

APEC Training Course on Building and Enhancing FTA Negotiation Skills on Government Procurement

Ho Chi Minh City, Viet Nam

January 09th – 10th, 2014

Summary Report

I. Introduction

On January 09th and 10th, 2014, the APEC Training Course on Building and Enhancing FTA Negotiation Skills on Government Procurement, initiated by Viet Nam and co-sponsored by Australia, Canada, Indonesia, Russia, and the United States, was held in Ho Chi Minh City, Viet Nam. There were 7 speakers and 50 other participants in the Training Course, including representatives from 12 APEC member economies (Australia; Canada; Chile; China; Hong Kong, China; Indonesia; Malaysia; Peru; Chinese Taipei; Thailand; the United States; Viet Nam) and an international organization (WTO – the World Trade Organization). Most of the Training Course speakers and participants were current or potential FTA negotiators in government procurement. There were also attendances of participants who are in charge of making government procurement related policies.

The Training Course was targeted to help in increasing capacity of negotiators and policymakers, with practical relevance, to participate in government procurement negotiations, increasing general knowledge of current situation in FTA negotiations on government procurement, knowledge of references in government procurement (academic references; feasibility studies and texts of FTAs) and knowledge of how government procurement obligations enhance transparency and reduce opportunities for corruption. It aimed also at sharing best practices and experiences in preparing for negotiations. Last but not least, the Training Course provided opportunities of exploring possible implications on trade and government procurement situation of economy(ies) if participating in the FTA/FTAAP.

II. Background

This project is designed to put into action APEC Ministers' instructions to build capacity to strengthen and deepen the regional economic integration, and to facilitate the realization of the Free Trade Agreement of the Asia - Pacific (APEC 2011 Ministerial Meeting statement), which is also a rank #1 priority of APEC of "promoting regional economic integration via free and open trade and investment."

In addition, this project will not only provide capacity building for APEC government procurement negotiators but also equip them with the updated and most relevant work on government procurement. This, in turn, will contribute to the objectives of APEC trade and investment liberalization and facilitation

Themes covered during the two-day event included: (i) *The Necessity of Having Government Procurement Chapter in FTAs*; (ii) *WTO Government Procurement Agreement and Government Procurement Chapter in FTA*; (iii) *Negotiating Government Procurement Chapter in an FTA*; (iv) *Experience in Coordination and Stakeholder Consultation*; (v) *Simulation Exercise*; and (vi) *Best Practices in Post-Negotiation Implementation*.

III. Discussion

Outcomes

The APEC Training Course on Building and Enhancing FTA Negotiation Skills on Government Procurement included 2 days for presentations and discussions on FTA-related government procurement and for simulation exercise. The last session (recommendations for future activities) was overwhelmed with active discussions of all speakers and participants who all had an opportunity to

share what they cantake away from the Training Course as well as to suggest potential APEC activities related to government procurement or other APEC capacity building activities.Overall, the Training Courseachieved its main objectives as described in the project proposal. Moreover, all participants considered this as a valuable chance for networking among experts in the field of government procurementwithin and outside the APEC region.

Key Issues Discussed

Opening remarks

In her opening remarks,**Ms Pham Quynh Mai (Deputy Director General, Multilateral Trade Policy Department, Ministry of Industry and Trade, Viet Nam)**, stressed the importance of the Training Course in the light that government procurement is a complicated issue whereas developing economies has modest knowledge and experiences. She reiterated that building and enhancing FTA negotiation skills on government procurement is essential and pragmatic for the benefits of all APEC economies, especially the developing ones. She hoped that with intensive presentations of speakers and active discussions of all participants, the Training Course would offer a worthwhile opportunity for negotiators and policy-makers of Viet Nam and other APEC members to exchange and learn precious experience, as well as to enhance their knowledge on negotiating government procurement issues in FTAs. This would contribute to boosting the efficiency of both government procurement negotiations and the implementation of government procurement regulations, once the FTAs enter into force.

