Chapter 4

Overview of the Trade and Investment Rules in TPP Comparative Analysis

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The analysis below covers the important chapters in TPP relating to the trade and investment rules. In order to understand how demanding the TPP rules are for developing countries, we need some comparative perspective. It is necessary to understand the "additional" rule making achieved under TPP that go beyond the requirements in the existing agreements. Firstly, we should compare the TPP obligations against the WTO's rules. Secondly, the obligations under TPP should be compared against those under existing FTAs. Hence, just because TPP includes obligations does not necessarily mean such are demanding; only when these obligations go beyond the existing obligations, can we say that the TPP has created new obligations.

Preamble

There are two very important issues mentioned in the preamble from the developing country perspective. Firstly, it recognises the parties' inherent right to adopt, maintain, or modify the health care systems. Secondly, it affirms that state-owned enterprises can play a legitimate role in the diverse economies of the parties, while recognising that the provision of unfair advantages to state-owned enterprises undermines fair and open trade and investment.

Chapter 2: National Treatment and Market Access for Goods

Chapter 2, mainly deals with tariff elimination or market access for trade in goods, which is one of most important components of TPP. The TPP parties' tariff elimination schedules are attached to Chapter 2 as Annexes.

Several rules are also stipulated in the chapter. Firstly, the use of the TPP's tariff preference is not compulsory. No party shall prohibit an importer from claiming for an originating good the MFN rate under the WTO Agreement (Article 2.4.6).

Secondly, regarding fees, each party shall make publicly available online a current list of the fees and charges it imposes in connection with importation or exportation (Article 2.14.3).

Thirdly, each party shall be a participant in the WTO Ministerial Declaration on Trade in Information Technology Products, 13 December, 1996 (Information Technology Agreement [ITA]), and have completed the procedures for modification and rectification of its Schedule of Tariff Concessions (Article 2.17).

Fourthly, regarding the Tariff-Rate Quota (TRQ), the party administering a TRQ shall publish all the information concerning its TRQ administration on its designated publicly available website at least 90 days prior to the opening date of the relevant TRQ (Article 2.28.3).

Chapter 5: Customs Administration and Trade Facilitation

The WTO Trade Facilitation Agreement (TFA) adopted in Bali in 2015, is the first substantial output of the Doha Development Agenda (DDA) negotiations. TPP Chapter 5 attempts to build upon the outcome of both the TFA and trade facilitation chapters for existing FTAs.

Table: Obligations under the WTO TFA

Provisions	Achievements	Weaknesses
Publication and Availability of Information (Article 1)	information available through the Internet is a mandatory obligation	Updating the information on the internet is a best endeavour
		The establishment of enquiry points became a best endeavour
Opportunity to Comment, Information before Entry into Force, and Consultation (Article 2)		The 'Interval between publication and entry into force' was dropped
		The opportunity to comment became a best endeavour
Advance Rulings (Article 3)	Each Member shall issue an advance ruling (classification and origin)	An advance ruling regarding other matters (e.g., method or criteria for Customs value determination and tariff quota) became a best endeavour
		For advance ruling, the member may require that an applicant has legal representation or registration in its territory
Appeal or Review Procedures (Article 4)	Each member shall provide the right to appeal or review the decision by the Customs	Administrative decisions made by other border agencies were dropped
Other Measures to Enhance Impartiality, Non-discrimination, and Transparency (Article 5)	(i) Each Member shall terminate or suspend notification when the circumstances giving rise to it no longer exist; and (ii) The termination or suspension of a notification shall be announced promptly (Article 5-1c, d).	
	Regarding detention, a member shall inform the carrier or importer promptly (Article 5-2).	
		Members may grant the opportunity for a second test (Article 5-3.1)
Fees and Charges Imposed on or in Connection with Importation and Exportation (Article 6)	information on fees and charges shall be published in accordance with Article 1	
	Adequate time between publication of new or amended fees or charges and their application is necessary	Exception for urgent circumstances
	Penalty disciplines are substantial	
Release and Clearance of Goods (Article 7)	Mandatory obligations include pre-arrival processing, separation of release from final determination of duties, post-clearance audit, authorised economic operators, and minimisation of documentation requirements for expedited shipment	
		Adoption or maintenance of a risk management system, release of expedited shipments, and perishable goods are best endeavour
Border Agency Cooperation (Article 8)	Domestic cooperation is mandatory	International cooperation is best endeavour
Movement of Goods under Customs Control Intended for Import (Article 9)		Best endeavour
Formalities Connected with Importation, Exportation, and Transit (Article 10)	Review of the formality and documentation requirement is mandatory	Reform based on review is best endeavour
	Three are mandatory: Prohibition of the pre-shipment inspection requirement, prohibition of mandatory use of Customs brokers, and common border procedures and uniform documentation requirements within a member's territory	

Source: Author's compilation

TPP members should introduce an automated system for risk management (Articles 5.6 and 5.7) and make sure that the release of goods is prompt, usually within 48 hours (Article 5.10), and for an express shipment, within six hours (Article 5.7).

