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Dispute Settlement under Free Trade Agreements: The Proposed Australia-China Free Trade Agreement

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1. INTRODUCTION

Recent FTAs have adopted dispute settlement systems quite independent of each other's system, and different to the WTO system. The obvious question is as to why this is so, or for that matter why FTAs have not adopted an acceptable common system for use by all parties to FTAs while still remaining outside the WTO system. The explanation for this mainly lies in the special characteristics of FTAs. A core characteristic of FTA is that it offers WTO-plus liberalisation, i.e. it provides access to investment, competition, and labour markets beyond that offered under the WTO agreements. Consequently, parties to a FTA cannot access the WTO dispute settlement process on a WTO-plus dispute matter. Given the increase in the number of FTAs, the issue of how best disputes under these agreements can be resolved arises. Threshold considerations on this matter include both the method, and means of dispute resolution. With respect to the former, the choices between litigation (adjudication by a system of courts of law), or by resort to alternative dispute resolution mechanisms (ADR) such as mediation, conciliation, and arbitration, or any combination of litigation and ADR arise. And with respect to means, choices include national court systems, members of professional ADR bodies such as arbitrators, as well as a system of especially constituted international courts such as the Tribunal and Appellate Body established under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), or a combination thereof.

This article focuses on what would be an appropriate framework for dispute settlement to be adopted in the forthcoming Australia-China free trade agreement (ACFTA) currently being negotiated. It proceeds in five parts. Part II examines the role of ADR and litigation under the WTO dispute settlement system to see how far these approaches have influenced dispute settlement under the presently existing FTAs. Part III investigates why existing FTAs have not adopted the WTO dispute settlement model, but have instead adopted a variety of alternative approaches of their own, including the multiple dispute procedures under the North American FTA (NAFTA), quasi-judicial

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approach under EU–Chile FTA, and ad-hoc arbitral tribunal under Singapore–Australia FTA and New Zealand–China FTA. To usefully employ the experience of these earlier models to ACTFA, Part IV looks at the kind of trading disputes that Australia and China have encountered under the WTO, and how they were resolved, i.e. whether by invoking the formal WTO procedure, or by ADR methods such as consultation and arbitration. On the latter, evidence shows that a large proportion of disputes which Australia or China had been parties to were settled by “mutually agreed solution”, i.e. by consultation or mediation. Part V explains why ADR is preferred over litigation in resolving disputes arising under ACFTA. Based on the view of maximising the use of consultation and mediation preceding arbitration, a dual dispute settlement mechanism with a general dispute settlement procedure for common-subject disputes such as anti-dumping, and a special procedure for WTO-plus matter disputes, such as investment, would appear to be the most appropriate under the proposed ACFTA. Part VI concludes.

2. DISPUTE RESOLUTION UNDER THE WTO AGREEMENTS

A fundamental question that arises in constructing and evaluating dispute settlement system at the international level is whether the system should be primarily designed to mediate disputes or to adjudicate them. Techniques used in respect of ADR methods include consultation, the use of good offices, mediation and conciliation, and arbitration. The adjudicative mechanism commonly refers to litigation. While both techniques are in use in all jurisdictions, the extent of the use of each of them varies as between jurisdictions.¹ Dispute settlement under GATT 1947 began with quasi-voluntary procedures. It expressed a clear preference for negotiated settlements, originally even referring to the dispute settlement process as “conciliation”, and requiring Contracting Parties to enter into consultation and negotiation.² Since then the WTO system has moved to incorporate elements of both ADR and litigation. The creation of the Dispute Settlement Body as well as the Appellate Body has driven the WTO system more towards litigation as a last resort as elaborated below.

2.1. ADR UNDER THE WTO

2.1.1. CONSULTATION AND MEDIATION

Under the WTO system, disputes start with mandatory consultation within a 60-day period.³ The DSU has no rules on the consultation process beyond requiring that

¹ For example, while Germany favours litigation over ADR, China and Japan give more or equal status to the two.

² Bryan Mercurio and Rebecca Laforgia, ‘Expanding Democracy: why Australia should Negotiate for Open and Transparent Dispute Settlement in its Free Trade Agreements’ (2006) 6(2) *Melbourne Journal of International Law* 485: 490.

³ According to DSU Art 4, the parties must attempt to resolve their differences through consultations trying to reach a “mutually agreed solution”.

they be entered into in good faith within 30 days of a request. The hope is that the parties will resolve their dispute without resort to the dispute settlement procedures. In addition to consultation, the WTO also provides the option of good offices, conciliation and mediation to the disputant parties to help with the process.⁴ These can be requested at any time by any party to a dispute. Moreover, the WTO process encourages parties to disputes to halt the process if they reach a mutual solution before a Panel Report is issued. Since the establishment of the WTO in 1994, 414 complaints have been submitted to the WTO.⁵ According to the 2007 World Trade Report of the WTO, about one third of all complaints were settled mutually and the dispute withdrawn from the WTO process.

2.1.2. ARBITRATION

Arbitration is provided for under Articles 21.3 (c), 22.6 and 25 of the DSU. It has been used in a limited way under the WTO. For example, for the period 1995 to 2009, only 25 Art 21.3 (c), and 12 Art 22.6 arbitration awards have been circulated.⁶ First, Art 21.3 (c) provides the means of determining “reasonable period of time” for compliance of the Panel or Appellate Body reports and rulings in the absence of an agreement between disputing parties.⁷ In the *US Gambling* case⁸ e.g., the disputing parties Antigua and Barbuda having failed to reach an agreement on this matter, requested that reasonable period of time be determined through the process of binding arbitration pursuant to Art 21.3 (c) of DSU. The arbitrator circulated his Award in August 2005 and determined that the reasonable period of time for the US to comply was 11 months and 2 weeks from the date of adoption of the Appeal Body Report.⁹ Secondly, arbitration is used to sort out the real losses and claims of the winning party to a dispute. DSU Art 22.6 provides for the possibility of arbitration in situations where the responding party disagrees with the proposed level of suspension of concessions or other obligations. Such arbitrations are normally conducted by the original Panel hearing the dispute. Again in the *US Gambling* case, after the Panel Report found the US had failed to comply with the Dispute Settlement Body recommendations and rulings,¹⁰ Antigua and Barbuda requested authorisation from the Dispute Settlement Body to suspend the application to the US of concessions and related obligations under the GATS and the TRIPS Agreements. The arbitrator ruled that Antigua was entitled to compensation of \$21 million – far less than the \$3.4 billion it had sought; but, controversially gave Antigua the right to suspend concessions and obligations under

⁴ Ibid., Art 5.

⁵ *Dispute Settlement: The Disputes* (2010) World Trade Organisation http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (12 Apr. 2010).

⁶ Kara Leitner and Simon Lester, ‘WTO Dispute Settlement 1995-2009 – A Statistical Analysis’ (2010) 13(1) *Journal of International Economic Law* 205, 213.

⁷ DSU, *supra* n. 3, Art 21 (3).

⁸ WT/DS285.

⁹ WT/DS285/13.

