2013 APEC FTAAP CBNI Workshop on FTA Dispute Settlement Proceedings

- Summary, Lessons and Implications

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Jaemin Lee
School of Law
Seoul National Univ.

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Introduction of the Workshop

- Date & Venue
  - November 7-8, 2013
  - Seoul (Plaza Hotel)
- Title
  - APEC FTAAP Capacity Building Program
    - *Dealing with FTA Dispute Settlement Proceedings: New Challenges and Opportunities for APEC Economies*

Introduction of the Workshop

- Background
  - Tightening web of preferential trade agreements with more complex legal obligations and logistical challenges in terms of DSM
  - Different challenges and issues from different FTAs regarding DSM
  - The gap between developed economies and developing ones growing

Introduction of the Workshop

- Objectives
  - to enhance understanding of FTA DSM
  - to discuss legal questions and logistical burden arising from various DSM of FTAs
  - to share the best practices and provide hands-on experience in solving disputes through FTA DSM
  - to bridge the capacity gaps among economies regarding FTA DSM in expertise, institution, coordination, and human resources
  - to identify challenges and explore pathways to the FTAAP in the area of DSM

Overview of the Discussion

- Session 1
  - Making a Better Dispute Settlement Mechanism for Regional Trade Agreements: Lessons of Integration Efforts in East Asia
  - Speaker: Prof. Wonmog Choi, School of Law, Ewha Womans University, Seoul, Korea
    - How to make a better DSM for RTA
    - A better DSM should include following traits: wider in scope, integrated, preventative, easy to compose, transparent, respecting parties' agreement, fast and good-faith implementation

Overview of the Discussion

- Session 2
  - FTA Dispute Settlement Mechanism: Key Provisions and Characteristics
  - Professor Henry Gao, Singapore Management University, Singapore
    - His presentation centered on key provisions and characteristics of FTA DSM
    - Compared DSMs between the WTO and FTA
    - Discussed the lack of usage of the FTA DSM in practice, due to institutional advantages of the WTO

Overview of the Discussion

- Session 3
  - Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members
  - Mr. Müslüm Yilmaz, Counsellor, Rules Division, WTO Secretariat, Geneva, Switzerland
    - He delivered a presentation regarding domestic judicial review of determinations made by trade remedy IAs
    - The domestic judicial system serves the same purpose with FTA DSMs, *i.e.* the application of the rule of law
    - One important difference of domestic judicial review from that of the WTO/RTA DSM is an actor involved

Overview of the Discussion

- Session 4
  - Some Issues Regarding the Administration of Trade Dispute Settlement Mechanisms: Dealing with Forum Shopping, Appellate Procedure, Transparency Requirements and Other Issues
  - Mr. Sungbum Lee, Attorney, Yoon & Yang, Seoul, Korea
    - He delivered a presentation regarding three issues: forum shopping, appeal system, and transparency
    - New attempts, concerns and challenges based on Korea's experience

Overview of the Discussion

- Session 5
  - Investor-State Arbitration and APEC Member Economies
  - Prof. Susan Karamanian, George Washington University School of Law, Washington, D.C., U.S.
    - She provided an overview of the investor-state arbitration process
    - Identified some of the key issues, relevant to APEC member economies
    - The investor-state arbitration has an overlap of the public and private, enabling many experts to engage in robust discussions of public international law issues

Overview of the Discussion

- Session 6
  - Trends in Investment Treaty Disputes: Myth, Reality and Cost
  - Prof. Susan Franck, Washington & Lee University School of Law, Lexington, VA, United States
    - She showed demographics to test myth against reality on key actors in investor-state arbitrations
    - Provided information about key variables linked to key outcomes
    - Pointed out that there have been some suggestions that arbitration is biased against states and towards investors and also concerns about costs

Response from Participants

- Survey Taken
  - 93% of the total participants that attended the workshop submitted surveys and among them:
    - With respect to overall assessment
    - 92% respondents answered “satisfactory”
    - 8% responded with “good”
  - This basically means that almost all participants surveyed found the workshop satisfactory & helpful

Response from Participants

- Survey Taken
  - In regards to the objectives and topics
    - 92% participants answered “satisfactory”
    - 8% responded with “good”
    - Considering the topics covered by the workshop, this result of the survey can be said to be impressive
  - General Comments:
    - “Received a significant deal of substantive knowledge regarding FTA negotiations and DSM”
    - “These issues should be able to be utilized in their own FTA negotiations promptly”
    - “Speakers were renowned experts on these issues, so practical and meaningful answers were given”

Response from Participants

- Survey Taken
  - With respect to the speakers invited
    - 67% respondents replied “satisfactory”
    - 25% answered with “good”
    - 8% with “fair”
    - This shows that almost 92% of the participants found the speakers well-suited for the topics and issues
  - General Comment
    - “Speakers were able to provide practical advice and usable information for the government officials as opposed to some academic discussions”

Response from Participants

- Survey Taken
  - Overall Comments
    - "The workshop provided a comprehensive analysis of DSM in the FTA regime
    - Delegations have learned a lot from speakers that can be used as a platform for future negotiations
    - The participants will convey the messages and lessons back to the capital and colleagues
    - The difficult topics were explained and discussed in an easier way
    - The topics selected were timely and appropriate
    - The speakers and discussants were well balanced to present various aspects of DSM"

Lessons and Implications

- Timely Topics Important
  - Even complex and technical topics may be welcome
  - Survey in advance critical
- Something Practical Necessary
  - Inputs and advice that can be used and immediately
  - Ideas and solutions for negotiations
- Developing Economies' Situation Reflected
  - Developing economies situations different
  - Academic-oriented discussion may not help
- Speakers Offering Guidance and Solutions
  - Academics, practitioners and officials well balanced
  - Providing solutions rather than questions

Lessons and Implications

- Areas of Improvement
  - Time constraints
    - 1 business day full discussion may not be sufficient
  - Inviting officials from participating economies as speakers
    - Officials from participating economies may be invited to speak and suggest problems upfront
  - Speaker selection
    - Regional, sectoral, professional balance required
  - Specification of topics
    - Broader topics vs. Specific and detailed topics
  - Detailed reports
    - Outcome need to be reported and circulated widely

Conclusion and Suggestions

- APEC FTAAP Capacity Building Program
  - Important, Timely and Helpful
  - Should be continued in the future if at all possible
- Suggestions for Future
  - Topic selection based on discussion and consensus
  - Facilitation of participation of experts & officials from developing economies as speakers and discussants
  - Report preparation and circulation
  - Sequential meetings in 2-3 years for one topic, if continuing discussions and follow ups are needed
  - Preparing participating officials in advance

Thank you very much!

jaemin@snu.ac.kr