ‘clearly’ set out), Art 18.31(d) TPP (sufficient information for the public understanding of procedures).
⁷⁹ Art 12.6(a)(i) TPP. ⁸⁰ Art 11.13.7 TPP. ⁸¹ Arts 26.2.4(c), 26.2.5(b) TPP.
⁸² Art 5.4 TPP. ⁸³ Art 25.5.5 TPP. ⁸⁴ Art 25.5.7 TPP.

With regard to the direct provision of information, the website must publicize the TPP text, including all annexes, tariff schedules, product-specific origin rules, and a summary of the TPP.⁸⁵ In particular, the website needs to offer information ‘designed for SMEs’, including the description of TPP provisions relevant to SMEs, and any additional information that the party deems useful for SMEs to reap the TPP opportunities.⁸⁶ In reality, the provision of such additional information may in turn depend on the capacity of the TPP countries.

Information shall be indirectly provided through weblinks to equivalent websites of other TPP countries⁸⁷ and the websites of its government bodies or entities that offer information deemed useful for actors in trade, investment, or business.⁸⁸ With regard to the latter, the information may include tax information, business registration procedures, and regulations concerning several areas (ie customs, intellectual property rights, investment, technical barriers to trade, SPS issues, and employment).⁸⁹ Procedures in relation to customs and intellectual property rights may be included too.⁹⁰ Both direct and indirect information sharing needs to be kept updated and correct, and shall be regularly reviewed by the TPP members.⁹¹

In government procurement, any potential measure maintained by a Contracting Party granting preferential treatment to SMEs, including its eligibility criteria, needs to be transparent.⁹² A ‘best endeavours’ clause calls for the provision of comprehensive information relating to procurement, including a definition of SMEs in a single electronic portal.⁹³

2. Procedural fairness

General requirements of procedural fairness in the TPP apply to administrative proceedings as well as the review and appeal process, including the right of the parties to these proceedings to a reasonable opportunity to support and defend their positions.⁹⁴ Sector-specific procedural fairness provisions pertain in particular to import licensing,⁹⁵ tariff rate quotas (TRQs) administration,⁹⁶ telecommunications licensing,⁹⁷ financial services,⁹⁸ competition law enforcement,⁹⁹ government procurement (eg time period¹⁰⁰), labour law enforcement,¹⁰¹ trademark examination and registration procedures,¹⁰² the listing for new pharmaceutical products or medical devices for reimbursement purposes,¹⁰³ procurement process,¹⁰⁴ trade

⁸⁵ Arts 24.1(a), 24.1(b) TPP. ⁸⁶ Art 24.1.1(c)(i) TPP. ⁸⁷ Art 24.1.2(a) TPP.

⁸⁸ Art 24.1.2(b) TPP. ⁸⁹ Art 24.1.3 TPP. ⁹⁰ Arts 24.1.3(a), 24.1.3(b) TPP.

⁹¹ Art 24.1.4 TPP. ⁹² Art 15.21.2 TPP.

⁹³ Art 15.21.3(a) TPP. On definitions of SMEs, see also the Annex of this volume.

⁹⁴ See, for example, Arts 26.3(b), 26.4.2(a) TPP. ⁹⁵ Art 2.12.8 TPP.

⁹⁶ See, for example, Art 2.28.2 TPP. ⁹⁷ Art 13.18.2(a) TPP.

⁹⁸ Art 11.13.9 TPP. ⁹⁹ Art 16.2 TPP.

¹⁰⁰ Art 15.14.1 TPP (sufficient time for suppliers to get tender documents and submit a responsive tender).

¹⁰¹ Art 19.8.3 TPP.

¹⁰² Art 18.23 TPP.

¹⁰³ Annex 26-A, Art 3 TPP.

¹⁰⁴ Art 15.15.1 TPP.

remedy proceedings,¹⁰⁵ trade facilitation,¹⁰⁶ and investment.¹⁰⁷ These provisions usually require the explanation of reasons for negative decisions for applicants (eg the denial of an import licence application,¹⁰⁸ and the denial of a licence for public telecommunication services¹⁰⁹), the opportunity to contest the initial refusal to register a trademark, the independence of the judicial and administrative tribunals, and the required time frame for decision-making. Some of these requirements are quite detailed. For instance, the rules on competition law enforcement provide for a reasonable opportunity to be represented by counsel,¹¹⁰ a reasonable opportunity to consult with competition authorities regarding significant legal, factual, or procedural issues,¹¹¹ written procedures for national competition law investigations,¹¹² rules of procedure and evidence for enforcement proceedings,¹¹³ and the opportunity to seek review of the sanction or remedy.¹¹⁴

For SMEs, these general and sector-specific requirements of procedural fairness improve the predictability and fairness of regulatory decisions, and thereby reduce regulatory risks as well as the volatility of the regulatory environment.

3. *Regulatory coherence*

Regulatory coherence requirements cover a very wide range of areas and extend to the whole process of regulatory measures, starting from planning, designing, and issuing to implementation and review.¹¹⁵ By conducting regulatory impact assessments (RIAs), the TPP parties should evaluate the need for regulatory proposals, investigate feasible regulatory alternatives, explain the reasons for the chosen alternative, and utilize best reasonably available information.¹¹⁶ Leaning in favour of light-handed regulation,¹¹⁷ regulatory coherence could promote consistency among different regulations, in particular through mutual learning and conciseness of rules. In planning new regulatory measures, regulatory agencies are encouraged to consider regulatory measures in other TPP parties and the development in multilateral and regional fora.¹¹⁸ New covered regulatory measures need to be ‘plainly written ... clear, concise, well organised and easy to understand’.¹¹⁹ Regulatory measures may later be streamlined or repealed following review.¹²⁰

¹⁰⁵ The TPP is expected to yield due process through recognition of best practices. Office of the US Trade Representative, ‘Summary of the Trans-Pacific Partnership Agreement’ (October 2015) <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership>> accessed 20 January 2017.

