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CTI 31-2013A – APEC CAPACITY BUILDING WORKSHOP ON FTA NEGOTIATION SKILLS ON INTELLECTUAL PROPERTY

Da Nang city, Viet Nam
December 17th – 18th, 2014
Summary Report

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I. Introduction

On December 17th and 18th, 2014, the APEC Capacity Building Workshop on FTA Negotiation Skills on Intellectual Property, initiated by Viet Nam and co-sponsored by Indonesia, Malaysia and Thailand, was held in Da Nang city, Viet Nam. Speakers and participants came from thirteen APEC member economies (Australia, Chile, China, Indonesia, Korea, Malaysia, the Philippines, Peru, Russia, Chinese Taipei, Thailand, the United States, Viet Nam). A former Intellectual Property Counselor from WTO also attended and spoke at the Workshop. Most of the Workshop participants were current and potential intellectual property negotiators from APEC member economies.

The Workshop sought to increase capacity of negotiators and policymakers, with practical relevance, to participate in intellectual property negotiations. It aimed also at sharing best practices and experiences in preparing for negotiations. Last but not least, the Workshop was expected to explore possible implications on trade and intellectual property 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 their 2013 Declaration, APEC Leaders insisted that "APEC has an important role to play in coordinating information sharing, transparency, and capacity building..." and "agreed to ...increase the capacity of APEC economies to engage in substantive negotiations." Furthermore, APEC Ministers "encouraged officials to advance the Regional Economic Integration Capacity-Building Needs Initiative Action Plan Framework as a key delivery mechanism for the technical assistance needed to one day make the FTAAP a reality."

Themes covered during the two-day event included: *(i) The Necessity of Having Intellectual Property Chapter in FTAs, (ii) WTO's Agreement on Trade Related Aspects of Intellectual Property Rights, (iii) The Law and Economics of Intellectual Property Rights, (iv) Negotiating Intellectual Property Chapter in an FTA, (v) Simulation Exercise, (vi) Experiences in Coordination and Stakeholder Consultation, and (vii) Best Practices in Post-negotiation Implementation.*

III. Discussion

Outcomes

The APEC Capacity Building Workshop on FTA Negotiation Skills on Intellectual Property included 2 days for presentations and discussions on FTA-related intellectual property 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 can take away from the Workshop as well as to suggest potential APEC activities related to intellectual property or other APEC capacity building activities. Overall, the Workshop achieved 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 intellectual property within and outside the APEC region.

Key Issues Discussed

Opening remarks

In his opening remarks, **Mr Nguyen Cam Tu (Vice Minister of Industry and Trade, Viet Nam)**, stressed the importance of the Workshop in the light that intellectual property is a complicated issue whereas developing economies has modest knowledge and experiences. He reiterated that building and enhancing FTA negotiation skills on intellectual property is essential and pragmatic for the benefits of all APEC economies, especially the developing ones. He hoped that with intensive presentations of speakers and active discussions of all participants, the Workshop 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 intellectual property issues in FTAs. This would contribute to boosting the efficiency of both intellectual property negotiations and the implementation of intellectual property regulations, once the FTAs enter into force.

Workshop's sessions

Experts provided presentations on the following topics:

1/ During Session 1 on "The Necessity of Having Intellectual Property Chapter in FTAs", **Ms Thu-lang Tran Wasescha (former Counsellor at the WTO Intellectual Property Division)** outlined her presentation into 5 parts: (i) Trade, (ii) Intellectual property/ intellectual property rights (IP/IPR), (iii) the trade – intellectual property relation, (iv) Why an IP Chapter in FTAs?, and (v) Multilateralism and plurilateralism. She highlighted that intellectual property has added value and is accessible to all economies, even the smallest or vulnerable. To her, there are many reasons behind the inclusion of IPRs in the Uruguay Round and in FTAs, such as increased economic importance of IP, reinforced by economies' acceptance of TRIPS as part of the landscape, distortions to international trade, market access problems. In addition, IP will help to add value to products and services and is one of the bargaining chips in

negotiations. She commented that some FTAs contain a reaffirmation of TRIPS, while others seek to go beyond. Last but not least, she introduced the current IP planet through an interesting graph.

