

**China Institute
University of Alberta**
Occasional Paper Series

Vol. 2, Issue No. 1 / March 2015

CHINA-AUSTRALIA FREE TRADE AGREEMENT: IMPLICATIONS FOR CANADA

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executive summary

On November 17, 2014, the Australian and Chinese governments announced the conclusion of the China-Australia Free Trade Agreement (ChAFTA) negotiations. Scheduled for official signing in 2015, the agreement will reduce tariffs on exports in sectors including agriculture, natural resources, and manufacturing, facilitate the trade in services, and reduce barriers for Chinese private investment in Australia. Tariffs will be removed on 85% of Australian goods exports on implementation, rising to 93% in four years and 95% at full implementation. Representing the most comprehensive trade agreement that China has ever completed with a major Western economy, one 2005 estimate suggested that the agreement could contribute at least AU\$20 billion (C\$19.9 billion) to bilateral trade, which reached AU\$150 billion (C\$149.5 billion) in 2013. Indeed, this figure may be understated, considering the growth of China's GDP since that time.

Given the similarities in the export profiles of Canada and Australia, the ChAFTA will have several implications for Canada. While the impacts will be fully apparent only after implementation, the agreement can be expected to provide challenges for Canadian trade with China that may accumulate over time. However, the completion of the ChAFTA also provides an opportunity to observe and learn from the Australian experience in negotiating and managing a comprehensive economic relationship with China.

Based on the initial list of “Key Outcomes” outlined by the Australian government, this paper identifies a number of provisions likely to engage Canadian interests. The promotion of agricultural and service exports is a central feature of the Australian government's strategy to capitalize on the growth of Asia's middle class. Under the ChAFTA, China will reduce or eliminate tariffs currently at 10-25% on Australian meat, wine, and seafood; eliminate tariffs on Australian resources and manufactured goods, including metallurgical coal; and improve market access for Australian education, tourism, and health care providers. These are sectors where Canadian industries currently compete with Australian counterparts or have seen significant growth in recent years. In these respects, the ChAFTA may serve as an instructive model for any future trade negotiations with China.

The outcomes of the ChAFTA also reveal potential obstacles to liberalization in the agriculture and forest products sectors. Australian rapeseed and vegetable oils were excluded from the agreement, along with other agricultural products designated as “significantly sensitive staples” by China. In addition to a discretionary safeguard on beef imports above a certain quota, these provisions underscore China's continuing concern with food security and the effects of imports on the development of its domestic agricultural industry. As well, Chinese tariffs on some wood and paper products have been retained. Although the exclusion of these products will diminish any immediate negative impacts to Canadian canola and wood pulp producers, it is likely that Canada would face many of the same challenges in negotiating advantages for these major exports to China.

Other notable provisions include the establishment of a “review mechanism” for non-tariff measures and the lowering of Australian screening thresholds for private Chinese investments. Surprisingly, the ChAFTA did not

reduce barriers to investment by Chinese state-owned enterprises as anticipated. The withdrawal of Chinese demands on SOE treatment reportedly occurred in exchange for maintaining tariffs in sensitive agricultural sectors. Given China's long-held interest in facilitating investor access for its SOEs, the concession possibly signals the malleability of this position and emphasizes its strong desire to protect its domestic industries.

While the ChAFTA may not be an ideal template, it offers lessons for the development of Canada's own economic relationship with China. The agreement involved many of the sectors identified in the 2012 Canada-China Economic Complementarities Study, providing anchors with which Canada may approach any future negotiations. As in Australia, the prospect of a more comprehensive trade relationship with China remains controversial. The efforts of the Australian government to promote public support for such a relationship should prove instructive. The additional competition for Canadian businesses generated by the ChAFTA, negotiated over the course of nine years, raises the stakes for an expeditious effort to secure improved trading conditions in China.

the report

After a nine-year process, the Australian and Chinese governments announced on November 17, 2014 the conclusion of negotiations for the China-Australia Free Trade Agreement (ChAFTA). The two governments signed a Declaration of Intent to undertake translation and legal review of the text of the agreement, in preparation for the official signing in 2015.

While the full text of the agreement has yet to be released, it is clear that this deal, hailed as a “landmark agreement” by Australian Prime Minister Tony Abbott, will be of significance to both countries. The ChAFTA promises to open Australian and Chinese markets across a number of sectors, including agriculture, natural resources, energy, manufacturing, and the services industry, as well as reduce barriers for private investment. Upon taking force, the agreement will remove tariffs on 85% of Australian goods exports to China, rising to 93% after four years. On full implementation, the agreement is expected to ensure that 95% of Australian goods exports to China will be tariff-free.¹

¹ Prime Minister of Australia, “Landmark China-Australia Free Trade Agreement,” *Prime Minister of Australia* 17 Nov. 2014: <http://www.pm.gov.au/media/2014-11-17/landmark-china-australia-free-trade-agreement>

On the Australian side, tariffs on Chinese exports of clothes, shoes, vehicles, and electronics will be removed between two and four years after implementation. As well, Australia has agreed to increase the screening threshold for its Foreign Investment Review Board (FIRB) from AU\$248 million to AU\$1.078 billion, for private Chinese companies investing in non-sensitive sectors.²

As the first comprehensive free trade agreement that China has signed with a major developed economy, the ChAFTA underscores Beijing’s greater willingness to engage with other Western countries as equals in global commerce. Given the similarities in the export profiles of Canada and Australia, as well as the fact that China is our second-largest trading partner, the ChAFTA has significant implications for Canada, both in terms of its possible economic effects and the potential lessons for the development of the Canada-China bilateral relationship. Although it is yet to be implemented, the ChAFTA can be expected to provide challenges for Canadian trade with China that may accumulate over time.