¹⁰⁶ Art 5.5 TPP.

¹⁰⁷ Art 9.6.2(a) TPP (compliance with due process regarding adjudicatory proceedings in minimum standard of treatment).

¹⁰⁸ Art 2.12.8 TPP.

¹⁰⁹ Art 13.18.2(a) TPP.

¹¹⁰ Art 16.2.1(b) TPP.

¹¹¹ Art 16.2.9 TPP.

¹¹² Art 16.2.2 TPP.

¹¹³ Art 16.2.3 TPP.

¹¹⁴ Art 16.2.4 TPP.

¹¹⁵ Art 25.2.1 TPP.

¹¹⁶ Art 25.5.2 TPP.

¹¹⁷ Eugenio Briales Gómez-Tarragona and Daniela Gómez-Altamirano, ‘The TPP: How to Facilitate Business through Legislative and Regulatory Reform?’ (2015) 21 ILSA Journal of International and Comparative Law 369, 375.

¹¹⁸ Art 25.5.8 TPP.

¹¹⁹ Art 25.5.4 TPP.

¹²⁰ Art 25.5.6 TPP.

Two SME-specific provisions exist in the chapter on regulatory coherence. In the process of RIA, the potential impact of the proposed regulation on SMEs may be taken into account.¹²¹ In discharging their duty to cooperate in order to facilitate regulatory coherence, the TPP parties may interact with SMEs of other TPP members through information exchange, dialogues, or meetings.¹²²

SMEs may thus benefit from regulatory coherence by having their concerns heard in the process of rule formation. Regulations might, therefore, be streamlined and more comprehensible for SMEs.

4. Other requirements

Other requirements in the TPP help to reduce the NTBs. For instance, 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 particularly designed to benefit SMEs. A special article is incorporated to facilitate the participation by SMEs in government procurement. ‘Best endeavours’ clauses under this provision call for the free provision of tender documentation, the conduction of procurement through electronic means or other new technologies, and the consideration of the design of the procurement, including the possible subcontracting by SMEs.¹²³

Several additional governance requirements are analysed below, which benefit businesses at large, but are particularly relevant to small businesses. These requirements are either commonly encountered by SMEs (trade facilitation and rules of origin), or exist across several areas (standards harmonization and equivalence of foreign regulations).

(a) Standards harmonization and equivalence of foreign regulations

As the TPP highlights for the TBT area, both the harmonization of standards and the acceptance of regulations of other TPP parties as equivalent help to pursue greater regulatory alignment.¹²⁴ SMEs in particular would benefit from such regulatory alignment since it is more difficult for small firms to bear the costs of complying with different standards and regulations.

Standards harmonization is closely connected to the alignment of national standards with international standards. The importance of international standards for global compatibility is explicitly highlighted in relation to telecommunications.¹²⁵ The TPP also calls for greater alignment of national standards with international standards in TBT areas,¹²⁶ the facilitation of greater use of international standards as the basis for TBT measures,¹²⁷ and the use of international standards regarding the procedures dealing with the release of goods.¹²⁸ Similarly, in government

¹²¹ Art 25.5.3 TPP.

¹²⁴ Art 8.9.2 TPP.

¹²⁷ Art 8.9.2(c) TPP.

¹²² Art 25.7.1(b) TPP.

¹²⁵ Art 13.25 TPP.

¹²⁸ Art 5.6.1(a) TPP.

¹²³ Art 15.21.3 TPP.

¹²⁶ Art 8.9.2(b) TPP.

procurement, technical specifications need to be based on international standards if appropriate.¹²⁹

The TPP also encourages the acceptance of technical regulations¹³⁰ and SPS measures¹³¹ of other TPP members as equivalent, as well as the recognition of professional qualifications, licensing, registration, or prudential measures in services and financial services.¹³²

(b) Trade facilitation

Customs administration and trade facilitation rules would enable the faster delivery of goods by businesses, large or small, and easier interaction with customs.¹³³ In order to expedite trade, trade facilitation streamlines and simplifies trade procedure, in particular through the efficient release of goods,¹³⁴ expedited customs procedures for express shipments,¹³⁵ advance rulings,¹³⁶ and automation.¹³⁷ It helps to address red tape and unreasonable delay in trade. Small firms are among the biggest winners from trade facilitation as they face the greatest difficulties in navigating these trade rules,¹³⁸ and are vulnerable to the financial and administrative burden of customs formalities.

(c) Rules of origin

TPP rules of origin may enable SMEs within the free-trade area to gain better access to markets, such as the US–Dominican Republic–Central America Free Trade Agreement (DR–CAFTA). The DR–CAFTA contains ‘yarn forward’ rules of origin under which the essential component for the import of most textiles and apparel are to be made from inputs produced in the FTA usually from the yarn stage forward,¹³⁹ and without which many American SME textile businesses facing low-cost Asian counterparts would not be able to survive.¹⁴⁰ Having similar effects, TPP ‘yarn forward’ rules of origin could benefit textile SMEs within the region, since the products need to have inputs from TPP parties in order to enjoy the TPP benefits.¹⁴¹ Moreover, accumulation is provided so that inputs from one TPP member will be regarded as a good from other TPP members when certain conditions are met.¹⁴² Notably, the certification of origin can also be waived for imports of low value,¹⁴³ which may be useful for SMEs in view of their generally low-value trade.

¹²⁹ Art 15.12.2(b) TPP. ¹³⁰ Art 8.9.2(d) TPP. ¹³¹ Art 7.8 TPP.

¹³² Arts 10.9, 11.12, Annex 10-A, para 1 TPP.

¹³³ On trade facilitation, see also Arancha González, Chapter 2 of this volume.

¹³⁴ Art 5.10.1 TPP (simplified customs procedure for the efficient release of goods).

