Preliminary analysis of the Memorandum of Understanding on the Investment Facilitation Arrangement and the Investment Chapter of the China-Australia Free Trade Agreement June 2015

Summary

This preliminary analysis deals with the lopsidedness of the agreement in relation to labour mobility and market access for foreign investment, and the fact that the ISDS clauses in the agreement are incomplete and therefore ambiguous.

The MoU Investment Facilitation Agreement for temporary migrant workers is separate from the text of the trade agreement. It applies only to Australia. Opportunities for Australian nationals to work in China are contained only in the trade in services chapter and are very specifically restricted.

The MOU permits companies of over A$150 million with **15%-50% Chinese equity** (see definitions below) investing in selected areas of infrastructure to apply for an Investment Facilitation Agreement and a Labour Agreement with Australian government departments which would enable them to employ temporary migrant workers. **Labour market testing of the local labour market to see if local labour is available is optional, not mandatory**. This is a very low threshold that would include most construction and mining projects. The low minimum level of Chinese equity means that these provisions could also apply to majority Australian-owned companies with a 15-40% Chinese shareholding.

The project company can negotiate the numbers, occupations to be covered, English language requirements, qualifications and experience, and **calculation of the terms and conditions of the Temporary Skilled Migration Income Threshold**. **This means that the minimum wage to be paid to the temporary migrant workers will be the subject of negotiation between the project company and the Department of Immigration and Border Protection. The minimum wages and conditions are meant to conform to Australian industrial law, but may be below the actual market rates paid to Australian workers in the industry. There is also no upper limit on numbers of temporary workers. This means that a large proportion of the workforce could be brought in by the investor. Their employment would be totally dependent on that employer, they would be isolated from the rest of the Australian workforce and would be vulnerable to exploitation.**

Chapter 9 Investment chapter is also lopsided, in that Australia has given Chinese investors far more favourable access to invest in Australia than Australian investors will have in China. And some important provisions are not complete, but have been shunted off to a committee to review in three years' time. The lopsided market access and the failure to finish the negotiations look as if the Australian government was desperate to seal the deal at any price, and that China was successful in defending many of its existing limitations on foreign investment.

Detailed analysis

Memorandum of Understanding on an Investment Facilitation Agreement

Found at http://dfat.gov.au/trade/agreements/chafta/official-documents/Documents/chafta-mou-on-an-investment-facilitation-arrangement.pdf

This is a document separate from the text of the trade agreement, but was negotiated alongside the trade agreement. It is not legally binding in the same way as a trade agreement, but is an agreement between the governments which can be changed through diplomatic channels.

There is no equivalent agreement for Australian workers to work on projects in China. Provisions for Australian nationals to work in China are contained only in the Trade in Services chapter, and are restricted to senior managers and other very specifically skilled workers in specific service industries.

Article1

This document establishes special arrangements between the Department of Immigration and Border Protection of Australia or its equivalent, and a project company eligible for such arrangements

Article 2a)

The project company will be eligible where either a single Chinese enterprise owns 50% or more of the project company, or where no single enterprise owns 50% or more of the project company, a Chinese enterprise holds a substantial interest in the project company**. A footnote defines a "substantial interest" as defined in Australia's foreign investment policy occurs when a single foreign person has 15% or more, or several foreign persons and any associates have 40% or more, of the issued shares, voting power, or potential voting power of the corporation**.

Article 2b)

The project company must be involved in a proposed infrastructure development project with an expected capital expenditure of A$150 million over the term of the project.

The project must be related to infrastructure development in food and agribusiness, resources and energy, transport, telecommunications, power supply and generation, environment or tourism.

The company must registered as a business in Australia, complying with Australian laws and regulations including workplace law licensing regulation certification standards, and recommendation by the China International Contractors Association and DFAT.

