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Transparency Provisions in FTAs – What They Mean and What Needs To Be Done

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TRANSPARENCY PROVISIONS IN FTAS

- WHAT THEY MEAN AND WHAT NEEDS TO BE DONE

Jaemin Lee

School of Law, Seoul National Univ.

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Contents

- Where We Stand
- Transparency Provisions in FTAs
- Legal Meaning of Transparency Provisions
- Implementation of Transparency Provisions
- Concluding Remarks

Where We Stand



Where Do We Stand in Trade?

- Spread of anti-globalization
- Surge of global protectionism
- Shattered Multilateralism
- WTO still struggling
- Lackluster Regionalism
- U.S.-China confrontation
- A bleak outlook, indeed

And then COVID-19 Pandemic

- Unprecedented event and still continues
- Affects the entire sectors of an economy
- Emergency response by many economies
- Trade measures are also taken
- Trade agreements stand to reflect the lesson

Eroding Leadership of WTO

- Many norms out of date
 - 1986 vs. 2022
 - Societies & businesses have seen a sea change
- New norms are missing
 - Consider digital economy, Artificial Intelligence
- So, inevitably
 - Disputes bound to increase
 - Rulings bound to be dissatisfactory
 - Panel/AB decisions unable to resolve disputes
- A vicious circle

Now Even the DSM is Faltering

- A crown jewel of the WTO regime
 - 606 disputes at the WTO since 1995
 - Strengthening rule of law
 - Trailblazer in many respects
- Other international courts look to WTO's DSM for insights and guidance
 - ISDS reform
 - FTA dispute settlement mechanisms
- But now in crisis in many respects
- Future is uncertain

Regional Trade Agreements

- Notable contribution for
 - Filling the gap and ensuring trade
 - Free Trade Agreements, Economic Partnership Agreements, etc.
 - Market liberalization
 - Adoption of new rules and norms
 - In particular, mega-FTAs
 - CPTPP, RCEP, USMCA, FTAAP
 - Mega-regionals are different from other FTAs
- Challenges still remain, however
 - The core problem of norm-reality mismatch remains and widens, even with FTAs

CPTPP

- *The Comprehensive and Progressive Agreement for Trans-Pacific Partnership*
- 11-state mega FTA
- U.S. initiated but later withdrew
- Entered into force on Dec. 30, 2018
- Then largely silent
- UK initiated negotiation in June 2021

RCEP Overview

- Entered into force January 1, 2022
- Important achievement at a critical time
- 8 years in the making
- 15 states' mega-FTA
- The largest FTA at this point
- New rules
- But cautious and conservative approach

Transparency Provisions in FTAs



Scattered in Many Places

- Rule-making by agencies
- Decision-making by agencies
- Record Keeping, Documentation & Publication
- Dispute Settlement Proceedings

Importance of Transparency

- In the absence of transparency:
 - Benefit of FTAs easily vitiated
 - Prone for Non-Tariff Barriers
 - Prone for disguised measures
- More important when norms are vague
- More important for new norms
- More important if agency has discretion