¹⁰ WT/DS285, Article 21.5 Panel Report circulated on 30 March, 2007.

several sections of Part II of the TRIPS.¹¹ Thirdly, a general provision in terms of expeditious arbitration is set out in DSU Art 25, as an alternative means where the issues are clearly defined by both parties. This latter procedure is not an alternative to the Panel and Appellate Body procedure, but used at the stage of implementation when the Panel Report has already been adopted, and the parties request the arbitrators to determine the level of nullification or impairment of benefits caused by the violation. To date, the provision has been invoked only in one dispute, namely, the *US-Copyright* case.¹²

2.2. ADJUDICATION UNDER THE WTO

2.2.1. PANEL AND APPELLATE BODY ASSESSMENTS

The parties to a dispute in the WTO are represented by lawyers in both Panel and Appellate Body review process, which also include a litigation process for the Panellists and members of Appellate Body to assess the dispute. Similar to the litigation procedure, both parties are required to submit written documents, conduct oral argument, as well as present evidence. According to DSU Art 11, the task of Panels is to make an objective assessment of the matter before them, including an objective assessment of the facts of the case and their applicability and conformity with the relevant WTO agreements. The Appellate Body members are entitled to determine appeals on legal questions emanating from the Panel decision. Although the Appellate Body has shown respect for due process and the procedural rights of Members in the dispute settlement process, it has also recognised considerable discretion on the part of Panels and rejected most procedural process challenges.¹³ On the whole, it is difficult to characterise the Appellate Body as being more or less deferential to WTO member discretion than Panels. While it has significantly cut back on the scope of Panel rulings in some cases, it has also significantly expanded the scope of liability in others.¹⁴

2.2.2. THE CREATION OF THE DISPUTE SETTLEMENT BODY

The creation of the Dispute Settlement Body has also given the WTO system a strong adjudicative element. The Panel and Appellate Body reports are judicial verdicts, binding disputant parties' obligations and rights. Both decisions are subject to adoption by the Dispute Settlement Body (DSB), which aims to maintain surveillance of implementation rulings and suspend concessions and other obligations covered under any WTO agreement if its recommendations and rulings are not implemented by any infringing member.¹⁵ If the complaining party succeeds, two rulings are normally

¹¹ WT/DS285/ARB This includes Section 1 Copyright and related rights; Section 2 Trademarks; Section 4 Industrial designs; Section 5 Patents and Section 7 Protection of undisclosed information.

¹² Leitner and Lester, *supra* n. 6, 214.

¹³ John H Jackson, William J Davcy and Alan O Sykes Jr, *Legal Problems of International Economic Relations: Cases, Materials and Text* (West Group, 5th ed, 2008), 275.

¹⁴ *Ibid.*

¹⁵ DSU, *supra* n. 3, Art 21.

recommended by the DSB. Firstly, it will recommend the withdrawal of any measure found to be inconsistent with a WTO member's obligation. Secondly, if the losing party fails to implement the recommendations and rulings within a "reasonable period of time",¹⁶ the Dispute Settlement Body will recommend the temporary measures: compensation and suspension of concessions. The prevailing party is then entitled to seek compensation from the non-complying member or request the Dispute Settlement Body to suspend concessions previously awarded to that member, also referred to as "retaliation."¹⁷ Compared with the dispute settlement practice under the original GATT, the DSU procedures promote enforceability of the Panel report, by switching from requiring a consensus for adoption to requiring a consensus to block the adoption of the Panel report.¹⁸

In summary, the WTO dispute settlement system has incorporated the best of the attributes of both ADR and litigation. It has now evolved from an initial reliance primarily on diplomatic efforts to help parties work out their differences in a mutually agreeable fashion, towards greater institutional discipline and control over the settlement of disputes. This change enriches it with more judicial attributes in handling the disputes between its members, with the assistance of ADR methods. While its dispute settlement system has been praised by many, it has also been criticised for being costly, taking too long, lacking a roster of panellists, and its enforcement and implementation as ineffective.¹⁹ These comments have been taken into account by the FTAs as seen below.

3. DISPUTE SETTLEMENT UNDER EXISTING FTAs

Compared to the WTO experience, the FTA dispute settlement procedure seems to be used much less frequently, and thus its record on disputes settlement is therefore limited. The two systems that have seen some use are those of NAFTA and Mercosur.²⁰ This infrequent use of dispute settlement procedure applies even in a number of relative complex systems. For instance, despite the subsequent introduction and then further amendment and legalisation of comprehensive dispute settlement processes under the Association of South East Asian Nations FTA, no disputes have been brought under these provisions, with its members preferring to negotiate over the issues arising from the delayed implementation of the agreement.²¹ The paragraphs following examine the

¹⁶ Ibid, Art 21 (3).

¹⁷ Jackson et al, *supra* n. 13, 276.

¹⁸ Ibid, 274.

¹⁹ See, Naboth van den Broek, 'Power Paradoxes in Enforcement and Implementation of World Trade Organization Dispute Settlement Reports' (2003) 37(1) *Journal of World Trade* 127; Donald McRac, 'Measuring the Effectiveness of the WTO Dispute Settlement System' (2008) 3(1) *Asian Journal of WTO & International Health Law and Policy* 1; Heinz Hauser and Thomas A. Zimmermann, 'The Challenge of Reforming the WTO Dispute Settlement Understanding' (2003) 38(5) *Review of European Economic Policy* 241.

²⁰ William Davey, 'Dispute Settlement in the WTO and RTAs: A Comment' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006), 349.

²¹ David Morgan, 'Dispute Settlement Under PTAs: Political or Legal?' in Ross Buckley, Vai lo Lo and Laurence Boule (eds), *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (Kluwer Law International, 2008) 241, 245.

operations of the dispute settlement system in key bilateral trade agreements, including North American Free Trade Agreement (NAFTA), EU-Chile FTA, Singapore-Australia FTA and New Zealand-China FTA. The purpose of this is twofold, first to examine what approaches have been employed to resolve the disputes between FTA members, and second to evaluate these approaches to see what lessons can be drawn from them for the future FTAs.

3.1. NAFTA

NAFTA, which includes Canada, Mexico, and the United States was signed on December 17, 1992.²² Its special feature is that instead of using one uniform procedure, it creates multiple dispute settlement mechanisms to deal with disputes on different subject matters. It includes Chapter 11 dealing with investor-state disputes especially, Chapter 19 for appealing the results of antidumping and countervailing duty decisions, and Chapter 20 providing general dispute settlement procedures and institutional arrangements. Although this has proved controversial, it demonstrates the capacity of an FTA to foster experimentation beyond the level possible in the multilateral system. This recourse to variety has proved instructive subsequent FTAs.

3.1.1. CHAPTER 11

Chapter 11 was designed to deal with the particularities of the politics of foreign investment in North America, targeting on encouraging cross-border investment.²³ The innovation about it is that it establishes a mechanism for the settlement of investment disputes through arbitration for private parties that were unprecedented in scope and power. When investors from one NAFTA country believe they had been treated unfairly by one of the other two signatory governments, they are not limited to seeking redress in the courts of that country. Rather, they are given the right to bring a claim for compensation against that government in an international tribunal, whose awards are enforceable in domestic courts. Such an approach assures both equal treatment among investors of the Parties of NAFTA in accordance with the principle of international reciprocity and due process before an impartial tribunal.²⁴ The underlying goal of Chapter 11 is to allow NAFTA investors to bypass the local courts of a host government through access to binding arbitration under the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) or the ICSID Additional Facility Rules, or the rules of UNCITRAL.²⁵ As of November 2010, 64 cases have been filed under investment-state dispute settlement system, of which 9 have been decided in favour of

²² Jackson et al., *supra* n. 13, 527.