¹³⁵ Art 5.7 TPP. ¹³⁶ Art 5.3 TPP. ¹³⁷ Art 5.6 TPP.

¹³⁸ Sangsuvan (n 2) 394. ¹³⁹ US International Trade Commission (n 1) 5–8 and n 28.

¹⁴⁰ *ibid.*

¹⁴¹ Under the ‘short supply list’ mechanism, certain non-originating materials may be treated as originating for five years after the TPP comes into force. Art 4.2.9 TPP.

¹⁴² Art 3.10 TPP. ¹⁴³ Art 3.23 TPP.

IV. Conclusion

First, cooperation to support SMEs, tariff elimination or reduction, and the reduction of NTBs are the major opportunities which the TPP holds for SMEs. These opportunities should bring enhanced market opening and predictability. Covering tariffs and non-tariff issues, the support for SMEs will help them better to utilize the TPP. Tariffs and NTBs 'across substantially all trade' will be eliminated or reduced.¹⁴⁴ Tariff and NTB reductions cover a wide range of areas, involving border measures and behind-the-border measures. The absolute levels of tariffs and NTBs are crucial for SMEs as they are usually neither able nor fully prepared to invest overseas in order to manufacture in foreign markets.

However, these opportunities may have limited effect in improving the market position of certain SMEs. The opportunities arising for SMEs are often also available to larger businesses, and there are concerns that the TPP in fact favours the big corporates.¹⁴⁵ Moreover, the opportunities may be limited in certain circumstances, such as tariff benefits for SMEs from TPP members other than the United States with regard to exports to the United States. This is due to the fact that the average applied tariff in the United States is currently as low as 1.4 per cent, and nearly 70 per cent of imports entering the United States are not subject to any tariffs.¹⁴⁶

Second, the reduction of NTBs, if properly implemented, is likely to benefit SMEs most. The adoption of good practices (eg enhanced transparency) is encouraged, which would help to put small businesses on an equal footing. SMEs are particularly vulnerable to regulatory measures and their implementation, including procedures hedged about with red tape, and inconsistencies in trade policy and regulations. Regulatory convergence or at least regulatory compatibility is pursued in the TPP and this will lead to market consistency and enhance cost-effectiveness. The reduction of NTBs may also benefit those SMEs outside the free trade area to which they apply.

Last but not least, SMEs are subject to increased special attention and support than before. The level of support should not, however, be exaggerated. The new stand-alone SME chapter and other chapters (in particular, regulatory coherence, government procurement, development, trade facilitation) provide support for SMEs. They also establish institutional arrangements for joint efforts by TPP parties and require TPP members to consider the possible impact on SMEs or provide support for them. However, provisions directly benefitting SMEs remain limited. The SME chapter, for instance, contains three articles with limited commitments

¹⁴⁴ Office of the US Trade Representative (n 105).

¹⁴⁵ The TPP is criticized for lacking concrete benefits and increasing inequality through 'enshrining power among big corporates'. See, for example, Zoe Daniel, 'Malcolm Turnbull and Barack Obama Hold White House Talks; PM Urges Powerbrokers to Back TPP' *ABC News* (New York, 20 January 2016) <<http://www.abc.net.au/news/2016-01-20/turnbull-and-obama-hold-white-house-talks/7099808>> accessed 20 January 2017.

¹⁴⁶ Office of the US Trade Representative, 'Leveling the Playing Field' (2016) <<https://ustr.gov/sites/default/files/USTR-Tariff-Information-by-Sector-6115.pdf>> accessed 20 January 2017.

from TPP members, including one on non-application of dispute settlement that may limit the enforcement of the SME chapter.

This conclusion provokes a number of questions. Why does the TPP in fact favour big corporates? Is it likely that the TPP is going to be properly implemented? Why do the provisions benefitting SMEs remain limited? These questions will be addressed in the following section.

C. Challenges

In trade and investment, SMEs face both internal challenges (eg limited expertise, fewer personnel and financial resources) and external challenges (eg tariffs, NTBs including market access restrictions, and obstacles to investment). With regard to the former, the TPP contains provisions aimed at supporting SMEs through capacity building and other assistance. With regard to the latter, the TPP may lead to more favourable conditions for SMEs particularly through tariff reduction and the improvement and harmonization of relevant regulation, all of which should help to provide a more predictable business environment. Meanwhile, there are still a number of thorny questions to be addressed.

I. Insufficient opportunities for SMEs

Although FTAs can open up opportunities for SMEs, the latter are often unable to incorporate them into their export practice.¹⁴⁷ Usage rate remains low for many FTAs,¹⁴⁸ and SMEs are usually less ready to utilize FTAs compared with larger businesses. SMEs may not be fully capable of exercising rights under and extracting benefits from the TPP due to their capacity constraints. As indicated in the preamble of the TPP, the development of SMEs will be supported through the enhancement of their capacity for 'participating in and benefitting from' the opportunities under the FTA. However, there remain real questions about whether the TPP rules will be sufficient to enable small businesses fully to engage in trade. Rules closely related to SMEs face enforcement difficulties as they are often 'without teeth'. The four chapters on capacity building, competitiveness and business facilitation, development, and SMEs are all relatively short, general and vague in content, and not subject to the TPP dispute settlement system.¹⁴⁹ The chapter on regulatory coherence contains more specific provisions, but is not subject to the dispute settlement mechanism either.¹⁵⁰ Many of these provisions are largely 'soft' or best endeavours clauses and their effect is yet to be seen.

¹⁴⁷ Battisti and Martin (n 43) 284.

¹⁴⁸ For instance, the average usage rate of the more than fifty FTAs surveyed is 26 per cent. See the Economist Intelligence Unit, 'FTAs: Fantastic, Fine or Futile? Business Views on Trade Agreements in Asia' (2014) 4 <https://globalconnections.hsbc.com/downloads/ftas_fantastic_fine_or_futile.pdf> accessed 20 January 2017.

