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**AN ASSESSMENT OF THE CHAFTA AND ITS
IMPLICATIONS: A WORK-IN-PROGRESS TYPE
FTA WITH SELECTIVE INNOVATIONS?**

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An Assessment of the ChAFTA and Its Implications: A Work-in-Progress Type FTA with Selective Innovations?

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Abstract: This paper explores two questions of the recent China-Australia FTA (ChAFTA): what is the approach of the ChAFTA? What are the challenges to the ChAFTA? It argues first that the ChAFTA adopts a problem-solving approach to harvest “low-hanging fruit” (e.g. tariff cuts). Containing WTO-based and WTO-friendly rules, it focuses on trade and investment facilitation through market liberalization and carefully written good governance norms. In spite of its short form investment chapter, the agreement is not as shallow as one may first think. It stimulates development concerning, among other things, regulatory issues (e.g. regulatory transparency and cooperation in financial services, regulatory autonomy in investment), the negative list approach for services and investment, investor-state dispute settlement, and the investment facilitation arrangement. The development appears to be often affected by the position of Australia. Second, the ChAFTA will meet challenges in implementation and future negotiations. The former includes vague rules, soft obligations, the considerable need for wide-ranging cooperation, and the usage rate. The latter is probably the complexity of legal issues, as well as internal (including sensitive issues such as labor mobility and review of investment by Chinese SOEs) and external uncertainties (including the WTO law, the US-China investment treaty negotiations). Finally, the future of the ChAFTA depends on bilateral cooperation in FTA implementation, and the political willingness to develop a rule-based system. The ChAFTA could bring an incremental paradigm shift of China’s FTAs, which will carry vast implications for China’s participation in international economic legal order.

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I. Introduction

The China-Australia Free Trade Agreement (ChAFTA) is among the high-level free trade agreements (FTAs) of China, although it is not comparable with deep FTAs such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the Trans-Pacific Partnership (TPP). In the context of burgeoning FTAs, China has increased the speed of concluding and updating FTAs, including the China-Korea FTA and ChAFTA. The ChAFTA negotiation was initiated in 2005 and finalized in 2014.¹ After lengthy negotiations of around ten years, the agreement became effective on 20 December 2015 and was notified to the World Trade Organization (WTO). It is the first FTA reached by China with a major developed economy “with large economic aggregates,”² and is deemed to be “one of the free trade agreements signed by China so far with the highest level of trade and investment liberalization.”³

The ChAFTA could be utilized not only for the development of trade and investment but also for the stable development of the Asia-Pacific region and the liberalization of world trade.⁴ It will foster the important economic partnership between China and Australia. China is the largest trading partner of Australia regarding the imports and exports of goods, and Australia is China’s second largest outbound investment destination.⁵ China is Australia’s top overseas market for services export, and investment grows vigorously between two countries.⁶ From day one, the ChAFTA sets Chinese and Australian import tariffs at zero for over 86 and 82 per cent of exports by the other party respectively, and this proportion will increase to 96 and 100 per cent eventually.⁷ For instance, Australia’s exports of agricultural produce, resources, and energy, for which China is Australia’s largest market, will benefit from tariff reduction.⁸ Investment and services trade is also facilitated. Australia is the developed country that provides the largest number of access for Chinese professionals.⁹ Meanwhile, Australian private equity and funds investors are

¹ China FTA Network, *A Reading of the Free Trade Agreement Between the Government of Australia and the Government of the People’s Republic of China*(2016), available at http://fta.mofcom.gov.cn/article/chinaaustralia/chinaaustralianews/201506/22176_1.html.

² MOFCOM, *Interpretation for the China-Australia Free Trade Agreement*(2015), available at <http://english.mofcom.gov.cn/article/policyrelease/Cocoon/201510/20151001144954.shtml>.

³ China FTA Network, *Ministers of Commerce of China and Australia Officially Sign the Free Trade Agreement*(2015), available at http://fta.mofcom.gov.cn/enarticle/enaustralia/enaustralianews/201506/22317_1.html.

⁴ Chunding Li, et al., *China’s Regional and Bilateral Trade Agreements* NBER Working Paper Series at <http://www.nber.org/papers/w19853>.

⁵ Network, *A Reading of the Free Trade Agreement Between the Government of Australia and the Government of the People’s Republic of China*. 2016.

⁶ Outcomes at a Glance. (2016).

⁷ *Guide to using ChAFTA to export and import goods*(2016), available at <http://dfat.gov.au/about-us/publications/Documents/guide-to-using-chafta-to-export-and-import-goods.pdf>.

⁸ Department of Foreign Affairs and Trade. 2016.

⁹ Network, *A Reading of the Free Trade Agreement Between the Government of Australia and the Government of the People’s Republic of China*. 2016.

welcomed to participate in the Chinese market as qualified foreign investors, and the bilateral cooperation is to be strengthened to promote “greater Australian mid-market size funds investment participation in China, as well as options to strengthen Australia-China Renminbi (RMB) fund partnerships in China.”¹⁰

The ChAFTA will lay the groundwork for the future or ongoing talks of important trade and investment agreements, including the Regional Comprehensive Economic Partnership (RCEP) to which Australia and China are parties. It is of strategic importance. For China, Australia is a valuable bridge between trade interests of the US and China, since Australia is a major US ally and China is Australia’s top trading partner.¹¹ Australia was also the first developed country to propose the FTA negotiation with China.¹² Australia not only has concluded a FTA with the US and China but also is a party to the TPP and RCEP. Notably, the ChAFTA is a dynamic agreement that envisages subsequent negotiations. Therefore, the ChAFTA could carry considerable implications for China’s future FTAs including China’s response to the trade approach of the US, since the ChAFTA could be used by China to test the water.

This chapter will discuss two questions, yet so far under-explored: what are the features of the ChAFTA? What are the challenges to the ChAFTA? Part II and III will examine these questions respectively. Part IV will analyse the implications of the ChAFTA and conclude.

II. The Features of the ChAFTA: A Problem-Solving Approach?

The ChAFTA consists of 17 chapters and related annexes. Besides four annexes to the agreement (i.e. Annexes I to IV), there are 11 annexes in various ChAFTA chapters (e.g. Annexes 2-A to chapter 2). Among them, Annex IV includes five side letters dealing with skills assessment and licensing, financial services, education, legal services, transparency rules applicable to investor-state dispute settlement (ISDS).

Moreover, the following related documents were concluded “as part of the overall ChAFTA package but do not form part of the Agreement”:¹³ a side letter on traditional Chinese medicine, two Memorandums of Understanding (MOUs) on an investment facilitation arrangement and on a work and holiday visa arrangement. These related documents were signed together with the ChAFTA.

¹⁰ ChAFTA Side Letter on Financial Services (2015).

¹¹ Nargiza Salidjanova, *China's Trade Ambitions: Strategy and Objectives behind China's Pursuit of Free Trade Agreements*, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT, 33 (2015).

¹² Kate Deere, *Saving Face after Seven Years: Australia-China FTA Negotiations and Lessons from New Zealand*,

16 INTERNATIONAL TRADE AND BUSINESS LAW REVIEW, 295 (2013).

¹³ DFAT, *FTA text and tariff schedules*.