²³ Ann Capling and Kim Richard Nossal, 'Blowback: Investor-State Dispute Mechanisms in International Trade Agreements' (2006) 19(2) *Governance: An International Journal of Policy, Administration, and Institutions* 151, 153.

²⁴ North American Free Trade Agreement (Hereafter referred to as NAFTA), Art 1115.

²⁵ *Ibid*, Art 1120.

the investors.²⁶ This approach gives unprecedented rights to private investors to take a complaint against a government directly to binding international arbitration, and has proved controversial in that it raises community fears and anger about the consequences of these new forms of rights.²⁷ Nevertheless, it has had significant impact on later FTAs.

3.1.2. CHAPTER 19

Chapter 19 of the NAFTA is also creative, because it governs anti-dumping and countervailing duty determinations exclusively. It is considered as somewhat of an anomaly in international dispute settlement since it applies importing party's domestic law rather than international law. To do so, an involved party may request a special 'Panel' to review a final antidumping or countervailing duty determination on whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party.²⁸ Unlike the Panel of the WTO, however, it replaces judicial review of final antidumping and countervailing duty determinations with a bi-national Panel review, to re-examine the application of the country's domestic law.²⁹ The bi-national Panel process is quite novel in the sense that it is directed to complaints alleging a failure to correctly apply national antidumping and countervailing duty law.³⁰ Chapter 19 is by far the most active part of the NAFTA dispute resolution system, producing 97% dispute settlement reports through the end of 2007.³¹ Till now, more than one hundred decisions and reports have been issued by the NAFTA Secretariat, most on anti-dumping claims.³²

²⁶ Ethyl (1997), S.D. Myers (1998), Pope & Talbot (1999), Abitibi-Bowater (2009), Metalclad (1996), Karpas (1998), Corn Products International (2003), ADM/Tate & Lyle (2003), and Cargill (2005). See 'Table of NAFTA "Chapter 11" Foreign Investor-State Cases and Claims' (2010) http://www.citizen.org/documents/NAFTA_investor_State_Chart_Nov_2010.pdf, 3 Nov. 2010.

²⁷ Critics claim that it has not been used, as intended, to protect property rights against government measures "tantamount to expropriation" but has legalized a peculiar American conception of property rights, given foreign corporations rights not available to nationals, and even been used to attack a wide array of national government regulation aimed at the social, environmental and other public goods. For example as commented by Professor Abbott, while dispute settlement system of Chapter 11 went as far as establishing a legal framework which provides attractive financial guarantees to the investors, it has not built a framework strong enough to accommodate social policies. See, John J. Kirton and Virginia W. Maclaren (eds), *Linking Trade Environment and Social Cohesion: NAFTA Experiences, Global Challenges* (Ashgate: Aldershot, 2002). See also, Frederick M. Abbott, 'The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration' (2000) 23 *Hastings International and Comparative Law Review*, 309.

²⁸ NAFTA, *supra* n. 24, Art 1904 (2).

²⁹ *Ibid.*, Art 1904 (1), and Annex 1901.2. On the date of entry into force of this Agreement, the Parties shall establish and thereafter maintain a roster of individuals to serve as Panellists in disputes under this Chapter. The roster shall include judges or former judges to the fullest extent practicable. The Parties shall consult in developing the roster, which shall include at least 75 candidates. Each Party shall select at least 25 candidates, and all candidates shall be citizens of Canada, Mexico or the United States.

³⁰ A. Ortiz Mena, 'Dispute Settlement under NAFTA' in E. Chambers and P. Smith (eds), *NAFTA in the New Millennium* (Centre for US-Mexican Studies, 2002) 427. See also, NAFTA Art 1904, which states that "each Party shall replace judicial review of final anti-dumping and countervailing duty determinations with bi-national Panel review."

³¹ Jackson et al., *supra* n.13, 532.

³² The latest decision was made on 18 January, 2011 on Welded Pipe (USA-MEX-2007-1904-03). See, *Decisions and Reports* (21 December 2010) NAFTA Secretariat <http://www.nafta-sec-alena.org/en/DecisionsAndReports.aspx?x=312>, 30 Dec. 2010.

3.1.3. CHAPTER 20

Chapter 20 deals with general disputes arising among the member countries. It provides the legal basis for NAFTA's dispute resolution on interpretation and application, and aims to resolve disputes by agreement wherever possible.³³ This process has been characterised as "traditional state-to-state *ad hoc* arbitration."³⁴ It begins with government-to-government consultations, which can then proceed to a meeting of the ministerial level "Commission", and finally to the creation of an arbitral panel.³⁵ Moreover, it provides for the establishment of a roster of up to 30 individuals from which the arbitration panellists are normally to be drawn.³⁶ The Panel is to consist of five members, based on its rule requirements for qualification of Panellist as well as its procedures for Panel selection.³⁷ Such a list of panellists effectively avoids the waiting time problem for which the WTO process has been criticised. According to the NAFTA Secretariat, Chapter 20 has been used less frequently than Chapter 19, with most of the disputes resolved through consultation. To date only three cases have been settled through an arbitration panel, namely, the US complaints against Canada's application of higher tariff on agricultural products (1995), and Mexico's complaints against the US over brooms and cross-border trucking services (1997/1998).³⁸

3.2. EU FTAs

EU bilateral agreements used to be based, almost exclusively, on traditional diplomatic means for dispute resolution.³⁹ As a result of dissatisfaction with the effectiveness of the diplomatic model as an instrument to solve trade disputes, experience with WTO dispute settlement and the demands of EU's trading partners, a quasi-judicial procedure for dispute settlements was introduced. This is signalled by the EC-Mexico FTA (2000) and the EU-Chile FTA (2003). The latter embodies a separate section of the detailed rules on dispute settlement⁴⁰ and represents a radical departure from prior EU practice of resolution through political and diplomatic channels.

The quasi-judicial approach of the EU-Chile FTA e.g. stipulates the use of arbitration as the main source of dispute settlement.⁴¹ Upon consultation failing to arrive

³³ *Overview of the Dispute Settlement Provisions* (19 January 2010) NAFTA Secretariat <http://www.nafta-sec-alcna.org/en/view.aspx?xs226>, 13 Jul. 2010.

³⁴ Mark Sher, 'Chapter 20 Dispute Resolution under NAFTA: Fact or Fiction?' (2003) 35 *George Washington International Law Review* 1007.

³⁵ NAFTA, *supra* n 24, Articles 2003-2011.

³⁶ *Ibid.*, Articles 2006, 2007, 2009-2011, 2016-2019.

³⁷ *Ibid.*, Articles 2010 and 2011.

³⁸ CDA-USA-1995-2008-01, USA-MEX-2008-01, and USA-MEX-1998-2008-01.

³⁹ Ignacio Garcia Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006), 384.

⁴⁰ EC-Chile FTA, Title VIII Dispute Settlement, Articles 181-189.

⁴¹ *Bilateral Relations* (1 February 2008) European Commission <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/chile/>, 11 Nov. 2010.

at a mutually satisfactory resolution of a dispute, arbitration is resorted to⁴² with both Chile and the Members of EU entitled to select their own arbitrators from a list of fifteen arbitrators provided by the Association Committee.⁴³ The FTA also explicitly provides for transparency of the dispute settlement process requiring that the ruling of the arbitration Panel be publicly available,⁴⁴ with hearings to be open to the public if both parties agree.⁴⁵ More importantly, the EU-Chile FTA includes specific provisions for dispute settlement on financial services, with such disputes to be resolved by a special arbitration Panel.⁴⁶ Different from the panel for normal disputes, the arbitrator of the financial service Panel is to be selected from a special-established list of at least five individuals who are financial experts.⁴⁷ This approach is similar to Chapter 11 of NAFTA discussed above. Both provisions give special attention to the subject of financial services and investment respectively.