¹⁴⁹ Arts 21.6, 22.5, 23.9, 24.3 TPP.

¹⁵⁰ Art 25.11 TPP.

First, the special support under the SME chapter may not meet the needs of SMEs. SME issues are among the ‘devilishly’ difficult ones in FTAs, and the TPP has not proved very innovative regarding its SME chapter.¹⁵¹ This chapter provides support mainly through information sharing via websites and the activities of the SMEs Committee. The information provided on the websites may not be sufficient to explain regulatory requirements fully, especially with regard to local government regulations. More detailed information on export processes, comprehensive trade databases in all TPP countries including frequently updated information on tariff and export control, and other aspects (eg detailed guidance on how to trade with and in other countries) would be very useful for SMEs. Financial barriers are another example. The volatility of currencies, the insufficient bank support for SMEs, and the taxation of overseas income constitute financial barriers for SMEs, although they may not be directly related to FTAs.¹⁵² Along with tariffs, financial barriers are deemed one of the main reasons why SMEs do not utilize the FTAs.¹⁵³ The shortage of working capital to finance export has been identified as one of the top two barriers to SMEs accessing international markets in a study of the Organisation for Economic Co-operation and Development¹⁵⁴ and remains a key challenge, particularly for start-up SMEs. These funding, currency, and taxation issues are largely outside the coverage of the TPP.¹⁵⁵ Even those funding issues that do seem to be covered by the TPP are not adequately addressed. The SMEs Committee will exchange experience and best practices in areas such as trade finance.¹⁵⁶ The support provided by the SMEs Committee is, however, far from enough to ensure SMEs’ easy access to trade finance.

The assistance provided by the SMEs Committee is laid down in general and soft language rather than being binding and detailed. Consequently, such assistance may not be sufficient to achieve its proclaimed goals. Furthermore, the assistance provided does not cover all relevant areas. The SMEs Committee is designed to assist SMEs in capitalizing on business opportunities,¹⁵⁷ to exchange and examine best practices in supporting SME exporters in relevant aspects (eg training programmes, trade finance, finding business partners, and establishing business credentials),¹⁵⁸ and to develop seminars and other activities to inform SMEs of the TPP benefits.¹⁵⁹ Other relevant activities of the SMEs Committee include exploring capacity-building opportunities to help TPP members provide

¹⁵¹ Elms (n 6) 391 (the SME chapter has ‘basically become a website to help smaller firms take advantage of TPP rules’).

¹⁵² Battisti and Martin (n 43) 281.

¹⁵³ Battisti and Martin (n 43) 280.

¹⁵⁴ OECD, *Removing Barriers to SME Access to International Markets* (OECD 2008) <http://www.oecd-ilibrary.org/industry-and-services/removing-barriers-to-sme-access-to-international-markets_9789264045866-en> accessed 20 January 2017.

¹⁵⁵ The side deal on currency policy reached among TPP members on 5 November 2015 does not require signing and will take the form of a ‘Joint Declaration of the Macroeconomic Policy Authorities of Trans-Pacific Partnership Countries’. This side deal is not covered by any form of dispute settlement. ‘Legal Scrub of TPP Side Letters Still Underway: Currency Deal Won’t Be Signed’ (2016) *Inside US Trade* 34.

¹⁵⁶ Art 24.2(b) TPP.

¹⁵⁷ Art 24.2.2(a) TPP.

¹⁵⁸ Art 24.2.2(b) TPP.

¹⁵⁹ Art 24.2.2(c) TPP.

better SME export counselling and assistance,¹⁶⁰ recommending information for the TPP members to share with the public,¹⁶¹ and facilitating the development of programmes to assist SMEs in engaging in supply chains.¹⁶² The TPP has not further clarified the information and programmes that are referred to here. Moreover, some concerns of SMEs are not fully addressed in the TPP, including the possibility of support for SMEs negatively affected by trade liberalization regarding laid-off workers.

Second, special support provided to SMEs under other chapters may also prove to be insufficient. Outside the SME chapter, special provisions on SMEs exist in areas including government procurement,¹⁶³ considerations relating to express shipment,¹⁶⁴ and small-scale fisheries.¹⁶⁵ It remains doubtful whether these provisions will have any tangible effect on small businesses. Several examples can be given here. As the first example, TPP members seek to help SMEs overcome obstacles in using electronic commerce.¹⁶⁶ Compared with larger businesses, SMEs still face substantial difficulties in conducting electronic commerce under the TPP rules. Besides the difficulties of operating e-marketplaces, SMEs from developing countries are less visible online and benefit very little from international e-commerce.¹⁶⁷ USAID, for instance, tried to establish business-to-business (B2B) e-marketplaces to engage SMEs online but encountered sustainability issues.¹⁶⁸ The TPP may not be able fully to solve the problem of lack of resources faced by SMEs. Financial barriers discussed above are largely outside the scope of the TPP and are thus left to the members. Further, in relation to financial barriers covered by the agreement, the TPP rules are inadequate. To promote the economic development, TPP members are encouraged to introduce policies 'related to the promotion of market-based approaches aimed at improving trading conditions and access to finance for ... SMEs'.¹⁶⁹ It is a soft obligation. Thus, these problems are not completely solved, and could still pose major impediments for SMEs in their attempts to utilize the TPP.

Third, in relation to opportunities common to SMEs and larger businesses, SMEs may still find it difficult to engage in trade and investment. With regard to trade in goods, trade in many 'sensitive' products is not liberalized or is liberalized only slightly.¹⁷⁰ These sensitive products include dairy and sugar.¹⁷¹ Certain reductions

¹⁶⁰ Art 24.2.2(d) TPP.

¹⁶¹ Art 24.2.2(e) TPP.

¹⁶² Art 24.2.2(g) TPP.

¹⁶³ Art 15.21 TPP.

¹⁶⁴ Art 5.7.1(f) TPP.

¹⁶⁵ Art 20.16.1 TPP.