Most of the rules are found in the main text of the ChAFTA. Generally speaking, side letters in Annex IV, as well as the relevant documents, are short ones. That said, Annex IV and MOUs may involve regulatory issues in areas such as financial services. Several major features of the ChAFTA will be discussed below.

A. WTO-Based Rules

The ChAFTA is a WTO-inspired and traditional FTA, building on the rules of and commitments under the WTO regime. First, the ChAFTA has similar coverage and structure with the WTO law except for few chapters such as investment. Trade in goods, trade in services, intellectual property, and dispute settlement are among the major issues of the ChAFTA. Non-trade concerns are not addressed in a robust way. The ChAFTA does contain a number of new rules such as an electronic commerce chapter that is absent in the previous FTAs including the China-New Zealand FTA. However, the ChAFTA has narrow coverage compared with deep FTAs (e.g. the TPP) and even the China-Korea FTA. Unlike the China-Korea FTA, the stand-alone chapters on competition and environment are missing in the ChAFTA. The ChAFTA does touch upon competition in a short article, which calls for cooperation rather than imposes stringent requirements. Such competition cooperation is to be promoted through information exchange, enforcement coordination, and technical cooperation.¹⁴ Basically, environment rules are absent in the ChAFTA.

Second, WTO law significantly affects the state-to-state dispute settlement system (SSDS) and substantive rules in the ChAFTA. Generally, the ChAFTA is similar with other FTAs of China in this regard. The free trade area is established under the ChAFTA as per the WTO disciplines on economic integration, namely GATT Article XXIV and GATS Article V.¹⁵ SSDS under the ChAFTA is modelled on the WTO counterpart except for the appeal system.

A number of fundamental WTO rules are incorporated into the ChAFTA, including general exceptions clauses (i.e. GATT Article XX,¹⁶ and GATS Article XIV¹⁷). In most cases, the ChAFTA rules closely follow or rely on the WTO norms, particularly in the WTO-covered areas including services trade, technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) measures, and trade remedies. For instance, the ChAFTA contains nearly identical provisions with the General Agreement on Trade in Services (GATS).¹⁸ Key terms of technical regulation, standard, and conformity

¹⁴ ChAFTA Article 16.7. 2015.

¹⁵ Id. at, Article 1.1.

¹⁶ ChAFTA Article 16.2.1. 2015.

¹⁷ Id. at, Article 16.2.2.

¹⁸ Id. at, Article 1.1; World Trade Organization, General Agreement on Trade in Services Article VI:6 (1994).

assessment procedures also have the same meaning in the ChAFTA as those in Annex 1 of the TBT Agreement.¹⁹

In particular, the ChAFTA builds on the latest WTO Agreement on Trade Facilitation (TFA). Several key provisions of the TFA are reflected in the ChAFTA.²⁰ Interested persons can get the responses of their inquiries on customs matters, with the relevant procedures published on the internet.²¹ The ChAFTA also resembles the TFA in obliging the parties, in the event of declining to issue an advance ruling on tariff classification and origin, to promptly send the written notification to the applicant including the basis of its decision.²² As a WTO-plus trade facilitation measure, the ChAFTA provides for “duty- and tax-free temporary admission of containers, pallets and packing material used in the transportation of goods,” which is not provided in the WTO norms.²³

Third, WTO rules are highly relevant to the operation and enforcement of the ChAFTA rules. WTO rules could be regarded as the standard or basis for the operation of the ChAFTA. For instance, the enforcement of intellectual property rules is crucial and is closely connected with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The ChAFTA mandates that countries “provide for criminal procedures and penalties in accordance with the TRIPS Agreement to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.”²⁴ It highlights the alignment with the TRIPS Agreement and is nearly identical to the WTO counterpart.²⁵ Here the ChAFTA contrasts with the TPP, which highlights the criminal procedures and penalties for the protection of intellectual property right.²⁶ The transparency of subsidy measures under the ChAFTA also relies on the exchange the notifications to the WTO.²⁷ Additionally, both parties are prohibited from applying or maintaining a bilateral safeguard measure on a product to which a measure of the party has applied as per GATT Article XIX and the Safeguards Agreement.²⁸ On a related note, measures taken under certain WTO rules are explicitly recognized. The ChAFTA does not affect the adoption of

¹⁹ ChAFTA Article 6.3(b). 2015.

²⁰ ChAFTA Summary of Chapters and Annexes. (2015). (“several key provisions” of the Agreement on Trade Facilitation are reflected in the ChAFTA)

²¹ ChAFTA art. 4.7.2. 2015; World Trade Organization, Agreement on Trade Facilitation Article 1.2, 1.3 (2014).

²² ChAFTA Article 4.9.3. 2015; Organization, Agreement on Trade Facilitation Article 3.1. 2014.

²³ Committee on Regional Trade Agreements Eighty-Third Session, Free Trade Agreement Between Australia and China (Goods and Services): Note on the Meeting of 7 - 8 November 2016. No. WT/REG369/M/1(2016).

²⁴ ChAFTA Article 11.21.2. 2015.

²⁵ World Trade Organization, Agreement on Trade-Related Aspects of Intellectual Property Rights Article 61 (1994).

²⁶ For example, TPP Article 18.68.1 (criminal penalties relating to technological protection measures), 18.69.1 (criminal penalties concerning rights management information).

²⁷ ChAFTA Article 7.10.2. 2015.

²⁸ Id. at, Article 7.3.4.

TBT measures by both parties pursuant to the rights and obligations under the TBT Agreement.²⁹

Notably, many rights and obligations under the WTO law are affirmed or retained in the ChAFTA. For the former, they include the rights and obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement),³⁰ and the Agreement on Technical Barriers to Trade (TBT Agreement).³¹ For the latter, WTO rights and obligations are retained, such as those under Article XIX of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Safeguards,³² the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994,³³ and the Agreement on Subsidies and Countervailing Measures.³⁴ The most typical example is that the ChAFTA does not “confer any additional rights or impose any additional obligations” on both sides regarding measures applied under GATT Article XIX and the Agreement on Safeguards.³⁵ It explicitly emphasizes that the ChAFTA follows precisely the WTO norms here. That said, WTO-extra (e.g. investment) and WTO-plus (e.g. certain trade facilitation provisions as discussed below) rules exist in the ChAFTA. In such situation, the ChAFTA often builds on the WTO commitments of both parties as the case with people mobility, services trade, SPS and TBT measures.³⁶

B. Innovative Investment and Services Rules

Among China’s FTAs, the ChAFTA innovates in a number of investment and services rules. In the ChAFTA, a substantial part of rule development occurs in services and investment. It is understandable as services and investment play an increasingly important role in the Australia-China economic relationship. The innovation is reflected not only in the current rules of the ChAFTA but also in its future plan.