3.3. SINGAPORE-AUSTRALIA FTA

Singapore-Australia FTA came into force on 28 July 2003 following an exchange of diplomatic notes.⁴⁸ It is a comprehensive agreement covering such areas as trade in goods and services, investment, and competition policy among others. Closer examination of the Agreement shows that its dispute settlement process is ADR focused. Disputes are subject to consultations, negotiations, and mediation. Where this fails, then within 60 days of receipt of a request for consultation, the disputing party may request the appointment of an arbitral tribunal, consisting of three members.⁴⁹ More importantly, unlike the Australia-US FTA, which has been criticised for the lack of a mechanism to resolve disputes between the host State and an investor from the other contracting State,⁵⁰ the Singapore-Australia FTA provides a dispute settlement procedure for such events. Any investment disputes between an investor and the host State over an alleged breach of an obligation of the Agreement is to be settled under Article 14.⁵¹ The third party arbitration approach under ICSID is a popular form of resolving investor-

⁴² Agreement Establishing an Association between the European Community and its Member States, of the one Part, and the Republic of Chile, of the other Part, Art 184 (2).

⁴³ *Ibid.*, Art 185.

⁴⁴ *Ibid.*, Art 188 (11).

⁴⁵ *Ibid.*, Art 189 (3).

⁴⁶ *Ibid.*, Art 129 (3).

⁴⁷ *Ibid.*

⁴⁸ *Singapore-Australia Free Trade Agreement (2003)* Department of Foreign Affairs and Trade, Australia Government http://www.dfat.gov.au/trade/negotiations/australia_singapore_agreement.html, 21 Nov. 2010.

⁴⁹ Singapore-Australia FTA, Chapter 16 Dispute Settlement, Articles 3 & 4.

⁵⁰ Andrew D. Mitchell and Tania Voon, 'The Australia-United States Free Trade Agreement' in Simon Lester and Bryan Mercurio (ed), *Bilateral and Regional Trade Agreements: Case Studies* (Cambridge University Press, 2009).

⁵¹ According to Article 14 (3) of this Agreement, in the circumstance where the claim between a party and an investor of the other party is unable to be resolved by consultation, the following three alternatives are available: (i) the courts or administrative tribunals of the disputing Party; (ii) the International Centre for Settlement of Investment Disputes for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, established in Washington on 18 March 1965; and (iii) arbitration under the rules of the United Nations Commission on International Trade Law.

state dispute cases, as it was formed specifically for that purpose.⁵² Currently, four of Australia's six FTAs allow third party arbitration as part of the investment chapter for investor-state dispute especially, namely, the Thailand-Australia FTA, Australia-Chile FTA, and Association of Southeast Asian Nations-Australia-New Zealand FTA.⁵³

3.4. NEW ZEALAND-CHINA FTA

China so far is a party to seven FTAs, the earliest having been signed in November 2004 and the latest in April 2010.⁵⁴ The dispute settlement systems in these FTAs share a great similarity. The disputing parties are always encouraged to make every attempt to arrive at a mutually satisfactory resolution through negotiation, mediation or consultation amicably. If that fails to settle the dispute, the complaining party is allowed to make a written request for the establishment of an arbitration tribunal or panel. Three arbitrators are required in all the agreements. Compensation and suspension of benefits are available for the compliance and implementation purpose. More importantly, five of these seven FTAs include a special dispute settlement procedure for investor-state matters,⁵⁵ where the dispute is to be submitted to the international conciliation or arbitration fora for solution. The rules of ICSID and UNCITRAL are the most popular ones selected. A typical example of the operation of the dispute settlement mechanism China participated in is the New Zealand-China FTA signed on 7 April 2008 in Beijing, after negotiations spanning fifteen rounds over three years.⁵⁶ Its dispute settlement mechanism has a general dispute procedure as well as a special one exclusively on investment. The former starts with consultations and mediation, and ends up with the arbitral tribunal. Moreover, it also establishes a special procedure for investor and host state disputes. As with Singapore-Australia FTA, the disputing parties under this agreement too have the choices of conciliation or arbitration by ICSID, or arbitration under the rules of the UNCITRAL.⁵⁷

3.5. IMPLICATIONS FOR FUTURE FTAS

Two dispute settlement approaches are noted of the examination of the existing FTAs. Firstly, apart from NAFTA's innovation of multiple dispute resolution procedures

⁵² 'Bilateral and Regional Trade Agreements' (Australian Government Productivity Commission, November 2010) http://www.pc.gov.au/_data/assets/pdf_file/0010/104203/trade-agreements-report.pdf, 13.18, 6 Jan. 2011. (Hereafter referred to as Productivity Commission Report).

⁵³ Thailand-Australia FTA (July 2004), Article 917; Australia-Chile FTA (March 2009), Article 10.16; and ASEAN-Australia-New Zealand FTA (January 2010), Article 21. Australia-US FTA and Australia-New Zealand Closer Economic Relations do not have such provision.

⁵⁴ Agreement on Trade in Goods of the China-ASEAN FTA was signed in November 2004; China-Costa Rica FTA was signed in April 2010.

⁵⁵ They are Agreement on Investment of the China-ASEAN FTA (2009), Article 14; China-Pakistan PTA (2009), Article 54; China-Singapore FTA (2008), Article 84; China-Peru FTA (2009), Article 139; and China-New Zealand (2008), Chapter 11, Section 2. China-Chile FTA does not include 'Investment' sector and thus no dispute resolution on investment. See, China-Chile FTA, Article 120.

⁵⁶ *The Free Trade Agreement between New Zealand and China* (2 July 2010) New Zealand Ministry of Foreign Affairs and Trade <http://chinafta.govt.nz/1-The-agreement/index.php>, 3 Oct. 2010.

⁵⁷ New Zealand-China FTA, Art 153.

on investment and anti-dumping and countervailing, most of them have a general procedure for resolution of disputes arising under the agreement, such as the quasi-judicial approach in the EU–Chile FTA, and the ad-hoc arbitral tribunal under Singapore–Australia FTA and New Zealand–China FTA. An arbitration panel is required to be established when the consultations fail to settle a dispute within a certain period (normally 60 days), which normally consists of three arbitrators selected from an arbitrator list. Secondly, a special dispute settlement procedure for some specific subject is also included, e.g. financial services in EU–Chile FTA, and investor–state dispute in Singapore–Australia FTA. Such disputes are typically handled by special rules, e.g. the rules under ICSID, and UNCITRAL. These approaches no doubt provide great references for the formation of the dispute settlement mechanisms for the future FTAs. Moreover, unlike the WTO where arbitration applies only in limited circumstances, the above examination shows the broad use of ADR for dispute resolution between FTA members. Instead of going through litigation, “arbitral tribunal” is the most popular option for dispute settlement under FTAs.