¹⁶⁶ Art 14.15(a) TPP.

¹⁶⁷ Martin Labbé, 'Harnessing Information and Communication Technologies for Development: The Trade-Related Technical Assistance Perspective' in Mira Burri and Cottier Thomas (eds), *Trade Governance in the Digital Age* (Cambridge University Press 2012) 430.

¹⁶⁸ *ibid.* ¹⁶⁹ Art 23.3.4 TPP.

¹⁷⁰ Simon Lester, 'The TPP's Contribution to Public International Law' *ASIL Insights* (2 December 2015) <<https://www.asil.org/insights/volume/19/issue/26/tpps-contribution-public-international-law>> accessed 20 January 2017.

¹⁷¹ Anna Vidot, 'TPP to Cut Agricultural Tariffs Across the Board, But US Sugar Protections Remain' *ABC News* (New York, 7 October 2015) <<http://www.abc.net.au/news/2015-10-06/agriculture-tariffs-to-fall-under-tpp/6830138>> accessed 20 January 2017.

of NTBs seem mainly to benefit larger businesses such as motor manufacturers.¹⁷² The TPP calls for an agreement in the WTO on ‘agricultural export state trading enterprises’ in order to eliminate trade-distorting restrictions on agricultural export authorization and special financing, and enhance transparency.¹⁷³ Given the stalemate in WTO negotiations, it is not likely that such an agreement will be reached in the near future. Moreover, few new disciplines are imposed regarding antidumping and countervailing duties and these areas fall outside the scope of the TPP dispute settlement system.¹⁷⁴ With regard to services, the subsidies and grants by the TPP members (eg loans supported by the government, insurance, and guarantees) for services and financial services are not subject to the disciplines on cross-border services trade.¹⁷⁵ In relation to investment, few Articles deal with special support for SMEs. Regarding competition, under-resourced SMEs may encounter difficulties in exercising the private right of action under the TPP involving domestic competition law,¹⁷⁶ which could be costly and complicated. In the area of government procurement, national authorities shall be established to review violations of TPP rules, but the compensation for loss can be limited to the costs incurred in preparing the tender and/or the complaint.¹⁷⁷ With regard to public participation, the establishment of opportunities for stakeholders to comment on proposed measures and to receive responses to these comments is often not explicitly required¹⁷⁸ or only stipulated as a best endeavour obligation for TPP parties.¹⁷⁹ The effect of these provisions remains to be seen, especially as SMEs may lack the resources (eg funding, time, and expertise) to effectively participate in such comment processes involving proposed SPS or TBT measures and financial regulations. In dispute settlement, the TPP does not grant the right of action under domestic law against TPP-inconsistent measures.¹⁸⁰ There seems to be no explicit support for SMEs with regard to these problems in the TPP.

II. Complexity of rules

While the TPP takes SMEs into account in some provisions, it also contributes to the overall proliferation of FTAs. The co-existence of the TPP with FTAs that are already in place will not necessarily result in an overall simplification of trade and investment rules.¹⁸¹ The lengthy TPP is unprecedented in terms of its scope and complexity.¹⁸² Apart from the TPP agreement itself, approximately 120 side letters exist to clarify trade issues between two TPP parties and these could significantly

¹⁷² ‘US–Japan Letter Exchange on Certain Auto Non-Tariff Measures’ (4 February 2016) <<https://ustr.gov/sites/default/files/TPP-Final-Text-US-JP-Letter-Exchange-on-Certain-Auto-NTMs.pdf>> accessed 20 January 2017.

¹⁷³ Art 2.23 TPP. ¹⁷⁴ Art 6.8.3 TPP. ¹⁷⁵ Arts 10.2.3(d), 11.2.5 TPP.

¹⁷⁶ Art 16.3 TPP. ¹⁷⁷ Art 15.19.4 TPP. ¹⁷⁸ Art 7.13.5 TPP.

¹⁷⁹ Art 11.13.3(b), 11.13.4 TPP. ¹⁸⁰ Art 28.22 TPP.

¹⁸¹ Patrick B Fazzone, ‘The Trans-Pacific Partnership: Towards a Free Trade Agreement of Asia-Pacific?’ (2012) 43 *Georgetown Journal of International Law* 695, 740.

¹⁸² Donald Robertson, ‘Impact of Trans-Pacific Partnership on the Energy Sector’ (Herbert Smith Freehills, 2 November 2015) (on file with the author).

affect bilateral trade.¹⁸³ SMEs thus face the difficulty of ascertaining and understanding a very complex set of rules, covering a wide range of subjects. This is, for instance, the case with origin rules (including product-specific rules of origin) and origin procedures,¹⁸⁴ especially when businesses change from one market to another under an FTA.¹⁸⁵ As seen in other FTAs, SMEs may encounter impediments emerging from the rules of origin.¹⁸⁶ This is an example of an area with especially complex regulations. The TPP has endeavoured to establish a uniform set of origin rules, and it remains to be seen how these will work in practice. In addition, becoming familiar with the relevant domestic law of different TPP members is equally complicated, although efforts are made to encourage TPP members to ensure new domestic regulatory measures are ‘plainly written and are clear, concise, well organised and easy to understand’.¹⁸⁷ As discussed below, the complexity of rules may also lead to difficulties in enforcement.