Foremost, the ChAFTA is innovative regarding services, including the partner’s approach to services commitments, GATS-plus obligations, cooperation on services trade, and China’s services trade commitments. Regarding the approach to services trade, Australia is the first country to provide China with services trade commitments on a negative list approach, which adopts the North American Free Trade Agreement approach. China will move to negative list approach from the current positive list

²⁹ Id. at, Article 6.2.4.

³⁰ Id. at, Article 5.4.

³¹ Id. at, Article 6.4.

³² Id. at, Article 7.8.1.

³³ Id. at, Article 7.9.1.

³⁴ Id. at, Article 7.10.1.

³⁵ Id. at, Article 7.8.1.

³⁶ ChAFTA Summary of Chapters and Annexes 3, 5. 2015.

approach of the GATS.³⁷ It is a remarkable development of China's approach to services trade.

Certain GATS-plus obligations are developed regarding transparency, domestic regulation, and cooperation on qualification recognition, to name but a few. In the ChAFTA negotiations, 'GATS-plus' stipulations were a top priority of Australia, including the extended scope of commitments, heightened requirements for regulators, and the rules for behind-the-border barriers to services trade.³⁸ GATS-plus transparency obligations are imposed.³⁹ As a GATS-plus obligation concerning domestic regulation, the ChAFTA requires one party to permit services providers of the other party to use enterprise names under which they trade in the other party.⁴⁰ Both sides also agree on qualification recognition cooperation,⁴¹ which is more detailed than the GATS.

The ChAFTA is also innovative regarding cooperation in services trade. The cooperation will promote good governance. In financial services, businesses from both sides are more likely to have equal footing with counterparts from other countries. The collaboration on financial services is a typical example, which includes the processing of applications and the recognition of regulation. Australian Prudential Regulatory Authority (APRA) and the China Banking Regulatory Commission (CBRC) will cooperate on issues under the side letter on financial services, which may involve the development of prudential frameworks of both parties. In particular, both sides will expeditiously process applications filed by financial institutions for the establishment of subsidiaries, branches, and sub-branches on "an equitable, non-discriminatory and good faith basis."⁴²

In the cooperation on financial services, it is worth noting that both sides will promote the cooperation in areas such as the recognition of regulation and the consideration of qualification. Australia and China will promote the recognition of each other's Over-The-Counter derivatives regulation to encourage cross-border activities.⁴³ For the knowledge and skill assessment of Chinese people nominated as "responsible managers" of branches or subsidiaries of Chinese banks in Australia, the Australian Securities and Investment Commission (ASIC) will consider the nominee's relevant qualifications and experience obtained in China and as per the same criteria applicable to other jurisdictions.⁴⁴ It is also confirmed that Chinese institutions are

³⁷ ChAFTA Article 8.24.3. 2015.

³⁸ ChAFTA Summary of Chapters and Annexes. 2015.

³⁹ ChAFTA Article 8.18. 2015.

⁴⁰ Id. at, Article 8.13.7.

⁴¹ Id. at, Article 8.15.

⁴² Id. at, Side Letter on Financial Services.

⁴³ Id. at.

⁴⁴ Id. at.

eligible to supply payment services (including clearing payments) in Australia.⁴⁵ Related to this, Chinese financial institutions could apply for the membership of the Reserve Bank Information and Transfer System on a national treatment basis.⁴⁶ They provide the non-discriminatory treatment.

Compared with most of the previous FTAs, China provides more commitments in services trade under the ChAFTA. For services trade commitments, China offers Australia its best ever FTA commitments (except for the agreements with Hong Kong, China and Macau, China).⁴⁷ China's most-favoured-nation (MFN) treatment commitments cover ten service sectors,⁴⁸ "three more than the best commitments China has made in any other FTA."⁴⁹ China has given the first-ever FTA commitment on the commercial association between law firms,⁵⁰ manufacturing services, and aged care services.⁵¹ It enables Australian businesses to have greater access to service sectors including healthcare, tourism, and financial services. In China, Australian firms are allowed to, among other things, operate wholly-owned subsidiaries in tourism, establish profit-making aged care institutions throughout the nation and wholly Australian-owned hospitals in selected provinces, and have a majority stake in joint ventures supplying services in agriculture, forestry, hunting, and fishing.⁵² For the first time, China gave Australia a quota of RMB 50 billion under the RMB Qualified Foreign Institutional Investor program, under which Australian financial institutions could invest offshore RMB in Chinese onshore financial instruments.⁵³ The liberalization of financial services in China is understandable since banking and wealth management is the leading area of Australian investment in China.⁵⁴

Second, a number of ChAFTA investment rules are innovative particularly regarding China's expected transition to the negative list approach, regulatory autonomy, ISDS, and investment facilitation. For the scheduling of investment commitments, China will shift to the negative list approach,⁵⁵ which seems to be

⁴⁵ Id. at.

⁴⁶ Id. at.

⁴⁷ Agreements, paragraph 1.15. 2016.

⁴⁸ ChAFTA Annex 8-A. 2015.

⁴⁹ ChAFTA Summary of Chapters and Annexes. 2015.

⁵⁰ Meanwhile, it is observed that the ChAFTA does not provide extra market access for Australian legal practices as it recognizes current practice in the Chinese market and the same market access granted to Australian firms is also available to other foreign legal practices. Weihuan Zhou & Junfang Xi, *China's Liberalisation of Legal Services under the ChAFTA: Market Access or Lack of Market Access for Australian Legal Practices*, JOURNAL OF WORLD TRADE, 1-28 (2016).

⁵¹ Department of Foreign Affairs and Trade of Australia, *Fact Sheet: Trade in Services*, available at <http://dfat.gov.au/trade/agreements/chafta/fact-sheets/Pages/fact-sheet-trade-in-services.aspx>.

⁵² Australian Broadcasting Corporation, *China-Australia Free Trade Agreement: Pros and Cons*(2015), available at <http://www.abc.net.au/news/2015-06-17/china-australia-free-trade-agreement-pros-and-cons/6553680>.

⁵³ Factsheet: Financial Services. (2016).

⁵⁴ Department of Foreign Affairs and Trade. 2016.

⁵⁵ ChAFTA Article 9.9.3(c). 2015.

affected by the US-China bilateral investment treaty (BIT) negotiations. It will be a fundamental change for China regarding the approach to investment.