The agreement appears to have achieved a number of key goals of both the Australian and the Chinese sides. Indeed, some Australian observers were reportedly “shocked” at the scale of the concessions given by the Chinese.³ According to preliminary reports, the ChAFTA will provide a number of important outcomes in three sectors where Australia competes with Canada: agriculture, natural resources, and manufacturing.

² Australian Government, “Key Outcomes,” *China-Australia Free Trade Agreement website*, 6: <http://www.dfat.gov.au/fta/chafta/fact-sheets/key-outcomes.pdf>

³ John Garnaut, “Tony Abbott seals free trade deal with Beijing,” *Sydney Morning Herald* 17 Nov. 2014: <http://www.smh.com.au/federal-politics/political-news/tony-abbott-seals-free-trade-deal-with-beijing-20141116-11nsk9.html>

In 2013, bilateral trade between Australia and China was valued at AU\$150 billion (C\$149.5 billion).⁴ In comparison, bilateral trade between Canada and China was C\$77.7 billion in the same year.⁵ Some reports have suggested that the ChAFTA will add AU\$20 billion (C\$19.9 billion) to trade between China and Australia, but these estimates are based on calculations conducted in 2005,⁶ ignoring that between 2005 and 2014, the average growth rate of China's real GDP was approximately 50% higher than originally estimated.⁷ The actual contribution of the ChAFTA to bilateral trade is therefore likely to be much greater.

The completion of the ChAFTA carries a number of implications for Canada:

AGRICULTURE

Under the agreement, China will phase out tariffs on Australian dairy, wine, meats, and other agricultural and seafood products over a number of years. With the relative slowing of demand for iron and coal in China, the “shift from mining to dining” has become a priority for the Australian government. Agricultural and service exports play a large role in its strategy to capitalize on the growth of Asia's middle class and the corresponding demand for a new diversity of food products. The dairy industry, in particular, will benefit heavily from the ChAFTA, thanks to the elimination of tariffs on all dairy products within eleven years. Tariffs on Australian wines, pork, and a range of seafood exports will be removed within four years.⁸

The treatment of vegetable oils and seeds under the ChAFTA is an important consideration for Canada. The exclusion of canola from the agreement is, arguably, a mixed blessing for the Canadian canola industry, since its market share is unlikely to be affected by advantages gained by Australian competitors. However, Canada is the largest exporter of canola oils and seeds to China, worth approximately \$2.8 billion in 2013, and could benefit significantly from improved access for these products under a potential trade agreement.⁹ China's apparent

⁴ Prime Minister of Australia, *supra* note 1.

⁵ Government of Canada, “International Commerce – By Country,” *Foreign Affairs, Trade and Development Canada*, http://w03.international.gc.ca/Commerce_International/Commerce_Country-Pays.aspx?lang=eng

⁶ Yinhua Mai, et al., *Modelling the Potential Benefits of an Australia-China Free Trade Agreement* (Melbourne: Centre of Policy Studies, 2005).

⁷ The modelling study assumed an annual GDP growth rate for China of 6.669% between 2005 and 2015. World Bank statistics indicate the actual growth rate between 2005 and 2013 ranged from 8-14%. See: World Bank, “World Development Indicators,” *World DataBank website*: <http://databank.worldbank.org/>

⁸ Australian Government, *supra* note 2 at 1.

⁹ Canola Council of Canada, “China,” *Canola Council of Canada website* 2014: <http://www.canolacouncil.org/markets-stats/markets/china/>

determination to protect this sub-sector does not augur favourably for any future Canada-China negotiation.

Those reductions in tariffs that have been granted will have implications for the Canadian agricultural industry, which has also seen increases in its meat, wine, and seafood exports to China, and which is a major competitor with Australia in these sub-sectors. Tariff exemptions under the ChAFTA are expected to provide a competitive advantage for Australian products, a fact highlighted explicitly in the Australian government's list of "Key Outcomes".¹⁰ The concern is that Canadian exports in these sub-sectors could be displaced by the preferential treatment afforded to their Australian counterparts, a pressing issue since there are significant opportunities for growth here. In the wake of ChAFTA, Canadian producers may have difficulties maintaining their market share in China and capitalizing on this growth. In 2013, Canada exported \$441 million worth of seafood products to China, which represents its second-largest market for seafood exports.¹¹ Lobster, in particular, has been a fast-growing export, with Chinese demand increasing since 2009.¹² China is also Canada's largest export market for ice wine and second-largest market for all wine exports, with more than \$18 million in total exports in 2013, up from \$5 million in 2009.¹³ Given that current Chinese tariffs on wine and seafood

range from 14-20%, the ChAFTA provides a clear advantage to these Australian industries.¹⁴ Australian wines, for instance, are typically located at the higher end of the price spectrum in China and therefore the elimination of tariffs could make a considerable difference in shelf prices.

While the agricultural provisions have generally been received positively by Australian businesses, the sugar and grain industries have expressed frustration at the absence of progress in their respective sub-sectors.¹⁵ Sugar, rice, cotton, and wheat have been excluded from the agreement. According to the Australian government, these products, along with rapeseed and vegetable oils, are "significantly sensitive staples" for China, which is concerned about the effects of these imports on its domestic industry.¹⁶ Self-sufficiency in food production has been a long-standing goal of Chinese government. While the PRC's grain self-sufficiency policy was loosened in February 2014, this move was intended to facilitate China's domestic meat industry, a driver of increasing grain consumption.¹⁷ The focus on domestic meat production may explain the discretionary safeguard that China has retained on imports of beef in the ChAFTA, which is set at 170 000 tonnes per year but will increase over time. Should beef imports exceed this figure, China has the right to impose tariffs on further imports.¹⁸

¹⁰ Australian Government, *supra* note 2 at 1.

