CHINESE INVESTMENT IN AUSTRALIA: A CRITICAL ANALYSIS OF THE *CHINA–AUSTRALIA FREE TRADE AGREEMENT*

WEIHUAN ZHOU*

The China–Australia Free Trade Agreement *('*ChAFTA*') reflects the latest development of trade and investment rules in regional economic integration and is of significance to the future development of the international economic legal order. Through a critical analysis of the major* ChAFTA *rules on investment protection and liberalisation, this article argues that the positive impact of these rules on Chinese investment in Australia has been overstated. These rules, as they currently stand, may not create sufficient incentives for or boost the confidence of Chinese investors. Chinese investment in Australia will continue to be influenced by the investment policies and needs of China as a capital exporter and Australia as a capital importer. However, the recent agreement of the two governments to commence the review of these rules in 2017 shows their commitment to further developing these rules to achieve a higher level of investment protection and liberalisation.*

CONTENTS

I INTRODUCTION

This article explores the regulation of investment under the *China–Australia Free Trade Agreement* ('*ChAFTA*'),[1] which entered into force on 20 December 2015. It offers a critical analysis of the major rules on investment protection and liberalisation that impact on Chinese investment in Australia. It takes the position that the ultimate goal of these rules is to induce two-way investment and an analysis of the rules as such would not be sufficient to determine the effectiveness and impact of the rules in that regard. Therefore, while the article discusses the approaches that the *ChAFTA* takes to regulating and liberalising the bilateral investment, it focuses on studying whether the *ChAFTA* would actually

* Senior Lecturer and Member of China International Business and Economic Law ('CIBEL') Initiative, Faculty of Law, UNSW Sydney. Email: weihuan.zhou@unsw.edu.au. The author is grateful to Professor Wenhua Shan for valuable comments and Ms Huiqin Jiang for research assistance. Any errors or oversights are my own. All websites cited are current as of 15 September 2017.

[1] For a comprehensive volume on the *ChAFTA* and its regulation of some of the most cutting edge issues such as trade in services, investment and digital trade, see Colin Picker, Heng Wang and Weihuan Zhou (eds), *The* China Australia Free Trade Agreement*: A 21st Century Model* (Hart, 2017). A brief overview of the book is available at: <www.bloomsbury.com/au/the-china-australia-free-trade-agreement-9781509915385/>, archived at <https://perma.cc/6VQL-W6ZK>.

promote Chinese investment in Australia, and if so, to what extent.[2] Such a study will necessarily involve a discussion of the potential investment barriers to Chinese investment in Australia which remain after the *ChAFTA* took effect.

The growth of Chinese investment in Australia in the past decade has been phenomenal, with Australia now the second largest recipient of Chinese outbound direct investment ('ODI'), and China one of the top investors in Australia. While Australia relies on foreign capital to sustain economic growth and prosperity, China requires resources, technology and international experience to promote economic reform and development. Thus, the two economies are complementary as far as investment is concerned, just as their bilateral trade in goods. As Chinese investment in Australia acquired growing prominence in the bilateral economic relationship, it became one of the most significant and controversial topics in the negotiations of the *ChAFTA* between 2005 and 2014. Since its conclusion, the *ChAFTA* has been widely observed as having great potential to open new opportunities for Chinese investors in Australia thanks to, amongst other reasons, the relaxation of regulatory barriers, the increase in confidence of investors, and the enhancement of access for Chinese workers.[3] The central argument of this article is that these observations have overstated the positive impact of the *ChAFTA* investment rules on China's ODI in Australia. In their current form, these rules do not develop new standards and fall short of the standard practice of Australia in other free trade agreements ('FTA'). In effect, Australia's commitments on investment protection and liberalisation are limited and may not create sufficient incentives for or boost the confidence of Chinese investors. However, the limitations of these rules may not discourage Chinese investment either, as such investment will continue to be influenced by the investment policies and needs of China as a capital exporter and Australia as a capital importer. Furthermore, the *ChAFTA*, including its investment rules, is a work in progress and is scheduled for further negotiations. The fact that the two governments recently agreed to commence the review of the investment rules ahead of the schedule envisaged in the *ChAFTA* sends a strong signal that they are keen to further develop these rules to achieve a higher level of investment protection and liberalisation.

The article proceeds as follows. Part II provides an overview of China's ODI in general and particularly in Australia. It observes that China's 'Go Global' policy and the investment complementarity between China and Australia are the major factors that have been driving Chinese investment in Australia. Part III reviews the *ChAFTA* negotiations of the major investment rules so as to understand the positions of the parties, which may continue to affect further development of the bilateral investment rules. Part IV discusses the investment

---

[2] For a detailed discussion of the Investment Chapter, see Vivienne Bath, 'Substantive Provisions in the *China Australia Free Trade Agreement* Investment Chapter' in Colin B Picker, Heng Wang and Weihuan Zhou (eds), *The* China-Australia Free Trade Agreement*: A 21st Century Model* (Hart, 2017).

[3] See, eg, Export Finance and Insurance Corporation, *Landmark* China-Australia Free Trade Agreement (November 2014) Australian Government <www.efic.gov.au/news-events/latest-news/2014/november/landmark-china-australia-free-trade-agreement/>, archived at <https://perma.cc/XX8R-YVQ4>; Paul Schroder and Scott Gardiner, *Are You Ready for ChAFTA? Our Predictions for Business in 2016* (18 December 2015) King & Wood Mallesons <www.kwm.com/en/au/knowledge/insights/china-australia-fta-2016-trade-opportunity-success-20151218/>, archived at <https://perma.cc/34BF-U99E>.

rules, particularly their effect on investment protection and liberalisation and whether they are sufficient to promote Chinese investment in Australia. These rules include: (1) the basic obligations and exceptions set out in ch 9 of the *ChAFTA*, also referred to as the 'Investment Chapter' below (Part IV(A)); (2) the liberalisation of Australia's foreign investment review regime (Part IV(B)); (3) the Investor–State Dispute Settlement ('ISDS') mechanism established in the Investment Chapter (Part IV(C)); and the so-called Investment Facilitation Arrangement created by a memorandum of understanding attached to the *ChAFTA* (Part IV(D)). The discussion of some of these rules will also involve an analysis of the relevant Australian regulations and practice which may continue to impact on Chinese investment in the post-*ChAFTA* era. Part V concludes and offers observations on how the *ChAFTA* may be developed during the renegotiations scheduled to commence in 2017 and in the context of China's domestic economic reform and engagement in investment activities globally.

II CHINESE INVESTMENT IN AUSTRALIA: AN OVERVIEW

While the economic activities between Australia and China date back to 1850s, the contemporary development of the bilateral economic relationship commenced only after their establishment of official diplomatic relations at the end of 1972.[4] The Australia–China economic relationship has since developed rapidly based on the diplomatic foundation but also thanks to other factors such as China's 'Open Door' policy launched in 1979, its accession to the World Trade Organization in 2001, and its rigorous and continuous economic reforms and development, creating massive and growing demands for two-way trade and investment. China is now both the largest export market and the largest source of imports for Australia.[5] As far as investment is concerned, Australia became the second largest recipient of China's ODI in 2015 (in terms of accumulated values since 2005) after the United States.[6] China has become the seventh largest investor in Australia based on the value of investment in 2015[7] and the largest investor based on the number of investment applications approved in the financial year ended 30 June 2015 according to the annual report of Australia's Foreign Investment Review Board ('FIRB').[8] At least two factors have contributed to the boom of Chinese investment in Australia, including China's 'Go Global' policy and the complementary nature of the bilateral investment.

---

4 Wilson Au Yeung, Alison Keys and Paul Fischer, 'Australia-China: Not Just 40 Years', The Treasury, Australian Government, *Economic Roundup* (2012) Issue 4 <https://treasury.gov.au/publication/economic-roundup-issue-4-2012/australia-china-not-just-40-years/>, archived at <https://perma.cc/24YU-Z5MV>.

5 Department of Foreign Affairs and Trade, Australian Government, *Australia's Top 10 Two-Way Trading Partners* (March 2017) <dfat.gov.au/trade/resources/trade-at-a-glance/pages/default.aspx>, archived at <https://perma.cc/7HCM-EZXM>.

6 KPMG and University of Sydney, *Demystifying Chinese Investment in Australia* ('KPMG 2016') (April 2016), KPMG, 6 <https://home.kpmg.com/au/en/home/insights/2017/05/demystifying-chinese-investment-in-australia-may-2017.html >, archived at <https://perma.cc/ECS4-972N>.

7 Department of Foreign Affairs and Trade, Australian Government, *Which Countries Invest in Australia?* <dfat.gov.au/trade/topics/investment/Pages/which-countries-invest-in-australia.aspx>, archived at <https://perma.cc/Y7NZ-MLK9>.

8 Foreign Investment Review Board, Australian Government, *Annual Report 2014–15* (April 2016) 35.

China's 'Go Global' policy, which was formalised in the 10th Five-Year Plan (2000–2005) and fully implemented during the period of the 11th Five-Year Plan (2006–2010), encourages Chinese companies to expand businesses overseas. The policy served China's strategic goals to internationalise local companies, promote exports of goods and services and satisfy its needs for raw materials, new markets and advanced technology.[9] Prior to the introduction of the policy, China's outbound investment was undertaken on an experimental basis and was severely restricted by government approvals.[10] The implementation of the policy was supported by a host of promotional measures and financial assistance,[11] and has led to continuous relaxation of the regulatory approval process by various responsible government departments such as the National Development and Reform Commission ('NDRC').[12] The impact of the policy has been remarkable, with China's ODI 'jumping from US$1.8 billion in 2004 to US$17.8 billion in 2006'.[13] In 2016, China's ODI reached over US$170 billion,[14] representing an average annual increase of approximately 85 per cent in the past decade. Likewise, the 'Go Global' policy has also boosted China's ODI in Australia. During the 15 years between 1991 and 2005, China's investment in Australia was strikingly marginal, with an accumulated value of A$3.5 billion accounting for merely 0.25 per cent of total foreign investment in Australia.[15] China's inactive investment activities in Australia reflected its foreign investment policies during the period. Since the full implementation of the 'Go Global' policy in 2006, China's investment in Australia increased rapidly and significantly as shown above, in parallel with the trend of its overall ODI.

---

9 For a comprehensive review of China's 'Go Global' policy and its early development and achievements, see Wenbin Huang and Andreas Wilkes, 'Analysis of China's Overseas Investment Policies' (Working Paper No 79, Center for International Forestry Research, 2011); Nargiza Salidjanova, 'Going Out: An Overview of China's Outbound Foreign Direct Investment' (Research Report, US-China Economic & Security Review Commission, 30 March 2011).

10 See generally, China Council for the Promotion of International Trade, 我国'走出去'战略的形成及推动政策体系分析 ['An Analysis of the Formation and Development of China's 'Go Global' Policy'] (Research Paper, January 2007). <aaa.ccpit.org/Category7/Asset/2007/Jul/24/onlineeditimages/file71185259698809.pdf>, archived at <https://perma.cc/YJP4-3JSY>.