A lot of ink has been used regarding the right to regulate. The ChAFTA contains a number of provisions to ensure regulatory autonomy such as the exclusion of certain regulatory measures from ISDS, the public welfare notice, and the provision on general exceptions. The ISDS mechanism does not apply to claims against non-discriminatory measures for lawful public welfare objectives (i.e. health, safety, environment, public morals or order),⁵⁶ and claims relating to foreign investment screening, such as the review by the Foreign Investment Review Board (FIRB).⁵⁷ For the measures for legitimate public welfare purposes, the responding party in the ISDS processes could issue a public welfare notice, which will trigger consultation between treaty parties.⁵⁸ If both parties decide that the disputed measure is not a violation given its public welfare objectives, such decision is binding on investment tribunals.⁵⁹ The general exceptions clause also supports the right to regulate by, inter alia, clarifying that environment measures are covered by general exceptions clause when these actions protect human, animal or plant life or health, or relate to the conservation of exhaustible natural resources.⁶⁰

For ISDS, the ChAFTA innovates to ensure treaty parties have more control over the ISDS processes and to strengthen the disciplines. The ISDS rules get a lot of attention and are carefully written regarding the selection of arbitrators and the interpretation of the schedule and provisions. The roster of arbitrators makes the governments choose the arbitrators, which deviates from the current practice of the respondent government and investor appointing arbitrators.⁶¹ Treaty parties need to establish the roster of ISDS arbitrators as per the ChAFTA. Within two years after the effective date of the FTA, a roster of ISDS arbitration panelists will be established, which consists at least of 20 individuals.⁶² Each party to the ChAFTA is to choose at least five individuals, and both sides will jointly select at least ten individuals as the tribunal chairpersons who are not nationals of the ChAFTA countries.⁶³ Moreover, treaty parties may jointly interpret Schedule of Non-Conforming Measures in the ChAFTA Annex III, which is binding on the ISDS tribunal.⁶⁴ The ChAFTA parties

⁵⁶ Id. at, Article 9.11.4.

⁵⁷ ChAFTA Summary of Chapters and Annexes. 2015.

⁵⁸ ChAFTA Article 9.11.5, 9.11.6. 2015.

⁵⁹ Id. at, Article 9.18.3.

⁶⁰ Id. at, Article 9.8.2.

⁶¹ Id. at, Article 9.15.5.

⁶² Id. at.

⁶³ Id. at, Article 9.15.6.

⁶⁴ Id. at, Article 9.19.

could exercise control on ISDS by a joint decision to declare their interpretation of FTA provisions, which will bind the ISDS tribunals in ongoing and future cases.⁶⁵

ISDS rules also strengthen the disciplines to ensure greater transparency and accountability, with more advanced provisions in place. The code of conduct for arbitrators is innovative and imposes more detailed requirements for arbitrators.⁶⁶ To improve the transparency of ISDS arbitral proceedings, a number of documents may be publicly available, ranging from the consultation request and decisions of the tribunal⁶⁷ to the disputing party's pleadings, minutes or transcripts of tribunal hearings or written submissions by the non-disputing party.⁶⁸ It is noteworthy that the Side Letter on Transparency Rules Applicable to ISDS envisages further negotiations on transparency. Furthermore, the ChAFTA contains more advanced ISDS procedural provisions to improve efficiency and assist the adjudication. For instance, it provides for the consolidation order in the event of multiple claims with common legal or factual issues or arising from the same events.⁶⁹ The tribunal may appoint experts to report in writing on the factual issue involving "environmental, health, safety, or other scientific matters" in the proceeding.⁷⁰ Overall, the ChAFTA endeavors to strike a balance between the protection of investment and public interests.

Regarding investment facilitation, the ChAFTA facilitates investment by Chinese investors through improved investment screening threshold and conditions for labor mobility. For China, the major demand under ChAFTA negotiations is a labor mobility clause enabling Chinese workers to work on Chinese-funded projects, and more liberal Foreign Investment Review Board (FIRB) investment review threshold for Chinese investors, particularly state-owned enterprises (SOEs).⁷¹ The ChAFTA arguably responds to these demand to a certain degree. For Chinese non-SOE investment in Australia's non-sensitive sectors, the FIRB investment screening threshold has been enhanced from 0.248 billion Australian dollars to 1.078 billion Australian dollars.⁷² Furthermore, the MOU on an investment facilitation arrangement (IFA) is included in the ChAFTA. Australia is the first developed country to provide China with such special facilitation arrangement regarding Chinese "temporary skilled

⁶⁵ Id. at, Article 9.18.2.

⁶⁶ Id. at, Annex 9-A.

⁶⁷ Id. at, Article 9.17.2(a).

⁶⁸ Id. at, Article 9.17.2(b), 9.17.2(c).

⁶⁹ Id. at, Article 9.21.

⁷⁰ Id. at, Article 9.20.

⁷¹ Lingling He, *Reassessing the China-Australia Free Trade Agreement Negotiation Process*, 10 FRONTIERS OF LAW IN CHINA, 720 (2015).

⁷² Network, *A Reading of the Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China*. 2016.

workers”⁷³ of qualified large projects,⁷⁴ which will facilitate the visa process for overseas workers under the IFAs. Additionally, labor market testing is not required to enter into an IFA but may be relevant for the issue of visas under the IFAs.⁷⁵

Third, further development is planned in the ChAFTA, and a number of provisions have forward-looking thoughts. As discussed above, China will shift to the negative list approach regarding investment and services trade commitments. Negotiations will be conducted for a comprehensive investment chapter.⁷⁶ For the enhanced transparency, the ChAFTA envisages, within one year of the entry into force of the pact, the consultations on the application of the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration to ISDS arbitrations.⁷⁷ Furthermore, the appeal system in the ISDS processes will be discussed. Within three years after the effective date of the ChAFTA, negotiations will be started with the aim of establishing an ISDS appeal mechanism for legal issues.⁷⁸ It goes beyond other trade pacts of China. On a related note, the MFN clause in the ChAFTA investment chapter enables the investors from both parties to benefit from investment rules of future agreements signed by either party, which covers pre-establishment and post-establishment stages⁷⁹ and should include the benefit of innovative provisions if any.

C. Increased Good Governance Norms

The ChAFTA incorporates improved good governance norms in selected areas and characteristics. The Agreement makes it clear right from the outset that both parties resolve to establish “clear rules governing their trade which will ensure a predictable, transparent and consistent commercial framework for business operations.”⁸⁰ Good governance norms could be found in different chapters. For instance, both sides will cooperate to streamline selected skills assessment processes for temporary skilled labor visas, to encourage the streamlining of pertinent licensing procedures, and to improve access to pertinent skills assessments.⁸¹ Such provision will benefit services trade and investment.

Progress in good governance has been made particularly in services and non-tariff

⁷³ E.g. Memorandum of Understanding Between the Government of Australia and the Government of the People’s Republic of China on an Investment Facilitation Arrangement paragraphs 8-11 (2015).

⁷⁴ Network, A Reading of the Free Trade Agreement Between the Government of Australia and the Government of the People’s Republic of China. 2016.

⁷⁵ Memorandum of Understanding Between the Government of Australia and the Government of the People’s Republic of China on an Investment Facilitation Arrangement paragraphs 6, 8. 2015.

⁷⁶ ChAFTA Article 9.9.3. 2015.

⁷⁷ Id. at, Side Letter on Transparency Rules Applicable to Investor-State Dispute Settlement.

⁷⁸ Id. at, Article 9.23.

⁷⁹ Id. at, Article 9.4.1.

⁸⁰ Id. at, recital 7 of the preamble

⁸¹ Id. at, Side Letter on Skills Assessment and Licensing.

measures (NTMs). Regulatory improvement is envisaged for services trade. In financial services, China agrees to provisions on “transparency, regulatory decision-making and streamlining of financial services licence applications.”⁸² Notably, regulatory transparency is provided in the Annex on Financial Services, which requires regulators of one party to make administrative decisions on a completed application of a financial service provider of the other party within 180 days, and to notify the decision to the applicant.⁸³ As discussed earlier, both parties commit to expeditiously process applications filed by financial institutions for the establishment of subsidiaries, branches, and sub-branches on “an equitable, non-discriminatory and good faith basis.”⁸⁴ It will help to improve the efficiency and fairness in the regulation of financial services.