Advance ruling is a mandatory obligation under TPP. ASEAN Trade in Goods Agreement (ATIGA) uses best endeavour language ("to the extent permitted by its respective laws, regulations and administrative determination"). It should, however, be noted that advance ruling is a strict obligation in TFA. The scope of advance ruling in TPP includes not only tariff classification and origin, but also the Customs valuation criteria, which is a small improvement from WTO TFA. TPP Article 5.3 says that each party shall issue an advance ruling no later than 150 days after it receives a request. One could argue that the 150-day span does not seem to be a demanding requirement, because, for example, the US-Korea FTA sets a 90-day deadline for this requirement.

Article 5.6: Automation. Each party shall: (i) Make electronic systems accessible to Customs service users; (ii) Employ electronic or automated systems for risk analysis and targeting.

Article 5.7: Express Shipments. Each TPP party shall, under normal circumstances, provide that express shipments may be released within six hours after submission of the necessary Customs documents. This is less demanding than, for example, the US-Korea FTA that stipulates a four-hour clearance limit for express shipments.

Under TPP rules, under normal circumstances, no Customs duties will be assessed on express shipments valued at or below a fixed amount set by the party's law. It should be noted that the threshold can be set and changed by the law of the party. This is also less demanding than other FTAs, such as the US-Korea FTA that sets the threshold at 200 US dollars. Article 5.9: Risk Management, states that each party shall adopt or maintain a risk management system. The automation of Customs clearance and automated risk management systems are not included in ATIGA and the majority of Japanese EPAs with ASEAN (use of ICT only).

Article 5.10 Release of Goods. Each TPP party shall adopt or maintain procedures that provide for the release of goods within a period not exceeding that required to ensure compliance with its Customs laws and, to the extent possible, within 48 hours after arrival of the goods. Neither TFA nor ATIGA has this type of time requirement.

Article 5.11: Publication. Each TPP party shall make publicly available, including online, its Customs laws, regulations, and general administrative procedures and guidelines. This is not a particularly demanding requirement because publication of these regulations in English is a best endeavour. Moreover, it is unclear whether Article 5.11.2 "Making … publicly available online" includes updates of the information. TFA says "Each member shall make available, and update to the extent possible and as appropriate, the following through the Internet". Hence, one could argue that updates of the information online is outside the scope of TPP. Moreover, two important issues are mere best endeavour: the interval between publication and adoption, and the opportunity to comment. Hence, it is sufficient that the Customs laws, regulations, and general administrative procedures and guidelines in the domestic language are available online.

Chapter 6: Trade Remedies

No party shall apply or maintain two or more of the following measures, with respect to the same good, at the same time (Article 6.2.5):

(a) A transitional safeguard measure under this Chapter;
(b) A safeguard measure under Article XIX of GATT 1994, and the Safeguards Agreement;
(c) A safeguard measure set out in Appendix B to its Schedule to Annex 2-D (Tariff Commitments); or
(d) An emergency action under Chapter 4 (Textiles and Apparel Goods).

No party shall apply or maintain a safeguard measure under this Chapter, to any product imported under a tariff rate quota (TRQ) established by the party under this Agreement (Article 6.2: Global Safeguards).

Regarding Transitional Safeguards, a party may apply a transitional safeguard measure during the transition period only if an import resulting from elimination of a Customs duty pursuant to this Agreement may cause or threaten to cause serious injury to a domestic industry (6.3.1). Transition period means the three-year period beginning from the date of entry into force of this Agreement, but if the tariff elimination for the good occurs over a longer period of time, the transition period shall be the period of the staged tariff elimination for that good (Article 6.1: Definitions). The period for the Transitional Safeguard shall not exceed two years, except that the period may be extended by up to one year if the competent authority of the party decides that a transitional safeguard measure continues to be necessary to prevent or remedy serious injury and facilitate adjustment (Article 6.4.2). No party shall apply a transitional safeguard measure more than once on the same good (Article 6.4.6).