11 See Huang and Wilkes, above n 9, 10–18.

12 See *Administrative Measures for Approval and Registration of Outbound Investment Projects* (境外投资项目核准和备案管理办法), Consultation Draft issued on 13 April 2016. For an analysis of the changes made in the new measure, see Latham & Watkins, 'China's NDRC Proposes Changes to Outbound Investment Rules' (25 May 2016) <www.lw.com/thoughtLeadership/LW-china-NDRC-proposes-changes-to-outbound-investment-rules>, archived at <https://perma.cc/7VGW-HZ9P>. For a discussion of the previous changes, see Andrew Lumsden, Lizzie Knight and Weihuan Zhou, 'Chinese Outbound Investment: The Growing Sophistication of China's "Go Global" Policy', Centre for Law, Markets and Regulation, UNSW Australia (18 March 2013) <clmr.unsw.edu.au/article//chinese-outbound-investment%3A-the-growing-sophistication-of-china's-"go-global"-policy>, archived at <https://perma.cc/4NV5-67WZ>.

13 James Laurenceson, 'Chinese Investment in Australia' (2008) 27(1) *Economic Papers* 87, 91.

14 The Ministry of Commerce of China, 中国非金融类对外直接投资简明统计 [Statistics for China's Non Financial Outbound Direct Investment] (January–December 2016) <http://hzs.mofcom.gov.cn/article/date/201701/20170102504421.shtml>, archived at <https://perma.cc/4QWX-R8TP>..

15 See Laurenceson above n 13, 'Chinese Investment in Australia', 88–9.

The investment complementarity between Australia and China is not as widely documented as their trade complementarity.[16] On the one hand, as Australia has a significant gap between national investment and national savings, it relies on foreign capital to sustain economic growth and prosperity, hence the government's open and friendly position to foreign investment.[17] On the other hand, China has a vast stock of national savings and foreign reserves, and has been overwhelmingly attracted to Australia's resources abundance to meet its domestic demands in the process of urbanisation and industrialisation.[18] Compared to trade, investment better serves China's strategic needs as it allows Chinese investors to own the assets and influence the decision making of the target mining companies, which in turn helps secure the supply of energy and resources and overcome price escalations.[19] Thus, for almost a decade up to 2013, Chinese investment in Australia had concentrated in the mining sector and had been undertaken predominantly by state owned enterprises ('SOEs').[20] The abrupt end of the mining boom in Australia in 2013[21] led to the diversification of Chinese investment into other sectors, notably in real estate, healthcare, agribusiness and infrastructure, while its mining investment became increasingly

---

16 For discussions of the general trade complementarity, see, eg, Yu Sheng and Ligang Song, 'Comparative Advantage and Australia — China Bilateral Trade' (2008) 27(1) *Economic Papers* 41; Dawei Cheng, 'A Chinese Perspective on the *China–Australia Free Trade Agreement* and Policy Suggestions' (2008) 27(1) *Economic Papers* 30; Au Yeung, Keys and Fischer, above n 4.

17 Department of Foreign Affairs and Trade, Australian Government, *The Benefits of Foreign Investment* (3 June 2016) <https://dfat.gov.au/trade/topics/investment/Pages/the-benefits-of-foreign-investment.aspx>, archived at <https://perma.cc/N3NZ-Z2VZ>; The Treasury, Australian Government, Foreign Investment and Trade Policy Division, 'Foreign Investment into Australia' (Working Paper No 1, The Treasury, January 2016) 10–11, <https://static.treasury.gov.au/uploads/sites/1/2017/06/TWP_201601_Foreign_Investment.pdf>, archived at <https://perma.cc/38RD-DESA>; Peter Drysdale, 'A New Look at Chinese FDI in Australia' (2011) 19(4) *China & World Economy* 54, 60–1.

18 East Asian Bureau of Economic Research (EABER) & China Center for International Economic Exchanges (CCIEE), *Partnership for Change: Australia China Joint Economic Report* (Australian National University Press, August 2016) 51–4; Paul Garvey, 'Chinese Investment in Australian Resources Lowest in Decade', *The Australian* (online), 22 June 2015 <https://www.theaustralian.com.au/business/mining-energy/chinese-investments-in-australian-resources-lowest-in-decade/news-story/1a5d8cdab46912d6e99aa35882bad213>; Edmund Tang, *Australia Remains the Second Most Favoured Country for China's Outbound Investors* (19 April 2016) Australian Trade and Investment Commission <https://www.austrade.gov.au/news/economic-analysis/australia-remains-the-second-most-favoured-country-for-china-s-outbound-investors>, archived at <https://perma.cc/R8D4-YE78>.

19 For an overview of the development of China's ODI policy in the energy and resources sector, see Xiaomei Tan, 'China's Overseas Investment in the Energy/Resources Sector: Its Scale, Drivers, Challenges and Implications' (2013) 36 *Energy Economics* 750, 752–4.

20 John Larum and Jingmin Qian, 'A Long March: The Australia-China Investment Relationship' (Report, Australia-China Business Council, October 2012) 9; Megan Bowman, George Gilligan and Justin O'Brien, 'China: Investing in the World' (Research Working Paper Series, Centre for International Finance and Regulation, September 2013) 24–9, <http://apo.org.au/system/files/65897/apo-nid65897-32946.pdf>, archived at <https://perma.cc/73PR-XYM4>.

21 Greg Jericho, 'The Mining Investment Boom is Over, So Where to Now?', *The Guardian* (online), 29 August 2014 <https://www.theguardian.com/business/grogonomics/2014/aug/29/mining-investment-boom-is-over-so-where-to-now>, archived at <https://perma.cc/A866-FEFB>. For an excellent analysis of the future of Australia's economy after the mining boom, see Ross Garnaut, *Dog Days: Australia after the Boom* (Redback, 2013).

focused on renewable energy and unconventional resources.[22] Furthermore, the investment diversification has been accompanied by increasing numbers of investment by privately owned enterprises ('POEs'), although large value transactions remain dominated by SOEs.[23] The table below shows the changes of China's investment pattern in Australia through a list of selected major investment transactions between 2011 and 2016.

Table 1: Major Chinese Investment in Australia: 1 January 2011–31 December 2016[24]

Sector	Investor/Ownership	Target	Transaction Value (millions)
2011			
Energy	China Datang Corporation / SOE	CBD Energy Ltd	A$6000
Energy	Sinopec Corporation / SOE	Australia Pacific LNG	A$1765
Food	Bright Food Group / SOE	Manassen Foods Group	A$530
2012			
Mining	Yanzhou Coal Mining Co / SOE	Gloucester Coal	A$8000
Mining	Guangdong Nuclear Power Group / SOE	Extract Resources	A$2200
Energy	PetroChina / SOE	Woodside Petroleum Ltd	US$1630
Energy	Sinopec Corporation / SOE	Australia Pacific LNG	US$1100
Energy	State Grid Corporation / SOE	ElectraNet	A$500
2013			
Energy	State Grid Corporation / SOE	SPI(Australia) Assets Pty Ltd	US$2856

[22] See generally KPMG and University of Sydney, *Demystifying Chinese Investment in Australia*, (May 2017) <https://assets.kpmg.com/content/dam/kpmg/au/pdf/2017/demystifying-chinese-investment-in-australia-may-2017.pdf>, archived at <https://perma.cc/PP2J-5KP4> ('KPMG 2017'); KPMG 2016, above n 6; KPMG and University of Sydney, *Demystifying Chinese Investment in Australia* (May 2015) <https://assets.kpmg.com/content/dam/kpmg/pdf/2015/05/demystifying-chinese-investment-in-australia-may-2015.pdf>, archived at <https://perma.cc/WLV6-DVW3> ('KPMG 2015'); KPMG and University of Sydney, *Demystifying Chinese Investment in Australia* (March 2014) <https://assets.kpmg.com/content/dam/kpmg/pdf/2014/03/demystifying-chinese-investment-in-australia-march-2014.pdf>, archived at <https://perma.cc/5K7E-XUKC> ('KPMG 2014').

[23] See KPMG 2015, above n 22, 29; KPMG 2017, above n 22, 8–9.

[24] The major transactions are selected from those of transaction value over A$500 million for the energy and resources sector and A$100 million for the other sectors in terms of investment by SOEs. For POEs, the threshold is A$100 million for all sectors. The transaction information provided in the table is compiled by the author from multiple sources including media reports, law firm websites and the following publications: KPMG and University of Sydney, *Demystifying Chinese Investment in Australia* (August 2012) 14 <http://sydney.edu.au/china_studies_centre/images/content/Research/demystifying-chinese-investment-2012.pdf>, archived at <https://perma.cc/7EEX-AXWU>; KPMG and University of Sydney, *Demystifying Chinese Investment in Australia* (March 2013) KPMG 22–3 <http://demystifyingchina.com.au/reports/demystifying-chinese-investment-2013.pdf>, archived at <https://perma.cc/YWL6-HGYA>; KPMG and University of Sydney, *Demystifying SOE Investment in Australia* (August 2014) 11 <http://demystifyingchina.com.au/reports/N12035MKT-Demystifying-SOE-Investment.pdf>, archived at <https://perma.cc/FPT6-UVFB>; KPMG 2015, above n 22, 11; KPMG 2016, above n 6, 20; KPMG 2017, above n 22, 9.

Energy	China National Offshore Oil Corporation Ltd / SOE	BG Group	US$1930
Mining	China Molybdenum Co, Ltd / SOE	Northparkes Cooper Mine	US$820
Mining	Tianqi Industrial Group / POE	Talison Lithium	A$815
Real Estate	Bright Ruby Resources / POE	Two properties in Sydney	US$279
Agriculture	Shangdong Jining Ruyi Woolen Textile Company, Ltd / POE	Cubbie Group Ltd	A$230
2014			
Infrastructure	CCCC International Holding Limited / SOE	John Holland Group	A$1150
Leisure	ID Leisure International Capital / POE	Hoyts Group	A$1000
Mining	Guangdong Rising Assets Management / SOE	PanAust Ltd	US$1055
Mining	Baosteel (with Australian partner Aurizon) / SOE	Aquila Resources Ltd	A$910
Infrastructure	China Merchants Group (partner with Hastings Funds Management) / SOE	Port of Newcastle	A$875
Energy	Fosun International / POE	Roc Oil Company Ltd	A$489
Real Estate	Dalian Wanda Group / POE	Commercial property in Sydney	A$425
Real Estate	Fu Wah International Group / POE	Park Hyatt Melbourne	US$114
2015			
Renewable Energy	State Power Investment Corporation / SOE	Pacific Hydro	A$3000
Real Estate	China Investment Corporation ('CIC') / SOE	Investa office portfolio	A$2450
Healthcare	Biostime Group / POE	Swisse Wellness	A$1380
Healthcare	Luye Medical Group / POE	Healthe Care	A$938
Infrastructure	Landbridge Group / POE	Port of Darwin	A$506
Real Estate	Bright Ruby Resources / POE	Sydney Hilton	A$442
2016			
Infrastructure	Consortium including China's CIC Capital / SOE	Asciano Ltd	A$2400 (CIC's equity is around 16%)
Infrastructure	Consortium including China's CIC Capital / SOE	Port of Melbourne	A$1940 (CIC's equity is around 20%)
Real Estate	Yunnan Metro Construction Investment / SOE	Homebush City Garden, Lidcombe	A$660
Mining	Tianqi Lithium Corporation / POE	Kwinana Lithium Plant	A$400
Agriculture	Mengniu Dairy Group / SOE	Burra Foods Australia	A$300
Agriculture	Moon Lake Investments / POE	Van Diemen's Land Company	A$280
Healthcare	JV between Macquarie Capital Group Pty Ltd & China Resources (Holdings) Co Ltd / SOE	Genesis Care	A$383 (China resources holding 50%)

Apart from the mining downturn, China's economic transformation and consumption growth are also important reasons for its investment diversification in Australia. As affirmed in the 13th Five-Year Plan (2016–2020), China is currently undertaking economic restructuring in furtherance of the development of a service and innovation-based economy. The new growth model is supported by the strong domestic consumption of 'China's large and increasingly wealthy middle class' and by the shift of consumption preferences to high quality goods and services.[25] In the context of the overall economic transformation, China's 'Go Global' policy has been gradually upgraded to promote foreign investment and cooperation in a variety of sectors apart from energy and resources, including agriculture, high end manufacturing, infrastructure and services, as well as further integration into the global value chain by local companies.[26] Furthermore, the growing domestic demands for high quality food products and supplements, advanced aged care facilities and managerial skills, amongst others, have led Chinese investors to acquire assets and supplies of raw materials for manufacturing and companies with advanced technologies and know how in Australia. These activities have also enabled Chinese companies to gain international experience and reputation, and to achieve cross border supply chain integration. From Australia's perspective, with the mining boom over, it is destined to reform its economic agenda and leverage its advantage in supplying higher value food and services and technology based assets so as to continue to capitalise on China's investment needs.[27] For Australian businesses, Chinese investment provides the much-needed capital for their local and global expansion, technology and human resources and international distribution network, especially in the Chinese market.