Good governance will be promoted in rules on NTMs. Generally, the ChAFTA Committee on Trade in Goods will review NTMs to ensure that they “do not constitute unnecessary obstacles” to bilateral trade.⁸⁵ In particular, good governance is highlighted in trade facilitation. Equal treatment is provided in more detail, such as the same treatment for all importation of goods subject to the advance ruling irrespective of the importer or exporter if the facts and circumstances are same “in all material respects.”⁸⁶ Moreover, efficiency and cost-effectiveness are taken into account on a number of occasions,⁸⁷ which will ease the burden of businesses. Both parties shall grant the release of perishable goods, in exceptional circumstances, outside the business hours of the customs and other authorities.⁸⁸ Under ChAFTA origin rules, consignments of originating goods could be split up in non-parties for further transport,⁸⁹ and minor errors or discrepancies will be tolerated.⁹⁰

Regarding the characteristics of good governance, transparency gets more attention in the ChAFTA. It is highlighted in both a chapter dedicated to transparency and specific rules in other chapters. A special transparency chapter strives to address a number of issues that are relevant to businesses, including those in administrative proceedings. This chapter incorporates rules on the publication of rules and administrative rulings,⁹¹ the notification and provision of information,⁹² the “consistent, impartial, objective and reasonable” administration of rules and

⁸² ChAFTA Summary of Chapters and Annexes. 2015.

⁸³ ChAFTA Annex 8-B, Article 5. 2015.

⁸⁴ *Id.* at, Side Letter on Financial Services.

⁸⁵ *Id.* at, Article 2.7.4.

⁸⁶ *Id.* at, art. 4.9.6.

⁸⁷ See, for example, *id.* at, art. 4.6.1 (the application of information technology in customs procedures).

⁸⁸ *Id.* at, art. 4.11.1(b).

⁸⁹ *Id.* at, art. 3.13.3.

⁹⁰ *Id.* at, art. 3.17.

⁹¹ *Id.* at, Article 13.2.

⁹² *Id.* at, Article 13.3.

administrative rulings,⁹³ as well as the review and appeal of final administrative actions regarding matters covered by the ChAFTA.⁹⁴ If properly implemented, it will improve the transparency of operation of trade regulation.

In other chapters, specific rules on transparency include the transparency of non-tariff measures (e.g. SPS and TBT measures),⁹⁵ greater transparency in customs procedures through publication and enquiry points,⁹⁶ the transparency of trade remedies,⁹⁷ regulatory transparency in financial services,⁹⁸ and transparency of measures relating to people mobility.⁹⁹ In these rules, stakeholder participation is possible in areas such as trade in goods and intellectual property. Interested persons are afforded the opportunities to comment on draft laws and regulations regarding customs matters.¹⁰⁰ In the application of information technology in customs procedures, the ChAFTA requires, “to the greatest extent possible,” the consultation with relevant stakeholders including firms directly affected.¹⁰¹ For intellectual property, the ChAFTA obliges the party to consider issues and questions “of interest to private stakeholders,”¹⁰² which may include the consultation with stakeholders.

A number of transparency rules impose WTO-plus obligations, such as the online publication of intellectual property rights (e.g. granted or registered patents for invention),¹⁰³ and the provision of reasons for the denial of preferential tariff treatment.¹⁰⁴ Among them, the GATS-plus transparency requirements for services trade and the transparency of NTMs deserve attention. The former requires, inter alia, the prompt publication of regulatory decisions including their basis, and of the measures concerning public networks or services including the requirements for permits.¹⁰⁵ For the latter, a mechanism is in place to deal with the transparency and review of NTMs, which will be the responsibilities of three committees on trade in goods, the SPS, and TBT measures.¹⁰⁶ This mechanism indicates that SPS and TBT measures attract special attention. The ChAFTA contains WTO-plus transparency obligation on TBT and SPS measures. For instance, a party must respond to comments received from the other side before the publication of final technical regulation or

⁹³ Id. at, Article 13.4.

⁹⁴ Id. at, Article 13.5.

⁹⁵ Id. at, Articles 2.7.3, 2.12.

⁹⁶ Id. at, Article 4.7.

⁹⁷ E.g. Id. at, Article 7.10.2.

⁹⁸ Id. at, Annex 8-B, Article 5.

⁹⁹ Id. at, Article 10.5.

¹⁰⁰ Id. at, art. 4.7.3; Organization, Agreement on Trade Facilitation Article 2.1.1. 2014.

¹⁰¹ ChAFTA Article 4.6.3. 2015.

¹⁰² Id. at, Article 11.23.2.

¹⁰³ Id. at, Article 11.6.1.

¹⁰⁴ Id. at, Article 3.22.2.

¹⁰⁵ Id. at, Article 8.18.

¹⁰⁶ Id. at, Article 2.12.

conformity assessment procedure.¹⁰⁷ For the SPS measures, the ChAFTA requires at least 60 days for the other Party to make comments on certain proposed SPS measures,¹⁰⁸ which set stricter rules than the SPS Agreement's requirement of "reasonable time" for comments.¹⁰⁹

D. Conclusion

All three features are interrelated with each other. For instance, the innovative investment and services trade rules also highlight good governance. The ChAFTA rules, including services trade rules, are often WTO-inspired ones and build on the WTO norms.

These features reflect the positions of both sides. WTO-based rules are favoured by China, and it is the consistent practice of China's trade pacts. Innovative investment and services rules, as well as increased good governance norms seem to be affected by the position of the Australia. Examples include ISDS, regulatory autonomy in investment and the duty-free movement of containers, pallets, and packing materials. For investment, the ChAFTA is affected by the position of Australia that recently takes a case-by-case approach.¹¹⁰ For the duty- and tax-free temporary admission of containers and material used in the transportation of goods, it seems to be the initiative of Australia as the representative of Australia in the WTO suggested more move in this respect from Australia.¹¹¹ That said, there are also incentives for China in these issues to promote trade and investment.

The ChAFTA reflects a pragmatic approach that focuses on the problem solving of selective priority issues, particularly investment and services (e.g. raised investment screening threshold, and regulatory transparency in financial services). Such an approach helps to finalise the trade pact and supports the view that something is better than nothing. This approach is reflected in the narrow coverage, the exclusion of sensitive areas and WTO-based rules, to name a few. For the FTA coverage, it does not address thorny WTO-extra issues (e.g. labor) or only touches upon them (e.g. environment). Taking trade in goods as an example, China has exempted certain agricultural products from tariff reduction (e.g. cotton, sugar) or extended their tariff reduction period, while the Australia has set a three- or five- year tariff reduction period for selected sensitive industrial products.¹¹²

¹⁰⁷ Id. at, Article 6.8.2.

¹⁰⁸ Id. at, Article 5.5.4.