¹¹ Government of Canada, "China – At a Glance," *Agriculture and Agri-Food Canada*: <http://www.agr.gc.ca/eng/industry-markets-and-trade/statistics-and-market-information/import-and-export-data/countries-at-a-glance/china/?id=1410072148234>

¹² Jane Taber and Nathan Vanderklippe, "Canadian crustaceans satisfying China's demand for Atlantic lobster," *The Globe & Mail* 23 Dec. 2014: <http://www.theglobeandmail.com/news/national/canadian-crustaceans-satisfying-chinas-demand-for-atlantic-lobster/article22198878/>

¹³ Canadian Vintners Association, "Canadian Wine Exports 2009-2013," *CVA website*: <http://www.canadianvintners.com/wp-content/uploads/2014/12/Canadian-Wine-Exports-by-Country-2009-2013.pdf>

¹⁴ Australian Government, *supra* note 2 at 1.

¹⁵ Colin Bettles, "Commodities left out of FTA party," *The Land* 18 Nov. 2014: <http://www.theland.com.au/news/agriculture/agribusiness/general-news/commodities-left-out-of-fta-party/2717590.aspx>

¹⁶ Australian Government, *supra* note 2 at 2.

¹⁷ Lucy Hornby, "China scythes grain self-sufficiency policy," *Financial Times* 11 Feb. 2014: <http://www.ft.com/intl/cms/s/0/6025b7c8-92ff-11e3-8ea7-00144feab7de.html>

¹⁸ Australian Government, "Fact Sheet: Agriculture and Processed Food," *China-Australia Free Trade Agreement* website, 1: <http://www.dfat.gov.au/fta/chafta/fact-sheets/fact-sheet-agriculture-and-processed-food.pdf>

Nonetheless, in April last year, Chinese Vice-Minister of Agriculture Chen Xiaohua re-affirmed self-sufficiency in wheat and rice as a “top priority in the future.”¹⁹

Reportedly, in exchange for concessions on certain agricultural products such as sugar and rice, the Chinese government agreed to withdraw its demands for equal treatment of proposed investments by its state-owned enterprises (SOEs), showing the depth of its concern with these sensitive sub-sectors.²⁰ Both of these sensitive issues will be up for review in three years, in accordance with a provision in the Declaration of Intent.²¹ The fact that the Chinese government appears to prioritize its domestic agricultural industry above investor access for its SOEs suggests that, for now, concessions on its sensitive sectors are effectively non-negotiable or at least difficult to extract.

¹⁹ Wang Qian, “China to ‘maintain self-sufficiency in food production,’” *China Daily* 21 Apr. 2014: http://www.chinadaily.com.cn/china/2014-04/21/content_17450136.htm

²⁰ Peter Cai, “How Andrew Robb used sugar to sweeten China FTA deal,” *The Australian Business Review* 22 Nov. 2014: <http://www.theaustralian.com.au/business/economics/how-andrew-robb-used-sugar-to-sweeten-china-fta-deal/story-e6frg926-1227131234285>

²¹ Australian Government, *supra* note 2 at 2.

NATURAL RESOURCES & ENERGY

Like Canada, Australia is a major exporter of natural resources and energy products to China, and the ChAFTA will eliminate tariffs on 99.9% of Australian natural resources, energy, and manufacturing exports. Notably, upon implementation, the agreement removes the 3% tariff on metallurgical (coking) coal, which had been introduced in October 2014 by the Chinese government.²² Metallurgical coal accounts for approximately 90% of Canada’s coal exports.²³ This provision will make Australian coal more cost-competitive, a considerable advantage given the oversupplied global market, which is currently experiencing a “glut of coal.”²⁴ The immediacy of the tariff reduction will be of concern to Canadian coal producers. Furthermore, to the extent that the final agreement will reduce tariffs on higher processed products in addition to raw materials—for example, on pelletized iron ore or other metals—such reductions would contribute to an Australian advantage in the Chinese market and impair Canada’s competitive options to enhance value-added resource exports.

²² Australian Government, *supra* note 2 at 2.

²³ Natural Resources Canada, “About Coal,” *Natural Resources Canada website* 5 Jan. 2015: <http://www.nrcan.gc.ca/energy/coal/4277>

²⁴ SNL Energy, “Coal exporters not backing down despite glut; could China enter the market too?” *Mining.com* 30 Jul. 2014: <http://www.mining.com/web/coal-exporters-not-backing-down-despite-glut-could-china-enter-the-market-too/>

China's exclusion of wood and paper products from the agreement should be noted, considering the importance of this export for Canada. According to the Australian government's fact sheet on ChAFTA, these products are "sensitive to China's economy or culture" and have been excluded from China's other free trade agreements.²⁵ Wood pulp is one of Canada's largest exports to China, accounting for over \$2.7 billion in 2013.²⁶ In October 2014, Canada filed a formal complaint with the World Trade Organization in response to the Chinese government's imposition of duties on Canadian wood pulp, which were claimed to be anti-dumping measures.²⁷ The incident underlines the Chinese government's willingness to deploy measures to safeguard industries it deems to be of economic importance. To meet the demands of its growing paper industry and to reduce reliance on imports of raw materials, China has promoted domestic pulp production by setting targets for production capacity and offering financial incentives for pulp and paper projects.²⁸ As such, China's pulp industry appears to enjoy a privileged status in its economic development strategy. This particular issue may be an obstacle in any future China-Canada free trade negotiation, since wood and paper products account for a significant proportion of Canada's merchandise exports to China. As with some of the agriculture exceptions, the non-coverage of forest products in ChAFTA will diminish

any immediate negative impacts on Canadian exports, but also indicates potential limits to any future negotiation by Canada with China.