2/ During Session 2 on "WTO's Agreement on Trade Related Aspects of Intellectual Property Rights", **Ms Thu-lang Tran Wasescha** divided her presentation in 4 parts: (i) TRIPS overview, (ii) TRIPS in 2014, (iii) Trade policy review (TPR) mechanism and (iv) WTO dispute settlement and TRIPS. After a comprehensive overview on TRIPS, Ms Wasescha provided useful information on TRIPS up to 2014, such as implementation, success stories, the unfinished business of the Uruguay Round, various misunderstandings, the TRIPS-public health debate, etc. She then introduced the TPR mechanism, which was evaluated as a dynamic instrument, containing a great wealth of information in all areas and as a transparency mechanism. Finally, Ms Wasescha presented the WTO dispute settlement and TRIPS.

3/ During Session 3 on "The Law and Economics of Intellectual Property Rights", there were 2 speakers: **Dr. R. Ian McEwin (Khazanah National Chair of Regulatory Studies, University of Malaya, Malaysia)** and **Ms Vikran Duangmanee (IP Manager, SCG Chemical Co. Ltd, Thailand).**

Dr R Ian McEwin made a presentation on "Basic Economies of Intellectual Property". Dr McEwin briefed the participants on intellectual property law and basic economics of IP law. He raised arguments of some economist that there is no need for IPRs because IPRs slow down the rate at which consumers can enjoy the benefits at lower prices and firms use IPRs strategically. In addition, Dr McEwin provided useful information on fundamental IP contradiction, real property rights, and scope of IPRs. He also mentioned IPRs and particular sectors (pharmaceuticals, biotechnology, copyright, computer software, patents, trademark, trade secrets). Dr McEwin gave an interesting example on cumulative and complementary innovations. According to Dr McEwin, the tentions are: (i) real problem arises in reconciling short and long term goals, (ii) the difficulty is knowing whether any market power gained as a result of IP protection is necessary to promote innovation or really an attempt to go beyond innovation incentives to earn a higher than necessary award, and (ii) it is impossible in practice to know once an IP right has been created what return was necessary to ensure its creation.

Ms Vikran Duangmanee divided her presentation into 4 parts: (i) IP, business and technology, (ii) Current IP systems, (iii) IP collaboration in ASEAN and (iv) IP laws of Thailand. Ms Duangmanee listed ASEAN Member States and their participation in IP systems (TRIPS and other Conventions such as Paris, Berne, PCT, Madrid, Hague). Regarding IP collaboration in ASEAN, she presented on ASEAN Framework, IPR Action Plan, ASEAN Patent Examination Cooperation (ASPEC) etc. Moreover, Ms Duangmanee introduced participants on Thai IP Laws, which include substances on copy right, optical disc products, trademark, protection of new varieties of plant, traditional Thai medicinal intelligence, geographical indications, layout – design of

integrated circuits, patent, and trade secrets. Last but not least, she updated participants on recent development of Thai Copyright Law with new issues of interim injunctive relief, rights management information, technological protection measures, exceptions to copyright infringement, performer's rights and rights of performer's heir, double penalty and confiscation of copyright – infringing goods.

4/ During Session 4 on "Negotiating Intellectual Property Chapter in an FTA", there were 3 speakers: **Ms Jo Feldman (Assistant Director, Legal, Australian Department of Foreign Affairs and Trade), Ms Christine R Peterson (International Trade Specialist, Office of Intellectual Property Rights, International Trade Administration, US Department of Commerce)** and **Ms Carolina Sepúlveda (Director, Intangible Consultancy Ltd, Chile).**

According to **Ms Jo Feldman**, it is important to well prepare for negotiation by consulting stakeholders, departments with expertise in the subject area and lawyers to identify the government's negotiating goals. From that basis, Ms Feldman reiterated the needs of identifying the negotiating parameters: red box (commitments you can not accept), amber box (commitments you will not actively seek, but which, if necessary, and in view of the overall treaty package, you could accept) and green box (commitments you will actively seek to include in the treaty). Regarding the content, Ms Feldman highlighted interpretive, substantive and relationship provisions. She concluded by referring to the language to be used in the treaty.