¹⁰⁹ World Trade Organization, Agreement on the Application of Sanitary and Phytosanitary Measures Annex B, paragraph 5.

¹¹⁰ Mark Feldman, et al., *The Role of Pacific Rim FTAs in the Harmonisation of International Investment Law: Towards a Free Trade Area of the Asia-Pacific* 6 (2016).

¹¹¹ Agreements, paragraph 1.18. 2016.

¹¹² Network, *A Reading of the Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China*. 2016.

III. The Challenges to the ChAFTA

A. The Implementation of the ChAFTA

The effective implementation of the ChAFTA is crucial to a win-win outcome for Australia and China. Efforts have been made to implement ChAFTA through FTA mechanisms and domestic measures. In terms of the FTA mechanisms, the implementation of the ChAFTA often involves the review of measures. For the agreement as a whole, both parties will conduct periodic review of the trade pact, firstly within three years after its effective dates and then at least every five years thereafter.¹¹³ For specific areas, for instance, the Committee on Financial Services is to be established to fulfill several functions, including the supervision of the implementation of the Annex on Financial Services and its elaboration.¹¹⁴ The review of the special agricultural safeguard measure is to be conducted, and a further review is possible if products covered by the measure have caused serious injury to Chinese domestic industry.¹¹⁵ The ChAFTA also envisages the review of origin documentary requirements in three years after the entry into force of the FTA.¹¹⁶ The review will take into account the development of an electronic origin data exchange system, the introduction of more trade-facilitative measures including broadening the use of Declarations of Origin. The review aims to ensure the effective and efficient implementation of the chapter on origin rules.¹¹⁷

Domestic measures are taken to implement the ChAFTA. Examples include China's Customs Decree 228 that sets out China's documentation requirements.¹¹⁸ Applying to the Australia and other FTA partners of China, China has made a number of announcements, including announcement 57 that provides advice on streamlined arrangements for FTA transshipment through third countries.¹¹⁹ On a related note, the Hong Kong Customs and Excise Department has established a China Free Trade Agreement Transshipment Facilitation Scheme to promote implementation of China's transshipment arrangements under trade pacts.¹²⁰

However, the implementation of the ChAFTA will need more efforts. First, three categories of the ChAFTA obligations need to be clarified, which could be vague, contain soft requirements, or be subject to domestic law. The pragmatic approach helps to conclude the agreement but may raise issues about the performance of the ChAFTA obligations. For the first category, worth noting are ambiguous terms that

¹¹³ ChAFTA Article 16.5. 2015.

¹¹⁴ *Id.* at, Annex 8-B, Article 7.3(a).

¹¹⁵ *Id.* at, art. 2.14.8.

¹¹⁶ *Id.* at, art. 3.24.

¹¹⁷ *Id.* at.

¹¹⁸ Guide to using ChAFTA to export and import goods 11. 2016.

¹¹⁹ *Id.* at.

¹²⁰ *Id.* at.

are susceptible to different interpretations and may lead to the uncertainty of obligations on the states. For instance, a number of general but ambiguous provisions can be found in the Side Letter on Financial Services, in which the parties will process applications by financial institutions on “an equitable, non-discriminatory and good faith basis.”¹²¹ It is not clear how to interpret the terms “equitable” and “good faith”.

For the second category, the ChAFTA often contains soft obligations or “buffers” such as the term “[t]o the extent possible” regarding the publication requirements.¹²² Similarly, transparency provisions may be tempered by best-effort language. In new issues such as e-commerce, the ChAFTA only provides a framework. As not much guidance has been provided, these issues are largely left to domestic law, which will play a key role in the implementation of the ChAFTA.

Concerning the third category, the ChAFTA rules may be subject to domestic law. In this context, national law may conflict with the ChAFTA obligation, and their relationship may need to be clarified. Among these rules, the expeditious processing of applications by financial institutions for the establishment of subsidiaries is subject to domestic prudential laws.¹²³ Under other circumstances, the ChAFTA requires one party, “in accordance with its laws and regulations,” to allow services providers of the other party to use enterprise names under which they trade in the other party.¹²⁴ For the former, it is not clear how to distinguish prudential regulation under domestic law from the prohibition against trade protectionism under the ChAFTA. For the latter, what will happen if the domestic law actually prevents enterprise names from being used? These issues may be addressed through consultation or further negotiations.

Second, the implementation demands close cooperation across a broad range of issues. In other words, the complexity of cooperation could be challenging. The ChAFTA calls for cooperation in a wide range of areas. These areas include intellectual property,¹²⁵ competition,¹²⁶ and services trade such as taxation and traditional Chinese medicine (TCM) services.¹²⁷ In particular, services trade rules demand wide-ranging cooperation. For financial services, cooperation will be promoted in areas such as payments system oversight, Australia-China RMB fund partnerships in China, information exchange on regulatory systems and policies, as well as measures against money laundering.¹²⁸ Cooperation will also extend to qualifications recognition in services trade. Both parties will encourage relevant

¹²¹ ChAFTA Side Letter on Financial Services. 2015.

¹²² *Id.* at, Article 13.2.2.

¹²³ *Id.* at, Side Letter on Financial Services.

¹²⁴ *Id.* at, Article 8.13.7.

¹²⁵ *Id.* at, Article 11.23.

¹²⁶ *Id.* at, Article 16.7.

¹²⁷ *Id.* at, Article 8.25.

¹²⁸ *Id.* at, Side Letter on Financial Services.

bodies to develop standards and criteria for licensing and certification, and provide recommendations on mutual recognition regarding selected service sectors (e.g. engineering and TCM).¹²⁹

Cooperation is also crucial to the operation of newly-established FTA committees. For instance, the review of NTMs require both sides' efforts through the ChAFTA committees, particularly those on SPS and TBT measures.¹³⁰ If the ChAFTA rules are unclear, the implementation will rely on the cooperation between two sides, since history shows that the dispute settlement system is rarely utilized under the FTAs.

The cooperation could extend beyond or go deeper than the WTO counterpart. The collaboration on intellectual property requires the party to consider issues and questions "of interest to private stakeholders,"¹³¹ which is not provided in the TRIPS Agreement and China's previous FTAs (such as the China-New Zealand FTA). It remains to be seen how this obligation will be fulfilled in practice.

The implementation of the ChAFTA involves a significant number of entities on both sides, including public and private ones. Moreover, the implementation of the ChAFTA also involves the consultation with relevant stakeholders including businesses.¹³² For instance, the ChAFTA side letters on skill assessment and financial services entail the close cooperation of Australian (e.g. Trades Recognition Australia, APRA, and ASIC), and Chinese (e.g. the China International Contractors Association, CBRC, and China's State Administration of Foreign Exchange) agencies. The coordination and cooperation among various agencies and stakeholders is not an easy job.