The party applying a transitional safeguard measure shall, after consultation, provide mutually the agreed trade liberalising compensation in the form of concessions that have substantially equivalent trade effects to the value of the additional duties expected to result from the transitional safeguard measure. If the consultation does not result in an agreement on trade liberalising compensation within 30 days, a party against whose good the transitional safeguard measure is applied may suspend application of substantially equivalent concessions to the trade of the party applying the transitional safeguard measure (Article 6.7).

Chapter 7: SPS

Above all, it is important to note that one of the core objectives of the TPP SPS chapter is to reinforce and build on the SPS Agreement (Article 7.2). In fact, Article 7.4 General Provisions, states that "The parties affirm their rights and obligations under the SPS Agreement" and "Nothing in this Agreement shall limit the rights and obligations that each party has under the SPS Agreement".

Article 7.3: Scope. Nothing in this Chapter shall prevent a party from adopting or maintaining the Halal requirements for food and food products in accordance with Islamic law.

Many parts of the SPS Chapter mention the scientific approach to SPS. Article 7.9 states "The parties recognise the importance of ensuring that their respective SPS measures are based on scientific principles".

Perhaps, inclusion of a clearer transparency discipline is one of the important achievements of TPP SPS. Article 7.13: Transparency, states that unless urgent problems concerning human, animal, plant life, or health protection may arise or threaten to arise, or the measure is of a trade-facilitating nature, the party shall normally allow at least 60 days for interested persons and other parties to provide written comments on the proposed measure after it submits a notification on the proposed SPS measure (7.13.4). The party shall make available to the public, by electronic means, in an official journal, or on its website, the proposed SPS measure (7.13.5).

Chapter 8: TBT

TPP has a substantial TBT chapter that aims to "Facilitate trade, including eliminating unnecessary technical barriers to trade, enhancing transparency, promoting greater regulatory cooperation, and applying a good regulatory practice." (Article 8.2 Objective)

Article 8.7 Transparency stipulates as below.

- Each party shall allow the persons of another party to participate in the development of technical regulations, standards, and conformity assessment procedures by its central government bodies on terms no less favourable than those that it accords to its own persons (8.7.1).

- A party that files a notification in accordance with the Articles of the TBT Agreement or this Chapter shall transmit the notification and the proposal electronically to the other parties through the enquiry points established in accordance with Article 10 of the TBT Agreement, at the same time as it notifies the WTO Members (8.7.13; 8.7.17).

- Each party shall normally allow 60 days from the date it transmits a proposal under Paragraph 13 for another party, or an interested person of another party, to submit written comments on the proposal (8.7.14).

Article 8.8 Compliance Period for Technical Regulations and Conformity Assessment Procedures, stipulates that "For the purpose of applying Articles 2.12 and 5.9 of the TBT Agreement the term "Reasonable interval" [between the publication of the technical regulations or requirements concerning conformity assessment procedures and their entry into force] normally means a period of not less than six months".

Chapter 9: Investment

Because of the close linkage between trade and investment, several attempts were made to include investment in the WTO system. The WTO Agreement on Trade Related Investment Measures (TRIMs) covers only THE trade related aspect of investment, not investment policy per se. Note that the scope of TRIM is limited to the trade in goods only (TRIM Article 1). Investment was one of the four Singapore Issues discussed at the Singapore Ministerial Meeting in 1996, but no concrete agreement was made since then because of some developing countries' strong concerns over investment liberalisation under the WTO framework, unlike the case of trade facilitation. However, there are more than three thousand BITs in the world and the majority recent FTAs include an investment chapter.

The investment chapter shall not apply to measures adopted or maintained by a party to the extent that they are covered by Chapter 11's Financial Services (Article 9.3.3). This means that ISDS is applicable to investment in Financial Services, because Chapter 11 does not establish ISDS provisions for financial services.

The obligations set out in the TPP investment chapter apply to measures adopted or maintained not only by the central government but also by regional or local governments or the authorities of that party, although the classification of a government in terms of the three levels are at the discretion of each party.[1] The obligations apply to measures adopted or maintained by any person, including a state enterprise or any other body, when it exercises any governmental authority delegated to it by the central, regional, or local government, or the authorities of that party (Article 9.2.2).

