Digital Trade and Investment in the UK-Australia Free Trade Agreement: Promises Kept from the Agreement in Principle

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The UK and Australia concluded an Agreement in Principle (AIP) for a Free Trade Agreement (FTA) on 17 June 2021[1] which set out the main contours of the final agreement, which was itself signed on 16 December 2021. The UK-Australia FTA is significant for a number of reasons, chiefly for its status as the first wholly new FTA concluded by the UK since its departure from the European Union (EU) in early 2020 (with a transition period lasting until the end of 2020). As a comprehensive FTA, the UK-Australia agreement is important also because it contains some innovative material on the investment and digital trade, among other areas. This short note will consider the extent to which the stated objectives in the AIP were actualized by the FTA in the two critical areas of investment and digital trade. It will also highlight various provisions of interest in the agreement's relevant chapters.

Investment

In setting out the parties' objectives, the AIP for the UK-Australia FTA stated that the parties would commit in the forthcoming FTA to investment commitments covering all kinds of investment, including both portfolio and conventional Foreign Direct Investment (FDI). This would be complemented with ambitious market access commitments. These objectives were achieved in FTA Chapter 13 on Investment which incorporates a very wide definition of investment in Article 13.1, including portfolio, as keeping with modern investment agreements. The Market Access commitments, found in Art 13.4, exceed those of the World Trade Organization's General Agreement on Trade in Services (GATS) by adding the

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[1] https://www.gov.uk/government/publications/uk-australia-free-trade-agreement-negotiations-agreement-in-principle/uk-australia-fta-negotiations-agreement-in-principle

prohibition against the requirement that an economic activity is carried out through a specific type of legal entity or by a joint venture, something although found in many FTAs.

The AIP from June specified that the FTA would grant investors 'fair treatment' (it did not use the phrase Fair and Equitable Treatment or Full Protection and Security) as well as protection for investors from expropriation of their assets. These provisions may be found in the text of the FTA using language found in modern FTA practice, such as the Comprehensive Progressive Trans-Pacific Partnership (CPTPP) to which the UK is currently seeking accession. There is also a provision in the FTA on the inapplicability of Fair and Equitable Treatment to the removal of subsidies, found in many modern FTAs like the CPTPP. These standard protections are expressly to be interpreted according to Customary International Law (CIL). CIL is helpfully further defined in an Annex to the FTA – itself a highly innovative and feature uncommon to most FTAs which should provide more clarity to a complicated issue in international law.

The AIP outlined that the FTA would preserve parties right to regulate in the public interest, now a common feature of investment chapters in FTAs as a consequence of the recognition that older treaties were one-sided in favour of investors. In the UK-Australia FTA, this entitlement can be found in Article 13.17: "nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, or other regulatory objectives." The wording of this provision is wider than that found in some recent FTAs, affording a good deal of policy space to the UK and Australia in relation to public policy. This is especially since it is framed in self-judging language, which should make it difficult to challenge in an international tribunal.

The AIP explained that the FTA would not include an Investor-State Dispute Settlement (ISDS) mechanism. As promised, this procedural mechanism is missing from the final FTA. As ISDS is also absent from the UK-EU Trade and Cooperation Agreement (TCA) and the UK-Japan Comprehensive Economic Partnership Agreement (CEPA) it now appears as though ISDS will not feature in the UK's future trade agreements. It is noteworthy, though, that ISDS that it is contained in the CPTPP meaning that it will be available to cover investments between Australia and the UK when the UK accedes to that agreement, likely by late 2022.

According to the AIP, the FTA would also include higher investment screening thresholds for UK investors in Australia. For UK investors, this would mean that fewer UK investments are subject to review by the Foreign Investment Review Board (FIRB), potentially being prevented from establishment because of their size. The screening thresholds can be found in the Annexes to the FTA containing Australia and the UK's respective schedules (Annex I). As promised, the specified thresholds for Australia, as maintained by the FIRB, are equal to or higher than that listed for all countries, including those with which Australia has preferential FTAs. Furthermore, the thresholds specified in the Annex are to be indexed annually on 1 January, presumably meaning adjusted upwards to account for inflation. This is a significant achievement in terms of promoting FDI between the countries.

As noted above, one of the objectives in the AIP was that the FTA would contain market access obligations for investment, prohibiting certain quantitative restrictions on investment at the central and regional level, except where specific reservations are noted in a schedule across the whole economy. This would be done using a negative listing approach. This objective was fulfilled in the FTA with the negative listed sectors for which restrictions would remain found in Annex I. These restrictions are relatively minor compared to many other FTAs. Of course, the GATS uses a positive listing format which has been less conducive to liberalization of services, including commercial presence (investment).

The AIP spoke of a new commitment in the FTA prohibiting all residency and nationality requirements for senior managers and boards of directors, with some exceptions to be as narrow as possible. True to form, this objective was fulfilled in Article 13.12 with rather modest limits set out in Annex I. For example, Australia still requires that at least one director of a private company must be resident in Australia. Such restrictions are not uncommon and are considerable improvements from similar elements in the GATS.

The FTA was to contain MFN provisions covering investment. An MFN provision can indeed be found in Article 13.6, covering all stages of investment. It notably excludes application to ISDS, a feature now common in modern FTAs in order to preclude arbitration over the extension of MFN to procedural matters. There is also a National Treatment obligation in Article 13.5 of the FTA, delivering on the AIP's aim to prevent discrimination based on nationality. There is an interesting limitation on the NT obligation relating to sub-central governments. In the UK-Australia FTA investment chapter, NT does not apply in

relation to better treatment offered by another sub-central government (i.e. better treatment in a different Australian state). Presumably this will enhance regional economic autonomy in Australia.