Training Course's sessions

Experts provided presentations on the following topics:

1/ To introduce the overview on “The Necessity of Having Government Procurement Chapter in FTAs”, **Mr Robert Anderson (Counsellor, Intellectual Property Division – Team leader for government procurement and competition policy, WTO)**gave an in-depth presentation with following content: *(i) Economic, developmental and social significance of government procurement; (ii) Two key trends regarding trade and government procurement worldwide; (iii) Potential benefits and costs of participation in relevant agreements for developing/transition economies.* Mr Anderson reiterated that government procurement is a large proportion of Gross Domestic Product (GDP) in most countries, accounting for 15 – 20 per cent of GDP. He pointed out that government procurement supports essential functions of government and is vital for development and social policy purposes. In addition, Mr Anderson emphasized the importance of including a Government Procurement Chapter in an FTA to assure transparency, good governance and healthy competitive markets for governmental functions. In the views of Mr Anderson, there are two key trends regarding trade and government procurement worldwide, which are: *(a) increasing coverage of government procurement by international trade disciplines (the WTO Government Procurement Agreement and Regional Trade Agreements), and (b) Limited (possibly narrowing) market access possibilities for suppliers not covered by such disciplines.* These trends led to the needs of clear necessity of an RTA chapter to secure market access rights in the government procurement sector as well as the compatibility of RTA participation with possibility of eventual GPA accession. Last but not least, Mr Anderson introduced the benefits and costs of participation in GPA/ a relevant RTA for developing/emerging economies. The benefits are: *(i) Potential trade gains from assured access to other economies' procurement markets and insulation from possible protectionist measures; (ii) Possibilities for achieving enhanced value for money in acceding economies' own procurement systems; (iii) potentially increased incentives for inbound foreign direct investment* (There are 2 more benefits of GPA members: Opportunities to influence the terms of other Parties accessions and opportunities to influence the future evolution of the Agreement). The costs are: (i) Direct costs of participating in relevant negotiations; (ii) Costs of necessary institutional adaption; (iii) Adjustment costs for local firms/industries.

2/ There were 2 speakers presenting during Session 2 on “WTO Government Procurement Agreement and Government Procurement Chapter in FTAs”: Mr Robert Anderson and **Ms Kamala Dawar (the Graduate Institute, Switzerland)**.

- Mr Robert Anderson’s presentation was divided into 5 parts: (i) *Relevance of WTO GPA to regional trade initiatives worldwide*; (ii) *Special relevance for APEC member economies*; (iii) *Objectives of the Agreement, core principles and main elements*; (iv) *Highlights of the recent GPA renegotiation*; (v) *Negotiating perspectives and issues for APEC economies*. With regards to the relevance of GPA for APEC member economies, Mr Anderson introduced APEC members that are also GPA members such as Canada; the United States; Hong Kong, China; Japan; Korea; Singapore and Chinese Taipei. Furthermore, China’s GPA accession is in progress and New Zealand is also seeking to join GPA. There are three core principles of GPA: (i) *non-discrimination*, (ii) *transparency of the procurement system and of individual procurements*, and (iii) *procedural fairness for suppliers/ potential suppliers*. There are five main elements of GPA: (i) *General rules on non-discrimination, national treatment and transparency with respect to each Party’s “covered procurement”*; (ii) *Coverage defined through detailed schedules in “Appendix I”*; (iii) *Procedural rules based on international best practices and embodying much flexibility*; (iv) *Enforcement*; (v) *“Transitional measures” to facilitate accession to the Agreement by new Parties*. Mr Anderson also made an overview about the recent GPA renegotiation which will come into force by 31st March 2014. He briefed on elements of the revision as well as key improvements in the revised GPA text. In conclusion, he stated possible negotiating issue for APEC economies, such as coverage, institutional provisions and transitional measures (if any).
- **Ms Kamala Dawar** gave an overview on the evolution of procurement provisions in RTAs. She introduced the scope, coverage and procedural requirements of RTA provisions. Ms Dawar highlighted that there are few Asian FTAs with comprehensive procurement provisions and no ASEAN FTAs include procurement provisions. Moreover, she pointed out existing flexibilities in RTA government procurement provisions, including local industry, development, employment and local content requirements. Ms Dawar summarized that (i) RTAs can serve as a unique venue for comprehensive regime, (ii) RTAs can offer legislative push through a committee, (iii) RTAs can serve as stepping stone to WTO GPA, and (iv) RTAs can serve to reinforce best practice. She concluded that ongoing advocacy and legislative push is needed and challenges and costs remain (in terms of preparatory, negotiation, implementation costs, impact of foreign competition on domestic industry).