The presentation of **Ms Christine R Peterson** focused on the practical experience and typical challenges in negotiating IP Chapters in FTAs. Ms Peterson introduced several IP Chapters' structures and highlights in its FTAs in force with 20 economies. In addition, she mentioned the U.S. objectives regarding IP sector in TPP negotiations. Ms Peterson also introduced domestic IP laws and made conclusion remarks that IP Chapters in FTAs will lead to an easier trading environment, business confidence, greater transparency, clearer IP laws, harmonization of IP rules and procedures, and greater certainty that IP will be protected.

Ms Carolina Sepúlveda approached the issue from the perspectives of a former IP Chilean negotiator and an IP and technology transfer advisor. According to Ms Sepúlveda, the question is the kind of IP system that developing economies need to stimulate their innovation and such kind will be different from what have been established in developed economies. In the opinion of Ms Sepúlveda, developing economies need an IP system in accordance with their levels of development. Furthermore, Ms Sepúlveda stressed that it is essential to prepare three kinds of proposals in different stages of negotiations: active proposal (or proposition), balance's proposal and defensive proposal. After providing specific, interesting examples for each of proposal, Ms Sepúlveda commented on most impacting proposals for developing economies, current negotiations of TPP and power of negotiation. In her final remarks, Ms Sepúlveda reaffirmed that "once we know that

we need, we could have a better strategy of negotiations and more alternatives to get a more balanced agreement."

5/ During Session 5 on "Experiences in Coordination and Stakeholder Consultation", there were 3 speakers: **Ms Christine R. Peterson, Dr Taemin Eom (Director, Multilateral Affairs Division, Korean Intellectual Property Office - KIPO)** and **Ms Carolina Sepúlveda.**

Ms Christine R. Peterson made an in-depth presentation on "Stakeholder Coordination and Consultation". In the view of Ms Peterson, it is essential to identify the stakeholders and give stakeholders an opportunity to identify themselves. To Ms Peterson, stakeholders are Government agencies, Senate and House of Representatives, elected State Officials, industry, SMEs, NGOs and acdemia, and the public. In addition, it is important to work with stakeholders to identify equities, keep stakeholders updated on the issues they care about., work with stakeholders to sharpen priorities, create opportunities for all stakeholders to be heard, and use online tools and social media to reach more people.

The presentation of **Dr. Taemin Eom** was outlined in 6 parts: (i) Introduction, (ii) Korea's FTAs, (iii) FTA policy and procedures, (iv) Experiences in FTA, (v) Public consensus-building in FTAs, (vi) Coordination and consultation. Dr Eom emphasized the objectives and principles in IPR negotiations. Those are: (i) higher IPR protection to promote IP-based economies, (ii) advancing IP system to increase FDI and (iii) adjusting unreasonable regulations to protect interests of stakeholders. According to Dr Eom, preparation for FTA would include conducting a feasibility and strategy study on FTA, establishing Task Force team, collecting extensive opinions from industries, universities and research institutions, and coordination among government agencies. Moreover, Dr Eom stressed the importance of public consensus-building in FTA as well as collecting opinions. In his summing up, Dr Eom observed that FTA negotiation under KIPO would include research/fundamental study, establishing strategy and public hearing.

Ms Carolina Sepúlveda started her presentation by pointing out that internal and external coordination would form national consensus. In terms of internal coordination, there are Inter-ministerial committee (political) and IP Inter-ministerial committee (technical). Meanwhile, external coordination would engage private sector, Congress and citizens' organizations. Ms Sepúlveda was of the view that consultation is very good practice, with the aim of properly detecting and interpreting the sensibilities and interests of the different production sectors, which are included in the offers and negotiations. She then discussed Chile's institution of room next door since 2001, which helped to build trust between negotiators and private sector and organizations. Ms Sepúlveda concluded her presentation by stressing that consultations, meetings with the private sector, room next door, informative sessions in the congress are important instrument to guarantee participation and then validation

of the negotiation process. But, she reiterated that it is important to highlight that those processes must have minimal standards to comply with its objectives.

6/ During Session 6 on *"Best Practices in Post-negotiation Implementation"*, there were 3 speakers: **Ms Jo Feldman, Dr. Taemin Eom** and **Ms Carolina Sepúlveda.**

Ms Jo Feldman shared experiences in treaty implementation in Australia. First, she provided a brief overview on the relationship between treaties and international law, as well as approaches to treaty implementation. She then described 6 steps of treaty making in Australia: (i) mandate, (ii) negotiations, (iii) legislation (is new legislation required?), (iv) approval for signature, (v) and (vi) ratification and entry into force. Ms Feldman finally commented that a treaty can only live up to its promise of improving IP protection and increasing trade if stakeholders understand the changes that have been made following the treaty.