The review of the development of the China–Australia investment relationship above demonstrates that Chinese investment in Australia has been heavily influenced by China's ODI policies and the complementarity between the two economies. These factors will continue to impact on Chinese investment in Australia.

III *ChAFTA* Negotiations on Investment

The conclusion of the *ChAFTA* took 21 rounds of negotiations, over a decade. The feasibility study undertaken by the two governments on an FTA in 2005 identified three ways to facilitate the bilateral investment flows, including (1)

---

25 See EABER & CCIEE, above n 18, 46, 56–7.

26 *Twelfth Five Year Plan for National Economic and Social Development of the People's Republic of China* (2011–2015) (《中华人民共和国国民经济和社会发展第十二个五年规划纲要》) (16 March 2011) <http://www.ndrc.gov.cn/fzgggz/fzgh/ghwb/gjjh/201109/P020110919592208575015.pdf>, archived at <https://perma.cc/N6A3-F7XU>; *Thirteenth Five Year Plan for National Economic and Social Development of the People's Republic of China* (2016–2020) (《中华人民共和国国民经济和社会发展第十三个五年规划纲要》) (17 March 2016), <http://news.xinhuanet.com/politics/2016lh/2016-03/17/c_1118366322.htm>, archived at <https://perma.cc/V5NS-Q3YC>; *Government Working Paper: At The Eleventh National People's Congress Held on 5 March 2012* (《政府工作报告—2012年3月5日在第十一届全国人民代表大会第五次会议上》) (15 March 2012) <http://www.gov.cn/2012lh/content_2092685.htm>, archived at <https://perma.cc/DC9W-2MTG>.

27 See EABER & CCIEE, above n 18, 65–70.

investment liberalisation by way of removing 'existing restrictions in each country's foreign investment regimes', (2) enhancement of transparency in relation to foreign investment approvals and procedures and (3) investment protection by affording to investors, for example, 'the right to repatriate profits and capital, compensation for expropriation and improved mechanisms for handling post establishment disputes'.[28] However, as discussed later, in all of the three areas, the *ChAFTA*'s achievements have been limited.

According to the limited information that Australia's Department of Foreign Affairs and Trade ('DFAT') has made public, China's negotiation interests concentrated on Australia's foreign investment approval process, mining investment (including access to railway and port infrastructure for mining investors) and temporary entry of Chinese workers.[29] Among them, the rules and procedures relating to foreign investment approval were of particular concern as China saw them as a major investment barrier. Despite Australia's reliance on and openness to foreign investment, the government maintains notification and approval requirements on foreign investment primarily through the *Foreign Acquisitions and Takeovers Act 1975* (Cth), its implementing regulations and the Foreign Investment Policy issued and amended by the Australian Treasurer from time to time and implemented by FIRB ('FIRB Policy').[30] While the Treasurer is empowered to review and approve investment proposals on a case-by-case basis, the FIRB undertakes the actual review work and makes recommendations to the Treasurer as to whether a proposed investment is in line with Australia's national interest. The foreign investment review, therefore, serves to balance Australia's needs for foreign investment and the protection of national interest by allowing the government to consider various concerns on foreign ownership when deciding whether to admit a foreign investment. In the *ChAFTA* negotiations, China sought to relax the FIRB review process by: (1) for investment by POEs, increasing the notification/screening thresholds to the levels that Australia has offered to several other FTA partners (ie Chile, Japan, Korea, New Zealand and the United States), and (2) for investment by SOEs, raising the threshold from zero to $1 billion.[31] China was successful in the request for POE investors only due to the lasting and widespread concerns from both the Australian government and the public over the impacts of China's state ownership and government driven non-commercial objectives on Australia's national interest.[32] As will be

---

28 Department of Foreign Affairs and Trade, Australian Government, 'Australia–China Free Trade Agreement: Joint Feasibility Study' (Feasibility Study, March 2005) 76 <dfat.gov.au/trade/agreements/chafta/Documents/feasibility_full.pdf>, archived at <https://perma.cc/9WJR-W6PS>.

29 The following page provides (limited) official information on each round of the *ChAFTA* negotiations: Department of Foreign Affairs and Trade, Australian Government, *Australia–China Free Trade Agreement News* <dfat.gov.au/trade/agreements/chafta/news/Pages/news.aspx>, archived at <https://perma.cc/7B3J-CZ6E>.

30 See generally, Commonwealth Treasurer, *Australia's Foreign Investment Policy* (1 July 2017) <cdn.tspace.gov.au/uploads/sites/82/2017/06/Australias-Foreign-Investment-Policy.pdf>, archived at <https://perma.cc/9MDT-APMJ> ('FIRB Policy 2017').

31 Ling Ling He, 'On Re-Invigorating the *Australia–China Free Trade Agreement* Negotiation Process' (2013) 14 *Journal of World Investment & Trade* 672, 684–5.

32 See Larum and Qian, above n 20, at 10–11; Jeffrey Wilson, 'Managing the Controversies over Chinese Foreign Investment – Lessons from Australia' (2015) 1(1) *China's World* 9, 15–16; Drysdale, above n 17, at 63–5; He, above n 31, at 685–6.

elaborated in Part IV(B), these concerns have intensified following the conclusion and implementation of the *ChAFTA* and the continuous growth of Chinese investment in Australia. In response, the Australian government has strengthened the foreign investment approval regime, which is now more restrictive in many aspects than it was before the *ChAFTA* took effect. In addition, on the movement of temporary workers, China was keen to gain enhanced access for its workers to work on Chinese projects in Australia.[33] A key outcome of the negotiations was the conclusion of the 'Memorandum of Understanding on an Investment Facilitation Arrangement' which is discussed in Part IV(D) below.

Australia's negotiation interests mainly focused on investment liberalisation. Specifically, Australia was concerned about China's domestic regulatory barriers to foreign investment and was keen to obtain enhanced market access for its investors in the Chinese market. Australia was largely unsuccessful in that pursuit as China was resistant to any significant changes to its foreign investment regulatory regime.[34] This is reflected in the imbalances in the *ChAFTA* investment rules discussed below. However, the limited commitments of China on investment seem to be balanced — to the satisfaction of Australia — by China's robust commitments in the other areas, such as trade in goods and trade in services.[35] Furthermore, while Australia pursued investment liberalisation actively in the *ChAFTA* negotiations, its position on the provision of investment/investor protection through an ISDS mechanism was remarkably conservative. Australia's uneasiness with ISDS arose from the famous arbitration claims brought by Philip Morris Asia against Australia's tobacco plain packaging legislation in 2011, the very first time that Australia was challenged in an investor–state dispute.[36] This dispute alerted the Australian government to the potential risks of losing regulatory autonomy on fundamental public issues and resulted in the government's position to eschew ISDS in any future treaties.[37] While the government has now softened that position, it remains cautious about ISDS and undertakes 'case by case assessment' in treaty negotiations.[38] In the

---

33 See He, above n 31, 684–6.

34 As this article focuses on Chinese investment in Australia, China's position on the liberalisation of its foreign investment regime is not explored here. For a discussion of the evolvement of China's foreign investment regime and the underlying policy considerations, see Tarrant Mahony, *Foreign Investment Law in China: Regulation, Practice and Context* (Tsinghua University Press, 2015); Michael J Enright, *Developing China: The Remarkable Impact of Foreign Direct Investment* (Routledge, 2017). For an overview of the major investment barriers in China, see Centre for International Economics, 'Estimating the Impact of an Australia-China Trade and Investment Agreement' (November 2008) 19–21.

35 Department of Foreign Affairs and Trade, Australian Government, *Outcomes at a Glance* <dfat.gov.au/trade/agreements/chafta/fact-sheets/Pages/key-outcomes.aspx>, archived at <https://perma.cc/X7V6-EWGK>.

36 For an overview of the dispute, see Attorney-General's Department, Australian Government, *Tobacco Plain Packaging–Investor-State Arbitration* <https://www.ag.gov.au/tobaccoplainpackaging>, archived at <https://perma.cc/3T8X-NHEF>.

37 Luke Nottage, 'Compromised Investor–State Arbitration in *China-Australia FTA*', *East Asia Forum* (online), 1 July 2015 <www.eastasiaforum.org/2015/07/01/compromised investor-state-arbitration-in-china-australia-fta-2/>, archived at <https://perma.cc/M3A5-7Y5K>.

38 Department of Foreign Affairs and Trade, Australian Government, *Investor–State Dispute Settlement* <dfat.gov.au/trade/topics/Pages/isds.aspx>, archived at <https://perma.cc/RF2R-XTWG>.

case of *ChAFTA*, the ISDS rules are rather limited and leave considerable policy space for both governments, as will be discussed in Part IV(C).

The positions of Australia and China on the major investment rules in the *ChAFTA* negotiations, as summarised above, were reflected in the final agreement. They provide an important context not only for the discussion of the rules and their practical implications, but also for the assessment of what the parties may achieve in their review of these rules, including further negotiations on a comprehensive Investment Chapter as mandated by art 9.9 of the *ChAFTA*.

IV INVESTMENT PROTECTION AND LIBERALISATION UNDER THE *CHAFTA*

Chapter 9 of the *ChAFTA*, the Investment Chapter, contains the core rules on investment. Articles 9.1–9.8 of the chapter lay down the basic obligations and exceptions that apply to the treatment of foreign investors and investment of each party. Annex III of the *ChAFTA*, which is cross-referenced, sets out the specific commitments and carve outs on trade in services and investment. Article 9.9, as mentioned above, lays out a work program for review and continuing negotiations of the Investment Chapter. Articles 9.10–9.25 provide for substantive and procedural rules for ISDS. The two annexes at the end of the Chapter deal with Code of Conduct and service of documents respectively. In addition to the Investment Chapter, Australia's commitment on the establishment of Investment Facilitation Arrangements is also relevant to Chinese investment.