3/ During Session 3 on “Negotiating Government Procurement Chapter in an FTA”, the speakers shared experience in negotiating government procurement chapter in trade agreements.

- **Ms Jane Wagner (Director, Trade Policy Section in Procurement Policy Branch, Australian Department of Finance)** approached the issue from the views of an experienced negotiator. She briefed on Australia’s Free Trade Agreements (FTAs) and FTAs under negotiation. Ms Wagner also shared her experience as head of government procurement trade team. She stressed typical challenges in negotiating government procurement. Those are: timetabling/ planning, text, market access schedule, FTA/non-FTA experience, differences among developed and developing/emerging partners, languages etc. Once the FTA is in place, Ms Wagner noted other typical challenges such as reviews and threshold adjustments, maintaining leveling exercise across all agreements, responding to stakeholders, FTA GPA commitments, government efficiencies and savings to be driven by procurement.
- **Mr Daniel Hylton (Deputy Chief Counsel, Office of the Chief Counsel for International Commerce, U.S. Department of Commerce)** shared his personal views on negotiating a government procurement chapter in an FTA. He divided his presentation into 4 parts: (i) preparation; (ii) strategy; (iii) negotiation; and (iv) “landing zone”. In order to prepare domestically for a negotiation, there are 4 important elements: a negotiating team, research, domestic consultation, and implementation. Among those elements, domestic consultation is the hardest part as negotiation objectives must be introduced clearly and persuasively to get support. Domestic consultation involves intra-government, industry and other stakeholders. Mr Hylton stated that preparation results in

strategy, which is consisted of identifying interests and negotiating objectives, meaningful market access gains, and win-win scenario. With regards to negotiation, he emphasized 5 points: (i) *agree on scope, sequence and schedule*, (ii) *core procedural obligations and market access*, (iii) *expanded procedural obligations and market access*, (iv) *technical assistance/ capacity building*, and (v) *flexibilities*. He concluded by mentioning about “landing zone”, which should be realistic, achieving the objective with win-win outcome, and trade-offs.

- **Ms Kamala Dawar** approached the issue from a different perspective with a presentation on “Negotiating S&D in Government Procurement Agreements”. She explained the need for S&D: (i) *Safeguard balance of payments, and ensure adequate reserves*; (ii) *Promote domestic industries*; (iii) *Support government procurement – dependent industrial units*; and (iv) *Encourage economic development through regional or global arrangements amongst developing countries*. Regarding S&D and public procurement provisions, there are two main types of measures, which are transitional measures and deferred implementation of specific obligations. Ms Dawar also listed other aspects in terms of S&D and public procurement provision such as technical co-operation and capacity building, accession- and implementation-related aspects etc. She provided examples of S&D including, but not limited to, price preference program, offsets, phase-in and transitional thresholds, implementation periods. In her conclusion, Ms Dawar reconfirmed several points: (i) *Transitional measures provide flexibilities for developing countries designed to respond to development needs*; (ii) *A need to be precise and concrete in negotiations*; and (iii) *S&D provisions should not lose sight of the benefits of liberalization or end goal through over-protection*.

4/ Speakers from Australia and Peru provided 2 presentations on the topic of “Experiences in Coordination and Stakeholder Consultation.”

