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**IN THE SHADOW OF THE AUSTRALIA-CHINA FREE TRADE
AGREEMENT NEGOTIATION: OBSTACLES AND SUGGESTIONS**

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In the Shadow of the Australia – China Free Trade Agreement Negotiation: Obstacles and Suggestions

Ling Ling He*

Since the 1990s, regional trade agreements have come to complement multilateral trade agreements as a major means for promoting free trade. With free trade agreements spreading across Europe, the Americas and East Asia, China and Australia entered into negotiations for an Australia – China free trade agreement (ACFTA) in 2005. So far, fourteen rounds of talks have been held. However, negotiations between the two countries seem to have come to a standstill with no substantial progress has been made since December 2008.

This article seeks to explain why the negotiations of the ACFTA have been extremely difficult. It points out that while Canberra wants to gain more market access in China for Australian firms, particularly access to agricultural and foreign direct investments sectors, Beijing is more interested in seeking a stable supply of energy resources and raw materials that China needs for her rapidly growing economy. The sticking point has been the differing approaches of the two countries by reason of their differences in level of economic development, understanding of FTA, the logistics of market and non market economies, different political systems, cultural outlook, and the issue human rights. There has also been stubborn resistance in some quarters to a FTA in both countries: in China, against further liberalisation of the agricultural and services sectors beyond the level of her World Trade Organisation (WTO) commitments; in Australia against the potential influx of cheap Chinese goods as well as the risk of losing control of its Resources industry. Additional Australian concerns include China's poor record on environmental and food safety standards. As a means of overcoming these hurdles, the paper suggests the need for a period of adjustment of the respective markets in the sensitive areas of agriculture, and the services and investment markets. This will condition the constituencies in both countries of the benefits of ACTFA. In this respect, the existing China – New Zealand FTA provisions Special Agricultural Safeguard Measures (Art 13) and Trade in Services (Arts 103-

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124) provide a useful referent. The paper suggests avenues for breaking the deadlock, and that these lie in terms of institutional changes, and a stronger commitment from the leadership of both economies.

I. Drivers of the ACFTA negotiation process

Bilateral trade between China and Australia has been growing continuously since the establishment of diplomatic relations between the two countries in 1972.¹ The *1973 Trade Agreement between the Government of Australia and the Government of the People's Republic of China* has served as the basis for the bilateral trade and economic relationship.² This has been enhanced by the conclusion of further bilateral agreements, such as the *1988 Agreement on the Reciprocal Encouragement and Protection of Investments*,³ and also by the active commitment of both Australia and China to the promotion of regional economic development through cooperation in the Asia Pacific Economic Cooperation (APEC) grouping. With China's accession to the WTO in December 2001 providing a more stable institutional framework for the bilateral trade, the two countries' commitment to a strong multilateral trading system and to their respective rights and obligations under the WTO, has represented a further enhancement in the institutional basis for the commercial relationship. Against this institutional background, the trade and investment relationship has witnessed impressive growth. By the end of 2008, China is already Australia's largest trading partner and is Australia's largest export market. Australia is also an important trading and investment partner for China. In this sense, one wonders why Australia and China are keen to enter into a free trade agreement when they have achieved so much under the WTO memberships.

A FTA is a reciprocal arrangement whereby trade barriers between participating nations are reduced or eliminated. Under the current WTO regime, FTA is subject to three sets of rules. The first is Article XXIV of GATT 1947 which, as clarified in the

¹ Dawei Cheng, 'A Chinese Perspective on the China-Australia Free Trade Agreement and Policy Suggestions' (27) 1 (2008) *Economic Papers*, 31.