4. PAST AND FUTURE DISPUTES

The dispute settlement systems of the WTO and the existing FTAs discussed above provide helpful references for ACFTA. As compared to the WTO, the latter provides illustrations of alternative approaches and procedures to be employed in claims between FTA members, such as e.g. multiple dispute procedure, quasi-judicial approach and ad-hoc arbitral tribunal. In order to design a dispute resolution model for ACFTA, however, it is necessary first to look at the kind of trading disputes that Australia and China have had in the past, as well as the possible disputes in the future. More importantly, it is necessary to examine how past WTO disputes to which Australia or China were parties had been resolved, i.e. whether by going through the formal WTO procedure, or by ADR methods such as consultation and arbitration, and what lessons they offer.

4.1. PAST DISPUTES

While Australia has been the complainant in 7, and respondent in 10 WTO cases, to none of these disputes was China a party. The subject matter of these disputes have been mainly in relation to sanitary and phytosanitary measures (SPS),⁵⁸ antidumping,⁵⁹

⁵⁸ WT/DS270 Certain Measures Affecting the Importation of Fresh Fruit and Vegetables; WT/DS271 Certain Measures Affecting the Importation of fresh Pineapple; WT/DS287, Quarantine regime for Imports; and DS367 Measures Affecting the Importation of Apples from New Zealand.

⁵⁹ WT/DS119 Anti-dumping Measures on Imports of Coated Woodfree Paper Sheet, and WT/DS217 Continued Dumping and Subsidy Offset Act of 2000.

subsidies and countervailing measures,⁶⁰ trade barriers,⁶¹ safeguard measures,⁶² and intellectual property rights.⁶³ Sps is the most frequent dispute topic Australia has been involved in – all as respondent. The concern of these cases has been mostly about import requirements imposed by Australia on fresh fruit and vegetable as being more trade restrictive than necessary to protect Australian produce. This largely reflects the restrictive quarantine regime in Australia. A detailed research on the disputes Australia has been a party to show that of 11 cases finalised as at present, 5 were resolved through a “mutually agreed solution”,⁶⁴ normally reached through negotiation and consultation. The disputes thus settled or terminated upon the disputing parties notifying the Dispute Settlement Body that they had reached a mutually satisfactory agreement on the matter to the disputes.

As at March 2011, China has been a party to 29 cases in the WTO, either as a complainant or a respondent. China was only an occasional player in the WTO before 2004. It only filed one consultation request with the US on safeguard measures in 2002,⁶⁵ and had only one filed against it from the US on value-added tax in 2004.⁶⁶ China’s approach has changed since 2007, when it became party to five cases, 4 of which as a respondent.⁶⁷ From 2008 to March 2011, China has filed 6 consultation requests and has had thirteen against it. An examination shows that the disputes China has been party to are mainly on anti-dumping,⁶⁸ subsidies and countervailing measures,⁶⁹ intellectual property rights,⁷⁰ trade barriers,⁷¹ and Sps.⁷² Furthermore, the cases brought by China shows its great concern about the use of trade remedies measures, and of anti-dumping in particular. For instance, among 7 cases filed by China, 4 of them are on anti-

⁶⁰ WT/DS265 Export Subsidies on Sugar; WT/DS106 Subsidies Provided to Producers and Exporters of Automotive Leather, WT/DS35, Export Subsidies in respect of Agricultural Products, and WT/DS217 Continued Dumping and Subsidy Offset Act of 2000.

⁶¹ WT/DS 169, Measures Affecting Imports of Fresh, Chilled and Frozen Beef; WT/DS270 Certain Measures Affecting the Importation of Fresh Fruit and Vegetables; and WT/DS91, Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products.

⁶² WT/DS178 Safeguard Measures on Imports of Fresh Chilled or Frozen lamb from Australia.

⁶³ WT/DS290 Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs.

⁶⁴ WT/DS21, WT/DS35, WT/DS91, WT/DS119, and WT/DS287.

⁶⁵ WT/DS252 United States of America – Definitive Safeguard Measures on Imports of Certain Steel Products.

⁶⁶ WT/DS309 Value-Added Tax on Integrated Circuits.

⁶⁷ WT/DS358, WT/DS359, DS362, WT/DS363, and WT/DS368.

⁶⁸ WT/DS368, Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China; WT/DS407 Provisional Anti-Dumping duties on Certain Iron and Steel Fasteners from the European Union; WT/DS379 Definitive Anti-Dumping and Countervailing Duties on Certain Products from China; WT/DS397 Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China and WT/DS405 Anti-Dumping Measures on Certain Footwear from China.

⁶⁹ WT/DS339/340/342 Measures Affecting Imports of Automobile Parts; WT/DS358/359 Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and other Payments; WT/DS387/388/390 Grants, Loads and other Incentives.

⁷⁰ WT/DS362 Measures Affecting the Protection and Enforcement of Intellectual Property Rights, and WT/DS363 Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products.

⁷¹ WT/DS372/373/378 Measures Affecting Financial Information Services and Foreign Financial Information Suppliers, and WT/DS394/395/398 Measures Related to the Exportation of Various Raw Materials.

⁷² WT/DS392 Certain measures Affecting Imports of Poultry from China.

dumping against the US and the EU.⁷³ This information is useful in relation to the forthcoming ACFTA on the need to prevent unfair trading practices between the two countries. Moreover, of the 12 cases finalised as at present, 6 of them were resolved by a ‘mutually agreed solution’.⁷⁴ This result shows China’s preference of resolving trade disputes by conciliation and consultation, rather than going through the long-drawn WTO process.

In summary, while the areas of dispute encountered by Australia and China over trade have been somewhat similar, they have different emphases. The former is more involved in SPS and anti-dumping, and the latter is more in anti-dumping. Obviously, how best to address the areas of conflict between the two countries in these areas is of high importance in shaping the dispute resolution model of the ACFTA. More importantly, the large proportion of dispute settlement by a ‘mutually agreed solution’ shows both countries’ preferences of consultation and mediation. This provides a valuable reference guide in the search for an effective dispute settlement mechanism under ACFTA.

4.2. LIKELY AREAS OF FUTURE DISPUTES

Past disputes on SPS show Australia’s adoption of a tough quarantine regime. This heralds a high possibility of SPS-related disputes under ACFTA. For example, even prior to ACFTA negotiations, Australia had expressed concerns over China’s poor record on environmental and food safety standards. In their eleventh negotiation, Australia reiterated its position that it did not wish to negotiate its present approach to import risk analyses, quarantine standards, or systems for assessing food safety risks in its FTA,⁷⁵ meaning that the SPS standard that Australia will seek to enforce will be as strict as before for China to comply with. In addition, while China has been active in filing anti-dumping claims against the US and the EU on their measures on Chinese products, for example, coated free sheet paper and certain footwear,⁷⁶ evidence shows the emerging anti-dumping activity in Australia against the cheap Chinese imports. For example, a “Don’t Dump on Australia” campaign was launched by the Australian Workers Union recently, against imports, particularly from China, which were claimed to “cheat” on

⁷³ WT/DS368, Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China; WT/DS379 Definitive Anti-Dumping and Countervailing Duties on Certain Products from China; WT/DS397 Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China and WT/DS405 Anti-Dumping Measures on Certain Footwear from China.

⁷⁴ They are WTO/DS309, WTO/DS358, WTO/DS359, WTO/DS372, WTO/DS373, WTO/DS378.

⁷⁵ *Australia-China Free Trade Agreement Negotiations: Eleventh Round of Negotiations* (27 June 2008) Department of Foreign Affairs and Trade, Australia http://www.dfat.gov.au/geo/china/fta/080627_subscriber_update.html, 12 Sep. 2010.