The AIP claimed that the eventual FTA would contain a new provision confirming that economic sanctions are not impacted by the commitment to allow free transfers of funds by investors. This sensible and timely rule can be found in Article 13.6. Furthermore, there would purportedly be a prohibition of performance requirements with another commitment to consult on the inclusion of additional such prohibitions such as headquarters localisation requirements, mandatory levels of research and development, export restrictions, and local hiring requirements. All of these commitments are contained in the FTA, as planned. In fact, these are among the most detailed such performance requirements seen in any modern FTA investment chapter. Historic Bilateral Investment Treaties (BIT) merely re-iterated the obligations of the WTO Trade Related Investment Measures (TRIMS) Agreement. This provision in the UK-Australia FTA also prohibits the tying of an investment incentive to trade distorting performance requirements. Investment incentives linked to other kinds of performance are expressly permitted by Article 13.11.3, an innovative feature for an FTA.

Digital Trade

Turning now to Digital Trade, now among the most important aspects of global commerce, the June AIP promised that the UK-Australia FTA would contain ambitious commitments in this sphere, implying that it would go beyond material found in other digital trade instruments. The AIP said that this would include strong rules on enabling data flows and the prohibition of unjustifiable data localisation requirements. It would also include provisions to ensure the recognition of electronic contracts and signatures to facilitate e-commerce. According to the AIP, commitments in the FTA's digital trade chapter would purportedly include a commitment to open digital markets by not imposing customs duties on electronic transactions. All of this was achieved in the FTA in Chapter 14 on Digital Trade, which is among the most comprehensive digital trade chapters in any FTA, solidifying the UK (and Australia) as world leaders in this field.

The AIP indicated that there would also be a commitment to reducing barriers to digital trade by addressing restrictive practices such as requirements for paper-based trade administration documents and a commitment to accept electronic contracts, except in specific

circumstances. The AIP further stated that the FTA would contain commitments to provide a safe trading environment for both consumers and businesses, through new and innovative ways to establish protections online, including improved enforcement and compliance provisions that support online consumer protection, personal information protection, and to discourage spam. There would also be novel commitments to cooperate in the development of a Digital Identities framework and to help users identify themselves online, itself uncommon in FTAs. There would be associated rules on ways of improving the accessibility of publicly available, anonymised government information. Again, all of these objectives were realized through the text of the FTA. The material on Digital Identities in particular is innovative, having not appeared in any of the UK's previous FTAs, nor in the CPTPP, often seen as the gold-standard. A Digital Identity enables the assessment and authentication of a user interacting with a business system on the web without the involvement of human operators. This makes it possible for computers to mediate relationships between customers and suppliers, massively reducing transaction costs and improving efficiency.

There would also purportedly be provisions in the FTA to protect innovation by preventing the forced tech transfer of Source Code and Encryption Keys, subject to legitimate scrutiny by appropriate authorities. True to form, this appears in the text of the FTA's Digital Trade Chapter. The material on Encryption Keys is not found in many FTAs, for example it is missing from the UK-Japan CEPA.

The AIP also claimed that the FTA would "ensure world-leading standards for personal data protection and for legitimate public policy objectives." For the most part this was achieved in Art 14.12 which requires parties to adopt a legal framework that protects of the personal information of the users of digital trade. While these frameworks are to be established by reference to international standards, it is not clear that there is an obligation that such standards will necessarily be 'world leading' (however that might be understood) because the EU's GDPR regime, as well as that of other countries such as China, has very strong personal data protection rules that arguably exceed that of the global community. In another sense, overly strong and costly data protection rules are detrimental. The UK's data policy appears to align more closely with Australia and other CPTPP parties which, generally speaking, adopt a less proscriptive approach to data protection with a view to liberalizing digital trade rather than mandating record keeping and bureaucracy.

The AIP set out that there would be commitments in the FTA to support ongoing cooperation on important digital trade issues, including data innovation and emerging technologies such as Artificial Intelligence, as well as collaboration to improve opportunities for RegTech enterprises. The FTA would also facilitate the building of capabilities and cooperation on evolving cybersecurity threats. This material is found in both FTA Chapter 14 on Digital Trade and Chapter 20 on Innovation, a chapter which does not appear in any previous UK FTAs and is quite rare in international trade practice. RegTech, a new technology designed to facilitate compliance with regulations, is specifically mentioned in Art 14.21.1 g). It will be interesting to see whether such forward-looking 'Innovation' chapters will become standard in future FTAs.

Conclusion

Both the investment and digital trade chapters of the UK-Australia FTA did what the parties set out to do in the AIP. The investment chapter is in keeping with modern such chapters in FTAs, containing comprehensive protections for investors coupled with much wider policy space for host states in the form of right to regulate provisions and narrower definitions of expropriation. The omission of ISDS furthers the approach that the UK appears to be taking against this controversial system of dispute settlement in its FTA negotiations. In the case of Australia, the non-inclusion of ISDS is not problematic as both countries have a strong commitment to rule of law.

The digital trade component of the UK-Australia FTA is also strong, containing what is becoming standard material designed to facilitate e-commerce, as seen in earlier precedents such as the United States Mexico Canada Agreement (USMCA) and the CPTPP. It goes further than existing precedent contained in other agreements, such as the UK-Japan CEPA, by including material on the encouragement of innovation, Digital Identities and encryption. It also adopts a sensible approach to data protection with an eye to incentivizing commerce while granting sufficient attention to public interest in this equally controversial field.