To assess the significance of the TPP investment chapter, we should first examine the scope of investment and investors. The scope of investment is wide, just like other investment chapters of Asian FTAs (e.g. The EPA between Japan and the southeast Asian countries). Investment means every asset (Article 9.1) illustrated in Table 1. The scope of investors is also wide; an investor is defined as "a party, or a national or enterprise of a party, that attempts to make, is making, or has made an investment in the territory of another party" (Article 9.1). However, a "Paper company" without a substantive business owned or controlled by a person of a non-party, is outside the scope as an investor (Article 9.15, Denial of Benefits). In this regard, it is important to note some Asian FTAs adopt a much narrower definition of investor than the TPP. For example, under the Japan-Philippines EPA, an investor of a party is defined as (i) A natural person who is a national of one party and not a national of

[1] However, it is each Party that defines the level of government meant by "central level of government" and "regional level of government" (Chapter 1 Annex 1-A). Although the definition of "local level of government" is not provided in TPP, it means government lower than regional government.

the other party; or (ii) A juridical person of a party (JPEPA Article 88, underline supplied). Moreover, JPEPA states "A branch of a juridical person of a non-party located in the area of a party, shall not be deemed as an investor in that party" (JPEPA Article 88), irrespective of the level of substantive business operation of the branch. However, ACIA uses more substantive business operation rules (ACIA Article 19).

Table 1: Scope of Investment

(a) An enterprise
(b) Shares, stock, and other forms of equity participation in an enterprise
(c) Bonds, debentures, other debt instruments and loans
(d) Futures, options, and other derivatives
(e) Turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts
(f) Intellectual property rights
(g) Licences, authorisations, permits, and similar rights conferred pursuant to a party's laws
(h) Other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens. and pledges

Source: Author's compilation

The TPP investment chapter covers protection and liberalisation of investment (pre-establishment and post-establishment). The most distinctive feature of the investment protection in TPP is the investor-state-dispute. While the WTO TRIM does not include ISDS (all disputes under WTO are state-state), many BITs and investment chapters signed by Asian countries have ISDS (such as ACIA). Under TPP, just like other BITs, investors (not countries) can fight against investment policy of the partner TPP governments. Note that the TPP uses a wide definition of an investment and investor, as discussed, which increases the usefulness of ISDS.

In the TPP, the liberalisation of investment covers the manufacturing and agricultural sectors and the service sectors. The majority of Asian FTAs follow the GATS-style positive list commitment method that includes Mode 3 (Services trade through commercial presence), which relate to investment in the service sectors. In other words, Asian FTAs have both service and investment chapters and the commitment to service investment liberalisation is stated in service chapter, but not investment. However, under TPP, all investment related matters are covered in the investment chapter, regardless of the sector.

The TPP investment chapter uses the negative list approach (Article 9.12). In the case of the negative list, everything should be liberalised unless reservations are made in an explicit manner. Reservations should be made in the two types of Annex. Annex I covers the existing measures of central and regional governments that are not subject to some or all of the obligations imposed by Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements), Article 9.11 (Senior Management and the Boards of Directors). However, it should be noted that Article 9.4, Article 9.5, Article 9.10, and Article 9.11 shall not apply to measures at a local level of government (also note that each party has discretion in defining each level of government, as discussed above). Annex II includes specific sectors, sub-sectors, or activities for which a party may maintain existing, or adopt new and more restrictive measures that do not conform with the obligations imposed by Article 9.4, Article 9.5, Article 9.10, and Article 9.11.

The TPP investment chapter is in sharp contract with GATS' positive list approach, whereby countries can easily (i) Exclude several sensitive sectors from the schedules, and (ii) Maintain policy space between the actual regulations and commitment. Thus, it is critically important that countries using the negative list for the first time carefully review all the implemented measures, especially those by central and regional governments, before preparing the annexes. Countries that have signed the positive list schedule with SS commitments (such as JPEPA) may be able to sign the negative list schedule relatively easily, because SS positive list commitment is located somewhere between the normal positive list and negative list (SS commitment means there is no policy space).

However, developing countries that seek TPP membership may be able to include an annex on the "Non-confirming measures ratchet mechanism", as by Vietnam. Annex 9-I stipulates that Article 9.4, Article 9.5, Article 9.10, and Article 9.11 shall not apply to an amendment made by Vietnam concerning any non-conforming measure to the extent that such amendment does not decrease conformity of the measure as it existed at the date of entry into force of the TPP for Vietnam. Some flexibility of the existing measures may be allowed by developing countries as a result of the accession negotiations.

The prohibition of performance requirement is another important element in the TPP investment chapter. The prohibition of performance requirement under TPP is applicable not only to the investment by an investor of a party but also of a non-party. However, the PR prohibition under TPP is not very demanding. Export of a given level or percentage of goods or services should not be a requirement for investment approval, it can be used as a condition for receipt of advantage, unlike Japanese IIAs. The three following requirements that are prohibited in Japanese IIAs are also not prohibited under TPP: (i) To hire a given number or percentage of its nationals; (ii) To locate the headquarters of that investor for a specific region or the world market in its area; and (iii) To achieve a given level or value of research and development in its area.