A *Non-Discrimination*

The key substantive obligations under the Investment Chapter are the non-discrimination rules, namely, national treatment (art 9.3) and most favoured nation ('MFN') treatment (art 9.4). The national treatment rule requires a host state to treat investment and investors of the other party equally favourably as it treats domestic investment and investors in like circumstances. The rule, however, is non-reciprocal, as Australia's obligation covers a wider range of investment activities from establishment to disposition of investments, whereas China's obligation does not apply to the establishment, acquisition and expansion of investments. As flagged above, the unequal obligations resulted from China's resistance to any substantial changes to its foreign investment regime, which has long treated foreign investment differently from domestic investment and applied special rules to pre-establishment investment activities as opposed to post-establishment investment activities.[39] Unlike the national treatment rule, the MFN rule applies to both pre-establishment and post-establishment investments, requiring each party to treat investment and investors of the other party equally favourably to investment and investors in like circumstances from other countries. However, the MFN treatment does not apply

[39] For the distinction between pre-establishment phase and post-establishment phase of investments, see OECD, Negotiating Group on the Multilateral Agreement on Investment (MAI), 'Treatment of Investors and Investments (Pre/Post Establishment)' (Report No DAFFE/MAI(95)3, 11 October 1995) <www1.oecd.org/daf/mai/pdf/ng/ng953e.pdf>, archived at <https://perma.cc/5AGB-P4A5>. The pre-establishment phase encompasses 'the making of new investments, including the participation in existing enterprises, by foreign or non-resident investors' whereas the post-establishment phase covers 'the conditions of operation in the host country for enterprises owned or controlled by non-established or non-resident investors'.

to bilateral or multilateral agreements of each party that existed before the *ChAFTA* entered into force. Both the non-discrimination requirements are not applicable to the so called non-conforming measures set out in Annex III of the agreement (art 9.5). In this regard, while Australia adopts a negative list approach whereby all limitations and exceptions are scheduled, China does not make such commitments and is generally exempted from the non-discrimination obligations with respect to 'any existing non-conforming measures maintained within its territory' (art 9.5.2). Finally, all the obligations contemplated in the Investment Chapter are subject to certain general exceptions (art 9.8) and security exceptions (art 16.3) that typically appear in trade agreements. Other than the non-discrimination requirements and the ISDS mechanism (which is discussed later), the Investment Chapter does not include other substantive rules for investment/investor protection but defers various substantive matters to the future work program contemplated in art 9.9, such as minimum standard of treatment, expropriation, transfer, performance requirements and so forth.

To assess the impacts of these substantive rules and exceptions on Chinese investment in Australia, one should first note that they fall short of the commitments that Australia has made under its recent FTAs with major trading partners. For example, Japan and Korea are respectively the fourth and eighteenth largest investors in Australia.[40] Under both the *Korea–Australia FTA* (2014) ('*KAFTA*') and the *Japan–Australia Economic Partnership Agreement* (2015) ('*JAEPA*'), Australia's commitments on investment/investor protection go beyond the non-discrimination requirements to cover minimum standard of treatment (ie fair and equitable treatment), conditions on expropriation and compensation, transfers of investment returns and restrictions on performance requirements on foreign investors.[41] These additional obligations have also existed in Australia's older FTAs with its major trading partners such as the United States[42] (the largest investor in Australia) and Singapore[43] (the fifth largest investor in Australia). Likewise, the limited coverage of the *ChAFTA* does not reflect China's best practice either. For example, both the recently concluded *China–Korea FTA*[44] (taking effect at the same time as the *ChAFTA*) and the much older *China–New Zealand FTA*[45] (China's first FTA with a

---

40 See Department of Foreign Affairs and Trade, 'Which Countries Invest in Australia?', above n 7.

41 *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea* ('*KAFTA*'), signed 4 August 2014, [2014] ATS 43 (entered into force 12 December 2014) art 11; *Agreement between Australia and Japan for an Economic Partnership* ('*JAEPA*'), signed 8 July 2014 [2015] ATS 2 (entered into force 1 January 2015).

42 *Australia–United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005).

43 *Singapore–Australia Free Trade Agreement*, signed 28 July 2003, [2003] ATS 16 (entered into force 28 July 2003) ch 8.

44 *Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea*, signed 1 June 2015 (entered into force 20 December 2015) ch 11.

45 *Free Trade Agreement between the Government of the People's Republic of China and the Government of New Zealand*, signed 7 April 2008, 2590 UNTS 101 (entered into force 1 October 2008) ch 11.

developed economy) cover these additional obligations.[46] One explanation for the limited scope of the *ChAFTA* may have to do with the *China–Australia Bilateral Investment Treaty* ('*BIT*') which took effect on 11 July 1988 and remains in force.[47] As the *BIT* had already covered most of these obligations (ie transfer, expropriation and fair and equitable treatment), one may think it unnecessary for the *ChAFTA* to repeat these obligations. This observation finds support in art 1.2.2 of the *ChAFTA*, which states that '[n]othing in this *Agreement* shall derogate from the existing rights and obligations of a Party under … any other … bilateral agreement to which both Parties are party'. This may be interpreted to mean that the *ChAFTA* does not discontinue the operation of the *BIT*.[48] However, it must be noted that these additional obligations are expressly intended to be the subject of future negotiations under the *ChAFTA*. Furthermore, under art 1.2.3 of the *ChAFTA*, any inconsistency between the *ChAFTA* and the *BIT* must be resolved by consultation between the two parties 'with a view to finding a mutually satisfactory solution'. Arguably, the inconsistencies between the *ChAFTA* and the *BIT* as to the scope of the parties' obligations — where they should apply and how they should apply — are for the parties to decide by consultation on a case-by-case basis until the negotiations under the future work program are concluded and relevant changes made. This consultation mechanism, therefore, confirms the parties' intention to defer the additional obligations for future negotiations, and creates uncertainties about the scope of investment/investor protection. Given the intention of the parties, it is likely that Chinese investment and investors in Australia may not enjoy the same level of protection as Australia's other major FTA partners.

Furthermore, Australia's domestic laws and regulations do not, in general, differentiate between foreign and domestic investment, except for the FIRB notification requirements which apply to foreign investment only.[49] The FIRB notification requirements, however, are a typical non-conforming measure in Australia's FTAs. The other non-conforming measures that constitute exceptions to the national treatment rule under the *ChAFTA* concentrate on, for example, residency requirements for officers, location requirements on offices of foreign invested businesses, and limitations on foreign investment in sensitive sectors (such as media, telecommunications, transport and so forth). These non-conforming measures are not uncommon in Australia's recent FTAs either.[50] Thus, Australia's obligations under the *ChAFTA* represent, at best, the status quo

---

46 It has been observed that most of China's BITs contain significantly more favourable terms than *ChAFTA*, see Sam Luttrell, 'ISDS in the Asia Pacific: A Regional Snap Shot' (2016) 19 *International Trade and Business Law Review* 20, 29−30.

47 *Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments*, [1988] ATS 14 (signed and entered into force 11 July 1988).

48 For a detailed discussion of the issue, see Tania Voon and Elizabeth Sheargold, 'Australia, China, and the Co-Existence of Successive International Investment Agreements' in Colin Picker, Heng Wang and Weihuan Zhou (eds), *The* China–Australia Free Trade Agreement*: A 21st Century Model* (Hart, 2017). A draft of the chapter is available at: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2905516>.

49 See generally Vivienne Bath, 'Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China' (2012) 34 *Sydney Law Review* 5, 6−9; EABER & CCIEE, above n 18, 117.

50 See *KAFTA* annex I; *JAEPA* annex 6.

of its domestic laws and existing commercial practice. Chinese investors will be subject to the same regulations and commercial standards with or without the *ChAFTA*.

B *FIRB Approval*

As China correctly targeted in the *ChAFTA* negotiations, the FIRB review process constitutes the most restrictive element of Australia's foreign investment regime.[51] FIRB notification is required for foreign investment that exceeds the value thresholds — generally the value of the target Australian entity or in terms of agribusinesses the value of investment — specified in the FIRB Policy. The FIRB Policy that first incorporated Australia's *ChAFTA* commitments was released in December 2015. The most recent and currently applicable FIRB Policy was issued on 1 July 2017.[52]

As a result of the *ChAFTA*, the notification thresholds have increased for Chinese private investors in some areas of investment so that less screening should be anticipated. The three major changes to the notification thresholds include: (1) for private investment in non-sensitive sectors, an increase of the threshold from A$252 million to A$1094 million; (2) an increase from A$252 million to A$1094 million for private investment in developed commercial land such as hotels, commercial offices, tourist resorts; and (3) an increase from A$55 million to A$1094 million for so-called low threshold commercial land which includes mines and critical infrastructure such as airports and ports. Most Chinese POE investments may not reach the increased thresholds (as Table 1 suggests) and hence would not be subject to FIRB approval. Thus, in 2016, Chinese investment in Australia increased by 11.7 per cent to $15.36 billion and reached a record of 103 deals signed.[53] Notably, both the number and the value of Chinese POE investment soared significantly, reaching 76 per cent and 49 per cent respectively of all Chinese projects in Australia.[54] This increase reflects the positive impact of the increased thresholds on Chinese private investment. However, it may also have a bearing on the intangible benefits that the *ChAFTA* as a whole conveys by way of increased confidence of investors on the prospects of Australia–China economic relations.

Despite the increased thresholds, the degree of liberalisation of the FIRB review process under the *ChAFTA* may be limited for the reasons below. This limited liberalisation responds to China's lack of substantial commitments to opening up its foreign investment regime, and hence reflects the reciprocity and compromise between the parties when the *ChAFTA* negotiations concluded in 2014. However, as will be discussed in Part V, China has recently reformed its foreign investment regime, which would provide a basis for further liberalisation of the investment rules under the *ChAFTA*.

---

51 See generally, Bath, above n 49, 8–9; Financial Services Institute of Australia, 'Regulating Foreign Direct Investment in Australia' (Discussion Paper, February 2014) 20–1 <http://www.finsia./com/docs/default-source/industry-reports-foreign-direct-investment/regulating-foreign-direct-investment-in-australia.pdf?.sfvrsn=4>, archived at <https://perma.cc/82GC-5XM8>.

52 See FIRB Policy 2017, above n 30.

53 See KPMG 2017, above n 22, 8.

54 Ibid 27.

First, these higher thresholds are already applicable to Australia's other FTA partners, referred to as 'agreement country investors' in the FIRB Policy, including Chile, Japan, Korea, New Zealand and the United States. Consequently, Chinese investors do not enjoy any advantage over their competitors in relation to FIRB approval.

Secondly, despite the increased thresholds, Chinese investors are treated less favourably than some of the agreement-country investors and some other foreign investors in certain areas of investment. These are set out below:

- Chinese investment in agribusinesses, which has been increasing in both number and value since the end of the mining boom, is subject to a much lower threshold of A$55 million than the threshold of A$1094 million applicable to investment from Chile, New Zealand and the United States. This means that all major Chinese investment in the agricultural sector, as indicated in Table 1 above, would be required to seek FIRB approval.
- Another related area concerns foreign investment in agricultural land. While investment from Chile, New Zealand and the United States enjoys a threshold of A$1094 million and investment from Singapore and Thailand a threshold of A$50 million, Chinese investment is disadvantaged by the application of a threshold of A$15 million. To make it more restrictive and discriminatory, the A$15 million threshold is calculated based on the cumulative value of agricultural land owned by a foreign person, while the higher thresholds are not cumulative. This would require more Chinese investment in Australia's agricultural land to undergo FIRB scrutiny.
- With respect to investment in mining and production tenements, all Chinese investment is required to notify FIRB regardless of value, while investment below A$1094 million from Chile, New Zealand and the United States is not required. As China's urbanisation and industrialisation continues and accelerates under its new development model,[55] mining investment will remain a substantial portion of Chinese investment in Australia despite the investment diversification. Thus, the FIRB notification is likely to become a significant barrier to Chinese investment in the mining sector.

