absent jurisdictional authority. While the goal of FATCA is to increase tax compliance among American foreign account holders, its effects have been, and will continue to be, felt on a global level. As evidenced by the emergence of several copycat initiatives, FATCA’s impact on global information exchange has the potential to foster international collaboration on tax matters and substantially reduce tax evasion. Offshore accounts have long been a thorn in the side for the IRS and other tax authorities that fear they are missing out on billions, and FATCA may in fact be one answer to their problems.

THE TPP: HOW TO FACILITATE BUSINESS THROUGH LEGISLATIVE AND REGULATORY REFORM?

Eugenio Briales Gómez-Tarragona & Daniela Gómez-Altamirano

I. INTRODUCTION ........................................................................................................ 369
II. REGULATORY COHERENCE ........................................................................... 371
III. ECONOMIC COMPETITIVENESS AND SME DEVELOPMENT IN TPP COUNTRIES: A VIALBLE COMMERCIAL AND FINANCIAL LAW REGIME AS A PREMISE ......................................................... 376
   A. Secured Financing ....................................................................................... 378
   B. Debt Resolution and Business Exit .......................................................... 380
IV. TRADE LIBERALIZATION IN DISHARMONY: THE NEED FOR BASIC HARMONIZATION ................................................................. 381
V. CONCLUSIONS ................................................................................................. 382

I. INTRODUCTION

In recent years, it has become evident that the success of the General Agreement on Tariffs and Trade (GATT) era has not been replicated and that the multilateral trade system rooted in the World Trade Organization (WTO) is far from a real achievement in further trade liberalization. Though the WTO has attracted many new members, including China and Russia, and the WTO’s dispute settlement mechanism has worked well, WTO negotiations have produced only minor results.1

“As Geneva talks drifted, major trading nations refocus efforts on mega-regionals as a potential Plan B:” the Transpacific Partnership (TPP), since March 2010; the Transatlantic Trade and Investment Partnership (TTIP), since July 2013; and the Regional Comprehensive Economic Partnership (RCEP) linking the Association of Southeast Asian Nations

---

1. In December 2013, WTO members concluded negotiations on a Trade Facilitation Agreement (TFA) at the Bali Ministerial Conference, as part of a wider “Bali Package.” The TFA contains provisions for expediting the movement, release and clearance of goods, including goods in transit. It also sets out measures for effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues. It further contains provisions for technical assistance and capacity building in this area. After a recent agreement between the United States and India, the full implementation of the TFA is imminent, becoming the first multilateral trade agreement to be concluded in the history of the WTO.
cooperation and regulatory reform. Regulatory cooperation seeks to address divergences in regulatory outcomes through the use of mutual recognition agreements, recognizing equivalent standards, or through harmonization. Regulatory reform deals with changes to the regulatory process itself.

Dr. Boris Kozolchyk, comparative commercial law specialist, claims that every treaty negotiation is likely to assemble a skeleton, which is the exchange of goods and services, but for this skeleton to work well, there must be a harmonization of commercial laws among the parties to the agreement. "Sufficiently" harmonized commercial laws are what ultimately enable the real commercial integration and economic development of nations. In short, the harmonization of the commercial laws of different countries is the necessary step to fulfill commercial integration beyond mere provisions on market access barriers, delving into more and major trade and investment.

This paper is divided into two parts. The first explores the concept to regulatory coherence in the international trading system. It then analyzes the leaked chapter on this issue of the TPP and explores the opportunities and challenges ahead of a potential conclusion of this Agreement. The second part sets out the areas where harmonization of commercial law is of utmost importance, and further analyzes the complexities of this regulatory reform. Finally, some concluding remarks are presented.

II. REGULATORY COHERENCE

As international trade has grown, the private sector has often found itself facing trade barriers no longer caused, in most sectors, by high tariffs but by an increasing variety of regulatory frameworks imposed by countries around the world. Consequently, regulatory coherence is no longer a matter of major importance. It is important to note that regulatory coherence is neither about less regulation nor is it about more regulation. It is about improving the process by which countries develop regulations, generate best practices, and find common acceptable standards and timings in which to implement regulatory and market access barriers. The TPP negotiations have been conducted under strict confidentiality, and it is well-known that twenty-nine chapters in the agreement are still under discussion including market access for goods, services, agricultural products, and other disciplines such as intellectual property rights, trade in services, government procurement, investment, rules of origin, competition, labor, and environmental standards. In addition to these traditional issues covered by FTAs, the TPP is meant to include horizontal or cross-cutting issues that address best practices such as regulatory coherence, supply chain competitiveness, and rules for small- and medium-sized enterprises which may break new grounds in FTA negotiations.