⁷⁶ See, WT/DS368, Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China; WT/DS379 Definitive Anti-Dumping and Countervailing Duties on Certain Products from China; WT/DS397 Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, and WT/DS405 Anti-Dumping Measures on Certain Footwear from China.

world trade rules.⁷⁷ These no doubt make antidumping a most likely subject of future dispute between the two countries.

The proposed ACFTA has been in the offing since 2005 and survived a change of government in Australia.⁷⁸ Two of the most sensitive issues in the ACFTA negotiation have been investment and services. In the words of Australia's then Trade Minister Simon Crean, "Access to direct investments in China had become a bigger priority for Australia as it negotiates an FTA."⁷⁹ Moreover, Canberra is also interested in acquiring market access in services for Australian firms. China for its part has reiterated its interest in Australia's foreign investment screening, particularly as the infrastructure access regime relates to minerals and energy.⁸⁰ Obviously, the disputes in the areas of investment and services will most likely be on top of the dispute list between the two countries. One key area of contention will be whether investor entities (companies) should be allowed to resort to the dispute settlement process against the host or investee State in their own right, and without reference to their home State as required under the WTO Agreements. The resolution of this is of course of significant concern and is considered in the discussion following.

5. PROPOSED DISPUTE RESOLUTION FRAMEWORK FOR ACFTA

As seen above, the design of an appropriate dispute settlement mechanism in respect of FTAs has proved to be a long drawn and difficult task. Factors taken into consideration include the effective use of diplomatic and judicial channels, and rules relating to jurisdiction and enforcement. Moreover, it also requires the delicate balancing of legal and procedural certainty and the exercise of discretion. As observed by one commentator:

"On the one hand, they care about compliance with the agreement, the value of which depends on the extent to which other parties honour their commitments. The more legalistic the dispute settlement mechanism they design, the higher the likely level of compliance. On the other hand, they also care about their own policy discretion – and the less legalistic the mechanism, the greater their discretion to craft policies that solidify domestic support."⁸¹

Special factors relating to ACTFA include the following. First, by reason of the differences in their economic, social, and legal outlook, the two countries operate totally

⁷⁷ 'Abbott and Union Condemn Imports Dumping', *The Sydney Morning Herald* (Sydney), 16 February 2011 <http://news.smh.com.au/breaking-news-national/abbott-and-union-condemn-imports-dumping-20110216-law00.html>. See also, *Cheating on Free Trade Threatens Commitment to a Global Marketplace* (16 February 2011) The Australian Workers' Union http://www.awu.net.au/550246_5.html, 18 Feb. 2011.

⁷⁸ So far, 15 rounds of talks have been held. However, nothing conclusive seems to have resulted.

⁷⁹ 'China Wants Urgency in Australia Free-trade Talks', *Khaleej Times* 30 October 2009 http://www.menafn.com/qa_news_story_s.asp?StoryId=1093279990, 4 Oct. 2010.

⁸⁰ *Australia-China Free Trade Agreement Negotiations: Eleventh Round of Negotiations* (27 June 2008) Department of Foreign Affairs and Trade, Australia http://www.dfat.gov.au/geo/china/fta/080627_subscriber_update.html, 12 Sep, 2010.

⁸¹ James McCall Smith, 'The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts' (2000) 54(1) *International Organization* 137,144.

different judicial systems; secondly, is the information to be gathered from the subject matter and type of disputes the two countries as members of the WTO have encountered with other members of the WTO, and the way they have been resolved; thirdly, is the balance of litigation and ADR struck by the two countries for use in relation to the resolution of disputes within their own territorial jurisdictions; and finally the political sensitivities of the trading relationship between the two countries and their nationals.

In respect of the first, while China is a communitarian society, Australia is a liberal democracy; while Australia is a well established free market economy, China is still in the process of being transformed into a market economy; and while China is dependent on bank based finance (both private and State) for its capital needs, Australia is largely dependent on stock exchange based capital for its requirements. Moreover, while the Australian legal system and legal traditions are based on the common law, and legal proceedings adversarial, China's legal system is civil law based, legal traditions Confucian, with legislation as the primary source of law, and has an inquisitorial court system.

In respect of the second, the areas of dispute the two countries have encountered with other member countries of the WTO have been in respect of Australia SPS and anti-dumping, and in respect of China antidumping, subsidies and countervailing measures, and intellectual property rights. These are common-subject disputes covered by both WTO and FTAs. In respect of the FTA between China and Australia, the likely areas of dispute will be of a WTO-plus nature, as it covers special matter dispute such as investment. Thus how to handle these two kinds of disputes is the top priority of the dispute settlement mechanism under ACFTA. Questions arising in this connection include whether disputes be resolved through litigation or arbitration, and the role of arbitration and ADR in such a system, and whether investor entities should have access to dispute settlement process in their own right

Thirdly, on the balance of litigation and ADR, China has a long history of mediation and conciliation based in part on Confucian principles of comity and accord with others in commercial transactions and personal relationships.⁸² Given the continued Influence of Confucian culture on politics, business, and cultural transactions in modern China, and the advantages of arbitration perceived by many parties involved in international business around the globe, arbitration has become a frequently selected and more viable dispute resolution option in China in recent decades.⁸³ Currently, all the arbitration activities in China are governed by *Arbitration Law of the People's Republic of China*, adopted in 1994 and came into force on 1 September, 1995.⁸⁴ It drew upon international arbitration legislation and practices, especially provisions in the New York

⁸² Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge University Press, 2002).

⁸³ Zhao Xiuwen and Lisa A. Kloppenberg, 'Reforming Chinese Arbitration Law and Practices in the Global Economy' (2005-2006) 31 *University of Dayton Law Review* 421: 422.

⁸⁴ *Arbitration Law of the People's Republic of China* (17 April 2006) China Daily http://www.chinadaily.com.cn/bizchina/2006-04/17/content_569263.htm, 2 Nov. 2010.

Convention and the Model Law of United Nations Committee on International Trade Law. Australia too, while predominantly reliant on litigation, is increasingly progressing in its use of ADR practices for dispute settlement. According to the survey conducted by Australia's National Alternative Dispute Resolution Advisory Council into the use of ADR in the civil justice system, ADR has expanded into a large, highly diverse and innovative field.⁸⁵ More recent news showed that Victoria has introduced pre-litigation requirements requiring parties to participate in ADR prior to the commencement of proceedings which relate to a "civil dispute", and it is anticipated that in mid 2011 the *Civil Procedure Act* NSW will be amended to follow up.⁸⁶ Although Australia's international arbitration structure and ADR processes were lagging behind others in the region and in Europe, it is viewed as having efficient and effective procedures and practices, with an open court system and arbitration friendly environment.⁸⁷ The recent amendment of the *International Arbitration Act 1974* of Australia represents Australia's broader push to promote more effective resolution of commercial disputes through arbitration. In introducing the amending Bill, the Attorney-General highlighted its aim was to "emphasise the importance of speed, fairness and cost-effectiveness in international arbitration, while clearly defining and limiting the role of the courts in international arbitration without compromising the important protective function they exercise."⁸⁸ Based on the developed arbitration regulations and practices in both Australia and China, arbitration is a better choice to be recommended for the ACFTA.