² *Australia-China Free Trade Agreement Joint Feasibility Study*, Department of Foreign Affairs and Trade, (2005), available at: <http://www.dfat.gov.au/geo/china/fta/index.html> (accessed 12 April 2010)

³ *Ibid.*

Understanding on the Interpretation of Article XXIV of the GATT 1994, provides for the formation and operation of customs unions and FTA on trade in goods. Secondly is the so-called “*Enabling Clause*”, permitting preferential trade arrangements in trade in goods between developing country Members. The “*Enabling Clause*” was officially called the “*Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*”, which was adopted under GATT in 1979 and enables developed members to give differential and more favourable treatment to developing countries, e.g. preferential tariff treatment. Thirdly is GATS Article V - Economic Integration - governs the formation of FTA in the area of trade in services. The unique nature of FTA is that it allows each member to determine its own external trade barrier against non-FTA members independently, including WTO members. In this sense, FTA seems at odds with the Most-Favoured-Nation (MFN) clause of WTO. The draftsmen of the GATT and WTO were well aware of this and therefore, created several conditional exceptions for FTA as three rules discussed above. The unique result of such accommodation of FTAs by the WTO agreements is that it enables members of FTAs to set their own tariff barriers alongside, and independent of any WTO tariff schedules the FTA members may be bound by in their capacity as WTO members.

Although the elimination of substantially all trade impediments between FTA members are reduced over time and in most case, not all trade is completely free of national barriers, the unique nature of FTA that entitles its member countries more benefits comparing the WTO members promotes the proliferation of it all around the world. Some 462 regional trade agreements have been notified to the GATT/WTO up to February 2010, of which FTA and partial scope agreements account for 90%.⁴ Apart from these special FTA benefits the FTA members are entitled beyond the WTO regime; there are also some domestic concerns from both China and Australia that promote the initiation of the ACFTA, as discussed in the paragraphs below.

(I) China’s concerns

⁴ Regional Trade Agreement, WTO, 2010, available at: http://www.wto.org/english/tratop_e/region_e/region_e.htm (accessed 9 April 2010).

China's motivations in negotiating the ACFTA could be examined under two different categories. Internationally, the increasing prevalence of regional free trade agreements has been showing that developed countries are seeking to build economic spheres of influence in which they can play a dominant role. This in practice has served to boost the diversification of markets. In corresponding to this, China decided to formulate a strategic framework for market diversification with expanding of free trade agreements. More importantly, the economic uncertainties caused by the 2007 sub-prime mortgage crisis⁵ and ever-increasing trade barriers that have emerged in the EU and the US have made Australia an attractive trading partner for China. Trade frictions between China and the United States and Europe have been escalating, causing serious damage to China's exports. All this has prompted China to seek new trading partners in order to diversify the external risks involved in the process of its domestic restructuring. Domestically, China is interested in seeking a stable supply of energy resources, such as uranium and iron ore, and raw materials that China need for domestic economic development. Minerals have long been the main commodity that Australia exports to China. In 2006, Australia exported US \$8.25 billion of minerals to China, accounting for 53.6% of its total exports to China, representing an increase of 34.4% over the previous year.⁶ In the same year, Australian exports of nickel, lead, zinc and copper to China increased by 159.0%, 122.2%, 73.1% and 70.0% respectively on a year-on-year basis.⁷ Apparently, Australia is becoming increasingly prominent in China's strategy to acquire raw materials. China thus hopes to include a clause in the ACFTA to lock in supply from Australia at relatively stable prices, which had become a priority in China's foreign economic policy objectives, as well as a crucial part of national security – energy security.⁸ The other key economic concern of China is to seek for market economy status from Australia and subsequently to use this to request the EU and the US to follow this suit, which would critically ease her disadvantaged

⁵ The subprime mortgage crisis is an ongoing real estate crisis and financial crisis triggered by a dramatic rise in mortgage delinquencies and foreclosures in the United States, with major adverse consequences for banks and financial markets around the global.

⁶ Cheng, Dawei. 2008. "A Chinese Perspective on the China-Australia Free Trade Agreement and Policy Suggestions." *Economic Papers* 27(1):30-40.

⁷ Ibid.

⁸ Jiang, Yang. 2008. "Australia-China FTA: China's Domestic Politics and the Root of Different National Approaches to FTAs." *Australia Journal of International Affairs* 62(2):179-195.

position as a transitional economy for 15 years after the WTO admission⁹ in antidumping and countervailing cases.