III. Difficulties in interpretation and implementation

The implementation of the TPP may prove challenging, especially for smaller and developing TPP members. In comparison with bilateral FTAs, the higher legal and regulatory requirements of the TPP demand more expertise and experience. Moreover, it is not easy to interpret the often vague TPP rules, and some TPP rules are subject to domestic law that could differ greatly among TPP members. Certain obligations are expressed in soft language (eg ‘should encourage’¹⁸⁸ and ‘endeavour to’¹⁸⁹) and need to be consistent with domestic law (eg the consideration of regulatory measures of other TPP parties in planning regulatory measures,¹⁹⁰ the annual public notice of new regulatory measures¹⁹¹). Similarly, other rules may be subject to domestic law, such as the requirement regarding the publicity of new regulatory measures covered by the TPP.¹⁹² A number of terms (eg a ‘reasonable opportunity’ to be represented by counsel,¹⁹³ a ‘reasonable opportunity’ to consult with competition authorities,¹⁹⁴ and ‘the opportunity’ to seek review of the sanction or remedy¹⁹⁵) may be subject to different interpretations. Certain mechanisms, such as the imposition of transitional safeguard measures,¹⁹⁶ including the interpretation of their 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 in order to reduce regulatory compliance costs and obtain support. Divergent regulatory frameworks can make an enormous impact on the trade costs for businesses and in particular SMEs.¹⁹⁷ The costs of regulatory compliance may even exceed

¹⁸³ ‘Legal Scrub of TPP’ (n 155). ¹⁸⁴ Chapter 3 TPP.

¹⁸⁵ Viviane De Beaufort, ‘The European Union and the New Face(s) of International Trade’ (2015) 1 *International Business Law Journal* 39.

¹⁸⁶ Fazzone (n 181) 718–19. ¹⁸⁷ Art 25.5.4 TPP. ¹⁸⁸ Art 25.5.8 TPP.

¹⁸⁹ For instance, Art 5.6.1(a) TPP. ¹⁹⁰ Art 25.5.8 TPP. ¹⁹¹ Art 25.5.7 TPP.

¹⁹² Art 25.5.5 TPP. ¹⁹³ Art 16.2.1(b) TPP. ¹⁹⁴ Art 16.2.9 TPP.

¹⁹⁵ Art 16.2.4 TPP. ¹⁹⁶ Art 6.3 TPP.

¹⁹⁷ Gómez-Tarragona and Gómez-Altamirano (n 117) 372.

the profits of export by SMEs. Even within the same regulatory entity, it is not rare to find SMEs facing a regulatory process that is interpreted inconsistently.¹⁹⁸ Thus, coordination within a given agency is of great significance. TPP rules relating 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 twelve countries include trade ministries, customs authorities, the administration for small businesses, and other agencies responsible for finance and standards (eg licensing and inspection), as well as intellectual property, to name but a few. The TPP contains certain requirements regarding increased domestic interagency consultation and coordination.¹⁹⁹ TPP obligations (eg equivalence of SPS measures²⁰⁰) may also require efficient coordination between countries of different development levels, which can be more challenging. It remains to be seen what TPP member countries need to do within and beyond the border to fulfil their regulatory improvement commitments (eg through legislative amendments) and how regulatory developments will unfold in reality.

Such challenges may co-exist with regard to the same TPP obligation. Taking the obligation to share information under the SME chapter as an example, the first issue is whether this obligation needs to be implemented through certain domestic procedures. The second issue is determining the scope of information useful for private actors, bearing in mind that information sharing is a self-judging provision.²⁰¹ In other words, the TPP members will have discretion regarding the scope of the information that is shared with the public. The third issue is the language in which the information is to be shared, since TPP parties must only endeavour and are thus not required to provide the information to SMEs in English.²⁰² Other issues such as inter-agency coordination are also encountered, since the websites and their links could potentially involve a large number of government agencies and other entities as a result of the wide coverage of the TPP.

IV. Other challenges

Other challenges include, inter alia, negative effects of trade liberalization on SMEs and the reduced impact of SMEs on trade policy-making compared with larger firms. After the implementation of the TPP (if the TPP is approved), the impact of the resulting market opening on SMEs of importing countries or on SMEs that currently export to related markets could be severe. Market opening and increased investment must be expected to increase competition for these SMEs. It could be challenging for SMEs in certain sectors that have not previously been liberalized, including the Mexican energy sector with regard to foreign participation²⁰³ and government procurement in Malaysia.²⁰⁴ In the same vein, for instance, there are

¹⁹⁸ *ibid* 373. ¹⁹⁹ Art 25.4 TPP. ²⁰⁰ Art 7.8 TPP. ²⁰¹ Art 24.1.2(b) TPP.

²⁰² Art 24.1.3 TPP. ²⁰³ Robertson (n 182).

²⁰⁴ The TPP is the first of the FTAs concluded by Malaysia that addresses government procurement. SME Corporation Malaysia, 'TPPA: Its Benefits and Challenges' (2015) (on file with the author).

concerns that global e-commerce giants may cause ‘problems for local brick and mortar retailers’ under the TPP.²⁰⁵ Two challenges deserve attention here.

1. Remaining regulatory differences

Regulatory improvements under the TPP will reduce, but can hardly eliminate all regulatory differences. The regulatory coherence chapter is among the most relevant of the TPP rules, but it does not affect the parties’ right to regulate in the areas of public health, security, safety, and other public interest considerations.²⁰⁶ The regulatory coherence chapter is also subject to other chapters in the case of conflict.²⁰⁷ Thus, regulatory differences will often exist at the intersections between trade and legitimate regulatory objectives (eg health, environment, and safety), with the latter concerning the protection level that a TPP member deems appropriate. For instance, there may be differences in positions taken by SMEs, such as those between pharmaceutical SMEs in one country and generic medicines SMEs in other countries.²⁰⁸ TPP members would need to address these differences, which may not always lead to the same approach. As another example, SPS and TBT requirements of TPP countries could be different, although regulatory convergence is to be pursued. The compliance costs resulting from different sets of rules could jeopardize small-scale exports for SMEs. 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 that would otherwise constitute insurmountable barriers and that administrative processes be developed to assist access for frequent small volume exports vulnerable to excessive compliance costs related to regulations.²⁰⁹

2. Disadvantaged positions of SMEs from developing TPP members

SMEs from developing TPP countries may encounter additional challenges. First, such SMEs could be less capable of utilizing TPP rules. They could encounter difficulties in reaping benefits due to limited resources (eg expertise and 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 with regard to tariff reductions.²¹⁰ Under NAFTA, exports by US SMEs to Canada and Mexico have risen significantly.²¹¹ In contrast, Mexican SMEs have encountered difficulties in reaping benefits

²⁰⁵ Ramli and Lynch (n 10).