The contents of **Dr Taemin Eom**'s presentation were: (i) Goals of FTA in principle, (ii) Korea after 10 years of FTA, (iii) FTA issues, (iv) Challenges and policy implications, (v) Direction of upcoming FTAs, and (vi) Suggestions. Dr Eom was of the view that the FTA utilization rate of SMEs was low and the trade deficit of agricultural industry with FTA partners increased. He also noted some challenges and policy implications such as worsening policy environment for FTAs, implementation issues, public consensus building, spaghetti bowl effect. Dr Eom concluded by raising several lessons, including (i) considering political situation in preparing for FTA, (ii) upgrading industrial competitiveness to maximize FTA effects, (iii) establishing FTA support system to raise SMEs' utilization rate, (iv) enhancing cooperation between private and public sectors to resolve problems, (v) increasing industrial cooperation competitiveness rather than providing subsidies for loss.

Ms Carolina Sepúlveda started her presentation by putting forward a definition of "implementation". She clarified that there were 2 perspectives of implementation: general and specific terms. After going into details on 2 perspectives of implementation, she concluded by raising some final remarks for policy makers in charge of IP chapter's implementation to take into account. Those are: (i) Define different interests affected by the policies, (ii) Determine the impact of the policy at the political and economical level, (iii) Strategy of the economy, (iv) Previous implementing experiences from other economies, (v) Design a draft taking into account those divergents interests in a balanced way, (vi) Design internal and external strategy to lead a national consensus.

<u>Mock negotiation</u>

During the mock negotiation, participants were divided into 3 groups of three economies (A, B, C) negotiating a Regional Trade Agreement. Each economy had differing economic characteristics and policy frameworks for patent and data protection.

One of the major outstanding areas of negotiation, indeed the one that has created the difficult challenges, is patent and data protection.

The objective of the mock negotiation is to reach an agreement amongst the 3 Parties regarding the inclusion of provisions related to patent and data protection in the RTA's Intellectual Property Chapter.

Each team had one hour to prepare for the mock negotiation and another hour to undertake the negotiation. The negotiation was divided into two rounds. 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 patent and data protection policies, including within their respective economies, prior to attending the APEC Workshop and during breaks in order to familiarize themselves with the domestic policy considerations related to this issue.

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, effective 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 knowing IP laws and policies on other Parties, arguments, making coalition on common issues (in plurilateral/ multilateral negotiations), understanding views during breaks, building relationships. Furthermore, participants were aware of the importance of clarifications on terminology and concerns, proposing non-papers and preliminary texts etc. during negotiations (especially in case English is the 2nd language of negotiators).

IV/ Conclusions and Recommendations

1/ The consensus view of the Workshop's speakers, moderators and participants agreed that the project achieved its intended objectives. They considered the Workshop to have evaluated to be good for participants to enhance knowledge on IP topic and how IP is seen by other APEC economies, practice negotiating skills, etc. The Workshop has achieved the objective to develop increased capacity of negotiators and policy makers with practical relevance to participate intellectual property negotiations; and enhance knowledge on FTA negotiation in relation to intellectual property. In addition, participants recognized that sharing experiences on coordination and post-negotiation implementation from the perspectives of governments and the private sector were useful. Participants also said that the Workshop had provided a great opportunity for networking with relevant IP government officials within and outside APEC region.

2/ The Workshop concluded with a discussion of possible future activities to continue this project.

Participants suggested that future activities on other sectors should be Workshops on: general negotiation skills, trade in services, rules of origin, environment, trade remedy etc.

Participants suggested that follow-up activities on intellectual property should be:

- At least 3-day Workshop, more simulation;
- Pharmaceutical case studies;
- More discussions with ex-negotiators;
- Protection of geographical indications;
- Analysis of textual proposals;
- Example in real court/case issues in IP chapter under FTAs;
- Advanced course on exercise, drafting text, actual FTA provisions (ambiguous), implementation phase etc.