Over time, the reduction of tariff levels has become less of the focus of international trade discussions. The new focus has been on the so-called "beyond the border" measures such as regulatory barriers. There are two types of barriers that recent trade talks have sought to deal with:

---


cooperation and regulatory reforms. Regulatory cooperation seeks to address divergences in regulatory outcomes through the use of mutual recognition agreements, recognizing equivalent standards, or through harmonization. Regulatory reforms deal with changes to the regulatory process itself.

Dr. Boris Konečný, comparative commercial law specialist, claims that every treaty negotiation is likely to assemble a skeleton, which is the exchange of goods and services, but for this skeleton to work well, there must be a harmonization of commercial laws among the parties to the agreement. "Sufficiently" harmonized commercial laws are what ultimately enable the real commercial integration and economic development of nations. In short, the harmonization of the commercial laws of different countries is the necessary step to fulfill commercial integration beyond mere provisions on market access barriers, delving into more and major trade and investment.

This paper is divided into two parts. The first explores the concept to regulatory coherence in the international trading system. It then analyzes the leaked chapter on this issue of the TPP and explores the opportunities and challenges ahead of a potential conclusion of this Agreement. The second part sets out the areas where harmonization of commercial law is of utmost importance, and further analyzes the complexities of this regulatory reform. Finally, some concluding remarks are presented.

II. REGULATORY COHERENCE

As international trade has grown, the private sector has often found itself facing trade barriers no longer caused, in most sectors, by high tariffs but by an increasing variety of regulatory frameworks imposed by countries around the world. Consequently, regulatory coherence is now playing a more prominent role in international trade talks as a means to address the current regulatory chaos. It is important to notice that regulatory coherence is neither about less regulation nor is it about more regulation. "It is about improving the process by which countries develop regulations, generate best practices, and find common acceptable standards and timings in which to implement..."
Regulatory coherence is intended to result in more effective regulation that does not distort markets fostering an optimal regulatory environment that will allow the market to be more open, competitive, and innovative.

In a broad sense, regulations are an integral part of a well-functioning economy and its ultimate goal is to achieve desired economic, social, and environmental objectives. More precisely, regulations can also have a significant impact on international trade and investment. When implemented properly and in coherence with the trading partners, regulations can facilitate trade of goods and services, foster international investment, encourage competitive economies, and enhance economic growth. Regulatory coherence also results in a higher degree of confidence providing the appropriate safeguards, which are properly enforced.

The impact of divergent regulatory frameworks is enormous in terms of trade costs for business, and in particular small- and medium-sized enterprises (SMEs). Divergent regulations may cause higher compliance costs which hinder international competitiveness and complicate the most efficient employment of resources. For example, the cost of divergent regulations between the United States and the European Union has been highlighted in detail estimating that “eliminating even half of the non-tariff barriers to trade caused by regulatory divergences could increase transatlantic Gross Domestic Product (GDP) by one-half a percent, or $150 billion.” Even more conservative estimates of economic gain imply the benefits of greater regulatory convergence through mutual recognition of compatible regimes and transatlantic regulatory impact analyses will far outweigh the costs.

As noted above, the TPP evolved as an initiative among APEC countries. Regulatory coherence has long been a very important issue for APEC. A recent report on strategic framework for regulatory coherence in the APEC region highlights core principles that should be followed:


9. Id. at 2.


11. Id.

- Encourage use of harmonized international standards: At a macro level, international standards should be used, where possible, as the basis for establishing domestic regulation. Standards developed internationally provide a solution to fragmented regulatory systems. Provisions that differ from existing international standards should be based on genuine differences in regulatory objectives or in available means to achieve them.

- Performance vs. prescriptive based regulations: Regulations should be performance based and not prescriptive based. Where foreign regulatory measures differ from those developed domestically, but nonetheless adequately fulfill the domestic policy objectives, acceptance of these measures as functionally equivalent to the domestic measure, where possible, will encourage market openness and stimulate competition. Performance based regulations reduce regulatory rigidity and compliance burdens while promoting innovation and allowing for lower compliance costs. Producers and service suppliers should have an open, transparent, and accessible process available. Recognition can also be facilitated through the adoption of mutual recognition agreements.