Another potentially significant concession by China is the inclusion of a provision to address non-tariff measures (NTMs) or barriers to trade. According to the list of Key Outcomes, the ChAFTA will establish a "specific mechanism to review and address NTMs on any good on a case-by-case basis."²⁹ China has been accused in the past of utilizing NTMs and other questionable trade actions to subvert the trade liberalization measures imposed by the WTO and its own free trade agreements. Despite the China-ASEAN FTA, for instance, Indonesian coal exporters have recently reported increased difficulties in clearing Chinese customs.³⁰ As well, in September 2014, the Chinese government announced that power utilities must reduce their coal imports by a combined total of 50 million tonnes by the end of the year, or else suffer penalties to their power generation quota.³¹ These measures, which are intended to depress domestic coal consumption, could ultimately play a more important role than tariffs and may be the types of NTMs that the Australians are interested in eliminating. Operating on a "case-by-case" basis, it is unclear how effective the review mechanism will be, but its establishment does represent a step forward on this issue.

²⁵ Australian Government, "Fact Sheet: Resources, Energy and Manufacturing," *China-Australia Free Trade Agreement website*, 3: <http://www.dfat.gov.au/fta/chافتa/fact-sheets/fact-sheet-resources-energy-and-manufacturing.pdf>

²⁶ Government of Canada, *supra* note 11.

²⁷ Ross Marowits, "Canada files WTO complaint against China's dumping duties on pulp," *The Canadian Press* 15 Oct. 2014: <http://www.ctvnews.ca/business/canada-files-wto-complaint-against-china-s-dumping-duties-on-pulp-1.2055557>

²⁸ C. Barr and C. Cossalter, "China's development of a plantation-based wood pulp industry: government policies, financial incentives, and investment trends," *International Forestry Review* 6 (2004): 268-269.

²⁹ Australian Government, *supra* note 2 at 3.

³⁰ Fayen Wong, "Rise of protectionism in China a threat to commodities imports," *Reuters* 14 Nov. 2014: <http://www.reuters.com/article/2014/11/14/us-china-trade-commodities-protectionism-idUSKCN0IY22Z20141114>

³¹ Brian Robins and Peter Ker, "Risky business: China dumps our dirty coal," *The Sydney Morning Herald* 17 Sep. 2014: <http://www.smh.com.au/business/risky-business-china-dumps-our-dirty-coal-20140916-3fvpf.html>

MANUFACTURING

Among the provisions included in ChAFTA on manufactured goods are the elimination of tariffs on Australian car engines and plastic products within four years.³² These are expected to help Australian firms capture a part of the value chain in Asia, where China is currently the main production hub. As well, aerospace is a fast-growing sector in China, having been listed as a priority in the Twelfth Five-Year Plan. Although China's long-term goal is to develop a domestic aviation industry that will develop, manufacture, and market planes that are entirely Chinese-made, it continues to rely heavily on foreign imports of manufactured parts due in part to a lack of technological expertise.³³ Due to expectations for increasing demand for commercial aircraft in the coming years, the Australian aerospace industry could stand to benefit from the removal of tariffs on manufacturing products. Canada's own potential for greater trade with China in aerospace has been highlighted by the Canada-China Economic Complementarities Study.³⁴ However, it should be recognized that Australia has a relatively modest manufacturing sector and that the Canadian sector is far larger in proportional terms.

³² Australian Government, *supra* note 2 at 2.

³³ Keith Crane, et al., *The Effectiveness of China's Industrial Policies in Commercial Aviation Manufacturing* (Rand Corporation, 2014) 39.

³⁴ Government of Canada and Government of the People's Republic of China, Economic Partnership Working Group, *Canada-China Economic Complementarities Study* (2012). Whether the ChAFTA will benefit aerospace equipment sales and service contracts may depend on the terms of any existing co-production arrangements for Canadian and Australian firms in China.

FOREIGN INVESTMENT

Contrary to some expectations, the ChAFTA does not appear to have achieved as substantial a lowering of investment barriers as desired by the Chinese. Outward investment has become a priority for China, since it is interested in gaining expertise and technologies, and acquisitions of foreign companies are considered as means to achieve this goal. As mentioned previously, the Foreign Investment Review Board screening threshold for private investments in non-sensitive sectors will be raised from AU\$248 million to AU\$1,078 million. This change brings the threshold for Chinese private investments on par with those from Japan, South Korea, New Zealand, and the United States. In addition, the ChAFTA sets the screening thresholds for Chinese investments in agricultural land and agribusiness at AU\$15 million and AU\$53 million, respectively.³⁵ Similar thresholds for agricultural investments were included in Australia's trade agreements with Korea and Japan, which recently entered into force in December 2014 and January 2015, respectively.³⁶ However, all investments by foreign state-owned enterprises and in sensitive sectors will remain subject to review by the FIRB, a barrier that the Chinese government had hoped to remove.³⁷ Moreover, no changes to existing restrictions on foreign investment in residential real estate were announced in

³⁵ Australian Government, *supra* note 2 at 6.

