

Scope of the China – Australia FTA Investment Chapter

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The China-Australia FTA (ChAFTA) Investment Chapter is unusual as it contains a relatively limited set of provisions. It does not contain standard investment protections such as expropriation or fair and equitable treatment. These protections are left for a future review and forward work program. (Note however that the existing bilateral investment treaty does contain these protections – see further here).

Another striking outcome is that Australia and China have made different levels of commitment on the key non-discrimination and ‘market access’ obligations of National Treatment and Most-Favoured-Nation (MFN) Treatment. While Australia has made detailed specific investment commitments, the detail of China’s commitments are left to be dealt with in the future forward work program.

For Australia the National Treatment obligation – which guarantees foreign investors treatment no less favourable than domestic investors – applies to all stages of investment, including the ‘pre-establishment’ stage where an investor is seeking to make an investment. However for China, the National Treatment obligation only applies to the ‘post-establishment’ stage, which is after an investment has been made.

The MFN obligation – which guarantees investors treatment no less favourable than any other foreign investors – is critical to ensuring that the agreement remains up to date. It means that Australian or Chinese investors will get the benefit of any better commitments which the countries make in future agreements.

Unlike National Treatment, the MFN obligation applies to all stages of investment, including where investors are seeking to make an investment, for both China and Australia. Australia’s commitments are subject to specific qualifications and carve-outs contained in detailed schedules. As China does not have detailed schedules it has taken a different approach and effectively imports the qualifications and carve-outs scheduled in other similar agreements. The detail of China’s commitments is subject to the future work program.

The full text of ChAFTA and further information is available on DFAT’s website.



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