It is noteworthy that the cooperation may involve many legal issues, which may create uncertainties and need to be addressed carefully. For instance, cooperation on TCM issues is covered not only in the ChAFTA but also in its related side letter. The cooperation on TCM may involve a broad range of legal issues, including subsidies, TBT, SPS, and environmental issues to the extent that the medicines are derived from endangered species.¹³³

Last but not least, other challenges include the FTA usage rate and the "noodle bowl" effect. It is important to ensure that businesses particularly small businesses could capital on the opportunities under the ChAFTA. The access to the ChAFTA benefits and the "noodle bowl" effect are among the problems that firms may face. For the former, for instance, enterprises outside first-tier cities may not be familiar

¹²⁹ Id. at, Article 8.15.2.

¹³⁰ Id. at, Article 2.12.

¹³¹ ChAFTA Article 11.23.2. 2015.

¹³² See, for example, id. at, Article 4.6.3 (the application of information technology in customs procedures).

¹³³ Colin Picker, *Chinese Medicines in the China-Australia FTA* § 2015 (2015).

with the ChAFTA. Even for businesses that know the ChAFTA, they need expertise and experience to reap the benefits. In particular, small and medium-sized enterprises (SMEs) could encounter the problems of insufficient opportunities, the complexity of rules, difficulties in interpretation and implementation, remained regulatory differences, to name a few.¹³⁴ The ChAFTA has a limited number of provisions to engage with businesses. Pitifully it does not explicitly provide for the special support to SMEs.

For the noodle bowl effect, businesses of Australia and China could utilize a large number of trade and investment agreements (e.g. the RCEP and the ChAFTA), which may contain different and complicated rules. To ensure that businesses take advantage of the ChAFTA and other related agreements, the noodle bowl effect arising from overlapping agreements should be carefully addressed.

B. The Future Negotiations of the ChAFTA

The ChAFTA is going forward since the parties will further negotiate the upgrade of the ChAFTA as planned. Tariff reduction, services market opening, and investment rules are now among focuses of the ChAFTA. Taking agriculture as an example, Australia enjoys a first-mover advantage over major agricultural competitors (e.g. the US, Canada and the European Union) through the ChAFTA.¹³⁵ Besides the exports of commodities, a lot could be explored under the ChAFTA to ensure the substantial growth of Australia-China economic relationship. Differing from South-South FTA, complementarity exists in the trade between China and Australia, with the former's advantage in labor-intensive manufactures and machinery and the latter's strength in agriculture and services.¹³⁶

Subsequent negotiations of the ChAFTA may focus on investment and services trade. Some of these developments have been envisaged. The implementation of ChAFTA services trade chapter will be periodically reviewed to further liberalize services trade.¹³⁷ Further negotiations in services trade (including the services market liberalization) are likely to attract more attention as China is the biggest services export market of Australia. For investment, the development of investment rules deserves attention. The ChAFTA incorporates underdeveloped investment treatment provisions, mainly national treatment and MFN treatment. The arbitration claim under ISDS is limited to the violation of national treatment.¹³⁸ Therefore, investment treatment provisions and the ISDS applicability are rather limited. To promote and protect investment, there will be a review of investment law framework within three

¹³⁴ Heng Wang, *The Implications of the Trans-Pacific Partnership for SMEs: Opportunities and Challenges*, 6 KLRI JOURNAL OF LAW AND LEGISLATION 45, 65-73 (2016).

¹³⁵ Department of Foreign Affairs and Trade. 2016.

¹³⁶ Deere, *INTERNATIONAL TRADE AND BUSINESS LAW REVIEW*, 304 (2013).

¹³⁷ ChAFTA Article 8.24.1. 2015.

¹³⁸ *Id.* at, Article 9.12.2.

years after the pact enters into force,¹³⁹ and both parties will start negotiating on a “comprehensive” investment chapter.¹⁴⁰ A number of important investment provisions will be negotiated, including the minimum standard of treatment, expropriation, transfers, performance requirements, and senior management and board of directors.¹⁴¹ Subsequent negotiation plans also exist for possible appellate review in ISDS, which should be negotiated within three years after the FTA comes into effect.¹⁴²

The major challenge to subsequent ChAFTA negotiations is probably complexity and uncertainties. It is plain that the negotiations will involve complicated legal and political issues, since most of the easy jobs have been done. The further development of the ChAFTA will probably deal with deeper issues, including skill assessment and licensing. Since complexity and uncertainties are closely related and uncertainties are a major cause of complexity, the discussion will focus on uncertainties due to space constraint.

The uncertainty consists of internal and external ones. The uncertainties, if properly managed, could also be opportunities. For the internal uncertainties, the negotiations may be affected by various considerations. A number of issues are excluded or remain unchanged under the ChAFTA for sensitivity, ranging from labor mobility and SPS market access to investment. In Australia, for instance, the requisite skill levels for Chinese visa applicants remain unchanged, and SPS market access matters are set apart and negotiated separately from the FTA negotiations.¹⁴³ The ChAFTA does not affect relevant sensitive domestic system such as Australia’s biosecurity arrangement.¹⁴⁴ Regarding investment, the screening of investment from China is a delicate issue, and Australia will continue to review Chinese investments at lower thresholds for agricultural land and agribusiness, in sensitive sectors (e.g. media, telecommunications, and defence-related industries) and investments by Chinese SOEs.¹⁴⁵ The review of foreign investment may be a potential issue for future negotiations.

In China, for example, further liberalization of services trade could be a delicate issue. The subsequent negotiations of the ChAFTA are not isolated from China’s domestic reform. In many cases, China’s commitments under the ChAFTA seem to be linked to the China (Shanghai) Pilot Free Trade Zone (SFTZ). Some services

¹³⁹ Id. at, Article 9.9.1.

¹⁴⁰ Id. at, Article 9.9.3.

¹⁴¹ Id. at, Article 9.9.3(b).

¹⁴² Id. at, Article 9.23.

¹⁴³ DFAT, *China-Australia FTA (ChAFTA): myths versus realities*(2015), available at <https://exportcouncil.kontribune.com/articles/6362>.

¹⁴⁴ Id. at.

¹⁴⁵ Department of Foreign Affairs and Trade. 2016.

liberalization measures in the SFTZ have been incorporated into the ChAFTA, including those on telecommunications, legal services, construction, and maritime transport.¹⁴⁶ It is observed that most of the ChAFTA commitments by China are limited to selected types of services trade or to the SFTZ with frequent limitations on the types of commercial presence despite higher foreign equity.¹⁴⁷ China's domestic reform and the FTZs, in particular, is likely to affect further negotiations of the ChAFTA. It may be challenging to further liberalize services trade market given China's progressive approach to services trade liberalization and the significance of domestic interest groups.¹⁴⁸

That said, the ChAFTA does call for cooperation in sensitive issues. Among them, both sides will endeavor to further reduce the number of occupations subject to mandatory skills assessment for Chinese applicants for the relevant Australian visa, or eliminate the requirement in five years.¹⁴⁹ If there is the political willingness, the ChAFTA presents the opportunity for China to test the market liberalization to Australia, a middle power, before further opening to larger economies (e.g. the US).¹⁵⁰ How these sensitive issues will be handled in subsequent negotiations is yet to be seen.