- Promote trade-friendly regulations and implementation: Manufacturers, service providers, retailers, SMEs, and farmers face duplicative and oftentimes opaque regulatory process which are often interpreted without consistency even within the same regulatory authority and fail to take into account their views and experiences. Government regulatory institutions should promote approaches to regulation and implementation that are trade-friendly and avoid unnecessary burdens on economic actors by taking into account equivalence of foreign regulations.

- Address unnecessary costs of regulation: Regulatory institutions should address unnecessary costs of regulation to ensure that economic actors can manage risk and operate in a pro-competitive environment, allocate resources, and seek more efficient techniques over time.

- Enhance domestic and regional regulatory cooperation: Regulatory institutions should advance both domestic and regional cooperation on regulatory issues to increase alignment of technical regulations, increase transparency, and identify mutually agreeable solutions.

- Regulatory impact assessments: Regulatory impact assessments (RIAs) should be used to assess the impacts of new or existing regulations on business, the environment, government, administration, or any other impact that is of relevance to the regulation-maker.
them. Regulatory coherence is intended to result in more effective regulation that does not distort markets fostering an optimal regulatory environment that will allow the market to be more open, competitive, and innovative.

In a broad sense, regulations are an integral part of a well-functioning economy and its ultimate goal is to achieve desired economic, social, and environmental objectives. More precisely, regulations can also have a significant impact on international trade and investment. When implemented properly and in coherence with the trading partners, regulations can facilitate trade of goods and services, foster international investment, encourage competitive economies, and enhance economic growth. Regulatory coherence also results in a higher degree of confidence providing the appropriate safeguards, which are properly enforced.

The impact of divergent regulatory frameworks is enormous in terms of trade costs for business, and in particular small- and medium-sized enterprises (SMEs). Divergent regulations may cause higher compliance costs which hinder international competitiveness and complicate the most efficient employment of resources. For example, the cost of divergent regulations between the United States and the European Union has been highlighted in detail estimating that “eliminating even half of the non-tariff barriers to trade caused by regulatory divergences could increase transatlantic Gross Domestic Product (GDP) by one-half a percent, or $150 billion.” Even more conservative estimates of economic gain imply the benefits of greater regulatory convergence through mutual recognition of compatible regimes and transatlantic regulatory impact analyses will far outweigh the costs.

As noted above, the TPP evolved as an initiative among APEC countries. Regulatory coherence has long been a very important issue for APEC. A recent report on strategic framework for regulatory coherence in the APEC region highlights core principles that should be followed:


11. M.
The leaked version of the TPP chapter on regulatory coherence seeks to impose a structure and set of procedures for domestic decisions on most forms of central government regulation in the countries parties to the agreement. The target is domestic regulation-making behind the border (i.e., coherence of regulations across the parties). Some of its elements are conducive to well-informed and consistent good decision making. However, the proposed text also has substantive biases in favor of light-handed regulation.

On its face, the regulatory coherence chapter of the TPP is purely procedural. The articles provide the right of a party to identify its regulatory priorities and to establish and implement measures, and the level of which these apply. The design, scope of authority, and institutional location of these mechanisms are expected to vary according to national circumstances. However, this right of each party to determine its own regulatory priorities is hindered by the overarching characteristics of the regulatory mechanism and the scope and criteria for Regulatory Impact Assessments (RIAs). It has been argued that the proposed text would directly and indirectly impose disciplines on the substance of government regulation.

As a general matter, reforms on domestic regulations can be of great value. However, the introduction of disciplines on regulatory coherence into an international treaty poses a series of questions to which there are no clear answers: What is the scope of regulatory coherence? Does regulatory coherence mean substantive regulatory harmonization, a coordinated process of regulation-making, or mutual recognition of regulations? What obligations does a country assume when signing an international treaty covering regulatory coherence? Why include those commitments in a FTA? What should countries do domestically to fulfill regulatory coherence commitments? Is it necessary to amend domestic legislation to implement it? What kind of control may the other parties to the treaty exercise?

Regarding the critical question on whether initiatives to address domestic reform through trade agreements are a good idea, one of the paramount concerns in the case of the TPP is that the United States as the leading negotiator is trying to push for the adoption of models and sophisticated programs like those in place in the United States onto other countries. This might be problematic. Because the countries that make up
The TPP negotiations on regulatory coherence have been pushed by the United States, with the strong support of Australia and New Zealand, aimed to eliminate unnecessary regulatory barriers and make TPP member countries' regulatory systems more compatible and transparent. The inclusion of a chapter on "regulatory coherence" in the TPP represents a major development in the area of FTAs, because it would purportedly include mechanisms to achieve greater domestic coordination of regulations. A leaked version of the chapter on regulatory coherence from March 2016 provides insights into the specific provisions currently being discussed. Though this is a draft, and the final version might evolve, it is still useful to understand the negotiators' thoughts.