Finally, the recent *Stern Hu* case highlights the political sensitivities in the trading relationship between the two countries. The case involved a Chinese national who had become a naturalised Australian citizen. He later worked for an Australian company which appointed him as their resident representative in China. He was accused of industrial espionage by the Chinese government and imprisoned pending the hearing of his case in 2009.⁸⁹ Quite a number of comments were made in the Australian Press following his detention in China. Most of these comments were directed at China's legal system, which was criticised for lack of transparency in the conducting of the case, unfair legal procedures, lack of rule of law, manipulation of judicial procedures for political purpose, etc.⁹⁰ Stephen Smith, the then Australian Foreign Affairs Minister,

⁸⁵ Ashley Tsacalos, *Australia: Embracing ADR – the Emerging Trend in Government* (18 February 2010) <http://www.mondaq.com/australia/article.asp?articleid=94246>, 22 Nov. 2010.

⁸⁶ *Alert – Civil Procedure Act Amendments* (23 February 2011) Minter Ellison <http://www.minterellison.com/public/connect/Internet/Home/Legal%2BInsights/Alerts/NA-CivilProcedureAct/>, 26 Feb. 2011.

⁸⁷ *Legal Leaders: Michelle Sindler – Settling down with disputes* (7 October 2010) Lawyers Weekly <http://www.lawyersweekly.com.au/blogs/profiles/archive/2010/10/07/legal-leaders-michelle-sindler-settling-down-with-disputes.aspx>, 22 Oct. 2010.

⁸⁸ The Hon Justice Clyde Croft and David Fairlie, 'The New Framework for International Commercial Arbitration in Australia' (2009) <http://www.iama.org.au/pdf/2NewFrameworkforInternationalCommercialArbitrationinAustralia.pdf>, 21.11 Aug. 2010.

⁸⁹ Stern Hu, Rio Tinto executive, together with his three colleagues, Liu Caikui, Ge Minqiang and Wang Yong, all Chinese nationals, received a sentence of 10 years for bribery and stealing business secrets 29 March, 2010. See Ann Kent, 'When Laws Fail to Protect' (2010) 34(4) *Alternative Law Journal Volume*.

⁹⁰ See generally, Vivienne Bath, *The Chinese legal system and the Stern Hu case* (28 March 2010) East Asia Forum <http://www.eastasiaforum.org/2010/03/28/the-chinese-legal-system-and-the-stern-hu-case/>, 30 Aug. 2010. See also, Kent, *ibid*.

described the sentences to Stern Hu as ‘harsh’ and the then Australian Prime Minister, Kevin Rudd, criticised China’s lack of transparency in handling the case.⁹¹ Given the close relations between politics, business and the law all over the world, Australia may have arrived at a similar decision had it been in China’s position.

All of the above factors serve to highlight difficulties in the use of litigation as the medium of dispute settlement for commercial matters arising under the proposed ACFTA. In this context it is necessary to look at what form of dispute resolution mechanism will serve best the interests of both Australia and China. Given the likely areas of disputes between the two countries, namely, common-subject dispute and WTO-plus matter disputes such as investor entity rights to dispute resolution, and a dual dispute settlement mechanism is proposed for ACFTA with the following detailed operational procedures.

5.1. *A GENERAL DISPUTE SETTLEMENT PROCEDURE FOR COMMON-SUBJECT DISPUTE*

The experience of the FTAs that Australia and China are already a party to, suggests that a general dispute settlement procedure for common-subject disputes through an arbitration tribunal is preferred and mostly accepted and practiced, as illustrated by e.g. the Singapore–Australia FTA, and the New Zealand–China FTA referred to above. The general procedure should provide first, that the dispute be resolved by ADR means. This is because the past disputes that Australia and China have been a party to show high frequency of their being settled by a “mutually agreed solution”. Thus, ACFTA should take heed of this experience and emphasise the use of consultation, conciliation, and mediation to resolve the problems. Secondly, due to the highly frequent involvement of SPS and anti-dumping disputes of Australia and China, a special government agency is needed to monitor these two specific sectors. Such agency should be established in the two countries respectively, aiming to address the possible emerging problems relating to SPS and anti-dumping at an early stage. Thirdly, a general procedure should provide the procedure for the establishment of an Arbitral Tribunal when ADR fails to settle a dispute within a certain period. Additionally, a roster of up to ten individuals as potential panellist for a three-arbitrator panel should be included to save the waiting time of creating arbitration panels and help speed up the arbitration process.⁹² Fourthly and more importantly, as common-subject disputes are covered by both WTO and FTA, it is important that the jurisdiction of such disputes be explicitly addressed when drafting

⁹¹ Vivienne Bath, *The Stern Hu trial – Results and follow-up on the verdict* (5 April 2010) East Asia Forum <http://www.eastasiaforum.org/2010/04/05/the-stern-hu-trial-%e2%80%93-results-and-follow-up-on-the-verdict/>, 30 Aug. 2010.

⁹² The number of the roster varies, depends on the size and area of the FTA. For example, Article 21 (7) of Australia-US FTA provides a contingent list of 10 individuals as potential arbitrators to constitute a 3-arbitrator panel. A list of 15 individuals is required in EC–Chile FTA from which 3 arbitrators are selected (Article 185). A roster of up to 30 members is established in NAFTA to compose a panel with 5 arbitrators (Articles 2009, 2011). Based on the existing FTAs that Australia and China are a party to, we suggest a roster of 10 individuals for a 3-arbitrator panel under ACFTA.

FTAs to avoid problems of overlap of dispute settlement procedures between the WTO and ACFTA as well as the problem of double dipping. For example, if China was to file a case on SPS against Australia, should it be brought to ACFTA or WTO, or should China be allowed to claim first under ACFTA, and a second time before the WTO? Generally, “choice of forum” under FTA is regulated in three ways:⁹³ (1) Oblige the complainant to submit the dispute to the WTO;⁹⁴ (2) Oblige the complainant to submit the dispute under the FTA;⁹⁵ or (3) Leave the choice of forum up to the complainant. Obviously, the exclusive jurisdiction clauses in the first two methods are the best means to avoid the complex overlaps between the WTO and FTA.

Closer examination of the existing FTAs which Australia and China are separately parties to suggests the complaining party is free to select the forum in which to settle the dispute.⁹⁶ In addition, to prevent a jurisdictional battle that may prolong the legal process, ACFTA should also include “forum exclusion clauses” to clarify the jurisdiction of common-subject disputes. Such clauses are desirable in the sense that they limit the scope of conflicting rulings.⁹⁷ Most FTAs have therefore included a provision stating that once dispute settlement procedures have been initiated in one forum, it shall be to the exclusion of the other.⁹⁸

5.2. A SPECIAL DISPUTE SETTLEMENT PROCEDURE FOR WTO-PLUS MATTER DISPUTE

A special dispute settlement procedure is needed where disputes on WTO-plus matters arise, and WTO cannot provide any solutions. In ACFTA’s case, the WTO-plus matter is mainly about investor-state dispute. The inclusion of investor-state dispute resolution system in an agreement is essential to protect the investors from actions by governments in changing the rules after an investment decision has been made. While it provides attractive financial guarantees to the investors, it also raises controversial questions. For example, whether Australian investors be favoured over the focal Chinese entities and vice versa, and whether Chinese investor companies be given the right to ignore Australia’s local courts and resort to Arbitration of their own accord and vice versa. As noted by the Department of Foreign Affairs and Trade, Australia, some investor-state dispute settlement provisions grant new procedural rights to foreign investors that are not afforded to domestic investors, who are unable to seek third-party

⁹³ Joost Pauwelyn, ‘Legal Avenues to ‘Multilateralising Regionalism’: beyond Article XXIV’ in Richard Baldwin and Patrick Low (eds), *Multilateralizing Regionalism: Challenges for the Global Trading System* (Cambridge University Press, 2009) 368, 386.

