

Arguing with a friend: dispute resolution under AUSFTA

Introduction

Even before the Australia–US Free Trade Agreement (AUSFTA) comes into the force, the US Trade Representative’s Office noted that:

We’ve made clear that the United States must certify that the implementation language fulfills the obligations under the FTA before the FTA can come into force. We reserve all our rights in this process.¹

This highlights that like any other contract or agreement, Free Trade Agreements (FTAs) can be a source for disputes. So, FTAs generally contain a dispute resolution system.

The intricacy of such systems can vary, from reasonably informal systems that have weak remedies, to rule-oriented and complex systems that can be utilised for disputes between governments or between governments and third parties such as private investors.² The AUSFTA, entered into on 18 May 2004, follows a rule-oriented model, and has a complex system in Chapter 21 of the AUSFTA.

The AUSFTA system

In its guide to the AUSFTA, the Department of Foreign Affairs and Trade described the goals of the agreement as a ‘fair, transparent, timely and effective procedure for settling disputes arising under the agreement’, providing for ‘flexible compensation arrangements’.³

The scope of the system

The system can be used to avoid or settle any dispute in relation to the

interpretation or application of the AUSFTA. However, it has three significant limitations:

- Use of the scheme is limited to disputes between the governments; private investors cannot utilise the system to directly challenge decisions made by a government.⁴ However, where ‘a change [...] in circumstances regarding the Parties’ economic and legal environments’ occurs, Article 11.16.1 permits the parties to enter into further negotiations to provide for a procedure to solve investor disputes⁵
- several chapters in the AUSFTA are beyond the reach of the system in relation to ‘nullification and impairment’ proceedings, and
- several provisions of the system apply only to labour and environmental disputes (under Chapters 18 and 19 of the AUSFTA).

Choice of forum

If a dispute arises that could come either within the AUSFTA or any other trade agreement to which Australia and the US are parties, such as the WTO/GATT, the choice of forum will lie with the complaining party. The dispute cannot be taken to another forum, thus preventing multiple proceedings in different fora.

Resolving a dispute

The system comprises four resolution stages and an implementation stage.

First stage: consultations

Either party may request consultations, requiring the other party to enter into such negotiations promptly and in good faith.

The consultations are not confined to disputes: the parties are entitled to request consultation prior to a dispute arising under the agreement, for example, to discuss the possible effect of certain measures to be taken under the AUSFTA. This could help to prevent a dispute arising.

Second stage: Joint Committee

Should the consultations between the parties fail within 60 days after their commencement—after 20 days where the goods are perishable—either party can refer the matter to the Joint Committee.

The Committee is established to supervise the implementation of this Agreement and to review the trade relationship between the parties (Article 21.1.2). It is comprised of government officials and co-chaired by the US Trade Representative and the Australian Minister for Trade.

The Committee must adopt its own rules of procedure and may seek the assistance of ad hoc or standing committees, working groups or non-governmental persons.

Under Article 21.6, the Committee must ‘endeavour to resolve the

matter' between the parties. While the provision does not stipulate the means by which to achieve this, it includes facilitating further consultations.

Third stage: the panel

Should the matter still be unresolved 60 days after the referral to the Committee—after 30 days where the goods are perishable—the complaining party is entitled to refer the matter to a Dispute Settlement Panel. The parties cannot refer hypothetical issues to the panel as its jurisdiction is expressly limited to actual disputes.

- **composition and selection**

The parties are free to agree on the number of panel members and the procedure to select them. However, the parties may adopt the method the AUSFTA sets forth: three panel members, with each party appointing one from an agreed list (see below) within 30 days of the referral and jointly choosing the third member, who acts as the chair.

The parties are required to consult with each other during the appointment process.

Where a party is unable to choose a panel member within the specified time frame, or the parties are unable to agree on a chair within 30 days of the appointment of the other two panel members, the selection of the respective member is done by lot.

- **the panel list**

As noted, panel members are chosen from a pool of persons agreed upon by the parties and included on a panel list.

The parties are required to agree on this list before the AUSFTA comes into force.

The selection of panel list members is subject to several conditions, including that those chosen are objective, reliable, of sound judgement and that they are independent. In addition, those selected for the list must have the requisite expertise or experience

relevant to international trade disputes.

Panel list members will be selected for a minimum period of three years and, pursuant to Article 21.7.4, remain on the list until the parties constitute a new list.