For the external uncertainties, they include the development of the WTO law, as well as relevant trade and investment agreements (e.g. the RCEP, the US-China BIT, and the China-Japan-Korea FTA). Future negotiations of the ChAFTA are connected with these agreements. Regarding the role of the WTO law, both sides will conduct negotiations on the commitments on government procurement after the finalization of negotiations on China's accession to the WTO Agreement on Government Procurement.¹⁵¹ The ChAFTA has been affected by the latest development of the WTO (i.e. the TFA), and it will continue to be the case.

Regarding the role of other FTAs, other agreements concluded by Australia and China provide a threshold for the ChAFTA negotiations, and it will probably continue to be the case. China's trade agreements with New Zealand¹⁵² and Chile are highly relevant, since these countries compete with Australia regarding agricultural products. For instance, New Zealand has been the "first country to grant China accession to the

¹⁴⁶ Network, A Reading of the Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China. 2016.

¹⁴⁷ Andrew Lumsden & Knight Lizzie, *Free Trade with China - What Does this Mean for Australian Services Firms?*, (2015).

¹⁴⁸ Deere, *INTERNATIONAL TRADE AND BUSINESS LAW REVIEW*, 305, 316 (2013).

¹⁴⁹ ChAFTA Side Letter on Skills Assessment and Licensing. 2015.

¹⁵⁰ Deere, *INTERNATIONAL TRADE AND BUSINESS LAW REVIEW*, 305 (2013).

¹⁵¹ ChAFTA Article 16.8. 2015.

¹⁵² Relating to this, New Zealand was expecting Australia to obtain a much better result in market access under the ChAFTA given the significant investment flows between China and Australia. Axel Berger, *Investment Rules in Chinese Preferential Trade and Investment Agreements: Is China following the global trend towards comprehensive agreements?* at https://www.die-gdi.de/uploads/media/DP_7.2013.pdf.

WTO and the first advanced economy to sign an FTA with China.”¹⁵³ Australian products could benefit from tariff reductions under the ChAFTA as those from New Zealand under the China-New Zealand FTA.¹⁵⁴ The ChAFTA counters the advantages Chile enjoys under its trade pact with China.¹⁵⁵ Compared with Australia’s FTAs with Japan and Korea, the ChAFTA provides better or similar treatment in tariff reduction and investment treatment.¹⁵⁶ Meanwhile, it is reported that tariff reductions made by the FTA parties under the ChAFTA are more liberalized (e.g. at a faster pace) than those under Australia’s FTAs with Japan and Korea.¹⁵⁷

Notably, the negative list approach that China will take is probably connected with China’s BIT negotiations with the US in which China committed to take the same approach. It partially explains why the ChAFTA contains the MFN clause in investment chapter, which takes into account China’s investment agreements such as the possible BITs with the US and EU. Other than the US-China BIT, the negotiations on the ISDS appeal system could be affected by the development of the ISD appeal system, which first appeared the CETA and EU-Viet Nam FTA. It may be influenced by the approach of the EU.

In the future negotiation of the ChAFTA, these existing (e.g. the upgrade of the China-New Zealand FTA) and new agreements (e.g. the RCEP) will probably affect the ChAFTA or serve as a baseline. A number of questions remain open: how long will China’s negative list in services trade and investment be? Will the ChAFTA adopt the appeal system in the ISDS procedure? How far will the ChAFTA go regarding regulatory disciplines? Will the ChAFTA develop detailed rules in non-trade concerns (e.g. environment and labor)? Will the ChAFTA lean towards deep FTAs or remain largely similar to traditional WTO-based FTAs of China? Will its paradigm eventually shift to a FTA featured with stringent regulatory requirements? Unless China has strong willingness to adopt stringent regulatory requirements, the ChAFTA is likely to mostly remain the status quo. Regulatory improvement is more likely to involve sectors where services market is liberalized such as health care. In the long term, it is interesting to observe whether and how the ChAFTA may interact with deep FTAs.

¹⁵³ Salidjanova, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT, 33 (2015).

¹⁵⁴ See, e.g., Australia Department of Foreign Affairs and Trade, *China-Australia Free Trade Agreement: A Snapshot*, available at <http://dfat.gov.au/trade/agreements/chafta/fact-sheets/Documents/chafta-snapshot.pdf>.

¹⁵⁵ Department of Foreign Affairs and Trade, *Outcomes at a Glance*. 2016.

¹⁵⁶ Network, *A Reading of the Free Trade Agreement Between the Government of Australia and the Government of the People’s Republic of China*. 2016.

¹⁵⁷ *Id.* at.

IV. Concluding Remarks: The Implications of the ChAFTA

Reflecting a pragmatic approach, the ChAFTA focuses on trade and investment facilitation mainly through market liberalization and a number of carefully written good governance norms. Different from the TPP, it does not intend to set governance model or impose a large number of stringent regulatory requirements. The ChAFTA is a WTO-based and WTO-friendly trade agreement that supports the multilateral trading system.

The ChAFTA has made substantial progress in several discrete but important areas, including tariff cuts, services trade and investment. The development often takes place through, inter alia, enhanced market access, non-discrimination treatment and regulatory cooperation. Overall, the innovations of the ChAFTA exist in a narrow range of areas (e.g. investment and services). The agreement is not shallow as one may first think as it touches upon, inter alia, regulatory transparency and regulatory cooperation (e.g. cooperation in financial services, and the harmonization of the plant breeders' rights administrative systems¹⁵⁸).

The ChAFTA is a work-in-progress type FTA. It is a dynamic pact in terms of its implementation (e.g. the review of NTMs, the review of the implementation of service trades rules, and the consideration of intellectual property issues concerning private stakeholders) and further negotiations. It seems to take a two-step approach: first the conclusion and implementation of the FTA rules, and then the upgrade of the ChAFTA (e.g. comprehensive investment rules). The ChAFTA needs to be further developed as it contains only short form provisions, particularly in WTO-extra issues.

The future of the ChAFTA depends largely on close cooperation between treaty parties in FTA implementation, on the one hand, and the political willingness to further develop the rule-based system on the other hand. The desire to develop bilateral relationship and maintain the competitiveness of both parties regarding trade and investment is the key driving force of the ChAFTA. The ChAFTA has indicated the flexibility of both sides in negotiating a trade agreement. This agreement has the potential of rule development most notably regarding deeper regulatory cooperation and sophisticated investment rules.

The development of the ChAFTA should carry vast implications not only for China's FTA model but also for Chinese-Australian economic relations and beyond. For China, the ChAFTA may serve as a pathway to a more rule-based FTA model focusing on good governance norms in selected areas (e.g. financial services). It may act as a "pilot zone" for an incremental FTA paradigm shift and have a demonstration effect for China's FTAs. The benefits under the ChAFTA could be made available

¹⁵⁸ ChAFTA Article 11.16(a). 2015.

under other agreements of China. Therefore, it will carry wider implications for China's interaction with other partners particularly developed economies in terms of bilateral trade and investment agreements. It could lay a foundation for and contribute to the negotiations of mega FTA (i.e. the RCEP). The starting point now is probably to address major challenges to the ChAFTA in terms of its effective implementation and subsequent negotiations.