- **Ms Jane Wagner (Australia)** made a comprehensive presentation on (i) Stakeholder identification and (ii) stages of negotiation. She introduced 4 groups of stakeholders identified: (i) *ministerial and parliamentary*; (ii) *internal to central Government*; (iii) *sub-central Government*; and (iv) *external to Government*. With regards to stages of negotiations, Ms Wagner named 4 stages. Those are: (i) *Pre-FTA negotiations commencing*; (ii) *During FTA negotiations*; (iii) *Between signing and entry into force*; (iv) *Ongoing*. She, then, made a detailed presentation on different engagements of stakeholders in each of the stage.
- **Mr Mario Arteaga (Government Procurement Administrative Tribunal Board member, Government Procurement Supervisory Agency, Peru)** covered 3 main parts in his presentation: (i) Liberalization of Peru’s Government Procurement market, (ii) Background, and (iii) Identifying sensitivities with stakeholders. He emphasized the main benefits sought during the considerations for liberalization of Peruvian government procurement market, including: close the gap between supply and demand, allow the government access to better procurement conditions, allow domestic suppliers access to “closed” foreign government procurement markets, promote development and growth of public procurement by commitments in FTAs, and strengthen competitiveness of domestic firms. In addition, Mr Arteaga listed main stakeholder in this field, such as Ministry of Foreign Trade and Tourism, Government Procurement Supervisory Authority, Ministry of Economy and Finance, Commission for SMEs’ Promotion, Ministry of Agriculture, Business Council for International Negotiations, and Consultative Council. Last but not least, he gave a comprehensive presentation on each stakeholder and its sensitivities (exceptions and non-coverage). He concluded by highlighting following points during post-negotiation implementation: (i) To fulfill international commitments on GP, all public entities (from central and sub-central level, including state owned enterprises) must develop a common procedure into a unique regulatory and institutional framework; (ii) Every commitment has been included into regulatory system and administrative procedures; it is only necessary to match FTAs thresholds with national ones for *major procurements*; (iii) *Minor procurements* represent the natural scope for domestic SMEs.

5/ During the 6th Session on “Best Practices in Post-negotiation Implementation”, there were three speakers sharing different and interesting perspectives of APEC member economies.

- **Ms Jane Wagner (Australia)**'s presentation is outlined into 5 components: (i) *action plan*; (ii) *legislative action plan*; (iii) *cost/ opportunities/ benefit analysis*; (iv) *dissemination*; (v) *review*. In order to develop an efficient action plan, she stressed the importance of investing time to plan tasks and activities, resourcing for implementation, building capability and capacity, changing of system etc. In addition, she highlighted the necessity of focusing on access gained rather than the opportunities/ tenders won. Important factor in dissemination is multiple dissemination tools targeting all levels. This include promulgating the rule set, training sessions, publishing procurement bulletins, establishing agency advice help desks, dissemination via Website FAQs, social media etc. In conclusion, Ms Wagner also shared information on the preparation for review with emphasis on calculations for thresholds, alert to Machinery of Government changes, opportunity to discuss operations of the agreement and/ or enhancements to the agreement.

- **Mr Kevin Thompson (Director, Trade Policy, Government Procurement, Trade and Environment Division, Department of Foreign Affairs, Trade and Development, Canada)** gave an in-depth presentation on implementation. He outlined his presentation in 4 parts: legislature, government policy centers, procuring entities, and independent supplier complaint body. After briefing on the two approaches of implementing government procurement obligations, Mr Thompson revealed a timeline of implementation. This timeline is not fixed and negotiators should take the implementation process into account before the negotiation, during the negotiations, during the implementation period and after the entry into force. He reiterated that the implementation process start before the end of the negotiations. Besides, he concluded that negotiators should be involved in each step of the implementation process.

