Resolving and defusing trade disputes - the potential for creativity in the Australia/EU context

Iain Sandford & Maree TanKiang, Minter Ellison Lawyers

Introduction

• Purpose – to suggest:
  • international negotiators should not be afraid to direct creative attention to dispute resolution clauses; and
  • in the context of EU/Australia trade, thinking about specific frameworks for undertaking a level of administrative review for regulatory decisions is one area where such creative attention may usefully be directed
• Three parts:
  • Limitations with the ‘default’ approach trade dispute settlement
  • Lessons from how these limitations have been addressed in other contexts
  • Are there lessons for Australia/EU relationship?

Problems with the default approach to dispute settlement clauses in trade agreements

Dispute settlement systems reflect the nature of inter-governmental trade agreements

• Inter-governmental trade agreements are inter-governmental agreement
  • Inherently political
  • Often have non-economic objectives
• But Inter-governmental trade agreements are also about trade
  • Impact on private commercial dealings
  • Have economic policy objectives, including economic integration

The ‘default’ approach to dispute settlement clauses in trade agreements

• Political character of inter-governmental trade agreement means that governments prefer to settle disputes amongst themselves.
• But this can create tension for commercial interests, which, in addition to eventual withdrawal of measures may want:
  • Timely resolution
  • Compensation for losses
  • Certainty of outcome
• Domestic courts sometimes a realistic option, sometimes not
• Recognising need for outlet, there is a ‘default’ international trade dispute settlement model – in EU/Australia context: WTO dispute settlement

Three resolution problems

• But the default model has three problems that mean it fails to deal with most disputes:
  • The ‘threshold problem’: only the biggest or trickiest disputes are ever subjected to dispute settlement under the default model
  • The ‘access problem’: private stakeholders are excluded from the process and must get their government to champion their case
  • The ‘enforcement problem’: no retrospective recovery of losses; no returns to interests harmed (unless suitable compensation agreed); ultimate sanction is trade retaliation
Alternative approaches to dispute resolution

Some alternatives from other trade agreements

- Good offices (as in Article 5 of the WTO DSU)
- Special bi-national arbitrators applying national law (as in Chapter 19 of the NAFTA)
- Special domestic law review mechanisms mandated by bilateral agreement (as with PBAC review contemplated by AUSFTA) or adopted unilaterally (eg TMRO for dumping cases) (but available MFN)
- Contractual dispute resolution mechanisms mandated by international agreement (as with ICANN UDRP)
- Private party – government arbitration (as with investor-state dispute settlement under BITs and FTAs)

Addressing the three resolution problems

Identifying options for trade agreements going forward – some implications for Australia/EU trade relations

Principles and lessons

- Specific problems often dealt with best by specific dispute resolution solutions rather than general frameworks
- Developing dispute resolution frameworks to address specific problems can be a tool to bridge differences in a negotiation where positions can otherwise be irreconcilable
- Useful dispute settlement rules tend to de-politicise issues and such rules are most successful when they deal with problems at the lowest possible level of escalation
- It is generally desirable to let the parties chiefly interested in a problem deal with it
- Dispute provisions that give access to domestic enforcement mechanisms are particularly effective

Creativity in addressing EU/Australia trade irritants

- What kinds of disputes arise in EU/Australia relations?
  - Differences over agricultural or industrial support policies
  - Differences over regulatory processes and outcomes
- Such problems have manifested in WTO disputes, as well as much bilateral consultation between respective authorities
- There may be scope for creating special frameworks to deal with trade issues that arise in relation to regulatory processes and outcomes
Two areas of regulatory divergence

- EU issues in Australia - quarantine & biosecurity
- Australian issues in the EU - product marketing regulation (e.g., REACH or GIs)
- Options?
  - Specific dispute resolution frameworks within particular regulatory frameworks because of the technical subject matter
  - From a trade dispute resolution perspective, desirable to make resolution process available before definitive decisions are taken
  - A low-key process that is accessible to the economic stakeholders themselves?
  - Municipal rather than international law dispute resolution?
  - Possible 'review' systems before definitive decisions taken - bi-national approaches or independent reviews?

Conclusion

- Dispute resolution clauses in trade agreements deserve creative attention
- The availability of an effective outlet for disagreements has a number of benefits, not least of which is providing a pressure valve to de-escalate problems
- In areas where EU and Australian regulatory cultures or regulatory drivers have drifted apart, special mechanisms could be an outlet for traders or investors who are frustrated by a regulatory outcome