12. APJC, supra note 8, at 4-11.
the TPP negotiations include advanced industrialized, middle income, and developing economies, if concluded and implemented, the TPP may require substantial restructuring of the economies and policies of most of the parties, particularly developing countries.

Moreover, this approach assumes that there is only one model for better regulation, that of the United States. But one size does not necessarily fit all. International discussion of how different countries regulate is probably a useful exercise. However, a unilateral push to have everyone else adopt the United States’ model through an international legal instrument may not be appropriate.19

III. ECONOMIC COMPETITIVENESS AND SME DEVELOPMENT IN TPP COUNTRIES: A VIABLE COMMERCIAL AND FINANCIAL LAW REGIME AS A PREMISE

In November 2011, the Leaders of the nine Trans-Pacific Partnership countries broadly supported TPP plans to proceed in four cross-cutting trade issues for follow-up work identified in the Outlines of TPP:

- **Regulatory coherence.** Commitments will promote trade between the countries by making trade among them more seamless and efficient.
- **Competitiveness and Business Facilitation.** Commitments will enhance the domestic and regional competitiveness of each TPP country’s economy and promote economic integration and jobs in the region, including through the development of regional production and supply chains.
- **Small- and Medium-Sized Enterprises.** Commitments will address concerns small- and medium-sized enterprises have raised about the difficulty in understanding and using trade agreements, encouraging small- and medium-sized enterprises to trade internationally.
- **Development.** Comprehensive and robust market liberalization, improvements in trade and investment enhancing disciplines, and other commitments, including a mechanism to help all TPP countries to effectively implement the Agreement and fully realize its benefits, will serve to strengthen institutions important for economic development and governance and thereby contribute significantly to advancing TPP countries’ respective economic development priorities.21

The appearance of SMEs as a cross-cutting issue in the November 2011 Framework, while of great importance, is not new territory. There is a gap between the SME exports as a share of total exports and the more meaningful SME share of all enterprises involved in cross-border trade.22 SMEs have obvious potential for creating jobs. In fact, between 2006 and 2010, they accounted for over eighty percent of all jobs created.23 The removal of legal constraints would disproportionately benefit SMEs, helping them fill this important trade gap and allowing them to grow into larger firms.

In particular, the November 2011 Framework conceived a competitive business environment and a level playing field for TPP companies as a priori objectives.

In order to attain these objectives, it is important to update and improve the legal and financial frameworks in the region for TPP businesses to become and remain economically viable and competitive in a global marketplace. To do so requires advances in the areas of commercial and financial law aimed at stabilizing commercial relationships, strengthening financial systems, and ensuring responsible corporate behavior.

Going forward, rebuilding the present trading system goes hand-in-hand with reinforcing its legal infrastructure. Bringing the commercial and financial law settings for TPP companies into the twenty-first century could involve the undertaking of reforms to facilitate secured financing, corporate debt resolution, and business exit. This article is meant to provide an illustrative range of commercial law areas where reforms can indeed encourage investment and development, and provide the legal foundation for debt sustainability and market access in a durable way.

---

20. Legislators often correctly recognize that many of the same issues that apply to the small-, medium-sized enterprises are also relevant for modestly larger firms as well.
the TPP negotiations include advanced industrialized, middle income, and developing economies, if concluded and implemented, the TPP may require substantial restructuring of the economies and policies of most of the parties, particularly developing countries.

Moreover, this approach assumes that there is only one model for better regulation, that of the United States. But one size does not necessarily fit all. International discussion of how different countries regulate is probably a useful exercise. However, a unilateral push to have everyone else adopt the United States’ model through an international legal instrument may not be appropriate.19

III. ECONOMIC COMPETITIVENESS AND SME DEVELOPMENT IN TPP COUNTRIES: A VIABLE COMMERCIAL AND FINANCIAL LAW REGIME AS A PREMISE

In November 2011, the Leaders of the then nine Trans-Pacific Partnership countries broadly supported TPP plans to proceed in four cross-cutting trade issues for follow-up work identified in the Outlines of TPP:

- Regulatory coherence. Commitments will promote trade between the countries by making trade among them more seamless and efficient.
- Competitiveness and Business Facilitation. Commitments will enhance the domestic and regional competitiveness of each TPP country’s economy and promote economic integration and jobs in the region, including through the development of regional production and supply chains.
- Small- and Medium-Sized Enterprises. Commitments will address concerns small- and medium-sized enterprises have raised about the difficulty in understanding and using trade agreements, encouraging small- and medium-sized enterprises to trade internationally.
- Development. Comprehensive and robust market liberalization, improvements in trade and investment enhancing disciplines, and other commitments, including a mechanism to help all TPP countries to effectively implement the Agreement and fully realize its benefits, will serve to strengthen institutions important for economic development and governance and thereby contribute significantly to advancing TPP countries’ respective economic development priorities.21

The appearance of SMEs as a cross-cutting issue in the November 2011 Framework, while of great importance, is not new territory. There is a gap between the SME exports as a share of total exports and the more meaningful SME share of all enterprises involved in cross-border trade.22 SMEs have obvious potential for creating jobs. In fact, between 2006 and 2010, they accounted for over eighty percent of all jobs created.23 The removal of legal constraints would disproportionately benefit SMEs, helping them fill this important trade gap and allowing them to grow into larger firms.

In particular, the November 2011 Framework conceived a competitive business environment and a level playing field for TPP companies as a priori objectives.

In order to attain these objectives, it is important to update and improve the legal and financial frameworks in the region for TPP businesses to become and remain economically viable and competitive in a global marketplace. To do so requires advances in the areas of commercial and financial law aimed at stabilizing commercial relationships, strengthening financial systems, and ensuring responsible corporate behavior.

Going forward, rebuilding the present trading system goes hand-in-hand with reinforcing its legal infrastructure. Bringing the commercial and financial law settings for TPP companies into the twenty-first century could involve the undertaking of reforms to facilitate secured financing, corporate debt resolution, and business exit. This article is meant to provide an illustrative range of commercial law areas where reforms can indeed encourage investment and development, and provide the legal foundation for debt sustainability and market access in a durable way.

20. Legislators often correctly recognize that many of the same issues that apply to the small-medium-sized enterprises are also relevant for moderately larger firms as well.
Clear and equitable application of regulatory requirements would increase TPP businesses' capacity to take advantage of the enhanced trading opportunities across multiple sectors.

Individually, secured financing reforms contribute to foreign lenders interested in financing local operations; to exporters wishing to sell their products in new markets; to SME’s ability to obtain the financing necessary to launch and continue operations; to help female-owned start-ups obtain seed financing without requiring real estate as collateral; and to help local businesses obtain capital necessary to compete in outside markets, as well as to fend off the flow of inexpensively financed foreign goods.

Finally, if financial difficulties arise, debt resolution and business exit reforms help parties have access to a variety of formal and informal restructuring techniques to solve their indebtedness problems and recover viable businesses that create jobs.

Collectively, these reforms contribute to the creation of effective regulatory frameworks, to equitable business opportunities in the public and private sectors, to greater assistance and opportunity for start-ups, to SMEs and female-owned businesses, to increased access to foreign markets, to a greater ability to compete locally, regionally, and globally, and to promote integration of TPP countries in a hyper-connected global economy.

A. Secured Financing

Access to credit provides a key source of capital for SME development. An efficient and cost-effective secured transactions regime plays a pivotal role in facilitating the extension of credit to the private sector and reducing borrowing costs, mainly as a result of expanding the range of acceptable collateral beyond immovable assets into a myriad of movable assets, tangible (e.g., motor vehicles, equipment, machinery) and intangible (e.g., accounts receivable, inventory, intellectual property) assets; and providing greater legal certainty for lenders as to priority and enforcement of security interests related to the debtors' obligations to creditors, whether present or future. In addition, economic studies have shown that introducing collateral registers for movable assets increases firms' access to bank finance by providing creditors with better access to accurate information on credit risk. As access to credit at lower costs becomes available to a wider range of economic actors, this can have a significant impact for SMEs and female-owned businesses, and serve to stimulate the current level and potential growth of trade, investment and development at large.

In addition, cross-border lending has increased exponentially in an increasingly financially integrated world in order to respond to the borrowers' diverse financing needs. TPP businesses that lack the legal and financial infrastructure necessary to participate fully in cross-border opportunities are forced to compete at a great disadvantage.