The above areas represent some of China's major failures in negotiating investment liberalisation under the *ChAFTA* as Chinese investors are not treated as favourably as the other agreement country investors but are rather treated the same as investors from Australia's non-FTA partners. The unchanged thresholds above would reduce the benefits from the increased thresholds for POEs as Chinese private investment in these sectors is still likely to trigger the FIRB process. The requirement of FIRB review places Chinese investors in an unfavourable position given the financial and administrative burdens involved, the possibility of an investment proposal losing confidentiality during the period of FIRB assessment and the commercial ramifications for investors, and the uncertainties associated with the review process, which will be further discussed below.

---

55 See EABER & CCIEE, above n 18, 65; KPMG 2017, above n 22, 31.

Thirdly, all Chinese SOE investments must be notified to FIRB regardless of value. While this 'zero' threshold also applies to other foreign government investors, its impact on Chinese investors may be more significant. Despite the increasing amount of Chinese POE investment in the past five years, major investments have been dominated by SOEs in both the traditional energy and resources sector and the emerging sectors such as real estate, healthcare and infrastructure (as shown in Table 1 above). Overall, the pattern of Chinese investment in Australia indicates that SOEs are routinely tasked to lead large scale and strategic outbound investment while POEs are encouraged to follow the lead by undertaking less significant investment activities. This division of labour is not purely policy driven but also has to do with the differences between SOEs and POEs in terms of financial capabilities and commercial decision making. As SOEs continue to play a significant role in Chinese investment in Australia, the FIRB approval process will remain a formidable barrier to Chinese SOEs investment given the widespread concerns in Australia on state ownership and non-commercial objectives of such investment. As shown below, these concerns are factored into the 'national interest' test and can affect the final decisions of the Australian government.

Fourthly, the FIRB review process, particularly the application of the 'national interest' test, has created considerable uncertainty, making the final decisions hard to predict. Observers and commentators on the FIRB process share the view that the 'national interest' standard is based on opaque criteria that make its application necessarily arbitrary, subject to 'sweeping ministerial and bureaucratic discretion'.[56] The six criteria include national security, competition, Australian Government policies (including tax), impact on the economy and the community and character of the investor. This last criterion is essentially a 'state ownership' test designed to assess whether a government investor operates on a commercial basis independently from its home government.[57] This criterion, as some have suggested, was intended to target 'Chinese investments in the strategic resources sector',[58] and resulted from the Australian government's and public resistance to Chinalco's proposed US$19.5 billion investment in Rio Tinto in 2009 due to concerns about a wholly Chinese

---

56 See, eg, Stephen Kirchner, 'Capital Xenophobia II: Foreign Direct Investment in Australia, Sovereign Wealth Funds, and the Rise of State Capitalism' (Policy Monograph 88, Centre for Independent Studies, 2008) 1, 7 <https://web.archive.org/web/20130616081506/http://cis.org.au/images/stories/policy-monographs/pm-88.pdf>; Jeff Rae, 'Counting the Cost of Regulation' (Paper presented at Australia's Open Investment Future, Grand Hyatt Hotel, Melbourne, 4 December 2008) 6 <https://generationliberty.ipa.org.au/library/publication/1229298979_document_rae.pdf>, archived at <https://perma.cc/446Z-AYAY>; Andrew Lumsden, *The 'National Interest Test' and Australian Foreign Investment Laws*, Centre for Law Markets and Regulation <https://clmr.unsw.edu.au/article/market-conduct-regulation/state-capital/the-"national-interest-test"-and-australian-foreign-investment-laws>, archived at <https://perma.cc/EH4P-3S9D>.

57 See Drysdale, above n 17, 62–3. See also FIRB Policy 2017, above n 30.

58 Philip Dorling, 'Law "Aimed to Limit" Chinese Investment', *Sydney Morning Herald* (online), 3 March 2011 <www.smh.com.au/business/laws-aimed-to-limit-chinese-investments-20110302-1bexm.html>, archived at <https://perma.cc/PG6G-HGF4>; Loong Wong, 'The "Liability of Foreignness": Chinese Investment in Australia' (2012) 4(4) *Transnational Corporations Review* 46, 53–4.

SOE gaining control of strategic mining assets.[59] Consequently, Rio's board decided to withdraw its support for the transaction despite the US$195 million break fee that the company was required to pay.[60] This case confirms that foreign state ownership is sensitive to the Australian Government and the community, and may well affect the Treasurer's assessment of whether an investment proposal is contrary to 'national interest'.[61] However, no further guidance has been provided as to the circumstances in which foreign state ownership might be rejected. Thus, while there have been very few rejections of foreign investment proposals,[62] the uncertainty that Chinese investors may face is not reduced due to the imbedded discretion for the Treasurer to reject such proposals based on the 'national interest' criteria without offering detailed reasons for decisions. One recent case involving Chinese investment provides a good illustration of this point. In November 2015, the Treasurer rejected a proposal by a Chinese-led consortium to acquire S Kidman & Co Limited ('Kidman') —Australia's largest private landholder — on the grounds that the total portfolio of Kidman properties is too sizeable and significant for Australia's national interest and that the properties on sale involved the Woomera Prohibited Area ('WPA'), which 'makes a unique and sensitive contribution to Australia's national defence'.[63] While the Treasurer kept the door open for alternative proposals that address these concerns, the decision above did not clarify how the 'national interest' concern may be addressed to his satisfaction. In April 2016, the Treasurer blocked a revised proposal in which Chinese-based Dakang Australia Holdings ('Dakang') and Australian Rural Capital proposed to acquire, respectively, an 80 per cent and 20 per cent interest in Kidman with the WPA excluded. The proposal again failed to pass muster the 'national interest' test as

---

59 John Chan, 'Rio Tinto-Chinalco Deal Collapses', *World Socialist Web Site* (online), 23 June 2009 <www.wsws.org/en/articles/2009/06/rtin-j23.html>, archived at <https://perma.cc/R7CD-ZHD9>; Wong, 'Chinese Investment in Australia', above n 58, 55–6.

60 John Garnaut, 'Chinalco, Rio Deal Collapses', *Sydney Morning Herald* (online), 5 June 2009 <www.smh.com.au/business/chinalco-rio-deal-collapses-20090604-bxdc.html>, archived at <https://perma.cc/JH8W-VH2R>.

61 This article does not offer a view on whether the 'national interest' test in general and the 'state ownership' test in particular discriminate against Chinese SOE investors *vis à vis* other foreign government investors, a topic requiring separate research. For an analysis of the development of Australia's regulatory responses to foreign SOE investment, see Greg Golding, 'Australia's Experience with Foreign Direct Investment by State Controlled Entities: A Move Towards Xenophobia or Greater Openness?' (2014) 37 *Seattle University Law Review* 533.

62 See Foreign Investment Review Board, above n 8, 22.

63 The Treasurer, Australian Government, 'Statement on Decision to Prevent Sale of S. Kidman & Co Limited' (Media Release, 19 November 2015) <sjm.ministers.treasury.gov.au/media release/011-2015/>, archived at <https://perma.cc/2GZ5-8JMT>; see also Kara Vickery, 'Turnbull Government Refuses Sale of S Kidman and Co Landholding to Overseas Investors', *News Corp Australia Network* (online), 19 November 2015 <www.news.com.au/national/politics/turnbull-government-refuses-sale-of-s-kidman-and-co-landholding-to-overseas-investors/news-story/6d282f3a013cd5e4a65701dea8e0045f>, archived at <https://perma.cc/6FZD-72UT>.

the Chinese investor was to obtain a majority ownership.[64] In December 2016, a further revised proposal was lodged and eventually approved by the Treasurer, whereby the 'national interest' concern was removed with Kidman's largest station acquired by a local farming family (ie the Williams), and the remainder of the business by Australian Outback Beef Pty Ltd which is held by Australia's Hancock Beef Pty Ltd (67 per cent) and China's Shanghai CRED Real Estate Stock Co Ltd ('Shanghai CRED') (33 per cent).[65] This deal 'ensured that control of the board and the day-to-day operations would remain Australian.'[66] This protracted transaction suggests that a majority foreign ownership of high profile Australian farmland may well raise 'national interest' concerns. Notably, the Chinese bidder in this transaction, Dakang, is a private company owned by Shanghai Pengxin Group Co, Ltd (also a private company holding 51 per cent interest) and Shanghai CRED (a Shanghai stock exchange listed company holding 49 per cent interest). Accordingly, 'national interest' concerns about foreign ownership are not limited to state ownership but may also target private ownership depending on the significance of the business/assets involved. However, the Treasurer's decision does not provide sufficient guidance for investors as it is unclear on which of the six criteria the rejection was based. More importantly, the position of the government on issues such as the ownership structure and exact shareholding may vary from case to case. In this case, the Australian government's position on these issues was not communicated to the investors until the third proposal, despite the investors' regular liaison with FIRB during the process (which is common in major investment transactions). The uncertainties associated with the FIRB process in this case may have created substantial financial and administrative burdens for the investors in terms of employing professional advisors, preparing bids and negotiating with Kidman's board and potential partners, managing internal decision making and Chinese government approvals and so forth. Once the investment was made public during the Treasurer's first decision, new investors could join the tendering process, increasing competition and bidding up the price for the initial investors. For listed companies, the loss of confidentiality of proposed investment could also affect share prices and, consequently, the prospects of their business. Agribusiness is not the only sector in which Chinese investment proposals have been knocked back. Rejected proposals have also included State Grid Corporation of China's bid for Ausgrid, the electricity

---

64 The Treasurer, Australian Government, 'Preliminary Decision of Foreign Investment Application for Purchase of S Kidman & Co Limited' (Media Release, 29 April 2016) <sjm.ministers.treasury.gov.au/media-release/050-2016/>, archived at <https://perma.cc/EVN8-WTJB>; see also Matthew Cranston, 'S Kidman & Co Agrees $370m Sale to China's Dakang', *Australian Financial Review* (online), 19 April 2016 <www.afr.com/real-estate/skidman-co-agrees-3707m-sale-to-chinas-dakang-20160419-go9vtu>.

65 The Treasurer, Australian Government, 'Approval of S. Kidman & Co Limited Sale to Increase Australian Ownership' (Media Release, 9 December 2016) <http://sjm.ministers.treasury.gov.au/media-release/130-2016/>, archived at <https://perma.cc/BTH6-VRVY>; see also Shoba Rao, 'Scott Morrison Approves Sale of S Kidman and Co to Gina Rinehart', *News Corp Australia Network* (online), 9 December 2016 <www.news.com.au/finance/business/other-industries/scott-morrison-approves-sale-of-s-kidman-and-co-to-gina-rinehart/news story/f4904dd27561cd0c06ccc8c70cef02d3>, archived at <https://perma.cc/5Q7J-XX58>.

66 See KPMG 2017, above n 22, 14.

distribution network in the state of New South Wales, due to concerns about the proposed transaction structure and the nature of the assets;[67] and Huawei Technologies of China's bid for Australian National Broadband Network, one of Australia's largest infrastructure projects, due to national security concerns.[68] As in the Kidman decision, a detailed 'national interest' assessment was lacking in these cases, creating considerable uncertainties and burdens for investors in structuring investment proposals and participating in the FIRB process. Finally, while both the number and value of rejected foreign investment proposals have been insignificant, one must note that the broad discretion of the Treasurer may well discourage potential investors or cause applicants to withdraw a proposal if there are indications that approval may not be granted (as shown in the Chinalco–Rio transaction above). Thus, the impacts of the arbitrary and opaque FIRB process on foreign investors go beyond the rejected proposals.