- Last but not least, **Mr Ricardo Miranda (Legal Department, Direccion ChileCompra, Chile)** started his presentation by introducing Chile's FTAs. He pointed out several important pre-implementation factors such as the "entry into force" provision in the FTA, the internal or domestic procedures of the signatories, ratification and ratification system. In terms of implementation, Mr Miranda insisted on legislative enactments and amendments, capacitating and public information, and implementation provisions in FTAs. What is more, he stressed the practical problems in the implementation of government procurement chapters. Those are: language, requirements for tenders, requirements for foreign supplier, and charging a fee for tender documentation. According to Mr Miranda, there are necessary steps needed before initiating a procurement process, including (i) checking the list of covered entities in government procurement chapters, (ii) checking if the goods or services intended to procure are included in the list covered by the FTAs, and (iii) checking if the value of the procurement equals or exceeds the relevant threshold specified in the FTAs. Mr Miranda concluding by highlighting main issues to be taken into account in a covered procurement such as national treaty and not discrimination, transparency, limited tendering, rules of origin, offsets, time periods, domestic review etc.

Mock negotiation

During the mock negotiation, participants were divided into 3 groups of three economies (A, B, C) negotiating a Regional Trade Agreement. Each country had differing economic characteristics and policy frameworks for small and medium enterprises (SMEs).

This issue had been raised in the context of the government procurement text as well as market access offers. The government procurement Negotiating Group had struggled with the types of obligations Parties should adopt to promote SME participation in government procurement, as well as whether discriminatory preferences for domestic SMEs should be permitted.

The objective of the mock negotiation was to reach an agreement amongst the 3 Parties regarding the inclusion of provisions related to small and medium sized enterprises (SMEs) in the RTA's Government Procurement Chapter.

Each team had one hour to prepare for the mock negotiation and another hour to undertake the negotiation. Each team was encouraged to designate one person to act as a lead negotiator during the mock negotiation.

Participants were encouraged to conduct research on SME procurement policies, including within their respective countries, prior to attending the APEC training session and during breaks in order to familiarize themselves with the domestic policy considerations related to SMEs.

The one-hour mock negotiation took place enthusiastically with 3 leaders of 3 groups to represent their groups to negotiate. The exercise on mock negotiation was evaluated to be frank, useful and helped to exchange views of negotiators. Through the mock negotiation, participants understood more about the importance of preparation before undertaking negotiations, especially in terms of preparing statistics on other Parties, arguments, making coalition on common issues (in plurilateral/multilateral negotiations). Furthermore, participants were aware of the importance of clarifications during negotiations (especially in case English is the 2nd language of negotiators) as well as the needs of sticking to the Party's position during negotiation.

IV/ Conclusion and Recommendations

1/ Training Course's speakers, moderators and participants shared their achievements after attending the Training Course, including but not limited to: (i) *Better understanding on the importance of government procurement in the FTA*; (ii) *Enhanced skills of negotiating government procurement in the FTA*; (iii) *Sharing experiences of coordinating and stakeholder consultation*; (iv) *Understanding on the background to WTO GPA/FTA*; (v) *Learning more about the practical aspects of FTA negotiations*; (vi) *Learning some tactics for negotiation skills*; (vii) *Better understanding of domestic issues faced by economies and concerns regarding coverage of government procurement*.

Participants also said that the Training Course had provided a great networking opportunity for current and potential government procurement negotiators in APEC member economies.

2/ The Training Course concluded with a discussion of possible future activities to continue this project. Participants suggested that follow-up activities on government procurement should be:

- At least 3-day Training Course, more simulation (analytically with in-country schedule);
- Share experiences in implementation on non-binding principles of government procurement;
- More studies and details on WTO GPA (for example its text and implications) as it is the core of government procurement negotiations
- Inter-linkage issues with government procurement (such as rules of origin, services, market access);
- Sharing information of respective APEC economies on the implementation of Government Procurement Chapters both on disciplines and market access under FTAs.

4/ Follow-up Training Course(s) of other areas should consider the following topics:

- Training Courses on Sustainable Development, GATS, rules of origin;
- A specific Training Course targeted at negotiation techniques and skills.