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Session 1

Dispute Settlement Mechanisms in Subject Matter Chapters in Trade Agreements

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Dispute Settlement Mechanisms in Subject Matter Chapters in Trade Agreements

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Overview

- E-commerce/digital trade provisions
- Financial services
- Intellectual property
- Dispute avoidance, de-escalation mechanisms

E-commerce/digital trade chapters

Context: Evolving digital business models, payment systems, data security

- Commercial
- Policymaking: data issues, authentication, security, etc
- Legal: scope, dispute avoidance and dispute settlement

Considerations in Digital Trade and Financial Services Chapters, Relationship with IP provisions

Digital trade and financial services (and often, IP) do not exist in silos.

- Provisions relating to services, financial services >> may overlap with investment and e-commerce chapter provisions (e.g. non-discriminatory treatment of digital products, data storage and source code provisions)
- Specific DS mechanisms or use general DS in the FTA (such as DS chapter, with or without modification)

Examples

CPTPP Digital Trade Chapter

- No Chapter-specific Dispute Settlement Mechanisms (only Art. 14.18 pertaining to Malaysia and Vietnam) >> Chapter 28 DS

China-Australia FTA E-commerce chapter

- DS in Chapter 15 not applicable (Art. 12.11)

(For comparisons, see e.g. [RCEP](#) Art. 12.17(3) – consultations + referral to RCEP Joint Committee; non-applicability of Chapter 19 but review process mentioned and

[CETA Joint Committee and other bodies](#)).

Digital Economy Partnership Agreements

Examples

Between APEC economies

- [DEPA between Chile, New Zealand and Singapore](#)
- [Japan-US Digital Trade Agreement](#)
[USMCA Digital Trade provisions]

Non-APEC + APEC

- [UK-Singapore DEPA](#)

Digital issues

Institutional, Procedural, Practical DS Issues

- Context of chapter disciplines
- Expertise
- National security and cybersecurity aspects
- Confidentiality issues

Digital issues

Dispute Avoidance, De-escalation Opportunities

- Potential for technical chapter-specific Committees in digital issues?
- Another example: ‘Dialogue’ provisions in *RCEP* E-Commerce chapter (Art. 12.16), including “current and emerging issues, such as the treatment of digital products, source code, and cross-border data flow” and the location of computing facilities in financial services”.
- Mechanisms which could de-escalate or more promptly resolve a dispute e.g. consultations, Chapter-specific Committee, decisions on availability of defences which would bind an investment tribunal (e.g. FSC, Art. 12.13.2 and panel, 12.13.3, Korea-Singapore FTA in relation to Art. 10.12 and 12.6).
- Referral to Commission (e.g. Chile-Thailand FTA, DS Chapter 14, includes cases of urgency – Art. 14.5)
- Potential role of mediation?

Example: DEPA – Chile, New Zealand, Singapore

Like some FTAs, DEPA Art. 14.3 includes a reference to the ‘avoidance’ of disputes.
 Annex 14-B: Mediation Procedures
 Annex 14-C: Arbitration Procedures

Key Features

Facilitate end-to-end digital trade:

Digital Identities

Develop safe and secure digital identities that are mutually recognised.



E-invoicing

Shorter invoice processing time, faster payment and cost savings when similar e-invoicing standards are adopted.



Paperless Trade

Reduce time for document transit and cargo clearance, resulting in lower operating costs.



FinTech and E-Payments

Promote cooperation among companies in the FinTech sector and develop FinTech solutions for businesses.



Enable trusted data flows:

Personal Data Protection

Develop mechanisms to protect personal data being transferred across borders, based on international frameworks.



Open Government Data

Expand access to, and use of, open government data to generate new opportunities for businesses, especially SMEs.



Cross-border Data Flows

Businesses can transfer information across borders and serve their customers, regardless of where they are located.



Data Innovation and Regulatory Sandboxes

Facilitate the development of new products and services by promoting data-driven innovation across borders.



Build trust in digital systems and facilitate opportunities for participation in the Digital Economy:

Artificial Intelligence

Promotes the adoption of ethical AI governance frameworks, which factor in principles that the countries have agreed to, in order to harness AI in a responsible manner.



These include: (i) AI should be transparent, fair and explainable, and (ii) AI must have human-centred values.

SMEs Cooperation

Capacity-building efforts such as a Digital SME Dialogue to promote information sharing and exchange.



Online Consumer Protection

Adopt or maintain laws and regulations that guard against fraudulent, misleading or deceptive conduct that causes harm to consumers engaged in online commercial activities.



Digital Inclusivity

Remove barriers to the digital economy and promote digital inclusion and participation.



Financial Services - examples

One can find a range of FS Chapter approaches to DS and related matters:

No chapter-specific provisions <> 'Hybrid'/Combination <> Chapter-specific provisions

- Examples: Chapter-specific DS provisions (e.g. Articles 12.10-12.13, [Korea-Singapore FTA](#), Art. 10.13, [Chile-Thailand FTA](#), Articles 12.11-12.13, [Hong Kong, China-Chile FTA](#)).
- Chapter-specific *exceptions* (e.g. prudential carve out e.g. Art.12.9, [Hong Kong, China-Chile FTA](#))
- Korea-Peru FTA: [Understanding](#) on FS and measures (page 1032 of FTA text).
- USCMA: [Art. 17.21](#) – in cases of invocation of Art.17.11 Exceptions >> qualifications of Chair and panelists

Financial Services - examples

Chapter-specific provisions

[Chile-Thailand FTA](#)