Fifthly, at the same time as the *ChAFTA* reduced the notification thresholds for Chinese private investors, it led the Australian government to introduce new rules to significantly strengthen the review of foreign investment proposals and impose additional burdens on investors. The major regulatory amendments made in December 2015 include:[69]

1) Stricter screening requirements for acquisition of agricultural land as mentioned above. For Chinese investors who already hold A$15 million of agricultural land, any further investment in agricultural land requires FIRB approval;
2) For acquisition of agribusiness, the screening requirements were made more stringent by introducing a lower benchmark for 'direct investment' (ie 10 per cent as opposed to 20 per cent for investment in other sectors). As shown above, any Chinese direct investment over A$55 million (as opposed to $1094 million for Chilean, New Zealand and the US investors) requires FIRB approval;
3) application fees between A$5000 and A$100 000 must now be paid by foreign investors before FIRB commences reviewing an application; and
4) Civil and criminal penalties were introduced or strengthened to ensure compliance with the notification requirements.

Since the above amendments, the Australian government has further bolstered the foreign investment rules by adding to the list of notifiable investment proposals acquisition of critical state owned infrastructure assets by foreign

---

67 The Treasurer, Australian Government, 'Statement on Decision to Prohibit the 99-year Lease of 50.4 per cent of Ausgrid under Current Proposed Structure' (Media Release, 19 August 2016) <sjm.ministers.treasury.gov.au/media-release/069-2016/>, archived at <https://perma.cc/Y46G-HWRJ>.

68 Maggie Lu Yueyang, 'Australia Bars Huawei from Broadband Project', *New York Times* (online), 26 March 2012 <www.nytimes.com/2012/03/27/technology/australia-bars-huawei-from-broadband-project.html>, archived at <https://perma.cc/JAR3-C7NV>.

69 For a comprehensive and detailed discussion of the changes, see Allens, *Australia's Foreign Investment Law Rewrite* (December 2015) <www.allens.com.au/pubs/pdf/ma/cuma4dec15.pdf>, archived at <https://perma.cc/4LUF-SJN9>; Norton Rose Fulbright, *Changes to Foreign Investment Regulation in Australia* (April 2016) <www.nortonrosefulbright.com/files/changes-to-foreign-investment-regulation-in-australia-april-2016-139174.pdf>, archived at <https://perma.cc/2CZC-2U63>.

POEs, effective on 31 March 2016.[70] Such assets include airports, ports, electricity, gas, water and sewerage systems, roads, railways, certain inter modal transfer facilities, telecommunications infrastructure and nuclear facilities. As the Treasurer stated, this new rule is intended to address potential national security risks associated with the sale of these assets to foreign investors. This regulatory change represents the government's response to the sale of a 99-year lease of Port of Darwin by the Northern Territory government to Shandong Landbridge Group (a Chinese POE) for A$506 million, a transaction exempted from FIRB approval under the previous legislation.[71] Subsequently, the ongoing concern of the Australian government on foreign ownership of critical assets may have caused the rejection of the State Grid Ausgrid transaction discussed above. Finally, as FIRB approval is a non- conforming measure under the Investment Chapter, Australia has the flexibility to further strengthen the framework for foreign investment review. Consequently, amendments to the foreign investment review mechanism may be undertaken on an as-needed basis to safeguard Australia's national interest.

In sum, the *ChAFTA* has merely liberalised some areas of investment for Chinese POEs. Such liberalisation may not reduce to any significant degree the restrictiveness and discrimination that the FIRB process may impose on Chinese investors, as Chinese POEs remain treated less favourably than private investors from Australia's other FTA partners, SOEs continue to lead Chinese investment in Australia and be treated as a 'threat' to Australia's national interest, Australia's foreign investment review framework continues to be strengthened in the pursuit of national interest, and the FIRB process remains arbitrary, opaque, uncertain, and costly.

C *ISDS*

As discussed in Part III, the *ChAFTA* was negotiated at a time of strong resistance in Australia against the inclusion of an ISDS clause in FTAs or investment treaties due to concerns that ISDS would unduly restrict regulatory autonomy and incur substantial operational costs.[72] Such resistance determined that the ISDS clause in the *ChAFTA* is restricted in substance despite the detailed provisions on procedural matters. The restrictiveness is reflected essentially in two aspects: (1) the arbitrable matter is limited to violations of the national treatment rule only (art 9.12); and (2) in addition to the general and security

---

70 The Treasurer, Australia Government, 'Critical Asset Sales to Fall within Foreign Review Net' (Media Release, 18 March 2016) <sjm.ministers.treasury.gov.au/media-release/031-2016/>, archived at <https://perma.cc/6D3J-RVAS>.

71 Senate Standing Committee on Economics, Parliament of Australia, *Interim Report: Foreign Investment Review Framework* (2016) 3−10 [2.1]−[2.29].

72 Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, China–Australia Free Trade Agreement (2015) 19−21 [4.4]–[4.12]. For discussions of Australia's policy changes on ISDS, see Jürgen Kurtz, 'Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication' (2012) 27(1) *ICSID Review* 65; Leon E Trakman, 'Investor State Arbitration: Evaluating Australia's Evolving Position' (2014) 15 *Journal of World Investment & Trade* 152 ('Investor State Arbitration'). For a comprehensive analysis of the impacts of ISDS on domestic policy-making and other emerging issues, see David Gaukrodger and Kathryn Gordon, 'Investor State Dispute Settlement: A Scoping Paper for the Investment Policy Community' (Working Papers on International Investment No 2012/3, OECD, December 2012).

exceptions, ISDS cannot be invoked to challenge measures 'for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order' (art 9.11.4). As Australia's domestic laws and regulations generally do not differentiate between domestic and foreign investment/investors other than the FIRB process which is a carve out under the *ChAFTA*, the practical effect of subjecting breaches of national treatment to ISDS would be rather limited. Even if such a breach is identified, the challenged measure will not be subject to ISDS if it serves any of the policy objectives. In such circumstances, the responding party may serve a 'public welfare notice' to the complaining party so as to trigger a state-to-state consultation process (arts 9.11.5–9.11.8) and exclude the application of ISDS. The consultation process serves to enhance the safeguards of regulatory autonomy by allowing the governments to hold in their hands the power to negotiate and interpret matters relating to public policy rather than leaving these matters to arbitration.[73] To reinforce this position, the parties' decisions from consultations are made binding on arbitral tribunals (art 9.18.3). Accordingly, the ISDS clause under the *ChAFTA* is likely of limited practicability, unless further negotiations successfully incorporate more substantive obligations into the Investment Chapter and make ISDS applicable to these obligations. Moreover, while an overhaul of the seemingly broad public policy exceptions is unlikely (given Australia's concerns), it may be improved to achieve a better balance between investment/investor protection and preservation of policy space, as this will also benefit Australian investment/investors in China.[74] In its current form, the ISDS clause is unlikely to afford adequate protection to investors given its limited application and the freedom for the governments to address a wide range of policy objectives.

As a matter of practice, neither Australia nor China has been an active user of ISDS. Despite the existence of the *BIT* since 1988, ISDS has never been invoked by the parties. Globally, while the number of ISDS cases has been on the rise, reaching a total of 696 cases as of 1 January 2016, Chinese investors have brought only five cases (including two cases by Hong Kong and Macau

---

73 Joint Standing Committee on Treaties, Parliament of Australia, *Report 154: Treaty Tabled on 17 June 2015* – Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (2015) 46 [5.13].

74 For an analysis of the standard of review that international investment tribunals may adopt to balance investment protection and public interest, see Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration' (2013) 4 *Journal of International Dispute Settlement* 197; Razeen Sappideen and Ling Ling He, 'Dispute Resolution in Investment Treaties: Balancing the Rights of Investors and Host States' (2015) 49 *Journal of World Trade* 85, 111–15.

investors) with the first case in 2007 and the latest in 2014.[75] Since 2014, no investor–state arbitrations ('ISAs') have been initiated by Chinese investors, although Chinese ODI continued to increase. These figures suggest that Chinese investors may be cautious in utilising ISDS. The reasons for such cautiousness remain unspoken; they may have to do with China's adherence to absolute sovereign immunity, the inexperience of Chinese investors in ISAs, the high costs associated with ISAs, lengthy and unpredictable ISA proceedings and the potential risk of damaging the relationship with host country governments.[76] As China becomes increasingly involved in global investment activities, Chinese investors are expected to bring more ISAs to protect their own interests.[77] Nevertheless, on the use of ISDS by Chinese investors against Australia, this expectation may be qualified by at least three factors. First, a more frequent use of ISDS requires a more comprehensive investment chapter and a more inclusive ISDS clause, as stated above. All five investment disputes that Chinese investors have brought so far were based on a relatively broader ISDS clause that typically exists in China's BITs,[78] and dealt with substantive obligations beyond national treatment, particularly minimum standard of treatment and expropriation. Secondly, given Australia's interest in safeguarding its sovereignty over public policies and its preference to resolve investor state disputes via alternative dispute resolution mechanisms,[79] such as state–state consultations envisaged in

---

75 UN Conference on Trade and Development, *Investor State Dispute Settlement: Review of Developments in 2015*, IIA Issues Note No 2, 43. These cases include *Tza Yap Shum v Peru (Annulment)* (ICSID Arbitral Tribunal, ICSID Case No ARB/07/6, 7 July 2011) (based on the *Peru–China BIT* (1994) — the claimant was a resident of Hong Kong); *China Heilongjiang International Economic & Technical Cooperative Corp v Mongolia* (Permanent Court of Arbitration, PCA Case No 2010-20, 30 June 2017) (based on *China–Mongolia BIT* (1991)); *Ping An Life Insurance Company of China, Limited v Belgium (Award)* (ICSID Arbitral Tribunal, Case No ARB/12/29, 30 April 2015) (based on the *China–Belgium–Luxembourg BIT* (1984) and the *China–Belgium–Luxembourg BIT* (2005)); *Beijing Urban Construction Group Co Ltd v Yemen (Jurisdiction)* (ICSID Arbitral Tribunal, ICSID Case No ARB/14/30, 31 May 2017) (based on the *China–Yemen BIT* (1998)). There was another case brought by a Macau investor: *Sanum Investments Ltd v Laos (Notice of Arbitration)* (Permanent Court of Arbitration, PCA Case No 2013-13, 14 August 2012) (based on the *China — Laos BIT* (1993)).

76 For a discussion of some of the reasons for China's reluctance to resort to ISAs, see Karl P Sauvant and Michael D Nolan, 'China's Outward Foreign Direct Investment and International Investment Law' (2015) 18 *Journal of International Economic Law* 893, 931−3. For a discussion of the advantages and disadvantages of ISAs in general, see UN Conference on Trade and Development, *Investor–State Disputes: Prevention and Alternatives to Arbitration*, UNCTAD/DIAE/IA/2009/11 (31 July 2010) 13–20. For a recent review of various factors that may discourage investors from resorting to ISDS, see Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, forthcoming 2017) 39–41.

77 Leon E Trakman, 'China and Investor–State Arbitration' (Research Paper No 2012–48, UNSW Law, 2 October 2012) 11–14; Manjiao Chi and Xi Wang, 'The Evolution of ISA Clauses in Chinese IIAs and Its Practical Implications: The Admissibility of Disputes for Investor–State Arbitration' (2015) 16 *Journal of World Investment & Trade* 869, 873.

78 See generally Axel Berger, 'Investment Rules in Chinese Preferential Trade and Investment Agreements: Is China Following the Global Trend Towards Comprehensive Agreements?' (Discussion Paper No 7, German Development Institute, 2013) <https://www.die-gdi.de/uploads/media/DP_7.2013.pdf>, archived at <https://perma.cc/KK74-2XLL>. For a comprehensive review of the development of China's international investment treaties and practice, see Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (Oxford University Press, 2009).