It is not clear whether panel list members will be eligible for re-appointment to a new list after they have been removed from a list. However, eligibility may affect their independence. Practical measures should be developed to ensure the impartiality of the limited pool of possible panel members.

- **Procedure for the panel**

Article 21.8 requires the parties to agree upon model rules of dispute settlement procedure to supplement and refine the broad framework set forth in the AUSFTA.

Minimum requirements include safeguards to guarantee procedural fairness, including the right to at least one hearing and the opportunity to provide written submissions and rebuttals. In addition, the rules must reflect the transparency principle and provide that written documents such as statements or submissions are to be publicised, unless the need for confidentiality demands otherwise.

Finally, the rules must provide the panel with discretion to consider requests from non-government persons or entities to have their views heard ('*amicus curiae* brief'). The panel may accept such *amicus curiae* briefs to assist in the evaluation of the parties' submissions. The express provision for such briefs is a novelty, for example, an *amicus curiae* brief may be submitted under WTO/GATT procedure only if the panel or appellate body grants leave to do so.

The rules dealing with *amicus curiae* briefs may overlap with Article 21.8.3, allowing the panel to seek information or technical advice

from experts, either on the request of a party or on its own motion.

However, this latter power is significantly curtailed because:

- the parties are required to agree before the panel can seek such information or assistance, and
- the power can only be exercised on the terms agreed on by the parties.

The practical effect of these provisions may be that either party can veto *amicus curiae* briefs.

Article 21.8.2 allows the panel to adopt additional procedures on a case-to-case basis; a measure designed to ensure greater flexibility. However, the panel is again subject to two significant limitations:

- the additional procedure is to be consistent with the model rules adopted by the parties, and
- the panel has to consult with the parties prior to adopting the additional rules.

The latter point may prove crucial as it provides the parties with a form of veto to block the adoption of meaningful additional procedures for individual cases.

Fourth stage: the panel report

The fourth stage in settling a dispute is the preparation and presentation of the panel's report. Two tiers characterise the final stage: the initial report and the final report.

- **The initial report**

Subject to the parties agreeing otherwise, the panel has to hand down the initial report within 180 days of the appointment of the chair. The report must contain:

- a finding of facts
- a determination whether the disputed measure is inconsistent with the AUSFTA

- a determination whether a party has otherwise failed to carry out obligations under the AUSFTA
- a determination whether a measure has caused nullification or impairment to a party, and
- any other matter the parties have jointly requested the panel to address.

Where the parties request the panel to make recommendations on how to resolve a dispute, the panel can include these recommendations in the report.

Once the initial report is delivered, the parties have 45 days, or any other period to which they agree, to submit written comments that the panel has to consider. The panel can make changes to the initial report or even engage in further examinations.

• **The final report**

At the end of the determined period, the panel has to hand down the final report. The AUSFTA demands that the final report is released to the public within 15 days of being handed down, unless it contains confidential material.

Final stage: implementation or non-implementation

The parties are required to resolve the dispute by implementing determinations and, if requested, recommendations of the panel. Alternatively, where the dispute arose in relation to an alleged non-conformity, nullification or impairment of the AUSFTA, the parties are required to resolve the dispute by eliminating same.

The parties have 45 days, or any such period agreed upon, in which to agree on implementation.

The non-implementation

Where it is not possible for the parties to reach an agreement within this time frame, the party complained against is obliged to commence negotiations to

determine mutually acceptable compensation.

• **notice of intention to suspend a benefit**

The complaining party can issue a notice of intention to suspend benefits where:

- the parties are unable to find mutually acceptable compensation within 30 days, or
- the parties reached an agreement, but the party complained against failed to observe its conditions.

However, between the notice to suspend and the actual suspension of the benefits, the complaining party must give the party complained against a period of grace of 30 days.

The party complained against has the option of choosing between three different ways of reacting to the notice to suspend: it may request the panel to reconvene; offer a monetary assessment; or it may do nothing (that is, agree to the suspension of benefits).

• *reconvened panel*

Once confronted with a notice to suspend, the party complained against has the right to request the original panel to reconvene within 30 days of receiving the notice. It can ask the panel to consider:

- whether the level of benefits proposed to be suspended are manifestly excessive, or
- whether a non-compliance, nullification or impairment has been rectified.

The AUSFTA stipulates that the panel has to reconvene as soon as possible after receiving the request and must deliver a determination of the issue within 90 or 120 days (depending on under which provision the request was made).

