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.
Contents

- Introduction of the Workshop
- Overview of the Discussions
- Response from the Participants
- Lessons & Implications
- Future Suggestions
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
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
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
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