79 See Trakman, 'Investor State Arbitration', above n 72, 162–3.

the *ChAFTA*, initiating an ISA against Australia may put a strain on the investor state relationship and jeopardise China's future investment in Australia. If faced with increasing numbers of ISA claims by Chinese investors, the Australian government may practically strengthen FIRB scrutiny of Chinese investment by taking into account the implications of such claims for 'national interest'. As shown in Part IV(B), the 'national interest' test contains very broad criteria and has been applied in a discretionary manner. Therefore, one should not exclude the possibility that potential ISA claims may be considered as, for example, affecting 'Australia's ability to protect its strategic and security interests' (ie the 'national security' criterion).[80] In anticipation of such a consequence, Chinese investors may strategically choose not to resort to ISAs. Thirdly, investor–state litigation before Australian courts may be preferred by both the Australian government and Chinese investors. For the Australian government, domestic courts have a greater comprehension of, and are hence in a better position than ISA tribunals to consider important public policy issues.[81] For Chinese investors, Australia's judicial system is well established to produce high quality and impartial judgments that are directly enforceable in the host state. Furthermore, to the author's knowledge, most Chinese investments in Australia are undertaken through mergers and acquisitions of Australian companies. This form of investment allows Chinese investors to take advantage of the local experience and commercial skills of the existing management teams including on litigation strategy and court proceedings. Thus, litigation may be perceived by Chinese investors as a better way to resolve investor–state disputes than ISAs.

In light of the above considerations, the ISDS clause in the *ChAFTA* may not promote Chinese investment in Australia. If the clause is to have any impact on Chinese investment, its limited scope and broad policy exceptions may diminish Australia's attractiveness. When a more comprehensive ISDS clause is reached, its impacts on Chinese investment should still not be overstated and will likely remain less significant than Australia making additional commitments on investment liberalisation, such as a more liberalised and transparent foreign investment review mechanism.

D *Investment Facilitation and Movement of Temporary Workers*

The *ChAFTA* negotiations concluded a memorandum of understanding ('MOU') on an investment facilitation arrangement ('IFA'), whereby Australia unilaterally commits to facilitate the entry of temporary workers from China through the establishment of IFAs between the Department of Immigration and Border Protection of Australia ('DIBP') (or its equivalent) and a Chinese held

---

80 See FIRB Policy 2017, above n 30, 8.

81 See Trakman, 'Investor State Arbitration', above n 72, 168; Leon E Trakman, 'Choosing Domestic Courts over Investor –State Arbitration: Australia's Repudiation of the Status Quo' (2012) 35 *UNSW Law Journal* 979, 981.

project company as defined in the MOU.[82] An eligible project under an IFA is limited to infrastructure development in which the project company injects at least A$150 million to acquire or upgrade the physical assets involved throughout the project. The covered sectors are also limited, including 'food and agribusiness; resources and energy; transport; telecommunications; power supply and generation; environment; or tourism'. Projects and project companies must be recommended jointly by the China International Contractors Association ('CHINCA') and Australia's DFAT. When recommended, a project company is allowed to nominate workers for a temporary skilled visa within the 457 visa scheme (ie Temporary Work (Skilled) (subclass 457) visa).[83] Instead of applying the general conditions for a 457 visa, the DIBP and the project company will negotiate some of the key conditions — including the nominated occupations, English language proficiency requirements, qualifications and experience requirements and the so called Temporary Skilled Migration Income Threshold (ie minimum income threshold for temporary migrant workers) — and enter into a labour agreement which documents the outcomes of the negotiation. While labour market testing is not required for an IFA, such testing may be required under labour agreements. In essence, the labour market testing requires sponsoring employers to demonstrate that they have tested the local labour market and found no suitably qualified and experienced workers readily available to fill nominated positions.[84] Moreover, while the MOU does not limit the number of workers that a project company may nominate, an annual cap on nominations may be imposed by labour agreements. Under an approved IFA, visa applications for nominated workers are processed in a timely manner.

Accordingly, the MOU on IFA appears to have introduced a fast track visa approval process for Chinese workers by relaxing both the substantive and procedural requirements under the 457 visa scheme. It has been observed that IFAs are intended to increase access to skilled Chinese workers and consequently 'promote Chinese investment in major infrastructure development

---

82 *Memorandum of Understanding between the Government of Australia and the Government of the People's Republic of China on An Investment Facilitation Arrangement* (17 June 2015) <http://dfat.gov.au/trade/agreements/chafta/official-documents/Documents/chafta-mou-on-an-investment-facilitation-arrangement.pdf>, archived at <https://perma.cc/5APG-DZPU>. For more detailed information on the conclusion of an IFA and labour agreements, see Department of Immigration and Border Protection, Australian Government, China-Australia Free Trade Agreement*: Investment Facilitation Arrangement/Project Agreement Operation Flowchart* <www.border.gov.au/WorkinginAustralia/Documents/ifa-operation-flowchart.pdf>, archived at <https://perma.cc/3CXM-VM4X>.

83 For an overview of the 457 visa program, see Harriet Spinks, 'The Temporary Work (Skilled) (subclass 457) Visa: A Quick Guide' (Parliamentary Library, Parliament of Australia, 2016).

84 Department of Immigration and Border Protection, Australian Government, *What is Labour Market Testing for Subclass 457?* <https://www.border.gov.au/visas/Pages/subclass-457-labour-market-testing-requirement.aspx>, archived at <https://perma.cc/529F-8QJX>. For more detailed information on labour agreements, see Department of Immigration and Border Protection, Australian Government, *Labour Agreements* <www.border.gov.au/Trav/Work/Empl/Labour-agreements>.

projects in Australia'.[85] The actual impact of the framework on Chinese investment in Australia, however, is yet to be seen. As at the time of writing, no IFAs have been reported. It is the author's view that there are at least two factors that may significantly reduce the attractiveness of IFAs to Chinese investors. First, the arrangement does not create an automatic visa granting channel for Chinese workers, who must still go through the visa application process. Nor does the arrangement grant an exemption from the 457 visa conditions, but merely allows these conditions to be negotiated by the DIBP and project companies. This effectively gives the DIBP the discretion to determine when and how to impose these conditions. During the *ChAFTA* negotiations, there were extensive concerns in Australia about the negative impact of temporary migrant workers on the local labour market, particularly if the labour market testing is exempted.[86] Apparently, these concerns have led to a compromised framework whereby labour market testing remains applicable. That is, in negotiating a labour agreement, the DIBP is tasked to consider whether local workers can satisfy 'the demands for labour in large infrastructure development projects' and give priority to Australian workers.[87] Thus, IFAs may not enhance the access for nominated workers or boost Chinese investment in Australia, as the obligations on Chinese investors and the limitations on Chinese workers may remain as onerous as in standard applications for 457 visas. Secondly, on 18 April 2017, the Australian government decided to abolish the 457 visa scheme and replace it with a Temporary Skill Shortage ('TSS') visa program, with an aim to 'strengthen the integrity and quality of Australia's temporary and permanent employer sponsored skilled migration programmes'.[88] This regulatory change will be implemented in steps between 19 April 2017 and March 2018. While there has been no announcement on how this change will affect IFAs, it is likely that Chinese workers under IFAs will eventually fall within the TSS visa program. The major negative impact of this change on Chinese temporary workers under IFAs and in general arises from the significantly tightened eligibility requirements for temporary workers to become Australian permanent residents, particularly the condensed eligible skilled occupation lists. The 457 visa scheme has long been used by foreigners — with Chinese citizens being one of the main users — as a pathway to obtain permanent residency in Australia.[89] Under the TSS visa scheme, the eligible occupation lists are significantly shortened or restricted from 19 April 2017 and will be divided into a short-term stream up to two years and a medium and long-term stream up to four years from

---

85 John Tuck and Simon Billing, 'How Does the *China–Australia Free Trade Agreement* Really Impact Australia's Labour Market?' (Working Paper, Corrs Chambers Westgarth, September 2015) <http://www.corrs.com.au/thinking/how-does-the-china-australia-free-trade-agreement-really-impact-australias-labour-market/>, archived at <https://perma.cc/A6FC-KDFF>.

86 See Foreign Affairs, Defence and Trade References Committee, above n 72, [4.25]–[4.28]; Australian Labor Party, *Labor's* China–Australia Free Trade Agreement *Safeguards* <www.alp.org.au/chinaftasafeguards>, archived at <https://perma.cc/MQC6-8U46>.

87 See Tuck and Billing, above n 85.

88 Department of Immigration and Border Protection, Australian Government, *Abolition and Replacement of the 457 Visa – Government Reforms to Employer Sponsored Skilled Migration Visas* (17 April 2017) <www.border.gov.au/Trav/Work/457-abolition-replacement>, archived at <https://perma.cc/W8NK-P5B6>.

89 Ibid.

March 2018.[90] While this article is not intended to offer a thorough discussion of these changes, two points are noted: (1) some of the most commonly used occupations (including by Chinese workers), such as human resource advisers, production managers and web developers, are removed from the occupation lists;[91] and (2) the short-term stream will no longer provide a permanent residence pathway for temporary workers. Accordingly, while the changes may well increase the quality of migrants and achieve the goal of 'Australian workers first',[92] they may create a disincentive for Chinese workers to come to Australia for employment and consequently for Chinese investors to utilise IFAs.

In sum, while IFAs are designed to provide increased access for Chinese temporary workers, they do not directly enhance market access for Chinese investors. In effect, they may not even enhance access for Chinese workers as the terms and conditions for visa applications are subject to the discretion of DIBP. The recent abolition and replacement of the 457 visa program further frustrates the expected benefits of IFAs and shows that Australia's immigration policies may be amended in a way that offsets the benefits and impacts of FTAs. Finally, it must be noted that IFAs provide no exemption from FIRB notification such that IFA projects, such as those involving investment in the critical infrastructure assets as discussed in Part IV(B), may well trigger the FIRB review process.

V CONCLUDING REMARKS: THE OUTLOOK FOR CHINESE INVESTMENT IN AUSTRALIA

This article has argued that the level of liberalisation and protection that the *ChAFTA* currently provides for Chinese investment/investors is limited, although some positive impact on China's ODI especially private investment in Australia has been witnessed in 2016 the first year of the implementation of the *ChAFTA*. However, it was China's 'Go Global' policy and the investment complementarity between the two economies that had driven the rapid growth of Chinese investment in Australia over the decade before the conclusion of the *ChAFTA*. This suggests that compared with the impact of the *ChAFTA*, China's domestic policies and global initiatives would be more critical for and influential on China's future investment in Australia.

The recent visit of China's Premier Li Keqiang to Australia signalled the political will in both governments to bolster the two-way trade and investment,

---

[90] Minister for Immigration and Border Protection (Cth), *Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2017/040 (IMMI 17/040)*, IMMI 17/040, 18 April 2017. See also Department of Immigration and Border Protection, Australian Government, *Fact Sheet One: Reforms to Australia's Temporary Employer Sponsored Skilled Migration Programme — Abolition and Replacement of the 457 Visa* (17 April 2017) <www.border.gov.au/WorkinginAustralia/Documents/abolition-replacement-457.pdf>, archived at <https://perma.cc/9M67-46DJ>.

[91] Catherine Hanrahan, 'HR, Coders and Manufacturing: The Occupations Most Affected by 457 Visa Changes', *ABC News* (online), 20 April 2017 <www.abc.net.au/news/2017-04-19/australia-457-visas-occupations-affected/8454494>, archived at <https://perma.cc/6QQL-VKZ5>.