⁹⁴ See e.g. Articles 8.4 and 10.7.2 of the Republic of Korea–US FTA state SPS, AD and countervailing duties disputes between these two countries must be brought to the WTO.

⁹⁵ NAFTA, *supra* n. 36, Art 2005. 4 provides, for example, that where a dispute relates to SPS or standards, the respondent has a right to insist that the dispute be brought under NAFTA.

⁹⁶ New Zealand–China FTA Art 185(2); Australia–US FTA Art 21.4 (1).

⁹⁷ Pauwelyn, *supra* n. 93, 385.

⁹⁸ See, e.g. Art 185 (3) of New Zealand–China FTA which provides that ‘Once the complaining Party has requested a particular forum, the forum selected shall be used to the exclusion of other possible fora’. Similar provision can also be found in Australia–US FTA Art 21.4.

arbitration against the Australian Government.⁹⁹ Against this is the need to attract and retain foreign direct investment in each of these countries. For example, if Australian investments into China face greater political risk in the absence of a treaty than do Chinese domestic investors, then no doubt the levels of investment into China from Australia will be very much limited. Thus, in order to encourage the investment flows under FTAs, it is crucial that the investor–state DSM is carefully designed to balance the interests of different parties. A case by case approach to the inclusion of investor–state dispute settlement provision in Australia’s international agreements has been recently proposed by Australia’s Department of Foreign Affairs and Trade, based on the consideration of the state of the legal system in the partner country, and the promotion of bilateral investment flows etc.¹⁰⁰ In the Australia–China context, the *Stern Hu* case discussed above has shown Australia’s dissatisfaction regarding China’s legal system, and this no doubt acts as a positive drive for the inclusion of an investor–state provision in ACFTA to settle all the disputes through international rules rather than domestic ones. The case also highlighted the ability of multinationals to lobby the government to act on their behalf. Moreover, the investment sector has played a considerable role in both countries in initiating this agreement. To have a separate procedure for investment–related disputes which would facilitate and promote investment flows would obviously be in the common interest of both parties.

As Mexico’s experience with its disputes with the US on sugar shows, for WTO-plus obligations to be functional, it is crucially important to have a workable FTA procedure.¹⁰¹ In its absence, WTO-plus elements cannot be enforced. Two steps are recommended for the special dispute settlement procedure under ACFTA. Firstly, as with the general procedure, the role of consultation and negotiation should be emphasised before proceeding to arbitration. As specified by the United Nations Conference on Trade and Development, methods of ADR that seek to resolve disputes through negotiation or amicable settlement is a very important alternative to international investment arbitration and thus should be promoted.¹⁰² Secondly, is the conducting of arbitration through third parties under clearly articulated rules and procedures. The setting of arbitration procedures exclusively for investment–state disputes in ACFTA requires them to be sufficiently detailed so as to prevent or reduce the adverse effect of investment arbitration, such as arbitrator bias and lack of transparency and public scrutiny. The Australia–Chile FTA is a useful example in this sense. It contains considerably more detailed procedural requirements than for Australia’s other agreements, such as the requirement that investors attempt to consult with the host

⁹⁹ *Review of Bilateral and Regional Trade Agreements: Supplementary submission to the Australian Productivity Commission* (2010) Department of Foreign Affairs and Trade, Australia http://www.pc.gov.au/data/assets/pdf_file/0016/102652/subdr098.pdf, 14, 8 Dec. 2010.

¹⁰⁰ *Ibid.*, 13.

¹⁰¹ Pauwelyn, *supra* n.93, 389.

¹⁰² *Investor-State Disputes: Prevention and Alternatives to Arbitration* (2010) United Nations Conference on Trade and Development http://www.unctad.org/en/docs/diaeia200911_en.pdf, 23.

government prior to entering into arbitration, the submission of a claim to arbitration, selection of arbitrators and the conduct of arbitration, as well as transparency of arbitration proceedings and of awards made.¹⁰³ In other words, investor entities in both States should be entitled to bring a claim for compensation against the host government through arbitration under these special rules. Australia's trade agreements traditionally offer parties a choice of three avenues, namely, rules established under the agreement, the rules of ICSID and UNCITRAL.¹⁰⁴ The latter two rules are recommended for ACFTA as they provide existing and effective avenues for investors to pursue claims against states. The rules of ICSID were formed especially for investor-state disputes, and proven to be a popular form for that.¹⁰⁵ Additionally, examination of existing FTAs shows that the rules of UNCITRAL are also an option for investor-state disputes. Of a total known number of 357 investor-state disputes as at the end of 2009, 225 were filed with the ICSID or under the ICSID Additional Facility, and 91 under the UNCITRAL rules.¹⁰⁶ It should be noted that both rules were adopted by the recent practice of Australia and China, e.g. Singapore-Australia FTA, Thai-Australia FTA, and New Zealand-China FTA.¹⁰⁷ This will no doubt facilitate their use under ACFTA. Furthermore, given both Australia and China both recognise ICSID and UNCITRAL,¹⁰⁸ incorporating the arbitration rules under these two conventions in the ACFTA would assist in the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.

6. CONCLUSION

The core feature of FTAs offering WTO-plus liberalisation shows that not all disputes between FTA members can be resolved under the WTO dispute settlement system. A separate dispute settlement mechanism beyond WTO is necessary to sustain the WTO-plus benefits in FTAs. Given that the number of parties to each of the FTAs is small, their concerns regional, and their interests specific, the approaches FTA members have adopted for dispute settlement vary from each other. The assessment of past disputes in which Australia and China have been involved in, and the likely areas of disputes in the future suggest two kinds of disputes that ACFTA will have to deal with: common subject disputes such as anti-dumping, and WTO-plus matter disputes on

¹⁰³ Productivity Commission Report, *supra* n. 52, 317.

¹⁰⁴ *Ibid*, 266,

¹⁰⁵ *Productivity Commission Urges Caution on Free Trade Agreements* (December 14, 2010) The Australian <http://www.theaustralian.com.au/national-affairs/productivity-commission-urges-caution-on-free-trade-agreements>, 266, 11 Jan. 2011.

¹⁰⁶ 'Latest Developments in Investor-State Dispute Settlement' (United Nations, 2010) http://www.unctad.org/en/docs/webdiacia20103_en.pdf, 2.

¹⁰⁷ Singapore-Australia FTA (signed 17 February 2003, in force 28 July 2003), Thailand-Australia FTA (signed 4-6 July 2004, in force 1 January 2005), and New Zealand-China FTA (signed 7 April 2008, in force 1 October 2008).

¹⁰⁸ Australia joined the UNCITRAL in 1975 while China joined in 1987. The ICSID came into force in Australia and China in 1991 and 1993 respectively. See, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html; See also, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>.

matters such as foreign investment and ownership. Based on the benefits of maximising the use of consultation and mediation preceding arbitration, a dual dispute settlement mechanism incorporating a general dispute settlement procedure for common-subject disputes and a special one for WTO-plus matter disputes, appears to be the most appropriate for ACFTA.