Legislative and regulatory efforts have been underway for some time to ensure that the secured transactions laws and collateral registers remain responsive to the growing capital needs of SMEs, providing them with the necessary financing to sustain growth and job creation, and reflect the rapid increase in women’s entrepreneurial participation in the Asia-Pacific region. However, the ultimate success of a secured transaction system relies on the existence of sound, predictable, and effective mechanisms for debt enforcement and collection.

From the TPP countries, Australia, New Zealand, Canada, and the United States have efficient registration systems and strong secured transactions legal frameworks. With regard to the Latin American countries participating in the TPP, reforms have been broadly successful in developing a well-functioning general security rights registry in Mexico; amendments to the current secured transactions legislation have been presented before the National Congress Peru; and Chile has recently strengthened its secured transactions system, albeit further modifications to the systems are needed to secure credit at equitable rates to the SME segment.

In Asian countries participating in the TPP, reforms in the legal and institutional frameworks have facilitated asset-based lending in Vietnam. China, absent from the TPP negotiations to date but still a major global commercial partner, has developed an efficient secured transactions regime and established streamlined registration procedures which have brought important benefits for individual businesses and the national economy.


Clear and equitable application of regulatory requirements would increase TPP businesses’ capacity to take advantage of the enhanced trading opportunities across multiple sectors.

Individually, secured financing reforms contribute to foreign lenders interested in financing local operations; to exporters wishing to sell their products in new markets; to SME’s ability to obtain the financing necessary to launch and continue operations; to help female-owned start-ups obtain seed financing without requiring real estate as collateral; and to help local businesses obtain capital necessary to compete in outside markets, as well as to fend off the flow of inexpensively financed foreign goods.

Finally, if financial difficulties arise, debt resolution and business exit reforms help parties have access to a variety of formal and informal restructuring techniques to solve their indebtedness problems and recover viable businesses that create jobs.

Collectively, these reforms contribute to the creation of effective regulatory frameworks, to equitable business opportunities in the public and private sectors, to greater assistance and opportunity for start-ups, to SMEs and female-owned businesses, to increased access to foreign markets, to a greater ability to compete locally, regionally, and globally, and to promote integration of TPP countries in a hyper-connected global economy.

A. Secured Financing

Access to credit provides a key source of capital for SME development. An efficient and cost-effective secured transactions regime plays a pivotal role in facilitating the extension of credit to the private sector and reducing borrowing costs, mainly as a result of expanding the range of acceptable collateral beyond immovable assets into a myriad of movable assets, tangible (e.g., motor vehicles, equipment, machinery) and intangible (e.g., accounts receivable, inventory, intellectual property) assets; and providing greater legal certainty for lenders as to priority and enforcement of security interests related to the debtors’ obligations to creditors, whether present or future. In addition, economic studies have shown that introducing collateral registries for movable assets increases firms’ access to bank finance by providing creditors with better access to accurate information on credit risk. As access to credit at lower costs becomes available to a wider range of economic actors, this can have a significant impact for SMEs and female-owned businesses, and serve to stimulate the current level and potential growth of trade, investment and development at large.

In addition, cross-border lending has increased exponentially in an increasingly financially integrated world in order to respond to the borrowers’ diverse financing needs. TPP businesses that lack the legal and financial infrastructure necessary to participate fully in cross-border opportunities are forced to compete at a great disadvantage.

Legislative and regulatory efforts have been underway for some time to ensure that the secured transactions laws and collateral registries remain responsive to the working capital needs of SMEs, providing them with the necessary financing to sustain growth and job creation, and reflect the rapid increase in women’s entrepreneurial participation in the Asia-Pacific region. However, the ultimate success of a secured transaction system relies on the existence of sound, predictable, and effective mechanisms for debt enforcement and collection.

From the TPP countries, Australia, New Zealand, Canada, and the United States have efficient registration systems and strong secured transactions legal frameworks.16 With regard to the Latin American countries participating in the TPP, reforms have been broadly successful in developing a well-functioning general security rights registry in Mexico; amendments to the current secured transactions legislation have been presented before the National Congress Peru; and Chile has recently strengthened its secured transactions system, albeit further modifications to the system are needed to secure credit at equitable rates to the SME segment.

In Asian countries participating in the TPP, reforms in the legal and institutional frameworks have facilitated asset-based lending in Vietnam. China, absent from the TPP negotiations to date, but still a major global commercial partner, has developed an efficient secured transactions regime and established streamlined registration procedures which have brought important benefits for individual businesses and the national economy.
attracting investments and growth.\textsuperscript{27} Steps toward strengthening secured transactions framework in Brunei, Japan, Malaysia, and Singapore may provide widely equivalent benefits, facilitating business creation, operations, capitalization, and refinancing.