Prohibition of the Performance Requirement under TPP

	TPP		Japan IIAs	
	As requirement for investment	As condition of advantage	As requirement for investment	As condition of advantage
To restrict exportation or sale for export	NA	NA	X	X
(a) To export a given level or percentage of goods or services	X		X	X
(b) To achieve a given level or percentage of domestic content	X	X	X	X
(c) To purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory	X	X	X	X
(d) To relate in any way the volume or value of imports to the volume or value of exports, or to the amount of foreign exchange inflows associated with the investment	X	X	X	X
(e) To restrict sales of goods or services in its territory that the investment produces or supplies by relating those sales in any way to the volume or value of its exports or foreign exchange earnings	X	X	X	X
(f) To transfer a particular technology, production process, or other proprietary knowledge to a person in its territory	X		X	
(g) To supply exclusively from the territory of the party the goods that the investment produces or the services that it supplies to a specific regional market or to the global market	X		X	
(h) (i) To purchase, use, or accord a preference in its territory, technology of the party, or of a person of the party; or (ii) That prevents the purchase or use of, or the according of a preference in its territory of a particular technology, or	X			
(i) To adopt (i) A given rate or amount of royalty under a licence contract; or (ii) A given duration of the term of a licence contract	X			
Senior management	X		X	
10. To hire a given number or percentage of its nationals			X	
9. To locate the headquarters of an investor for a specific region or the global market in its area			X	
11. To achieve a given level or value of research and development in its area			X	

Source: Author's compilation

Chapter 10: Cross-border Trade in Services

Service was included under the WTO regime in 1995 as a result of the Uruguay Round and the launch of GATS. Four modes of service transaction are defined in GATS: Mode 1 (Cross-border trade), Mode 2 (Consumption abroad), Mode 3 (Commercial presence), and Mode 4 (Presence of natural persons). GATS uses the positive list approach, wherein the countries may decide which sectors to commit to liberalisation.

TPP Chapter 10 does not apply to the financial services defined in Chapter 11 (Financial Services) and air services and related services that support of air services (Articles 10.2.3, 10.2.5). In addition, government procurement and services supplied in the exercise of governmental authority are excluded (Chapter 10.2.3).

Cross-border trade in services means the supply of a service (a) From the territory of a party into the territory of another party; (b) In the territory of a party to a person of another party; or (c) By a national of a party in the territory of another party. These concepts are very close to Modes 1, 2 and 4 in GATS, and not limited to Mode 1. As discussed in the previous section, an investment in the service sector, which is a similar concept to GATS Mode 3, is covered by Chapter 9 in the TPP.

Similar to investment, cross-border trade in services also uses the negative list approach (Article 10.7). Existing measures of central and regional governments that are not subject to some or all of the obligations imposed by Article 10.3 (National Treatment), Article 10.4 (Most-Favoured-Nation Treatment), Article 10.5 (Market Access), and Article 10.6 (Local Presence) shall be listed in Annex I. Article 10.3, Article 10.4, Article 10.5, and Article 10.6 shall not apply to measures at a local level of government. Annex II includes specific sectors, sub-sectors or activities for which a party may maintain the existing measures, or adopt new or more restrictive measures that do not conform with the obligations imposed by Article 10.3, Article 10.4, Article 10.5, and Article 10.6.

No party shall require a service supplier of another party to establish or maintain a local presence, or a a local presence (a representative office or any form of enterprise) as a condition of the cross-border supply of services, unlike the case for GATS (Article 10.6).

Domestic regulation (Measures relating to the qualification requirements and procedures, technical standards, and licensing requirements) is critical to the supply of services. Article 10.8.2 recognises the right to regulate and introduce new regulations concerning the supply of services. If a party requires authorisation for the supply of a service, it shall ensure that its competent authorities shall:

(a) Within a reasonable period of time after submission of an application that is considered complete under its laws and regulations, inform the applicant of the decision concerning the application;
(b) To the extent possible, establish an indicative timeframe for processing an application;
(c) If an application is rejected, to the extent possible, inform the applicant the reasons for rejection, either directly or on request, as appropriate;
(d) At the request of the applicant, provide, without undue delay, information concerning the status of the application;
(e) To the extent possible, provide the applicant with the opportunity to correct any minor errors and omissions in the application, and endeavour to provide guidance concerning the additional information required; and
(f) If deemed appropriate, accept copies of documents that are authenticated in accordance with the Party's laws in place of original documents.