³⁶ See: Australian Government, "Fact Sheet: Trade in Services and Investment," *Japan-Australia Economic Partnership Agreement website*, 3-4: <http://www.dfat.gov.au/fta/jaepa/fact-sheets/downloads/fact-sheet-trade-in-services-and-investment.pdf>; Australian Government, "Fact Sheet: Investment," *Korea-Australia Free Trade Agreement website*: <http://www.dfat.gov.au/fta/kafta/downloads/fact-sheet-investment.pdf>

³⁷ Australian Government, *supra* note 2 at 6.

the ChAFTA Key Outcomes and, more importantly, all investments must originate directly from China in order for the reduced thresholds to be applicable. As a result, Chinese private investors who structure their investments through offshore vehicles may not benefit from these arrangements.

In other words, the ChAFTA continues to uphold the distinction that many Western countries have made between privately- and state-owned foreign enterprises, and between sensitive and non-sensitive sectors, in their investment regulations. In this respect, the provisions bear some resemblance to the December 2012 restriction imposed by the Canadian government on new investments in the Canadian oil sands, where state-owned enterprises were prohibited from obtaining a controlling interest, except in “exceptional circumstances”.³⁸ Improving investor access and regulatory treatment for its SOEs has long been a pillar of the Chinese government’s efforts to expand outward investment, which makes the absence of any concessions in this area all the more surprising. However, the reported withdrawal of Chinese demands on SOE treatment in exchange for maintaining tariffs in sensitive agricultural sectors, discussed earlier, suggests that this position could be malleable. That China would concede on this long-held goal shows, as mentioned earlier, its strong motivation to protect domestic industries and reduce reliance on foreign imports, especially to achieve food security.

³⁸ Prime Minister of Canada, “Statement by the Prime Minister of Canada on Foreign Investment,” *Office of the Prime Minister* 7 Dec. 2012: <http://www.pm.gc.ca/eng/news/2012/12/07/statement-prime-minister-canada-foreign-investment>

As in Canada, Chinese investment has been a controversial topic in Australia. Public opinion is divided, with a 2014 poll by the Lowy Institute finding that 56% of respondents believe their government allows too much investment from China. Investments in the agriculture sector are particularly sensitive, with 63% and 60% of respondents indicating they are against the foreign investments in this sector in 2012 and 2014, respectively.³⁹ Indeed, the Australian government has been criticized for concessions in this area, including a well-publicized incident where Prime Minister Abbott was challenged by popular conservative radio broadcaster Alan Jones for the lack of reciprocity in the investment provisions; Jones was unhappy that Australians could not buy agricultural land in China, as Chinese investors could in Australia, under the agreement.⁴⁰ Nonetheless, public sentiment toward China appears to have warmed recently, with the latest Lowy poll reporting a rise in overall positive perceptions.⁴¹ The fact that the ChAFTA has had bipartisan support, having been initiated under a Coalition government and continued by its Labor successors, may be one factor facilitating the adoption of the agreement.

Controversy has also surrounded the investor-state dispute settlement (ISDS) provision of the ChAFTA, due to some speculation that the agreement could make the Australian government liable to foreign investors for enacting legislation detrimental to their investments.⁴²

³⁹ Lowy Institute for International Policy, *The Lowy Institute Poll 2014* (Sydney, Australia: Lowy Institute, 2014) 6-11.

⁴⁰ Daniel Hurst, “Tony Abbott tries to ease fears over China trade deal after Alan Jones tirade,” *The Guardian* 17 Nov. 2014: <http://www.theguardian.com/australia-news/2014/nov/17/tony-abbott-tries-to-ease-fears-over-china-trade-deal-after-alan-jones-tirade>

⁴¹ Lowy Institute, *supra* note 39 at 5.

⁴² Gareth Hutchens, “ISDS: Chinese corporations could sue,” *The Land* 19 Nov. 2014: <http://www.theland.com.au/news/agriculture/general/news/isds-chinese-corporations-could-sue/2717700.aspx?storypage=0>

These concerns are not isolated to the ChAFTA, having previously emerged in Canada with the ratification of the Canada-China Foreign Investment Promotion and Protection Agreement (FIPA). It is important to note that, like the Canadian case, the Australian government has expressly included safeguards that will preserve its ability to regulate in the public interest.⁴³ Without the full text of the agreement, however, it cannot be determined whether the ISDS mechanism would allow for actual litigation, as opposed to a form of international arbitration, which is more commonly adopted in various bilateral investment treaties and investment protection agreements.

⁴³ Australian Government, *supra* note 2 at 6.

TRADE IN SERVICES

The ChAFTA incorporates a number of provisions that will facilitate the trade in services between the two countries. The Australian government notes that China is its largest market for services, with almost AU\$7 billion in exports in 2013.⁴⁴ As part of the Chinese government's plans to modernize the economy, it has actively encouraged a transition away from exports and manufacturing toward greater domestic consumption. The emphasis on consumption, along with the growing Chinese middle class, is expected to galvanize the demand for services in China over the next several years. Greater competition from Australian service providers also has the benefit of encouraging domestic enterprises to adopt innovative technologies and business practices; the efficiency of Chinese businesses, particularly state-owned enterprises, has become a major concern of the central government.

Highlights of the agreement include greater access to the Chinese market for Australian providers of legal, educational, tourism, and health services. The ChAFTA will allow Australian law firms to establish commercial associations with Chinese law firms in the Shanghai Free Trade Zone to offer Australian, Chinese, and international legal services. It will also enhance the mobility of lawyers through the facilitation of professional secondments, a move long anticipated by the Law Council of Australia.⁴⁵

⁴⁴ Australian Government, *supra* note 2 at 3.