B. Debt Resolution and Business Exit

With the ongoing crisis, the recovery of viable companies in financial distress plays an important role in promoting economic efficiency, restoring growth, and enhancing private sector competitiveness.

Corporate debt restructuring and insolvency is another key area of legislative and regulatory reform enabling proper rehabilitation of viable business and efficient exit mechanisms to transfer assets from uncompetitive companies to more profitable business activities. Whether to invest in restoring the competitiveness and productivity of a given business or to liquidate casualties of competition in free markets, long-term corporate viability prospects should determine the best course of action. The World Bank has developed a standard which provides a basis for consistent advice and assessments in the area of insolvency and creditor-debtor rights under the Reports on the Observance of Standards and Codes (ROSC) program.\textsuperscript{28} The standard reflects the principles of fairness, impartiality, transparency, and accountability.

A strong institutional and regulatory framework—including financial disclosure obligations, accounting and auditing rules—plays an important role in corporate debt restructurings. Against a formal insolvency proceeding’s backdrop, simplified procedures and alternative dispute resolution mechanisms—such as arbitration and mediation—encourage and facilitate voluntary negotiations.\textsuperscript{29} There seems little purpose to requiring formalities beyond ensuring the effectiveness of their contractual arrangements and the enforceability of their transactions.

Unlike advanced industrialized economies, developing and emerging economies creditors (e.g. domestic or foreign), depending on the particular jurisdiction, have been hampered by


\textsuperscript{115} \textit{Briales Gómez-Turronaga & Gómez-Almimiro}, 381
attracting investments and growth. Steps toward strengthening secured transactions framework in Brunei, Japan, Malaysia, and Singapore may provide widely equivalent benefits, facilitating business creation, operations, capitalization, and refinancing.

B. Debt Resolution and Business Exit

With the ongoing crisis, the recovery of viable companies in financial distress plays an important role in promoting economic efficiency, restoring growth, and enhancing private sector competitiveness. Corporate debt restructuring and insolvency is another key area of legislative and regulatory reform enabling proper rehabilitation of viable business and efficient exit mechanisms to transfer assets from uncompetitive companies to more profitable business activities. Whether to invest in restoring the competitiveness and productivity of a given business or to liquidate casualties of competition in free markets, long-term corporate viability prospects should determine the best course of action. The World Bank has developed a standard which provides a basis for consistent advice and assessments in the area of insolvency and creditor-debtor rights under the Reports on the Observance of Standards and Codes (ROSC) program. The standard reflects the principles of fairness, impartiality, transparency, and accountability.

A strong institutional and regulatory framework—including financial disclosure obligations, accounting and auditing rules—plays an important role in corporate debt restructurings. Against a formal insolvency proceeding’s backdrop, simplified procedures and alternative dispute resolution mechanisms—such as arbitration and mediation—encourage and facilitate voluntary negotiations. There seems little purpose to requiring formalities beyond ensuring the effectiveness of their contractual arrangements and the enforceability of their transactions. Unlike advanced industrialized economies, developing and emerging economies creditors (either domestic or foreign), depending on the particular jurisdiction, have been hampered by


15. Brides Gómez-Turégano & Gómez-Altimirano

1) constant uncertainty and delays;
2) disadvantageous or even hostile substantive legal provisions, regulatory environments, corporate governance rules affecting restructurings; and
3) unpredictable application of those by the courts.60

Confidence building reforms in areas of the greatest sensitivity, such as enforcement of creditor rights, debt collection, information asymmetries, and the toll that restrictions in the ownership of shares taken on foreign investors, might need to be reduced to reduce the willingness to extend financing to, recapitalize, and invest in TPP businesses in financial distress. A reasonable set of middle ground rules compatible with international best practices that—if applied impartially and consistently—balances the rights of debtors, creditors, and shareholders can foster communication and cooperation to further the long-term viability of the TPP businesses.

With this trade liberalization stimulus, systemically important emerging market economies will have even more significant multilateral effects. As the importance of corporate debt restructuring in these markets has grown in the face of the global financial crisis and aftermath, the identification and removal of potential obstacles that are impeding cross-border debt restructuring remains imperative to ensure further integration of financial markets regionally.

