

Joint Standing Committee on Treaties
Parliament House
Canberra ACT 2600
email: jsct@aph.gov.au

**Subject: Submission to The Joint Standing Committee on Treaties –
Australia China FTA**

Dear Committee Secretariat

I have prepared this Submission to express concern about some of the key negotiated outcomes embedded in the trade agreement between Australia and China (ChinaFTA).

Appreciate if you would please take account of the following, particularly, paragraphs (1), (2) and (3). These suggestions could contribute towards greater accountability and transparency and may assist in building trust.

Recording the Scope, Interpretation and Implementation Obligations.

I would urge JSCT as well as going through this important deliberative process to prepare, as part of its Report, a specific section that formally records the public service and the government's responses to *the scope, interpretation and implementation obligations of the Agreement*. A record such as this should be capable of serving as a concise and clear formal record of evidence given and provide a failsafe 'living' record after the 'ink is dry' on JSCT's deliberations. (Treaties such as this are promoted as 'living' agreements created with consultative mechanisms to develop over time.)

The reason for requesting this approach is that the claims and counterclaims are all about arguments and interpretations of the 'meaning' embedded in the text. This record is normally scattered throughout the report. Simply relying on registering differences of opinion, robust though this process might be, and then recording the various political 'recommendations' in JSCT's Report, is not enough when binding legal agreements are made on behalf of Australians.

Evidence given by negotiators, the implementing departments and the government proposing this Treaty is important *evidence* that must be able to be easily identified; drawn upon for implementation when the Treaty is signed; and, provide guidance into the future. This information could be particularly useful if disputes arise externally or from the Parties to the Agreement and also for those wishing to use the trade opportunities in Treaty. Please consider the following options:

1. Evidence given by the Negotiators on how to interpret the text is extremely important. Including political understandings (formal and informal) reached during negotiations. This evidence informs and gives meaning to claims made on the reach or scope of these legally binding obligations. Also, the

claims made by government as to the effect of the 'text' are also significant. *This is the evidence that has special status. It is or should be the basis for implementation and needs to be forensically captured and put into a form that will legally and institutionally define the boundaries of Australia's implementation obligations.*

2. To assist JSCT's deliberations it may be appropriate for the Chair to ask the Secretariat to also provide The Committee with information on: *Measures other States take to define and ensure the legal and political interpretation made in accepting FTA obligations is implemented and mainstreamed into bureaucratic practice.*
 - For example, US legislators are better equipped to define collectively how they view the text, how it should be implemented and how it will not be interpreted. Some of this process is imbedded in the Mandate given to the powerful Trade Advisory Committee to Report to Congress and The President. This political dialogue more effectively prescribes and proscribes the intention of the text in advance, before ratification and signals the limitations to any future legal or diplomatic dispute.
 - Another option often used by the EU is a relatively simple and useful example of transparency and accountability. The EC negotiator's formal Memos to Members identify and also interpret the scope of all new obligations contained in the draft Treaty.¹ This information assists parliamentary deliberations.
 - This strategic information advises exactly how the text should be interpreted and obligations and understandings agreed to achieve the EU's national interest priorities – even on issues where the actual subject matter is not specifically identified in the text.
 - Explains in detail each specific part(s) and/or annex, footnote of the text triggering obligations that differ from or are greater than existing WTO or national obligations.
3. DFAT has formal whole-of-government carriage for national interest reporting to JSCT. Also DFAT has already issued formal papers containing advice: about the obligations made; and, to address concerns and/or claims made by Australians of the problems with the China FTA. To facilitate JSCT deliberations DFAT could be asked to explain the claims it has publically made (and in its whole-of-government role) to prepare information similar to the EC Memo identified above.²

¹ See <http://keionline.org/node/1013> and this link provides the illustration of how information provides capacity to read the text for its full effect - scope of the treaty and interpretation of what is included. See Sub 10.2 of http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/jsct/21november2011/subs.htm

² Details and the structure of the EC Memo can be found at <http://keionline.org/node/1013>

To ensure transparency and to improve understanding, it would be useful to also include the following guidance in preparing the information referred to in Para 3. For example, if DFAT's assessment of **"no change to existing obligations"** refers back to an obligation contained in the AUSFTA, the legal and/or implementing consequences of that obligation should also be fully explained. The rationale for requesting this information is because the AUSFTA obligations have never been fully analysed in the manner indicated in paragraph 2. This approach would help develop a better understanding of the scope of obligations and opportunities, particularly if the specific ChinaFTA text/obligation has been identified as problematic by others.

Finally, I wish to also formally *register my support for the submissions put forward by the Australian Fair Trade & Investment Network (AFTINET)* as I have been following closely this NGO's attempts to influence the outcome of these negotiations.

This submission represents my personal views and should not be treated as confidential.

Anna George