⁴⁵ Australian Government, "Fact Sheet: Trade in Services," *China-Australia Free Trade Agreement website*, 1: <http://www.dfat.gov.au/fta/chafta/fact-sheets/fact-sheet-trade-in-services.pdf>

Complementing the additional advisory work that will be generated through the newly-liberalized trade and investment between the two countries, these changes will be a boon for the legal profession. As well, it should be noted that increased cross-border integration in professional services could raise expectations in future negotiations regarding labour mobility and mutual recognition of credentials, possibly setting a precedent for new trade agreements with China. Already, the ChAFTA will provide guaranteed access for intra-corporate transferees to China who are Australian citizens for up to three years and addresses recognition of higher education qualifications.

Both Canada and Australia are major exporters of educational services to China, which include international students studying in Canadian or Australian schools and universities and the delivery of educational services in China by domestic institutions. For Australia, these exports were worth approximately AU\$4 billion in 2013, according to its Department of Foreign Affairs and Trade.⁴⁶ The agreement will enhance the marketing of Australian educational services to the Chinese public by listing 77 private higher education institutions on a Chinese Ministry of Education website, in addition to the 105 public and private institutions already listed. As well, both sides agreed to sign MOUs aimed at improving mutual recognition of higher education qualifications and to promote exchange opportunities for students and scholars.⁴⁷ These changes are intended to improve the

profile of Australian education in China, an aspect where both Australian and Canadian institutions are currently at some disadvantage relative to their European and US counterparts, which are traditionally more established in international markets. Visibility is thought to play a role in the choice of overseas institutions; the Australian government noted that 88% of higher education students from China study at institutions found on the Ministry of Education website.⁴⁸

According to a report commissioned by Department of Foreign Affairs, Trade and Development, China is Canada's single largest market for education exports, representing an estimated \$1.8 billion worth of trade in 2010.⁴⁹ Given the prospects for further growth, the Canadian government has identified this sector as a top trade priority. During Prime Minister Harper's visit to China in 2012, education was declared a "strategic priority of the bilateral relationship" and attention was placed on increasing opportunities for academic exchanges between the two countries.⁵⁰ Meanwhile, the Advisory Panel on Canada's International Education Strategy made a number of recommendations the same year on the promotion of Canadian education in priority markets, including China.⁵¹ The report also recognized the importance of e-communication as a medium for marketing to prospective international students, an approach clearly endorsed by the ChAFTA. The MOUs signed between the University of Alberta and a number of Chinese universities during the Prime

⁴⁶ Australian Government, *supra* note 45 at 2.

⁴⁷ Australian Government, *supra* note 45 at 2.

⁴⁸ Australian Government, *supra* note 45 at 2.

⁴⁹ Roslyn Kunin & Associates, Inc., *Economic Impact of International Education in Canada—An Update* (Vancouver, BC: RKA, Inc., 2012) 36.

⁵⁰ Prime Minister of Canada, "Joint List of Outcomes of Canadian Prime Minister Stephen Harper's Visit to China," *Office of the Prime Minister* 9 Feb. 2012: <http://pm.gc.ca/eng/node/24910>

⁵¹ Canada, Advisory Panel on Canada's International Education Strategy, *International Education: A Key Driver of Canada's Future Prosperity* (Ottawa, ON: Minister of International Trade, 2012) 45-53.

Minister's November 2014 visit to China are an example of ongoing Canadian efforts to develop educational relationships.⁵² However, Canada has yet to achieve the comprehensive bilateral educational relationship called for by the Advisory Panel and which would be facilitated by provisions like those in the ChAFTA.

Lastly, Australian businesses are well-placed to benefit from China's changing demographics in two further ways. With a vast aging population, concerns exist that China's health care system lacks sufficient resources to meet the needs of its elderly. Perhaps partly due to these concerns, the Chinese have permitted private Australian firms to establish wholly-owned hospitals and aging care homes in China under the ChAFTA, which may also bolster the domestic health care reform agenda of the Chinese government by introducing Australian expertise. Furthermore, the agreement allows for the establishment of Australian-owned hotels, restaurants, and subsidiaries of travel agencies in China, which will cater to its growing middle class.⁵³ Outbound tourism alone has risen dramatically in China over the past few years, with an estimated 100 million outbound visitors in 2013, a number that is expected to double by 2020.⁵⁴ Supplementing these provisions, a new air services agreement with China was announced on January 23 that will increase weekly flight seats between Australian

gateway cities and Beijing, Shanghai, and Guangzhou by almost 18%. Australia is aiming to triple this capacity in the next two years with additional increases in seat quotas, a strategy that invests in the potential of travel and tourism in Asia.⁵⁵ By securing favourable conditions to expand the trade in services, Australia will be prepared to capitalize on the next stage of China's economic transition. The broader Australian approach can serve as an instructive model for any future Canada-China discussions, particularly on education and health services, even though these sectors are not normally part of Canadian trade negotiations, being predominantly provincial responsibilities.

⁵² Geoff McMaster, "Four agreements signed to strengthen ties between UAlberta and China," *UAlberta News* 6 Nov. 2014: <http://uofa.ualberta.ca/news-and-events/newsarticles/2014/november/four-agreements-signed-to-strengthen-ties-between-ualberta-and-china>

⁵³ Australian Government, *supra* note 2 at 4.

