

Dispute settlement under a China-Australia FTA

Possibilities, problems and prospects

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Today's road map* ...

- **About international dispute settlement**
- **WTO dispute settlement**
- **Dispute settlement under bilateral trade agreements**
- **Critical issues for contemporary FTA dispute settlement**
- **Australia's models of FTA dispute settlement**
- **China's FTA dispute settlement commitments to date**
- **Dispute settlement considerations for a China-Australia FTA**

"A road map always tells you everything... except how to refold it."
H. Stanley Judd

WTO dispute settlement

- **Entrenched court-like processes**
- **Enforcement through Member endorsement of findings...**
- **...but more significantly through suspension of concessions**
- **Four key aspects:**
 - **Institution, legalism and consistency**
 - **Objective and independent**
 - **WTO law, not international law, focused**

Dispute settlement under bilateral trade agreements

- **NAFTA provides “themes” still relevant today**
- **State-State, investor-State, and special purpose (AD/CVD) dispute settlement**

Critical issues for contemporary FTA dispute settlement

- **Relevance of FTA dispute settlement given primacy of WTO**
- **Strength of substantive obligations in the FTA**
- **Procedural integrity**
- **Whether to extend beyond State-State, to investor-State**
- **Institutional arrangements and enforcement of investor-State awards**

Australia's models of FTA dispute settlement

Australia New Zealand Closer Economic Relations Agreement

- More than an FTA, but...
- ...no specific dispute settlement in the text of ANZCERTA
- Article 22.2 consultations
- Some interesting aspects:
 - No AD/CVD
 - “Trans-Tasman market” for competition law
 - Closeness and joint administrative institutions

Australia's models of FTA dispute settlement

Singapore Australia Free Trade Agreement

- **Arbitral tribunal for State-State dispute settlement**
- **Objective assessment, and recommendations**
- **Investor–State dispute settlement provisions**
- **First, six month consultations...**
- **...then court or ICSID or UNCITRAL procedures available**

Australia's models of FTA dispute settlement

Thailand Australia Free Trade Agreement

- Like SAFTA, a tribunal for State-State dispute settlement
- Awards and implementation options
- Compensation and suspension of benefits
- Investor–State dispute settlement provisions
- Court or UNCITRAL procedures available, but not ICSID
- Additional dispute settlement procedures possible via MFN

Australia's models of FTA dispute settlement

Australia US Free Trade Agreement

- **State-State dispute settlement provisions**
- **No investor-State**
- **State-State extends to nullification or impairment, for certain Chapters**
- **Agreed compensation, or suspension of concessions**

China's FTA dispute settlement commitments

China's FTA agenda

- **CEPA with Hong Kong and Macau**
- **Existing FTAs with ASEAN, Chile and Pakistan**
- **Negotiations underway with:**
 - **Gulf Cooperation Council**
 - **Southern African Customs Union**
 - **New Zealand**
 - **Australia**
 - **Iceland**
 - **Singapore**

China's FTA dispute settlement commitments

In the WTO forum

- Learning through participation as a third party, and once as a joint complainant...
- ...but now a respondent

CEPA

- China's political and economic considerations
- Only bilateral consultation applies for dispute settlement

China's FTA dispute settlement commitments

China-ASEAN FTA

- **Impetus to build large FTA zone**
- **State-State dispute settlement available...**
- **...with arbitration by a three member panel as last resort**
- **Preference for implementation of recommendations, not compensation or suspension**
- **No investor-State dispute settlement**

China's FTA dispute settlement commitments

China-Chile FTA

- Only State-State dispute settlement available
- Compliance panels as well – an advance on ASEAN FTA
- FTA stipulates that domestic law cannot be used to penalise breach by the other

China-Pakistan FTA

- State-State similar to Chile FTA
- New development – annexure dealing with procedural rules of State-State arbitration
- Investor-State dispute settlement, for the first time
- Jurisdiction is with domestic court, or ICSID
- Rights and obligations extend beyond expropriation and nationalization

Dispute settlement considerations for a China-Australia FTA

- **Dispute settlement – one of the seven paramount principles**
- **Present position – texts similar to WTO settlement procedures...**
- **...but will investor-State be put on the table?**
- **Different perspectives – legalism v mercantilism**
- **Socialist rule of law needs to develop**
- **Cultural differences are strong**
- **Limited information availability in China**
- **Difficult exercise of coordinating the Chinese bureaucracy**



Dispute settlement considerations for a China-Australia FTA*

- **UNCITRAL v ICSID models**
- **China's ICSID reservations create limitations**
- **Upcoming leadership contests and possible changes**
- **Conclusions**

** "A bird does not sing because it has an answer. A bird sings because it has a song."
Chinese proverb*

The logo for moulislegal, featuring the text "moulislegal" in a lowercase, sans-serif font, enclosed within a white, hand-drawn oval shape.

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