If the licensing or qualification requirements include completion of an examination, each party shall ensure that (a) The examinations are scheduled at reasonable intervals; and (b) A reasonable period of time is provided to enable interested persons to submit an application (Article 10.8.6). Each party shall ensure that there are procedures in place domestically to assess the competency of the professionals of another party (Article 10.8.7). In the case of GATS, procedures to verify the competence of professionals shall be provided only for the sectors where specific commitments are undertaken.

Article 10.9 is about recognition, which includes both autonomous recognition and mutual recognition based on the agreements. Note that MFN does not apply to recognition. The parties shall endeavour to facilitate trade in professional services, including establishment of a Professional Services Working Group. TPP does not entail any MRA at this point in time, and Annex 10-A Professional Services, states the guiding principles to facilitate mutual and autonomous recognition. In the case of engineering and architectural services, a party shall encourage the relevant bodies operating the APEC Engineer or APEC Architect Registers to enter into mutual recognition arrangements with the relevant bodies of the other parties operating such registers (best endeavour). A party may consider, if feasible, taking steps to implement a temporary or project specific licensing or registration regime based on a foreign supplier's home licence or recognised professional body membership, without the need for a further written examination (best endeavour).

Chapter 11: Financial Services

Under GATS, the sector of financial services is one of 12 sectors. Almost all FTAs in Asia follow the GATS style, but include an annex on Financial Services that contains provisions on the measures for prudential reasons and new financial services, among others. However, NAFTA has a stand-alone chapter on financials services, separating it from other services. TPP follows NAFTA in this regard.

It is critically important to understand the types of financial activities that are *not* covered by the chapter. Firstly, Chapter 11 shall not apply to activities or services forming part of a public retirement plan or statutory system of social security, provided that those are conducted without competition with a public entity or a financial institution. Secondly, the chapter shall not apply to government procurement of financial services.

Article 11.5 Market Access for Financial Institutions, stipulates that no party shall adopt or maintain with respect to the financial institutions of another party, or the investors of another party, seeking to establish institutions, measures that impose limitations on:

- The number of financial institutions (numerical quotas, monopolies, exclusive service suppliers, economic needs test);
- The total value of financial service transactions or assets (numerical quotas, economic needs test)
- The total number of financial service operations, or the total quantity of financial services output expressed (quotas, economic needs test)
- The total number of natural persons that may be employed in a particular financial service sector, or that a financial institution may employ, and who are necessary for, and directly related to, the supply of a specific financial service (quotas, economic needs test);

Measures that restrict or require specific types of legal entity or joint venture are also prohibited under Article 11.5. However, in the case of new financial services, a party may determine the institutional and juridical form through which the new financial service may be supplied, and may require authorisation for supply of the service (Article 11.7: New Financial Services).

Article 11.6 Cross-Border Trade, states that each party shall permit, under terms and conditions that accord with national treatment, cross-border financial service suppliers of another party to supply the financial services specified in Annex 11-A (Cross-Border Trade).

The nationality requirement for management level people is also restricted. Article 11.9: Senior Management and the Board of Directors states:

- No party shall require the financial institutions of another party to engage natural persons of any particular nationality as senior managerial or other essential personnel.
- No party shall require that more than a minority of the Board of directors of a financial institution of another party be composed of the nationals of the party, persons residing in the territory of the party, or a combination thereof.

As in the chapters on investment and cross-border trade in services and investment, Chapter 11 uses the negative list approach (Article 11.10). Existing measures by central and regional governments that are not subject to some or all of the obligation imposed by Article 11.3 (National Treatment), Article 11.4 (Most-Favoured-Nation Treatment), Article 11.5 (Market Access for Financial Institutions), Article 11.6 (Cross-Border Trade) and Article 11.9 (Senior Management and the Board of Directors) shall be listed in Annex III Section A. Article 11.3, Article 11.4, Article 11.5, Article 11.6, and Article 11.9 shall not apply to measures by a local level of government. Annex III Section B includes specific sectors, sub-sectors, or activities for which a party may maintain the existing measures, or adopt new or more restrictive measures that do not conform with the obligations imposed by Article 11.3, Article 11.4, Article 11.5, Article 11.6, and Article 11.9.

A party shall not be prevented from adopting or maintaining measures for prudential reasons. "Prudential reasons" includes maintenance of the safety, soundness, integrity, or financial responsibility by individual financial institutions or cross-border financial service suppliers, as well as the safety and financial and operational integrity of the payment and clearing systems (Article 11.11 Exception). Nothing in the financial services chapter shall apply to non-discriminatory measures of a general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies (Article 11.11 Exceptions). However, special consideration is given to state-state dispute settlement and ISDS that deal with Article 11.11 (See details below).