⁵⁴ CLSA, "Outbound Chinese tourists to double by 2020 propelling global growth in travel related sectors," 20 Jan. 2014: <https://www.clsa.com/about-clsa/media-centre/2014-media-releases/outbound-chinese-tourists-to-double-by-2020-propelling-global-growth-in-travel-related-sectors.php>

⁵⁵ Australian Minister for Infrastructure and Regional Development, "New air deal with China: 2015 off to a flying start for Australian tourism," *Minister for Infrastructure and Regional Development* 23 Jan. 2015: http://www.minister.infrastructure.gov.au/wt/releases/2015/January/wt013_2015.aspx

chinese reaction

Reactions from the Chinese media have been extremely positive, touting the free trade agreement as a step toward more comprehensive and cooperative relations with Australia. A commentary in *Xinhua*, for instance, referred to the agreement as “historic” and an “epochal, twin upgrade of bilateral cooperation,” possibly an indication of the strategic significance that the Chinese government attributes to the ChAFTA.⁵⁶ President Xi Jinping’s own remarks during his visit to Australia emphasized the need for closer strategic relations.⁵⁷

There are also indications that China views its efforts to establish bilateral and regional free trade agreements, such as the recently-signed China-Korea and the proposed China-Japan-Korea FTAs, as a response to the ongoing negotiations for the Trans-Pacific Partnership (TPP). In an editorial published by the *People’s Daily*, the ChAFTA was explicitly called “another counterbalance to the TPP.”⁵⁸ Underlying the economic benefits of free trade with Australia, then, Beijing seems to be motivated by long-term political considerations, as well.

The positive official Chinese reaction reported in the media may or may not reflect the sentiments of the general Chinese public. As such, it should not obscure the

reality that neither Chinese negotiators nor regulators in charge of implementation and enforcement are immune from parochial and sometimes protectionist concerns. The exceptions won by China attest to the salience of these ongoing pressures and the attendant limits to trade liberalization.

lessons for canada

The conclusion of the ChAFTA negotiations has raised the stakes for a potential Canada-China trade agreement that could deliver many of the same advantages granted to Australian industries. Given the similarities between Australia and Canada in their trade relationship with China, it is likely that Canada will face many of the same challenges in achieving its own free trade agreement with China, should the government choose to pursue that option. The implementation of the ChAFTA provides an opportunity to observe and learn from the Australian experience, in terms of the negotiations, priorities of the Chinese side, and the role of public perceptions of the agreement.

As discussed previously, the ChAFTA represents a further step in China’s integration with major developed economies, albeit still bilaterally rather than multilaterally.

⁵⁶ Deng Yushan, “Commentary: Historic breakthroughs in China-Australia win-win cooperation,” *Xinhua* 17 Nov. 2014: http://news.xinhuanet.com/english/indepth/2014-11/17/c_133794929.htm

⁵⁷ Mark Kenny, “Chinese President Xi Jinping urges Australia to embrace ‘harmonious’ relationship with Beijing,” *The Sydney Morning Herald* 18 Nov. 2014: <http://www.smh.com.au/federal-politics/political-news/chinese-president-xi-jinping-urges-australia-to-embrace-harmonious-partnership-with-beijing-20141117-11ohwq.html>

⁵⁸ Ma Xiaochun and Liang Jun, “China-Australia FTA another counterbalance to TPP,” *People’s Daily Online* 25 Nov. 2014: <http://en.people.cn/n/2014/1125/c98649-8813436.html>

While the Australian business community has expressed overall support and great anticipation for the agreement, it remains to be seen whether the legal provisions of the ChAFTA will be fully respected in the actual implementation. At least one commentator has cautioned that the Chinese government “has frequently resorted to using ad hoc regulatory hurdles” to subvert its other trade agreements, for political or protectionist purposes.⁵⁹ For this reason, and while it can be argued that China is not alone in such practices, particular attention should be placed on the management of non-tariff measures and the ChAFTA’s impact in this respect. Previous experience has shown that Chinese NTMs in conjunction with broader, more systemic or institutional constraints, can be more consequential and costly than tariffs alone. Canada would do well to observe the outcomes produced by the review mechanism for NTMs, announced in the agreement.

At the same time, it is evident that the Declaration of Intent reflected a less comprehensive agreement than originally desired, leaving aside the more problematic aspects of the deal for now. Both sides agreed to review the agreement in three years, and it will be interesting to see if there will be a change in approach from either side on the issues of SOE investment and tariffs on sugar and rice, for example.

⁵⁹ John Lee, “A reality check for the China-Australia FTA,” *Business Spectator* 18 Nov. 2014: <http://www.businessspectator.com.au/article/2014/11/18/china/reality-check-china-australia-fta>

As we have seen, the ChAFTA has been instructive about the priorities of the Chinese leadership. We expect to learn more about the negotiation process in the coming months, as more details are revealed closer to the ratification of the deal. Some of the issues important to Canada—agricultural exports, wood exports, and foreign investment—have posed difficulties in the ChATFA negotiations. It is possible, though, that Canada might benefit from the concessions that have already been made to Australia, providing it with a potential “second-mover” advantage to free trade negotiations with China if such an option were to be pursued. This factor arguably influenced the Australian government’s own approach to the negotiations, as they were able to point to clear targets on dairy tariffs based on the China-New Zealand FTA.⁶⁰ In the same way, Canada could anchor its own position to the ChAFTA.