(II) Australia's concerns

With China's increasing economic growth power, Australia is more interested in China's potential market. Compared with China's seeking in energy resources and raw materials, Australia wants to gain more market access for its agricultural and manufacturing exports. For example, Australian exports of simply transformed manufactures (STMs) and elaborately transformed manufactures (ETMs) like electrical machinery and telecommunications equipment have grown steadily; driving growth in Australia's total manufacturing exports. Strong Chinese economic growth underpins demand for STMs as key industrial inputs into the production process. Trade in ETMs has also been driven by the increasing importance of intra-industry trade; the growing sophistication of China's economy, which is creating new opportunities for niche products and services; and the expanding purchasing power of China's consumers. More importantly, Canberra takes the access to direct investments in China as a bigger priority for Australia as it negotiates a FTA, says Australia's Trade Minister Simon Crean.¹⁰

II. Issues and Obstacles in establishing the ACFTA

Australia and China share a strong and rapidly growing trade and economic relationship. Further strengthening and deepening this relationship is a major priority for both countries, with both governments committed to sustaining the impressive trade and investment performance achieved in the past two decades. China accepted Australia's proposal of the ACFTA following Chinese President Hu Jintao's visit to Australia in October 2003. A trade and economic framework agreement for the potential ACFTA was signed, and negotiation talks began in April 2005 after a feasibility study was conducted. So far, fourteen rounds of talks have been held but

⁹ Protocol on the Accession of the People's Republic of China, Section 15 (d).

¹⁰ Khaleej Times, 30/10/2009. China Wants Urgency in Australia Free Trade Talks, http://www.menafn.com/qn_news_story_s.asp?StoryId=1093279990 (accessed 19 Mar 2010)

no visible results have emerged. The paragraphs below discuss why the ACFTA negotiations have been approved so difficult.

(I) GATS

Trade in service is a crucial part in negotiating the ACFTA. Both Australia and China want to gain more market access to each other's service industries, especially the former. However, the structure of the GATS implies that trade negotiations in the services area were sectoral, and can be expected to be driven very much by the concerns and interests of the players in each industry.¹¹ Thus, although basic WTO principles, such as removing trade restrictions and non-discriminatory barriers, to market access were agreed to be legitimate objects of the ACFTA negotiation, this is on a sector-by-sector basis. Given that a sectoral approach has been chosen, the needs of service providers could be factored into specific commitments in any sectors, e.g. access to capital information, telecoms networks, or accompanying labour mobility. However, the GATS itself does not mandate any particular suggestion as to what sector has to be included in the negotiation.¹² This largely impedes the ACFTA negotiation. For example, China would like to include the market access in medical profession in the ACFTA while Australia would not want to open up the profession to Chinese trained doctors out of the profession's own self interest.

(II) TRIPS

Intellectual property right is one of the sensitive issues in the ACFTA negotiation, which blocks the negotiation progress. Similar to the problems emerged when China joined the WTO; Australia's concern is about China's poor IPR protection and enforcement. Given the somewhat abstract nature of IPR, the protection of IPR is not normally a top priority in a country's development strategy, not less in such a country like China which has been described as being large, complex, diverse and "sometimes internally contradictory"¹³ with economic conditions varying drastically as

¹¹ John H. Jackson, William J. Davey & Alan O. Sykes, Jr., *Legal Problems of International Economic Relations: Cases, Materials and Text* (American: West Group, 5th ed, 2008), p. 946.

¹² *Ibid*, p947.

¹³ CF Bergsten, B Gill NR Lardy and D Mitchell (eds), *China: The Balance Sheet: What the World Needs to Know Now About the Emerging Superpower* (2006) Public Affairs.

between the different parts of the country. Even in the United States, the protection of IPR is generally considered to be of lower priority than the resolution of such domestic problems as the prevention of murders, burglaries, robberies, thefts, arsons, assaults and distribution of narcotics and Child pornography.¹⁴ Moreover, the abstract nature of IPR alongside its importance to economic development makes IPR policing unattractive for the host country. In the face of this, overcoming the conflicts and challenges towards a more developed IPR regime, would involve incurring short-run costs, such as unemployment as labour shifts from infringing activities, as well as higher prices for consumer goods which might discourage economic development. To some extent, the lack of awareness of the close relationship between the protection of IPR and economic development has also postponed the progress for upgrading of IPR protection in China. Thus, it is not hard to understand the present neglect of intellectual property rights protection in countries all over the world.