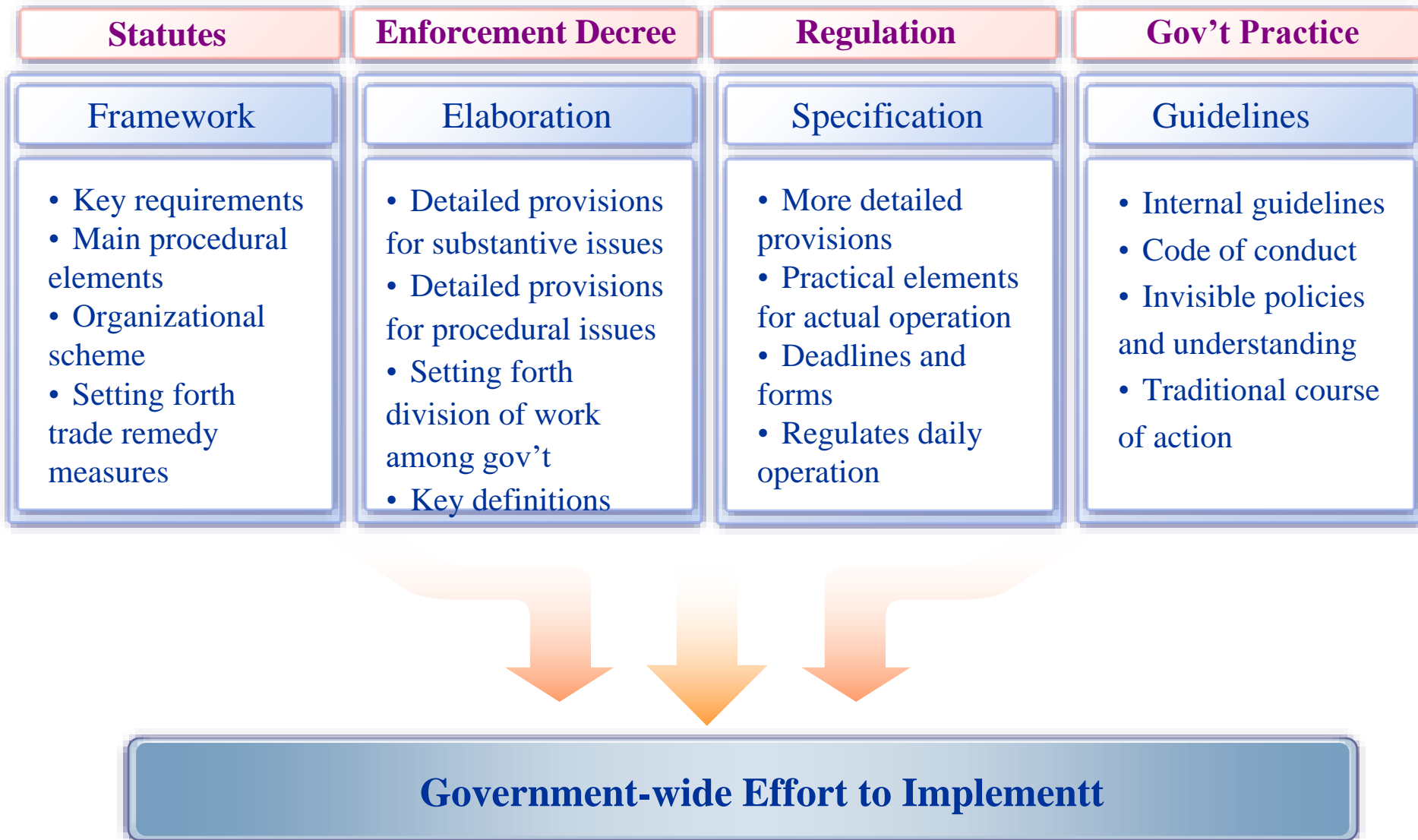
Difficulty of Transparency Provisions

- Wide scope and broad coverage
- Hard to implement
- Implementation takes time
- Related to national infrastructure
- Different cultural background involved
- Developing economies more difficult

Implementation of Transparency Provisions



Implementation of FTAs



Legal Meaning of Transparency Provisions



Rule-making by Agencies

- Advance notice for the plan
- Publication of preliminary rule
- Soliciting comments from interested parties
- Written comments & public hearing
- Evaluation and reflection of comments
- Publication of final rule
- Record keeping, documentation & publication

Decision-making by Agencies

- Investigative proceedings by agencies
- Trade remedies, competition rules, customs classifications, etc.
- Publication of preliminary determination
- Written submissions & public hearing
- Right to be heard
- Prohibition of *ex parte* communication

Decision-making by Agencies - 2

- Meeting with interested parties
- Evaluation and reflection of submissions
- Evaluation and reflection of comments
- Publication of final determination
- Record keeping, documentation & publication

Dispute Settlement Proceedings



Transparency Provisions in DSM

- State-to-State dispute settlement proceedings
- Investor-State dispute settlement proceedings
- Transparency becomes a key element
- Transparency has been widely accepted
- Scope is being expanded

Korea and Transparency Provisions in DSM

- Korea was one of the states that adopted transparency provisions early on
 - Korea-US FTA, from the 2005-2006 period
- Transparency rules embraced since then
 - Transparency as a key component of IIAs
- Specific outcomes vary, though
 - depending on reactions from the other contracting parties
- Some agencies still somewhat cautious
 - to see how actual applications of the rules may play out

Korea and Transparency Provisions

- Korea as an active participant in negotiations of:
 - UNCITRAL Transparency Rules
 - UNCITRAL Transparency Convention
- Korea has not acceded to “Mauritius Convention”
 - Still contemplating
 - Demand is growing
- Effect of recent ISDS proceedings against Korea
 - Triggered defensive response from the government
 - Caused different views among agencies
- In principle, transparency is the general direction for all Korean FTAs
 - Demand from the NGOs and public

UNCITRAL Transparency Convention

Convention on Transparency in Treaty-Based Investor-State Arbitration

- “Mauritius Convention”
- Text Adopted in July 2014 UNCITRAL Meeting in New York
- Applies UNCITRAL Transparency Rules to pre-April 1, 2014 BITs
- New ideas, new attempt

UNCITRAL Transparency Convention

- States have an option to:
 - Accede to the convention
 - Carve out BITs that they want to leave outside the Transparency Rules
- This option has been made possible through “reservations”
- FTAs reflect UNCITRAL Rules and/or Transparency Convention as necessary

Korea-US FTA

- Entered into force on Mar. 15, 2012
- Article 11.21: Transparency of Arbitral Proceedings
 - Documents disclosed to the public
 - Hearing open to the public
 - Protected information
 - Submitting party determines ☐ On challenge, tribunal reviews and determines ☐ On request from respondent, Joint Committee issues a binding determination
- Definition Clause:
 - **UNCITRAL Arbitration Rules** means the arbitration rules of the United Nations Commission on International Trade Law.

Concluding Thoughts



Going Forward

- Realizing Transparency as a Core Pillar of Future Trade Norms
 - Sometimes more important than market liberalization & facilitation
- Bilateral Level
 - FTAs should explore new norms on transparency
- Multilateral Level
 - Consensus building for WTO Membership
 - Incorporating results from mega-FTAs (i.e., CPTPP, RCEP, etc.)
 - Introduction and experiment of new rules
- APEC is the best forum for this experiment

Going Forward

- Transparency provisions represent:
 - A global trend these days
 - Increasingly common elements in FTAs
- They appear in many different places in FTAs
 - Wide coverage and broad scope
- Difficult to implement, however
 - Takes a long time
 - Needs infrastructure and expertise
 - Developing economies face more difficulties
- Transparency in dispute settlement
 - More complex and politically sensitive
- In future negotiations:
 - These various aspects of transparency provisions should be reflected

Thank you

jaemin@snu.ac.kr