• *annual monetary assessments*

Alternatively, the party complained against has the right to issue a notice to pay a monetary assessment under Article 21.11.5.

DFAT argued that this may be an important mechanism as the payment of a negotiated amount of money in lieu of having certain benefits suspended may be a preferable policy option.⁶

Where the notice to pay has been issued, the complaining party may be prohibited from suspending benefits as announced in the notice to suspend.

The parties have to commence consultations to agree on the amount of the assessment within 10 days of the notice to pay being issued and they have 30 days to reach this agreement.

Where such an agreement cannot be reached within 30 days, the amount to be paid is set at 50 per cent of:

- the level of benefits determined by the panel pursuant to Article 21.11.3, or
- the level of benefits proposed to be suspended by the complaining party pursuant to Article 21.11.2.

The assessment is to be paid in equal quarterly instalments, beginning 60 days after the party complained against gave the notice to pay.

Generally, the assessment has to be paid to the complaining party as compensation, leaving it to the respective Government to decide the use of the compensation paid.

However, in certain circumstances, the Committee may determine that the assessment must be paid into a fund created to facilitate initiatives to improve the trade relations between the parties. The AUSFTA does not provide any clarification as to the possible circumstances in which such a decision may be made and guidelines should be included in the Committee procedures to be negotiated between the parties.

The assessment will be set in US dollars. However, the payment can be either in US or Australian dollars (Article 21.11.6). As a result, Australia bears any currency risk.

Non-payment of the agreed or set assessment entitles the complaining party to suspend benefits.

- *Suspension*

Where the complaining party is entitled to suspend the benefits under the AUSFTA, it may do so either:

- where the panel did not make a determination pursuant to Article 21.11.3 (up to the level proposed pursuant to Article 21.11.2), or
- where the panel made a determination pursuant to Article 21.11.3 (up to this level).

However, where the panel found that the party complained against rectified a non-conformity, nullification or impairment, the complaining party loses this entitlement.

Concluding comments

The dispute resolution system set forth in Chapter 21 of the AUSFTA fulfils the main goals for the system set out in the DFAT Guide. It includes:

- provisions allowing *amicus curiae* briefs (albeit potential restrictions) (openness)
- strict time frames for a swift resolution of disputes (timeliness)
- an innovative compensation scheme allowing a panel to determine the compensation payable (effectiveness)
- a framework aimed at maximising procedural fairness and due process (fairness), and
- requirements to publish findings (transparency/openness).

However, these positive aspects have to be seen in the overall context. There are problems: for example, many important aspects of the system can be changed by agreement between the two governments. Further, confidentiality requirements pervasive in international trade could mean that the system is not as open and transparent as suggested.

The design of the complementary procedural rules will be important to safeguard the goals of the system.

In relation to the procedural rules applied by the Committee, the following issues are of particular relevance:

- questions relating to the establishment of ad hoc and standing committees
- possible limitations affecting the Committee's power to delegate responsibilities, and
- the procedure to seek advice from non-governmental persons and entities without veto rights.

In relation to the procedure applied by the panel, particular attention needs to be paid to:

- procedural issues, especially with the view of strengthening and protecting procedural fairness, and
- safeguarding the panel's power to obtain *amicus curiae* briefs.

For the purposes of developing these rules, it is advisable to draw on existing institutional arbitration rules. This could be complemented by analysing procedural rules that have been developed for other bilateral or multilateral agreements, such as the WTO/GATT or NAFTA.

A more detailed analysis of the system, including a discussion of investor, labour and environmental disputes, compliance review under Article 21.13 and the minimum requirements of the additional rules of procedure, will be included in a forthcoming Current Issues Brief.

1. R. Mills, Spokesperson of the Office Of The United States Trade Representative, *Regarding Australian implementing legislation and amendments related to the FTA*, [media release](#), 12 August 2004.
2. Australia and New Zealand Closer Economic Relations Trade Agreement (CER), http://www.dfat.gov.au/geo/new_zealand/anz_cer/anzcertal.pdf, accessed 2 August 2004.
3. Department of Foreign Affairs and Trading, *Guide to the Agreement*, 1st ed. Canberra, 2004, p. 121.
4. J. Varghese, 'Australia-US Free Trade Agreement', *Research Note*, no. 28, Parliamentary Library, Canberra, 2003-04.
5. Department of Foreign Affairs and Trade, op. cit., p. 59.
6. *ibid.*, p. 123.

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