



JONES DAY
COMMENTARY

NEW TRADE OPPORTUNITIES FREE FOR THE TAKING WITH AUSTRALIA–SOUTH KOREA FREE TRADE AGREEMENT

The Australian Government announced on 6 December that it has concluded negotiations to enter into a Free Trade Agreement (“FTA”) with the Republic of Korea. Australia will now join the United States, the European Union and ASEAN countries, which are already benefiting from free trade agreements with Korea. The Australian Government is aiming to conclude FTAs with China and Japan within 12 months.

AUSTRALIAN–SOUTH KOREAN TRADE TO GROW

Korea is currently Australia’s third largest goods export market and fourth largest trading partner. The news was welcomed by the Australian trade industry, which hopes to capitalise on an anticipated 25 per cent rise in overall exports to Korea. The Australian economy stands to benefit greatly from the FTA— independent modelling shows the FTA could be worth AUD\$5 billion between 2015 and 2030 and

boost the Australian economy by around AUD\$650 million annually after 15 years.¹

Some potential winners and losers of the FTA at an industry level include:

- **Australia’s agricultural sector.** Perhaps the greatest winner out of the deal will be Australia’s agricultural sector. Korea is the third largest buyer of Australian beef and veal, and the elimination of beef tariffs over the next 15 years will enhance Australia’s price competitiveness in the Korean beef market.
- **Australian car manufacturers.** The FTA will remove a five per cent import tariff on Korean vehicles, placing significant pressure on the few remaining Australian car manufacturers.

The FTA will now proceed to the Cabinets of both countries for approval, with a likely commencement date still at least several months away.

FREE TRADE MEANS FREE TO SUE

While the terms of the FTA have not yet been finalised, the FTA will include a provision for an investor–state dispute settlement (“ISDS”) mechanism. An ISDS mechanism may take many forms. At its most basic, it provides a mechanism for settlement of a dispute by international arbitration directly between the investor and the host country, often without the need for recourse to the host country’s domestic courts.

It is unclear at this stage what this particular ISDS provision will entail. The most recent FTAs to enter into force to which Australia and South Korea are parties share the following characteristics.

They require an investor and the host country to initially seek to resolve their dispute (for example, disputes relating to alleged unfair treatment of the foreign investor by the host State) by consultation and negotiation, which can include nonbinding, third-party procedures such as mediation.

They also allow an investor to submit a claim to arbitration, provided that:

- the investor has given the host country at least 90 days’ notice of its intent to submit the claim to arbitration before the claim is submitted;
- at least six months has elapsed either from (depending on the particular FTA) the date of request for consultation or negotiation, or the events giving rise to the claim; and
- the FTAs give investors a choice of arbitration under the ICSID Convention (the generally preferred option for investment treaty arbitration), the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or any other arbitral rules agreed upon by the parties.

We expect the Australia–South Korea FTA to contain similar provisions.

The precise terms of the ISDS provision will be paramount to Australian and South Korean investors. This is because a foreign investor’s only recourse where a State has acted in a way which harms its investment may be to submit a claim to arbitration under the ISDS provision of the FTA. Historically, Australian companies have been slow to take advantage of the ISDS procedure; however, in recent years Australian investors have shown that they are prepared to take direct action against States for breaches of bilateral investment treaties. For example, in 2012, an Australian company successfully took action against India under the Australia–India Bilateral Investment Treaty for a failure by India to promptly enforce an arbitral award.²

While the Prime Minister of Australia, Mr Tony Abbott, has commented that the FTA text includes appropriate “carve outs and safeguards”³ to protect Australian business and the Government alike, the final impact of the ISDS mechanism in the FTA may not be seen for years to come.

JONES DAY’S KOREA PRACTICE TEAM

Lawyers in the Sydney Office are well placed to advise on Australian law as it relates to the FTA, including the operation and enforcement of the ISDS mechanism.

In addition, the Korea Practice team advises Korean companies in their outbound business and international companies doing business in Korea. Our team includes lawyers resident in Firm offices in Asia (Beijing, Hong Kong, Shanghai, Taipei, Tokyo, Singapore and Sydney), Europe and the United States who have worked in prominent Korean law firms or have substantial experience advising international or Korean clients on a broad range of projects and transactions.

LAWYER CONTACTS

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ENDNOTES

- 1 Prime Minister of Australia and Minister for Trade and Investment, Australian Government, “Australia Concludes FTA Negotiations with the Republic of Korea”, 5 December 2013, Press release.
- 2 *White Industries Australia Ltd v India* (an UNCITRAL arbitration in Singapore).
- 3 Australian Government, Department of Foreign Affairs and Trade, “Korea-Australia Free Trade Agreement—Key outcomes”, December 2013, Fact Sheet.