Article 4: 20 days after advice from the project company, DFAT will assess that the project meets the relevant criteria and will negotiate the following conditions with the project

company for the employment of temporary workers on the project. These include the occupations to be covered, English language requirements, qualifications and experience, and calculation of the terms and **conditions of the Temporary Skilled Migration Income Threshold**. **Note that this means that the minimum wage to be paid to the temporary migrant workers will be the subject of negotiation between the project company and the Department of Immigration and Border Protection, and may not be equivalent to the market rate paid to Australian workers in the industry,**

Article 6

Following agreement on matters in article 4, an Investment Facilitation Agreement will be concluded between the department and the project company, which will set out guaranteed occupations and the terms and conditions against which overseas workers can be nominated for a temporary skilled fees are for the purposes of the eligible project. The agreement will record any requirements and conditions that the project company must comply with. There will be no requirement for labour market testing to enter into an IFA

Article 7

IFAs will be valid for four years with the possibility of extension.

Article 8

Once the IFA is executed, the project company can enter into a Labour Agreement with the department. At this point there may be a requirement for labour market testing, to see if there are sufficient suitable workers in Australia, but it is not mandatory.

Articles 9 to 11 deal with processing of these applications and requirements to comply with Australian laws including workplace law, work safety law and licensing regulation and certification standards.

Article 12

The operation of this MOU will be reviewed after two years, and changes can be made at any time by agreements between the parties through diplomatic channels

China FTA investment Chapter 9 Summary: lopsided and unfinished

http://dfat.gov.au/trade/agreements/chafta/official-documents/Documents/chafta-chapter-9-investment.pdf

The investment chapter is lopsided, in that Australia has given Chinese investors far more favourable access to invest in Australia than Australian investors will have in China. And some important provisions for ISDS are not complete, but have been shunted off to a committee to review in three years' time. The lopsided market access provisions and the failure to finish the ISDS negotiations look as if the Australian government was desperate to seal the deal at any price, and that China was successful in defending most of its existing limitations and regulations on foreign investment.

Lopsided market access

Articles 9.3.1-9.3.5 say that Australia is obliged to give national treatment and non-discrimination to the establishment and acquisition of Chinese investment, as well as to ongoing investments. China does not have this general obligation for establishment and acquisition of Australian investment. This means there can still be limitations, like requirement for joint ventures, for new Australian investments in China, except for some service sectors which are discussed below.

Article 9.5.2 says China has also exempted from the investment chapter all of its other existing limitations on investment measures (known as nonconforming measures) across the economy.

However there is some relaxation of these measures listed in its positive list for chapter 8, the Trade in Services chapter. This list is in Annex III of the agreement. A positive list means China includes only those services which it has decided to include in the agreement. Some of the services included in the list have less limitations for foreign investors in some sectors. Some examples of the removal of restrictions for investment in services are in transport, tourism, hospital, aged care, education, financial and insurance services. These are the "breakthroughs" in market access for services which the Australian government is promoting.

Australia has used a negative list for Annex III for both investment and services, which means everything is included (including future measures) unless specifically excluded, and its nonconforming measures are therefore far fewer than China's.

Unfinished ISDS provisions

The ISDS section gives foreign investors the right to sue governments over changes in domestic legislation which they can argue are harmful to their investments, and spells out a detailed procedure for this. But the chapter is unfinished, with important definitions of the criteria that can be used to sue governments to be determined by review process in three years' time (Article 9.9). These include two of the most controversial aspects of ISDS, the definition of indirect expropriation and the definition of minimum standard of treatment for foreign investors. These are provisions often used to sue governments under other agreements. There is a "safeguard" clause to protect public interest measures from ISDS, but because of the unfinished clauses, it is not clear how this would work (Article 9.11.4).

The procedures for ISDS cases are less transparent than other agreements, notably the Korea FTA. Article 9.17.2 says there is no obligation to make ISDS hearings and documents public, which is a backward step, and a side letter referred to in Article 9.12.9 says neither government will apply the UNCITRAL new rules on transparency, which do require hearings and documents to be made public.

The Australian Parliament will be asked to vote in the next few months for the implementing legislation for this agreement without having the details of what these future provisions may be. This is like asking Parliament to sign a blank cheque for an agreement which has been badly negotiated.