[92] 'What You Need to Know about the 457 Visa Changes', *News Corp Australia Network* (online), 19 April 2017 <www.news.com.au/finance/work/what-you-need-to-know-about-the-457-visa-changes/news-story/3894724396a5c7f99491c961ae9b8088>, archived at <https://perma.cc/N259-FKG4>.

and culminated in the conclusion of a list of collaborative arrangements,[93] which includes an agreement to bring the review of the *ChAFTA* Services Chapter, the Investment Chapter, and the MOU on IFA forward by one year commencing sometime in 2017 (instead of 2018 as scheduled under the *ChAFTA*).[94] This suggests that both governments were unsatisfied with the current level of investment liberalisation: while China may remain concerned about Australia's foreign investment review mechanism,[95] Australia may be keen to convince China to adopt a negative list of non-conforming measures and assume obligations on pre establishment investment activities. On investment/investor protection, the two governments are mandated to negotiate a more comprehensive investment chapter to include broader substantive obligations. However, it is less clear whether they will agree on a more inclusive ISDS clause and how they will amend the MOU on IFA in light of the overhaul of the 457 visa program. Furthermore, a substantive breakthrough in investment liberalisation under the *ChAFTA* may depend on the progress of China's negotiations of a BIT with the United States and the European Union, respectively,[96] as well as China's domestic reforms of foreign investment framework. Nevertheless, one should be positive that the review of the *ChAFTA* investment rules will be a stepping stone towards further investment liberalisation and investor protection.

Inevitably, Chinese investment in Australia will continue to be affected by the investment needs and policies of the two countries. Australia will remain heavily reliant on foreign capital, advanced technology, international expertise and network, and human capital to service growth of various industries such as agriculture and infrastructure and 'transform resource endowments into real wealth'.[97] For example, in 2016 Australia rolled out the first comprehensive Infrastructure Plan with ambitious long term plans for infrastructure reforms and investment across the nation.[98] Moreover, to unlock the potential of and

---

93 Prime Minister of Australia, 'Visit to Australia by China's Premier Li Keqiang' (Media Release, 24 March 2017) <https://www.pm.gov.au/media/visit-australia-chinas-premier-li-keqiang>, archived at <https://perma.cc/TD4A-7Q5J>.

94 *Declaration of Intent by the Government of Australia and the Government of the People's Republic of China regarding Review of Elements of the* China–Australia Free Trade Agreement, 24 March 2017 <dfat.gov.au/trade/agreements/chafta/official-documents/Documents/declaration-of-intent-review-elements-chafta.pdf>, archived at <https://perma.cc/4FR8-YNLV>.

95 Dominic Meagher, 'What to Expect from Li Keqiang's Australia Trip', Lowy Institute for International Policy (21 March 2017) <www.lowyinstitute.org/the-interpreter/what-expect-li-keqiang-australia-trip>, archived at <https://perma.cc/TYB2-J5GP>.

96 See Parliament of Australia, 'Report 154', above n 73, [5.7]–[5.8]. For a discussion of the evolvement of the negotiations of the two BITs, see Eric Pekar, 'The Chinese Investment Regime and the *US–China BIT* Negotiations' in Wenhua Shan and Jinyuan Su (eds), *China and International Investment Law: Twenty Years of ICSID Membership* (Martinus Nijhoff, 2015) 263; Marc Bungenberg and Catharine Titi, 'The Evolution of EU Investment Law and the Future of EU China Investment Relations' in Wenhua Shan and Jinyuan Su (eds), *China and International Investment Law: Twenty Years of ICSID Membership* (Martinus Nijhoff, 2015) 297.

97 See EABER & CCIEE, above n 18, 110–11.

98 Infrastructure Australia, Australian Government, 'Australian Infrastructure Plan: Priorities and Reforms for Our Nation's Future Report' (Report, February 2016) <infrastructureaustralia.gov.au/policy-publications/publications/files/Australian_Infrastructure_Plan.pdf>, archived at <https://perma.cc/2J9R-ECQ6>.

opportunities for Australia's agricultural sector, foreign investment remains vital.[99] Accordingly, it is in Australia's own interest to create a better environment for foreign investment.

As China accelerates domestic reforms in furtherance of its new development model, its investment activities are expected to increase globally. This is confirmed in China's President Xi Jinping's keynote speech at the World Economic Forum in Davos on 17 January 2017, canvassing his expectations for Chinese ODI to reach US$750 billion within the next five years.[100] As far as Australia is concerned, Chinese investment will be increasingly diversified into agriculture, health care, infrastructure and technology related assets.[101] For instance, the China led One Belt One Road ('OBOR') Initiative and Australia's involvement as a major shareholder in the Asia Infrastructure Investment Bank will create massive opportunities for the two countries to collaborate on potential infrastructure projects in Australia and elsewhere. In this connection, 'an Australia China OBOR Initiative has been established to promote Chinese engagement in the Australian economy'.[102] The recent Belt and Road Forum held in Beijing in May 2017 showed a strong and shared vision among the Belt and Road countries (including Australia) to further strengthen and expand trade, investment and economic cooperation.[103] Furthermore, since September 2016, China has gradually revamped its foreign investment law and implementing regulations by replacing an approval based system with a registration based system under which approval is required only for foreign investment in prohibited or restricted sectors.[104] In July 2017, the NDRC and the Ministry of

---

99 Kali Sanyal, 'Foreign Investment in Australian Agriculture' (Research Paper, Parliamentary Library, Parliament of Australia, 2014) 16–17.

100 Xi Jinping, 'Jointly Shoulder Responsibility of Our Times, Promote Global Growth' (Speech delivered at the World Economic Forum, Davos, 17 January 2017) <america.cgtn.com/2017/01/17/full-text-of-xi-jinping-keynote-at-the-world-economic-forum>, archived at <https://perma.cc/96PN-QFNU>.

101 See generally KPMG 2017, above n 22.

102 Geoff Wade, 'China's 'One Belt, One Road' Initiative' (Briefing Book, 45th Parliament, Parliamentary Library, Parliament of Australia, 2016) 148–51. For the inaugural report of the Australia China OBOR Initiative, see Australia-China OBOR Initiative, 'China's One Belt One Road: Opportunities for Australian Industry' (Report, 27 May 2016) <http://www.australiachinaobor.org.au/report/ACBRI_Report-Final1-1054-56.pdf>, archived at <https://perma.cc/5FCM-RMBE>.

103 The Ministry of Commerce of the People's Republic of China, 'Initiative on Promoting Unimpeded Trade Cooperation along the Belt and Road Released in Beijing' (16 May 2017) <english.mofcom.gov.cn/article/newsrelease/significantnews/201705/20170502578235.shtml>, archived at <https://perma.cc/KBX7-YKAW>.

104 The principal law and regulation include: 中华人民共和国外资企业法 [Law of the People's Republic of China on Foreign-Capital Enterprises] (People's Republic of China) National People's Congress (12 April 1986, amended on 31 October 2000, and on 3 September 2016, effective on the same date); 中华人民共和国中外合资经营企业法 [Law of the PRC on Sino-Foreign Equity Joint Ventures] (People's Republic of China) National People's Congress on 1 July 1979, effective on 8 July 1979; amended on 4 April 1990, 15 March 2001, and 3 September 2016, effective on 1 October 2016 中华人民共和国中外合作经营企业法 [Law of the PRC on Sino Foreign Contractual Cooperative Enterprises] (People's Republic of China) 7th National People's Congress, 13 April 1988, effective on the same date; amended on 31 October 2000, and 7 November 2016, effective on the same date; and 外商投资企业设立及变更备案管理暂行办法 [Interim Measures for Administration of Record Filing for the Establishment and Variation of Foreign Invested Enterprises] (People's Republic of China) Order No 3 of the Ministry of Commerce, 8 October 2016.

Commerce released an amended *Catalogue of Industries for Guiding Foreign Investment* which introduced a negative list approach for the approval of foreign investment and significantly reduced the number of prohibited and restricted sectors from 93 to 63.[105] These reforms followed the experimental implementation of the negative list approach in free trade zones (eg Fujian, Guangdong, Shanghai and Tianjin)[106] and are aimed at further enhancing the access for foreign investment to the Chinese market. China's regulatory shift to the negative list approach and a more streamlined framework for the admission of foreign investment lays the foundation for similar moves in international trade and investment treaties including the *ChAFTA*. Finally, as one of President Xi's priorities for economic reforms, China's SOE reforms have progressed steadily in 2016 after the *Guiding Opinions on Deepening the Reform of State Owned Enterprises* was promulgated in August 2015.[107] Implementing measures have been adopted and applied at both central and provincial levels to promote market oriented and mixed ownership reforms, enhance management and operational efficiency, and reduce overcapacity, amongst other objectives.[108] While the reforms have encountered considerable challenges[109] and are most likely to progress incrementally, they are expected to facilitate the transformation of China's SOEs to market-based enterprises and ease Australia's 'national interest' concerns in the long run. In the short run, however, it would be unlikely for Australia to soften the FIRB scrutiny of investment by Chinese SOEs.

The *ChAFTA* is a significant milestone in the Australia–China economic relationship; however, it is 'a blueprint for initial change, not an end-point' in the relationship.[110] There is considerable room to improve the *ChAFTA* investment rules to achieve greater investment liberalisation and investor protection. As the bilateral relationship continues to deepen and broaden, the *ChAFTA* investment rules will be gradually improved to serve the shared interests of both countries.

---

105 外商投资产业指导目录 [Catalogue of Industries for Guiding Foreign Investment] (People's Republic of China) State Planning Commission (SPC), State Economic and Trade Commission (SETC) and the Ministry of Commerce (MOFTEC), effective on 20 June 1995; amended in 1997 (by Order No 9 of the SPC, the SETC and the MOFTEC), in 2002 (by Order No 21 of the SPC, the SETC and the MOFTEC), in 2004 (by Order No 24 of the NDRC and the Ministry of Commerce ('MOFCOM')), in 2007 (by Order No 57 of the NDRC and the MOFCOM), in 2011 (by Order No 12 of the NDRC and the MOFCOM), in 2015 (by Order No 12 of the NDRC and the MOFCOM, effective on 10 April 2015), and in 2017 (by Order No 4 of the NDRC and the MOFCOM, effective on 28 July 2017).

106 Government of the People's Republic of China, State Council, *Negative List on Foreign Investment in China's Free Trade Zones* (21 April 2015) <english.gov.cn/policies/infographics/2015/04/21/content_281475093149079.htm>, archived at <https://perma.cc/BEE8-AUNS>.

107 关于深化国有企业改革的指导意见 [Opinions of the CPC Central Committee and the State Council on Deepening the Reform of State-Owned Enterprises] (People's Republic of China) No 22, 24 August 2015. For a comprehensive review of China's SOE reforms, see Dong Zhang and Owen Freestone, 'China's Unfinished State-Owned Enterprise Reforms', The Australian Treasury, Economic Roundup (2013) Issue 2 <https://treasury.gov.au/publication/economic-roundup-issue-2-2013-2/>.

108 Xinhua, 'China Eyes Breakthroughs in SOE Reform', *China Daily* (online), 23 December 2016 <www.chinadaily.com.cn/business/2016-12/23/content_27753459.htm>, archived at <https://perma.cc/DBN8-B87G>.

109 For a discussion of some of these challenges, see Wendy Leutert, 'Challenges ahead in China's Reform of State-Owned Enterprises' (2016) 21 *Asia Policy* 83.

110 See EABER & CCIEE, above n 18, 26.