Regarding transparency, while the majority of the provisions are best-endeavour clauses, there are two specific binding obligations. Firstly, each party shall ensure that the rules for a general application adopted or maintained by the self-regulatory organisation of the party are published promptly or otherwise made available (Article 11.13.5). Secondly, each party shall maintain or establish appropriate mechanisms to respond to inquiries from interested persons regarding measures for a general application covered by the financial services chapter (Article 11.13.6). Thirdly, the regulatory authorities shall make available publicly the requirements for completing an application relating to the supply of financial services and they shall inform the applicant of the status of its application (Article 11.13.8, 9). Fourthly, a party's regulatory authority shall make an administrative decision on a complete application within 120 days, and shall notify the applicant of the decision promptly (Article 11.13.10).

In the case of the financial sector, the Self-Regulatory Organisations defined as "Any non-governmental body, including any securities or futures exchange, or a market, clearing agency, or other organisation or association, that exercises regulatory or supervisory authority over the financial services suppliers or financial institutions by statute or delegation by the central or regional government" sometimes play a critical role. If a party requires a financial institution, or a cross-border financial service supplier of another party, to be a member of, participate in, or have access to, a self-regulatory organisation in order to provide financial services in or into its territory, it shall ensure that the self-regulatory organisation observes the obligations of NT and MFN (Article 11.14).

Under the terms and conditions that accord with the national treatment, each party shall grant the financial institutions of another party established in its territory access to the payment and clearing systems operated by public entities. This Article is not intended to confer access to the party's lender of last resort facilities (Article 11.15).

Both ISDS and state-state disputes are applicable to financial services. However, in the case of a state-state dispute, if the responding party invokes Article 11.11, the chair of the panel shall have suitable expertise or experience in financial services law or practice, which may include the regulation of financial institutions, unless the disputing parties agree otherwise (Article 11.22). If an investor of a party submits a claim under ISDS, and the respondent invokes Article 11.11 (Exceptions) as a defence, the respondent shall submit a written request to the authorities responsible for financial services of the party of the claimant for a joint determination by the authorities of the respondent and the party of the claimant on the issue of whether and to what extent Article 11.11 is a valid defence to the claim (Article 11.23).

Chapter 12: Temporary Entry for Business Persons

First of all, Article 12.2 makes it clear that the provisions in Chapter 12 shall not apply to measures affecting natural persons seeking access to the employment market of another party, nor shall it apply to measures regarding citizenship, nationality, residence, or employment on a permanent basis. It shall apply to measures that affect temporary entry of the business persons of a party into the territory of another party (Article 12.1).

Application procedures are expected to be prompt, but this is best endeavour (Article 12.3).

Each party shall set out the commitments it makes with regard to temporary entry of business persons.

The commitments shall specify the conditions and limitations for entry and temporary stay, including the length of stay for each category of business persons (Article 12.4). It should be noted that each party may provide the definition of each category of business persons. The commitments by each party shall be included in Annex 12-A. For example, Malaysia's commitments are in the table below. A party shall grant temporary entry to the business persons of another party to the extent provided by these commitments, provided that such business persons: (a) Comply with the granting party's prescribed application procedures for the relevant immigration formality; and (b) Comply with the relevant eligibility requirements for temporary entry.

Table: Malaysia's Commitment for Temporary Entry

Business Visitors	Temporary entry is for a period of up to 90 days. Does not receive any remuneration from a source located within Malaysia.
Installer and Servicer	Temporary entry shall not exceed a total of six months.
Intra-Corporate Transferees and Specialists	Temporary entry is for a period of up to two years that may be extended every two years for a total term not exceeding 10 years for senior managers and not exceeding five years for specialists or experts.
Dependents	Upon an application by a dependent and subject to the Malaysian laws and regulations, relevant licensing, administrative and registration requirements, a dependent may be permitted to work.
Contractual Service Suppliers	Temporary entry is for a period of up to 12 months or the duration of the contract, whichever is less.
Independent Professionals	Temporary entry is for a period of up to 12 months or the duration of the contract, whichever is less. Not more 20 per cent of the lecturers employed by an educational institution who possess the necessary qualifications, knowledge, credentials, or experience.

Source: Author's compilation

Each party shall promptly make publicly available, information on (i) The current requirements for temporary entry under this Chapter, and (ii) The typical timeframe within which an application for an immigration formality is processed. Online publication is best endeavour (Article 12.6).

Chapter 14: Electronic Commerce

At the second WTO Ministerial Meeting in 1998, the "Declaration on Global Electronic Commerce" was adopted. The members agreed not to impose Customs duties on "electronic transmissions", and the moratorium has been extended several times. However, it is unclear if the terms electronic commerce and electronic transmissions refer to the medium of e-commerce and the content itself. Several councils under the WTO (services, goods, TRIPS, etc.) have worked on the subject, but so far without substantial progress.