IV. TRADE LIBERALIZATION IN DISHARMONY: THE NEED FOR BASIC HARMONIZATION

The TPP enlists vastly different civilisations and legal traditions. We can also observe diversity in commerce and finance, where diverging laws govern international transactions and foreign parties deal with conceptual confusion and eroded certainty about the legal structure in several different ways. The practical ramifications are evident in substance and application of the legal system, restricting the impulse to trade and investment originated by the TPP.

As mentioned, structural reforms of national laws in areas such as secured financing, insolvency regime, corporate governance, and restructuring of financially distressed businesses play a crucial role in the creation of the local tools necessary to promote open markets and economic competition at the regional and global level. The lenses of the TPP provide an opportunity to show how these changes, if effectively designed and implemented to address the rapidly changing needs of commerce and
finance, can boost confidence in the economy, attract foreign direct investment inflows, and support sustainable development. Harmonizing the legal framework for international commerce and finance, including conflict-of-laws rules within the TPP countries, would allow countries to capitalize on expanded markets, and to obtain long-term growth prospects, on both domestic and international levels.

For our purposes, the idea of harmonization is that of predictable domestic laws and procedures accepted with confidence by those who engage in transnational, cross-border commercial and financial transactions.31

A number of international organizations have adopted international instruments on the topics of secured financing and/or insolvency, including the United Nations Commission on International Trade Law (UNICTRAL),32 the Organization of American States (OAS),33 the International Institute for the Unification of Private Law (UNIDROIT),34 and the Hague Conference on Private International Law (HICCH).35

In light of the legal divergences and deficiencies in many jurisdictions, the overarching goal of these instruments is to promote the adoption of modern, integrated, and harmonized secured financing and insolvency systems.

V. CONCLUSIONS

A twenty-first century approach to regulatory coherence in the TPP negotiations would build on the efforts in APEC and will most likely reflect the following objectives:

(i) An integrated approach to regulatory coherence;
(ii) robust infrastructure, procedures and mandate; and
(iii) flexible scope.

31. FAQ-Org, Mandate, and Composition of UNCITRAL, UNCITRAL (2015), http://www.unctdal.org/uncitral/faq/uncitral_faq.html (last visited December 14, 2016) ("Harmonization" may variously be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions).
32. Id.
finance, can boost confidence in the economy, attract foreign direct investment inflows, and support sustainable development. Harmonising the legal framework for international commerce and finance, including conflict-of-laws rules within the TPP countries, would allow countries to capitalize on expanded markets, and to obtain long-term growth prospects, on both domestic and international levels.

For our purposes, the idea of harmonization is that of predictable domestic laws and procedures accepted with confidence by those who engage in transnational, cross-border commercial and financial transactions.31

A number of international organizations have adopted international instruments on the topics of secured financing and/or insolvency, including the United Nations Commission on International Trade Law (UNCITRAL),32 the Organization of American States (OAS),33 the International Institute for the Unification of Private Law (UNIDROIT),34 and the Hague Conference on Private International Law (HCCH).35

In light of the legal divergences and deficiencies in many jurisdictions, the overarching goal of these instruments is to promote the adoption of modern, integrated, and harmonized secured financing and insolvency systems.

V. CONCLUSIONS

A twenty-first century approach to regulatory coherence in the TPP negotiations would build on the efforts in APEC and will most likely reflect the following objectives:

(i) An integrated approach to regulatory coherence;
(ii) robust infrastructure, procedures and mandates; and
(iii) flexible scope.

31. FAQ-Orign, Mandate, and Composition of UNCITRAL, UNCITRAL (2015), http://www.uncitral.org/en/standards/faq.htm (last visited December 14, 2014). This “harmonization” may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions.

32. Id.


2015  Briades Gómez-Torragona & Gómez-Altamirano 383

Not clear still, are the challenges in the implementation of these disciplines.

Trade policy issues, such as multilateral trade liberalization, tariff and non-tariff barriers to trade and investment, unfair trade practices and other public law issues have continued to occupy trade policy-makers’ full attention over the TPP talks, who have devoted comparatively little thought to the link between the emerging trade architecture and ongoing efforts to modernize and harmonize private laws governing international commercial transactions. Yet, it is precisely the broader global trade challenges of the twenty-first century that make an ambitious comprehensive approach to strengthen and deepen trade and investment ties among its participants so important, including commercial and financial law regimes. By adopting effective and sufficiently harmonized insolvency and creditor-debtor regimes according to internationally recognized standards that foster a more competitive and integrated Asia-Pacific region, the TPP nations can lay the foundation for greater prosperity at home while supporting their trade and investment activities region-wide.