Art. 10.13

[Korea-Singapore FTA](#)

Art. 12.12

Chile-Thailand FTA

Art. 10.13 in FS Chapter

Article 10.13: Specific Provisions on Dispute Settlement

1. Except as otherwise provided in this Article, any disputes under this Chapter shall be settled in accordance with the provisions of Chapter 14 (Dispute Settlement).
2. Consultations held under Article 10.12 shall be deemed to constitute the consultations referred to in Article 14.3 (Consultations), unless the Parties otherwise agree. If the matter has not been resolved within sixty (60) days after the starting date of the consultations under Article 10.12 or ninety (90) days after the receipt of the request for consultations under Article 10.12.1, whichever is earlier, the complaining Party may request in writing the establishment of an arbitral panel. The Parties shall report the results of their consultations directly to the Commission.
3. Arbitrators of arbitral panels constituted for disputes arising under this Chapter shall meet the requirements set out in Article 14.7 (Composition of Arbitral Panels) and shall also have expertise or experience in financial services law or practice, which may include the regulation of financial institutions.
4. Consistent with Article 14.14 (Non-Implementation – Compensation and Suspension of Concessions or other Obligations), in any dispute where an arbitral panel finds a measure to be inconsistent with the obligations of this Agreement and the measure affects:
 - a. only the financial services sector, the complaining Party may suspend benefits only in the financial services sector;
 - b. the financial services sector and any other sector, the complaining Party may suspend benefits in the financial services sector to the same extent that such measure have an effect on the Party's financial services sector; or
 - c. only a sector other than the financial services sector, the complaining Party may not suspend benefits in the financial services sector.

Art. 14.6 in [DS Chapter](#)

2. The establishment of an arbitral panel shall not be requested on any matter relating to a proposed measure, as referred to in Article 14.3.1.

Korea-Singapore FTA FC Chapter

ARTICLE 12.12 : DISPUTE SETTLEMENT

1. Relevant Articles in Chapter 12 shall apply to the settlement of disputes.
2. For the purposes of this Article, the following shall apply:

ARTICLE 12.11 : CONSULTATIONS

1. A Party may request consultations with the other Party arising under this Agreement that affects financial services. The Parties shall give sympathetic consideration to the request. The Parties shall refer consultations to the Financial Services Committee.
2. Consultation under this Article shall include official visits for financial services.

ARTICLE 20.4 : CONSULTATIONS

1. A Party may request in writing consultations with the other Party on any matter affecting the implementation, interpretation or application of this Agreement or whenever a party considers that any measure or any other matter that is inconsistent with the obligations of this Agreement or causes nullification or impairment of any benefit accruing to it directly or indirectly under Chapters 3 (National Treatment and Market Access for Goods), 4 (Rules of Origin), and 9 (Cross Border Trade in Services).
2. If a request for consultation is made, the Party to which the request is made shall reply to the request within ten (10) days after the date of its receipt and shall enter into consultations within a period of no more than twenty (20) days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.
3. The Parties shall make every effort to reach a mutually satisfactory resolution of any matter through consultations. To this end, the Parties shall:
 - (a) provide sufficient information to enable a full examination of how the measure might affect the operation of the Agreement; and
 - (b) treat as confidential any information exchanged in the consultations which the other Party has designated as confidential.

Korea-Singapore FTA FS Chapter

ARTICLE 12.13 : INVESTMENT DISPUTES IN FINANCIAL SERVICES

1. Where an investor of a Party submits a claim under Section C in Chapter 10 (Investment) against the other Party and the respondent invokes Article 10.12 or 12.6, on request of the respondent, the tribunal shall refer the matter in writing to the Financial Services Committee for a decision. The tribunal may not proceed pending receipt of a decision or report under this Article.

2. In a referral pursuant to paragraph 1, the Financial Services Committee shall decide the issue of whether and to what extent Article 10.12 or 12.6 is a valid defence to the claim of the investor. The Financial Services Committee shall transmit a copy of its decision to the tribunal. The decision shall be binding on the tribunal.

3. Where the Financial Services Committee has not decided the issue within sixty (60) days of the receipt of the referral under paragraph 1, the respondent or the Party of



Korea-Singapore FTA FS Chapter

the claimant may request the establishment of a panel under relevant Articles in Chapter 20 (Dispute Settlement). The panel shall be constituted in accordance with Article 12.12. The panel shall transmit its final report to the Financial Services Committee and to the tribunal. The report shall be binding on the tribunal.

4. Where no request for the establishment of a panel pursuant to paragraph 3 has been made within ten (10) days of the expiration of the 60-day period referred to in paragraph 3, a tribunal may proceed to decide the matter.

5. For the purposes of this Article, tribunal means a tribunal established pursuant to Article 10.19.

Illustrative Hypothetical & Conclusion

Economy A and Economy B are negotiating an FTA which will include digital trade, services and investment chapters. A regulates the sale/transfer of digital products in various ways, but B does not.

If B's investor establishes a business in A which facilitates the sale and purchase of digital assets in a virtual environment in A (e.g. sale of digital 'assets' or tokens in a Metaverse system), it will be subject to A's regulations.

Some questions for policymakers:

- What kinds of measures would be subject to FTA DS? [Scope issue]
- Should FTA disciplines be situated in the digital trade chapter, services/financial services chapter, investment chapter, *or all of the above*? What relationship would such provisions have with IP provisions?
- What DS mechanism would be suitable for dispute avoidance/de-escalation and perhaps, speed?
- What authorities/agencies should be involved and what would be their roles?