²⁰⁶ Office of the US Trade Representative (n 105).

²⁰⁷ Art 25.10 TPP.

²⁰⁸ For an analysis of different positions of American SMEs and Australian generic medicines SMEs, see Thomas A Faunce and Ruth Townsend, ‘The Trans-Pacific Partnership Agreement: Challenges for Australian Health and Medicine Policies’ (2011) 194 *Medical Journal of Australia* 83, 83–85.

²⁰⁹ Battisti and Martin (n 43) 284.

²¹⁰ Bill Curry, ‘The ABCs of TPP’ *The Globe and Mail* (Toronto, 5 November 2015).

²¹¹ US International Trade Commission (n 1) E-8, n 35.

from the NAFTA due to lack of financial resources, planning, management, and obsolete techniques.²¹² It is possible that a similar situation would develop under the TPP. For instance, SMEs from developing countries may also be in a disadvantaged position in the area of e-commerce due to the lack of infrastructure (eg 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. Another example is provided by the fact that trade associations may help SMEs to efficiently utilize TPP provisions, providing support for SMEs. However, trade associations in developing countries may be less organized and less effective than those in developed countries.

Second, developing TPP countries may not be able to provide sufficient assistance to their SMEs to benefit from the TPP to the same extent as developed TPP countries. To provide effective support and assistance, countries need to ascertain, inter alia, how many SMEs are exporting and investing overseas, the barriers they encounter in FTA partners, and their competitiveness. This will not be easy given the large number of SMEs and the range of market sections and regulatory regimes involved. The TPP SME chapter, however, does not provide for special treatment for developing countries.

In a broader sense, developing countries could also support SMEs through broad-based economic growth, sustainable development, and the reduction of poverty,²¹³ all of which are recognized by the TPP to be related to SME issues. However, as one writer observes, the TPP's role in generating economic growth and poverty reduction is 'not at all certain'.²¹⁴

V. Conclusion

First, the major challenges resulting from or not overcome by the TPP include the insufficiency of opportunities provided for SMEs, the complexity of rules, difficulties in rule interpretation and implementation, remaining regulatory differences, the disadvantaged position of SMEs from developing TPP countries, and the impact on SMEs negatively affected by trade liberalization. Some of these challenges (eg the complexity of rules and difficulties in interpretation and implementation) are common to large and small businesses, but SMEs may be disproportionately affected by them. As a key issue, one might argue that the TPP does not create sufficient opportunities, including concrete binding requirements, to provide assistance to SMEs. This is particularly the case for SMEs in developing countries and for micro-sized enterprises.²¹⁵ The support for SMEs often appears

²¹² Francisco J Reyes Avila and Amy Preiss, 'Strategic Management: A Survival Need for Mexican SMEs' (2015) 6 *Business Management and Strategy* 65, 67.

²¹³ Art 23.3.4 TPP.

²¹⁴ Raj Bhala, 'Trans-Pacific Partnership or Trampling Poor Partners? A Tentative Critical Review' (2014) 11 *Manchester Journal of International Economic Law* 2, 3.

²¹⁵ Art 1.3 TPP (SMEs include micro-sized enterprises).

to be largely confined to hortatory pronouncements and relatively feeble measures, and larger businesses may be in a position to better take advantage of commercial opportunities. This insufficiency may also stem from a lack of capacity within the TPP nations, particularly developing TPP countries.

Second, the challenges of the TPP to SMEs are not the same as those of older FTAs. On the one hand, the TPP is much more complicated, making it more difficult for SMEs to understand and utilize. On the other hand, the TPP may provide more assistance to SMEs than previous FTAs that do not have an SME chapter, helping SMEs through learning by doing. Moreover, the economic impacts of the TPP should not be underestimated. From an economic point of view, a larger number of businesses and stakeholders are likely to get involved in TPP practice compared to a typical bilateral FTA with smaller trade benefits and fewer participants. The large number of private and public participants of the TPP could help SMEs to gain experience at higher speed as presumably more resources (eg web-pages and workshops) will be available regarding the utilization of the TPP. Given that the TPP is a mega FTA with potentially greater economic benefits resulting from the larger number of FTA partner countries, more SMEs may become aware of the TPP due to its economic impact and the increased publicity surrounding it (eg information sharing under the TPP SME chapter). SMEs also have more incentive to learn and utilize the TPP. It will therefore be interesting to observe whether the usage rate of the TPP by SMEs will be higher than that of other FTAs if the TPP is approved.

Last but not least, looking beyond the TPP, there will be more challenges for SMEs from non-parties than those from TPP members. The TPP aims to level the playing field between the parties, but it would come with the inherent flaw of placing SMEs inside and outside the TPP on an unequal footing. For instance, the TPP will eliminate over 18,000 tariffs on US exports, benefitting sectors like manufacturing, the automotive industry, and agriculture, as well as information and computer technology.²¹⁶ These benefits are largely confined to SMEs of TPP countries. The TPP also strengthens regional value chains and encourages businesses to source inputs within the region. The TPP yarn forward provision would negatively affect Chinese businesses in textiles and apparel.²¹⁷ TPP TRQs rules only apply to TRQs listed on the TPP schedules of the contracting parties rather than those set out in their WTO schedules.²¹⁸ According to a recent World Bank report, in the post-TPP era exports by non-TPP members may fall in contrast to an increase in exports among TPP members.²¹⁹

²¹⁶ Keating (n 9).

²¹⁷ Chris Devonshire-Ellis, 'The U.S. TPP "Yarn Forward" Program and Implications for China & Vietnam' *China Briefing* (4 November 2015) <<http://www.china-briefing.com/news/2015/11/04/the-u-s-tpp-yarn-forward-program-and-implications-for-china-vietnam.html>> accessed 20 January 2017.