Moreover, TRIPS itself does not “create any obligation with respect to the distribution of resources as between the enforcement of intellectual property rights and the enforcement of law in general.”¹⁵ That is to say, a WTO member state is not required to devote more resources to intellectual property enforcement than other areas of law enforcement. With this background China appears to have fulfilled its enforcement obligations as required by TRIPS Art 41(5).¹⁶ This is made clearer in the consultation process on the dispute filed by the US against China with the WTO Dispute Settlement Body on “*Measures Affecting the Protection and Enforcement of Intellectual Property Rights*”.¹⁷ Instead of general enforcement measures charges, the focus of this dispute was on the lack of compliance with specific provisions of the TRIPS, that is, the lack of criminal procedures and penalties for commercial scale counterfeiting and piracy in China. The US claimed that China had failed to make the procedures and penalties required by the first and second sentences of TRIPS Art

¹⁴ Peter K., Yu, ‘Three Questions That Will Make You Rethink the U.S.-China Intellectual Property Debate’ (2008) 7 *John Marshall Review of Intellectual Property Law* 416.

¹⁵ TRIPS Article 41 (5).

¹⁶ “It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.”

¹⁷ WTO Doc WT/DS362.

61 “available” as required by TRIPS Art 41 (1).¹⁸ However, the WTO Panel Report exercised judicial economy with respect to the claims under TRIPS Art 41 (1) and the second sentence of Art 61, and finally concluded that the United States has not established that the criminal thresholds of *Copyright Law of the PRC* are inconsistent with China’s obligation under the first sentence of TRIPS Art 61.¹⁹

(III) Different background and negotiation approaches

The two countries have different approaches to FTA negotiation resulting from their differences in the level of economic development, their understanding of FTA and of the logistics of the market economy, and political system. For example, Australia and China have two very different political systems. The former encourages robust debate in public, while the latter places greater priority of public unity and consensus. This no doubt presents great challenges to manage matters when interests, values, and concerns are pulled in opposing directions in the two countries. As to the negotiation approach, while Australia wishes the application of GATT Art XXIV (Regional Agreement) to cover “substantially all trade” in the FTA, China prefers use of the “enabling clause”²⁰ to negotiate trade in goods first, and services and investment later, so as to gain more time for her domestic economy to confront the challenges that the FTA with Australia would bring to China. Moreover, there are also diplomatic tensions extending the impasse of the ACFTA negotiation. For example, the tension sparked by the arrest of Rio Tinto executive Stern Hu, a Chinese born Australian citizen in Shanghai some weeks after Rio had rejected a huge cash infusion from China's Chinalco.²¹ Other Chinese attempts to buy into Australia's huge resources sector have also hit trouble following China’s discontent over Australia's move to allow a visit by exiled Uighur leader Rebiya Kadeer, as well as controversies about Australia’s new Defence White Paper.²²

¹⁸ WTO Doc WT/DS362/R, 2.

¹⁹ WTO Doc WT/DS 362/R, 133.

²⁰ See above, Part I.

²¹ China Wants New Ties with Australia, SBS, 2009. Available at:

<http://www.sbs.com.au/news/article/1121747/China-wants-new-ties-with-Australia> (accessed 20 April 2010)

²² Australia Moves to Quell Tension with China, ABC News, 2009. Available at:

<http://www.abc.net.au/ra/asiapac/stories/200910/s2724780.htm> (accessed at 20 April 2010).