Article 14.3 clearly states that "No Party shall impose Customs duties on electronic transmissions, including the content transmitted electronically, between a person of one party and a person of another party". Thus, any content (digital product) transmitted electronically should be duty free. But at the same time, TPP Chapter 14 is silent about "Digital products fixed on a carrier medium", unlike the US-Korea FTA which makes it clear that such should also be duty free. Hence, one could argue that it is possible for a TPP party to impose duties on digital products on a carrier medium.

Article 14.4 is about non-discrimination. It should be noted that the Article stipulates that no less favourable treatment shall be given to digital products created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of "another party". This is in sharp contrast to the US-Singapore and the US-Australia FTAs that extend the non-discrimination principles to digital products originating from "non-parties".

TPP Article 14.5 states that, each party shall maintain a legal framework governing electronic transactions consistent with the principles of the UNCITRAL Model Law on Electronic Commerce 1996, or the United Nations Convention on the Use of Electronic Communications in International Contracts 2005. The Article does not request each party to be a participant to the UNCITRAL Model Law or Electronic Communications Convention. In fact, Chile, Japan, and Peru have signed neither. The table below show the adoption status of these two conventions by the developing countries in Asia-Pacific.

Table: Status of Treaty Ratification

	UNCITRAL Model Law	Electronic Communications Convention
TPP Members		
Australia	2011	Not yet
Brunei	Not yet	Not yet
Canada	2000-2004 (each state)	Not yet
Chile	Not yet	Not yet
Japan	Not yet	Not yet
Malaysia	2006	Not yet
Mexico	2000	Not yet
New Zealand	2002	Not yet
Peru	Not yet	Not yet
Singapore	2010	2006
Vietnam	2005	Not yet
US	1998-2004 (each state)	Not yet
Non-TPP Members		
Bangladesh	2006	Not yet
Bhutan	2006	Not yet
Cambodia	Not yet	Not yet
China	2004	2006
India	2000	Not yet
Indonesia	Not yet	Not yet
Korea	1999	2008
Lao PDR	2012	Not yet
Myanmar	Not yet	Not yet
Philippines	2000	2007
Sri Lanka	2006	2006
Thailand	2002	Not yet

Source: Author's compilation

TPP Article 14.6 stipulates that "A party shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form", but also includes flexible language that states "Except in circumstances otherwise provided according its law". Hence, we can argue that there is a loophole and the requirement becomes merely the best endeavour clause.

TPP Article 14.6 has a negative binding obligation stipulating that "No party shall adopt or maintain measures for electronic authentication that would prohibit the parties to an electronic transaction from mutually determining the appropriate authentication method for that transaction".

TPP Article 14.7 stipulates that each party shall adopt or maintain consumer protection laws that proscribe fraudulent and deceptive commercial activities that may harm or potentially harm consumers engaged in online commercial activities.

TPP Article 14.8 (Personal Information Protection) states that each party shall adopt or maintain a legal framework that provides protection of the personal information of the users of electronic commerce. Brunei Darussalam and Vietnam are not required to apply this Article before the date on which that they implement their respective legal framework.

TPP Article 14.9 stipulates that each party shall *endeavour* to (i) Make trade administration documents available to the public in electronic form; and (ii) Accept trade administration documents submitted electronically as the legal equivalent of the paper version of such documents.

TPP Article 14.11 stipulates that "Each party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for conduct of the business of a covered person". Hence, the freedom of information flow is guaranteed only for the conduct of business.

Article 14.13 (Location of Computing Facilities) is one of the areas that TPP was able to achieve a substantial rule making result. This Article prohibits the performance requirement regarding the location of computing facilities to conduct business in a territory. It states that "No party shall require a covered person to use or locate computing facilities in that party's territory as a condition to conduct business in that territory."

TPP is the first FTA that attempts to address the problem of unsolicited messages. Article 14.14 (Unsolicited Commercial Electronic Messages) stipulates that each party shall adopt or maintain measures to overcome the problems associated with unsolicited commercial electronic messages. Brunei Darussalam is not required to apply this Article before the date on which it implements its legal framework.

Article 14.17 (Source Code) prohibits the performance requirement concerning the source code. No previous FTA has provisions concerning source code. It states that "No party shall require the transfer of, or access to, the source code for software owned by a person of another party, as a condition for the import, distribution, sale, or use of such software, or of products containing such software, in its territory".