²¹⁸ Art 2.28.1, n 16 TPP.

²¹⁹ After the entry into force of TPP, the exports of Thailand are expected to fall by 2 per cent in contrast with a 30 per cent increase in exports from Vietnam. Peter Martin, 'TransPacific Partnership Will Barely Benefit Australia, Says World Bank Report' *The Sydney Morning Herald* (12 January 2016).

D. Conclusion

First, the key benefits the TPP can be expected to bring for SMEs are enhanced market liberalization and a more predictable regulatory environment. These benefits stem from the opportunities of support for SMEs, and the reduction of tariffs and unwarranted NTBs. Compared with previous FTAs, the TPP starts to pay more attention to the special constraints encountered by SMEs in trade and investment. SMEs will benefit specifically from a small number of special provisions tailored for SMEs, including the new stand-alone SME chapter and rules explicitly related to SMEs in a number of other chapters. 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.

Second, the TPP poses serious challenges for SMEs, but different types of SMEs will face very different problems. Most of the benefits for 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 be insufficient, SMEs still face difficulties due to their capacity limitation (eg expertise and funding). Within the TPP parties, SMEs from countries with better assistance capacity are likely to be in a better position than those from other TPP countries. Some TPP countries already provide a certain degree of support to SMEs and have highlighted SME issues in the TPP negotiations. They may increase their assistance under the TPP. For instance, the United States has provided an online Free Trade Agreement Tariff Tool, including a searchable database,²²⁰ which helps American SMEs better to understand tariff rates in FTA partner countries. The United States also proclaimed support for American SMEs as one of its core goals in the TPP negotiations.²²¹ Moreover, SMEs from non-TPP parties are likely to encounter much more serious challenges and would not directly benefit from the TPP. The TPP may provide a level playing field in certain respects for SMEs of TPP countries, and this could result in a competitive advantage over their counterparts in non-TPP countries.

Third, the TPP, if properly managed, should bring more opportunities than challenges to SMEs. Interestingly, the opportunities and challenges could be linked to each other. For example, the review of the customs-duties-exempt threshold regarding express shipments may take into account the impact on SMEs,²²² and the RIA may consider the proposed regulation's potential impact on SMEs.²²³ Both provisions bring opportunities. However, the TPP neither requires such impact on SMEs to be evaluated nor prescribes how it is to be considered. Thus, it is also a challenge for SMEs to have their needs catered for. Similarly, many SME-related TPP provisions are vague or not subject to the dispute settlement system

²²⁰ Office of the US Trade Representative, 'Small Business' (2016) <<https://ustr.gov/issue-areas/small-business>> 12 May 2016.

²²¹ Office of the US Trade Representative (n 7).

²²² Art 5.7.1(f) TPP.

²²³ Art 25.5.3 TPP.

(eg the regulatory coherence provisions related to SMEs). Therefore, while the TPP could help to internationalize SMEs, the extent of this support will depend on the interpretation and implementation of the TPP and further efforts will be needed (eg trade finance and capacity building in developing countries).

Finally, opportunities and challenges to SMEs under the TPP may not always be the same as those under bilateral FTAs given the unique nature of this mega FTA. As an example, the TPP may bring more opportunities for SMEs to access much larger markets, but may also involve much more complicated rules and a wider range of actors. While SME-related issues get attention in the TPP, they remain a difficult topic (eg the support to SMEs, and the implementation of SME-related provisions). The TPP parties seem to hesitate in making concrete commitments in this area. It will therefore be interesting to observe closely the impact the TPP will ultimately have on SMEs.

References

- Battisti, M and Martin, P, 'Creating Opportunity for Small-Firm Exporters through Regional Free Trade Agreements: A Strategic Perspective from New Zealand' (2008) 14 *Australasian Journal of Regional Studies* 275
- Bhala, R, 'Trans-Pacific Partnership or Trampling Poor Partners? A Tentative Critical Review' (2014) 11 *Manchester Journal of International Economic Law* 2
- Curry, B, 'The ABCs of TPP' *The Globe and Mail* (Toronto, 5 November 2015)
- Daniel, Z, 'Malcolm Turnbull and Barack Obama Hold White House Talks; PM Urges Powerbrokers to Back TPP' *ABC News* (New York, 20 January 2016) <<http://www.abc.net.au/news/2016-01-20/turnbull-and-obama-hold-white-house-talks/7099808>> accessed 20 January 2017
- De Beaufort, V, 'The European Union and the New Face(s) of International Trade' (2015) 1 *International Business Law Journal* 39
- Devonshire-Ellis, C, 'The U.S. TPP "Yarn Forward" Program and Implications for China & Vietnam' *China Briefing* (4 November 2015) <<http://www.china-briefing.com/news/2015/11/04/the-u-s-tpp-yarn-forward-program-and-implications-for-china-vietnam.html>> accessed 20 January 2017
- Elms, DK, 'The Trans-Pacific Partnership Trade Negotiations: Some Outstanding Issues for the Final Stretch' (2013) 8 *Asian Journal of WTO & International Health Law and Policy* 379
- 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' (1 May 2014) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1041>> accessed 20 January 2017
- Faunce, TA and Townsend, R, 'The Trans-Pacific Partnership Agreement: Challenges for Australian Health and Medicine Policies' (2011) 194 *The Medical Journal of Australia* 83
- Fazzone, PB, 'The Trans-Pacific Partnership: Towards a Free Trade Agreement of Asia-Pacific?' (2012) 43 *Georgetown Journal of International Law* 695
- Gómez-Tarragona, EB and Gómez-Altamirano, D, 'The TPP: How to Facilitate Business through Legislative and Regulatory Reform?' (2015) 21 *ILSA Journal of International and Comparative Law* 369