(IV) Resistance from China's domestic constituencies

Chinese central policymakers do not enjoy as much policy making autonomy as they used to, and now often face quite stubborn resistance from protectionist interest groups against the opening up of markets. The increased assertion of domestic interests comes from experience as well as resentment that has followed from China's accession to the WTO and its impact on some sectors, as well as from partial reforms that has produced monopoly profits for some other sectors. Their influence is further strengthened by the sensitivity of political and social problems in China, e.g. Tibet, human rights, and rural problems. Given this context, domestic resistance in China to further liberalising trade and investment to China beyond the level of WTO commitments has come mostly from the agricultural, services, and Investment sectors.

a) Agriculture

Agriculture has been the most sensitive sector in the ACFTA negotiation. Agriculture is a special sector for every country because of political concerns. This is especially true in China. It is also one of the "three agricultural" problems facing the country: peasant, rural area, and agriculture, and been on the highest list of policy priorities at the 16th National People's Congress in 2004, and remains so today.²³ One of the fiercest opponents to the prospective opening of Chinese agriculture to Australia has been the Ministry of Agriculture of China (MOA), which plays the role of representing farming interests in China. The MOA has repeatedly asserted that Chinese trade negotiators had already made far too many concessions under the WTO.²⁴ For instance, the MOA claims that wool production in China has been almost completely lost because of foreign competition following the WTO accession.

Ethnic issues have become more sensitive in recent years in China's domestic politics following an increasing incidence of violent conflicts between the Han majority and Muslims.²⁵ The need to protect the interests and livelihood of ethnic

²³ "Central Government's View on Policies to Increase Peasants' Income" [Zhongyang guangyu zengjia nongmin shouru ruogan zhengce de yujian], People's Daily of China, 9 February 2004.

²⁴ Protocol on the Accession of People's Republic of China, Part I, Section 12.

²⁵ See, "Ethnic Conflict Catches China Off Guard", *Asian Economic News*, 8 Nov. 2004, available online at http://findarticles.com/p/articles/mi_m0WDP/is_2004_Nov_8/ai_n6343590. Mathew D.

minority groups within China has also generated considerable resistance to the opening up of markets under a FTA. The provinces in North China²⁶ which are home to many ethnic minorities reside including Muslims and Mongolians most of whom rely on cattle and sheep farming for a living, are those which will be most likely affected by the ACTFA. Once the Chinese government opens the wool trade market to Australia, there would be adverse impacts on Chinese fine wool growers. This need to “protect the ethnic minorities' economy and maintain the border stability”²⁷ of China assumes great significance in respect of an FTA. Moreover, as compared with China's FTA with Association of Southeast Asian Nations (ASEAN), the potential agricultural trade volume between China and Australia will be much bigger, and the area that would be affected by the potential ACFTA was much wider. It is thus not difficult to understand why the Chinese have been “at pains to say that they were on the defensive on agriculture and would resist liberalisation there”²⁸ as from the very first rounds of negotiations in respect of ACTFA.

b) Services and investment

Services trade and market access for foreign investments are closely related, and have been another of the most contentious areas in the FTA negotiations between China and Australia. Although Australian services industries have been keen to enter the Chinese market, Chinese domestic service providers and relevant government institutions have been clearly resistant to significant liberalisation services and investment beyond the WTO commitments.²⁹ The Chinese government believes it has already made substantial concessions under the WTO and carried them out faithfully. Chinese services regulators argue that the WTO impacts on domestic industries still need to be seen, before it can commit to any further liberalisation or

Moneyhon, 2004, “Taming China's “Wild West”: Ethnic Conflict in Xinjiang”, *Peace, Conflict, and Development: An Interdisciplinary Journal* 5, 5: 2-23. Jessica Koch, 2006, “Economic Development and Ethnic Separatism in Western China: A New Model of Peripheral Nationalism”, *Murdoch University Asia Research Centre Working Paper* No. 134 (Aug. 2006), available online at <http://www.warc.murdoch.edu.au/wp/WP134.pdf>.

²⁶ Xinjiang, Gansu, Ningxia and inner Mongolia.

²⁷ Tian, Kechuan (2006) Fine wool industry in China and the free trade between China and Australia. *Australia-China FTA Agricultural Conference* Xi'an — in, Australian DFAT.

²⁸ Kohler Alan. ‘FTAs Protectionism in Disguise: Garnant’ (2005) *Inside Business*, ABC Australia, 24, April.