However, one significant disadvantage to Canadian exporters is the preferential advantage that their Australian competitors will enjoy in the meantime. Once the benefits of the ChAFTA begin to be realized, the patterns of international trade and the market share of Australian firms may be “locked-in”, making it difficult for a subsequent Canadian trade deal to dislodge. Canada’s experience following the implementation of the US-Korea Free Trade Agreement in 2012 can

⁶⁰ Cai, *supra* note 20.

be considered an example of this phenomenon. The US-Korea FTA contributed to market share losses for Canadian pork and beef exporters through a series of tariff reductions for American products.⁶¹ The recent Canada-Korea agreement, the Canadian response in an era of competitive trade liberalization, allowed the agricultural industry to recover some market share and forestalled a further enlargement of the competitive gap.⁶²

While the news of the ChAFTA has doubtlessly bolstered arguments for Canada's own free trade agreement with China, the domestic political challenges facing such an endeavour are clearly significant. As in Australia, public perceptions of China in Canada are mixed, and the parallels here should also prove instructive.

Surveys have shown that although Canadians recognize the economic opportunities presented by engagement with China, they remain somewhat uncomfortable with the prospect of increased economic ties, particularly on the topic of foreign investment. The 2014 Alberta Survey conducted by the China Institute found that while 53% of respondents agreed that "China is a stable trading partner for Alberta" and 60% agreed that "Alberta should promote energy exports to China", 78% thought China's human rights record was a consideration for conducting business and 69% disagreed that full ownership by Chinese investors was acceptable.⁶³ Likewise, the 2014

National Opinion Poll by the Asia Pacific Foundation recorded significant opposition to a free trade deal with China, with 50% of respondents opposing such a deal and greater opposition among older Canadians than any other time in the past.⁶⁴

Judging from the heavy public criticism accompanying the ratification of China-Canada FIPA, the reality is that proposals for a more comprehensive trade relationship with China will remain controversial, at least in the near to medium term. In Australia, the government has made efforts to address public concerns and improve understanding about Chinese trade and investment. Prime Minister Abbott, for instance, has sought to dispel misperceptions about China's SOEs,⁶⁵ while initiatives such as the *Demystifying Chinese Investment in Australia* website have been launched to better inform the Australian public.⁶⁶ Yet, it is important to remember that another factor favouring the ChAFTA was the presence of bipartisan support for the deal in Australia. The negotiations for the agreement began in 2005, under the tenure of Prime Minister John Howard, and later Labor PMs Kevin Rudd and Julia Gillard had been supportive of the process. The absence of a similar level of broad, cross-partisan and cross-regional support in Canada may be one political obstacle to such an agreement.

⁶¹ John M. Weekes, Al Mussell, and David McInnes, *Leveraging Trade Agreements to Succeed in Global Markets* (Canadian Agri-Food Policy Institute, 2014) 3-4.

⁶² Rod Nickel, "For Canadian farmers, South Korea deal a chance to catch up," *Reuters* 11 Mar. 2014: <http://www.reuters.com/article/2014/03/11/canada-korea-trade-agriculture-idUSL2N0M80VH20140311>

⁶³ China Institute at the University of Alberta, *Albertans' Views on China* (Edmonton, AB: China Institute, 2014) 4.

⁶⁴ Asia Pacific Foundation of Canada, *2014 National Opinion Poll: Canadians' Views on Asia* (Vancouver, BC: Asia Pacific Foundation of Canada, 2014) 3-8.

⁶⁵ Katharine Murphy, "Tony Abbott says China's state-owned enterprises are welcome in Australia," *The Guardian* 11 Apr. 2014: <http://www.theguardian.com/world/2014/apr/11/abbott-says-chinas-state-owned-enterprises-welcome>

⁶⁶ *Demystifying Chinese Investment in Australia website*, <http://www.demystifyingchina.com.au/>

While there have been no negotiations toward a comprehensive Canada-China trade agreement, the ChAFTA and the 2012 Economic Complementarities Study offer starting points for consideration. The impacts of the ChAFTA on Canadian exports will be fully apparent only after implementation, but it is clear that the risk to Canada's competitiveness in China is only going to increase over time. The ChAFTA may not be a perfectly "transplantable" template for a potential Canada-China accord. Its exemptions in the agriculture and forest products sector would not be attractive to Canadian producers, and the progress made on NTMs in other areas is arguably modest. Nevertheless, its completion is a significant development that matters to Canada, not only due to the increased competition it will introduce for Canadian exporters, but also the example it presents of a comprehensive, strategic approach to economic relations with China. The ChAFTA targets many of the same sectors identified under the Complementarities Study, and both documents provide clear goals with which Canada can approach future negotiations. Given that the ChAFTA took nine years to negotiate, the need for an expeditious effort to secure trading conditions that are, at least, on par with our competitors is greater than ever. ■

acknowledgements

I would like to thank all the reviewers of this paper for their guidance and comments, which not only improved the final draft but also taught me much. The team of reviewers included, at the China Institute, Senior Fellow Ron MacIntosh; Research Associates Ruotao Tang and Lifang Li; Research Fellows Daouda Cissé and Nong Hong; and Director Gordon Houlden, as well as Professor Cheng Li of the Institute of Economics, Chinese Academy of Social Sciences and Professor Linda Reif of the Faculty of Law, University of Alberta. I am deeply grateful to have had the benefit of the expertise of all reviewers. Any errors and faults are entirely my own and not those of the reviewers.

The publication of this paper would not have been possible without the contributions of my colleagues at the China Institute. My thanks go out to Megan Yu and Kai Valdez Bettcher for the editing and proofing, and Vivian Mak for the layout and formatting, of the paper.



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