²⁹ Protocol on the Accession of People's Republic of China, Part II.

experimentation.³⁰ For instance, regulators of China's banking sector believe that Chinese banks are still vulnerable to foreign competition. Australian negotiators have tried to persuade China that medium-sized Australian companies can enhance the competitiveness of Chinese companies without their facing the destructive force of big European and American companies. This is consistent with the rhetoric of some Chinese trade officials about the role of ACFTA. However, China is still very cautious on such experiments. According to the Ministry of Commerce of China (MOFCOM) officials, imposing domestic reforms is not the starting point or motivation of the Chinese government in its pursuit of FTAs. Unlike the motivations which had prompted China to join the WTO which included the desire to use the move to WTO membership as the lever to push forward domestic reforms, Beijing is now assuming a more cautious approach to domestic reform under a FTA for reasons of economic security and stability, which factors now have assumed priority in China's current reform and opening up strategy.

c) Policymaking institutions

Unlike in respect of the WTO accession, there is yet to emerge a "Central Leading Group" made of a Premier and ministerial representatives to coordinate policymaking in relation to The China-Australia FTA negotiations.³¹ Several domestic policymaking bodies have also constrained Chinese negotiators' room for concession. While MOFCOM is designated as the lead agency to negotiate the ACFTA, it does not have the formal authority to settle conflicting domestic interests. Nor is the MOFCOM expected to report directly to the leadership or the State Council on what are regarded as "working issues". While the MOFCOM has the same political rank as other industrial ministries, it is of lesser standing than some national commissions, and is consequently subject to pressure from other ministries and commissions to accommodate their interests. Moreover, because the power of trade, investment and industrial policymaking is fragmented among MOFCOM, the National Development and Reforms Commission (NDRC), and other ministerial-level government agencies, MOFCOM cannot propel trade liberalization without the consent of others. All of these force MOFCOM to take a conservative position at the ACFTA negotiation.

³⁰ Australia DFAT, "Updates on Progress in the Negotiations", available online at <http://www.dfat.gov.au/geo/china/fta/>; see in particular the 8th and 9th rounds of negotiations.

³¹ Jiang, above n 8, at 191.

Domestic resistance to the FTA has also come from the NDRC, a powerful institution with oversight of China's industry policies. It seems to not only have inherited a conservative position on reforms and opening from its former body, the State Planning Agency, but also enjoys increased power because part of the State Economic and Trade Commission was merged into the Agency to form NDRC. Other government agencies call the NDRC a "small state council",³² because it has departments matching every sector of the economy, and holds a higher political position than the ministries. The Australian Department of Foreign Affairs and Trade remains concerned that NDRC has not been fully involved in the negotiations and therefore MOFCOM cannot move beyond traditional agendas.³³

(V) Resistance from Australia's domestic constituencies

Australia's domestic resistance is mainly from its businesses. Due to the competitive "made-in-China" products, Australian manufacturers are worried about the potential influx of cheap Chinese goods could take a critical part of their market shares. Local horticulturalists and others are also concerned about low wages and poor environmental and food safety standards behind China's agricultural exports to Australia. More importantly, with China's great interests in Australia's mining and energy resources, there is increasing worries about the risk of losing control of Australia's resources industry to China. Additionally, Australia has an IP chapter in all of its FTA, with the exception of that with New Zealand.³⁴ In part of a consequence of the Australia-US FTA, Australia IP rules are currently among the most stringent in the world. This makes it difficult for Australia to comprehend Chinese attitudes to IPR protection. IP protection has become an issue in China's thought agenda only since the 1980s.³⁵ Consequently, Australian enterprises exporting and investing into China consider the lack of effective IPR protection as being of the greatest concern. Almost half of the firms exporting to China identified shortcomings in IPR protection as the issue of most concern amongst all non-tariff barriers to trade in China. In addition, a lack of transparency in legal and financial

³² Ibid, at 192.

³³ Ibid.

³⁴ Ogge-Cowan, Jane. "Chapter 16 - The Australia-China Trade Agreement: implications for intellectual property law" (2008) in Brian Fitzgerald, Fuping Gao, Damien O'Brien, Samsung Xiaoxiang Shi (eds), *Copyright Law, Digital Content and the Internet in the Asia-Pacific* (2008) 339.

³⁵ Peter K. Yu, 'Still Dissatisfied after All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility' (2005) 34 *Georgia Journal of International and Comparative Law* 149.

systems is also considered as an important barrier as well as the inconsistent interpretations of Chinese law.

III. On overcoming the Impediments

Some of the issues discussed above have emerged in the existing FTAs which Australia and China have entered into separately. Although they existed differently because of the different backgrounds of the negotiating countries, they have all been solved in reaching a final FTA. Therefore, it is of great benefit to look back at the negotiations of the existing FTAs and find some referent which might be useful for a breakthrough for the ACFTA. For example, in the China – New Zealand FTA, China is permitted to apply a special safeguard measure to agriculture goods if the volume of imports from New Zealand of an originating good listed in Table one of Annex 2 exceeds the trigger level for that product in that calendar year.³⁶ However, this special safeguard measure must be implemented in the form of an additional customs duty, and in a transparent manner.³⁷ The same words “transparent manner”³⁸ was used in Australia-US FTA, which also established a Committee on Agriculture to provide a forum for agricultural matters arising between the two countries.³⁹ The “special safeguard measure” and “agricultural Committee” are great referents to be included in the forthcoming ACFTA. It is interesting to note that the Australia-US FTA provides an opportunity for each party to modify market access commitments for dairy goods listed in each party’s Schedule after 20 years of the Agreement.⁴⁰ This could be used as an important strategy to deal with the sensitive agriculture sector in the ACFTA. China in this sense can open her agriculture market to Australia gradually but observe the right to modify the market access commitments after a specific period within the applicable legal procedures. The existing Australia-US FTA and China-New Zealand FTA also provide some direction for the ACFTA to deal with trade in services. For example, both of them embody a “Specific Commitments” provision⁴¹ to deal with the specific issues, and moreover, Art 108 of the latter lists the measures a Party shall not maintain or adopt to restrain

³⁶ China-New Zealand FTA, Art 13 (2).

³⁷ Ibid, Art 13 (6).

³⁸ Australia-US FTA, Art 3.4 (5).

³⁹ Ibid, Art 3.2.

⁴⁰ Ibid, Art 3.6.

⁴¹ Australia-US FTA Art 10.12, and China-New Zealand FTA Art 109.

the other Party's market access, e.g. limitation on the number of service suppliers, the total value of service transactions, or the total number of service operations.⁴²

China-Australia FTA negotiations should be promoted from a strategic perspective and give full play to each other's strengths. The need for mutual benefit in China-Australia ties should be stressed. Firstly, both sides need to pay particular attention to the balance of their interests during the negotiations, taking into account not only their own capacity, but also the legitimate requirements of the other party. On the one hand, sufficient allowance needs to be given in terms of the scope and timetable of tariff concessions for those sectors in which one party is lagging. On the other hand, both sides need guaranteed gains to make the process worthwhile. Second, the creation of the free trade area will impact heavily on the development of some sectors of the Chinese economy, agriculture in particular. To address such impacts effectively, efforts made during the negotiations to gain more space to manoeuvre are themselves not enough. Internal adjustment must also be implemented. In her negotiations with Australia concerning the agricultural sector, China must insist on a gradual approach in opening up the market for the agricultural products that are most severely affected, and demand that Australia amend its current practice of imposing trade barriers via Agreement on Sanitary and Phytosanitary Measures.⁴³ At the same time, China needs to speed up its agricultural adjustment, for example by increasing financial and technological input in areas involving such labour-intensive agricultural products as vegetables and fruits, and enhancing the export advantages of these products.

IV. Concluding Thoughts

Australia and China must approach their negotiations with a view to achieving the ultimate win-win outcome by bridging their differences, while recognising that negotiations alone cannot solve all the problems. A successful conclusion of ACFTA is in the interests of both Australia and China. The fundamental way of achieving an early resolution of ACFTA lies in balancing domestic gain with the need for domestic industrial and infrastructure adjustment. The hope for a change in China's position in

⁴² China-New Zealand FTA Art 108 (2).

⁴³ Cheng, above n 6, at 35.

the negotiation lies in institutional change, such as the formation of a central coordination agency and a stronger commitment to the negotiating front.