UK-Australia FTA Call for Evidence – Committee on International Trade

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This document will evaluate the UK-Australia FTA from in relation to services, investment and digital trade.

To what extent does the FTA deliver on the UK-Australia Agreement in Principle (AIP)?

Services:

1. The AIP stated that the FTA would liberalise services in a manner that strengthens existing bilateral trade, deepens market access and makes it easier for services companies to trade and for professionals to operate in each other's economies. The AIP further indicated that the FTA would commit to 'high standard' rules for all services sectors. This will include full market access to the other market for all UK and Australian service suppliers. The AIP also spoke of "services market access liberalisation going beyond the UK and Australia's respective best precedent" to be finalised through a request and revised offer process.

2. While the phrase 'high standard' is rather indeterminate, these objectives appear to have been achieved in the UK-Australia FTA, primarily Chapter 8. As promised, the UK-Australia FTA appears to be best-in class for services. It is the first time that Australia has signed an FTA which opens up its services sector at federal, state and territory level.

3. More specifically, the AIP claimed that the FTA would adopt a "highly liberal" approach to trade in services, including full market access for service suppliers from the other country at central and regional level, except where specific reservations are listed. This was achieved through conventional Market Access prohibitions in Chapter 8 coupled with a negative list schedule (Annex I) for both countries. The negative lists are limited compared to many other FTAs.

4. The AIP said that the FTA would make provision for professional services, enabling their qualifications to be recognised without facing unnecessary cost and bureaucracy. This rather modest objective, focussed on processes rather than outcomes, was very much achieved. The FTA's chapter on the mutual recognition of professional qualifications (Chapter 10) encourages relevant professional bodies to operate mutual recognition systems in their own sectors. In that sense it places an obligation on parties to endeavour to remove restrictions through discussion and consultation – it

does not remove all restrictions on the delivery of professional services. For example, a UK qualified lawyer is not automatically entitled to delivery advice on Australian federal or state-level law.

5. On legal services in particular, the AIP stated that the FTA would contain provisions which will both guarantee that UK and Australian lawyers can advise clients and provide arbitration, mediation and conciliation services in the other country's territory using their original qualifications and title. While this might have been construed to grant automatic recognition, it is more likely that the AIP meant there will be a right to home title practise for foreign lawyers. Article 10.7 on Legal Services, itself unusual for an FTA, achieves these objectives. Art 10.7.3 b) in particular provides that a party shall not impose disproportionately complex or burdensome administrative or regulatory conditions on, or for, the supply of legal services.

6. The AIP promised that the FTA would contain MFN provisions which ensure that if UK/Australia provide more generous access to their services markets for other countries then these would be available to those from UK/Australian suppliers. There would also supposedly be commitments to impartiality, transparency and responsiveness by Australian and UK authorities, ensuring that requirements, procedures, and technical standards do not constitute unnecessary barriers to trade. The AIP also referred to non-discrimination provisions in services, ensuring that UK/Australia cannot discriminate in favour of its own service suppliers along with coverage of the services disciplines where services are supplied by the presence of a national of UK/Australia in the other country. Each of these objectives is fulfilled through Chapter 8 of the FTA on Services.

7. It is notable that Article 8.3.2 on National Treatment, which is framed using conventional FTA language, states that it does not cover better treatment accorded by another sub-central government, meaning better treatment provided to a like service provider from another Australian state. This restriction of NT is not typically found in other FTAs with parties with sub-central governments, for example, Canadian FTAs. There is also an unusual restriction on both NT and MFN contained in a footnote. It states: "for greater certainty, whether treatment is accorded in "like circumstances" under Article 8.3 (NT) or Article 8.4 (MFN) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between services or service suppliers on the basis of legitimate public welfare objectives." While granting this discretion to governments in conjunction with non-discrimination, is uncommon in FTAs, it does not conflict with the AIP's objectives.

8. Article 8.6 on Local Presence is also an important feature of this chapter of the FTA, as it prevents parties from requiring a service supplier of the other party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service. This is crucial to the facilitation of services trade, as specified in the AIP.

Mobility

9. The AIP indicated that the FTA would contain rules on temporary entry that will encourage people to travel and work in each other's territory, on the basis of reciprocity. Such commitments would include the ability of firms to sponsor visas without first having to prove that a national of the country in question could not be hired to do the job, through the reciprocal removal of economic needs tests. The AIP further said that the parties would provide balanced guarantees that are broadly reciprocal to maintain visa pathways for service suppliers for a substantial number of sectors. The AIP promised moreover that the FTA would include a wider range of side initiatives in conjunction with the FTA encompassing broader demographics than Business Mobility. This would enable the UK and Australia to make Youth Mobility Schemes available to nationals no older than 35 for a total stay of up to 3 years, without having to undertake specified work including regional work, for example on a farm. Finally, in line with each country's respective immigration system, the FTA would purportedly contain material that would allow parties to further explore opportunities to enhance the ability for citizens to live, work and travel in each country.

10. True to the AIP's word, on mobility, the UK-Australia FTA achieves the above objectives in their entirety. In particular, the FTA establishes that executives located in one nation can relocate to the other's territory for up to four years, double the period previously allowed. Executives may also bring their spouses and children with them – a right not found in most FTAs. There is also a separate agreement that individuals under the age of 35 may live and work in each other's territories for up to three years.

Investment

11. The AIP stated that Australia and the UK would commit in the FTA to investment commitments covering all investment, portfolio and FDI along with ambitious market access commitments. This was achieved, as promised, in FTA Chapter 13 on Investment which incorporates a very wide definition of investment in Article 13.1, as keeping with modern investment agreements.

12. The AIP further specified that the FTA would grant investors 'fair treatment' and protection from expropriation of assets. All of these provisions may be found in the text of the FTA using language found in modern FTA practice, such as in the CPTPP. It is noteworthy that the inapplicability of Fair and Equitable Treatment to the removal of subsidies, found in many modern FTAs like the CPTPP, also appears. These protections are expressly to be interpreted according to Customary International Law, which is further defined in an Annex to the FTA – this is itself a highly innovative and welcomed feature uncommon to most FTAs in that it should provide more clarity.

13. The AIP stated that the FTA would preserve parties "right to regulate in the public interest," now a common feature of investment chapters in FTAs. This entitlement can be found in Art Article 13.17 which states "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." This is among the wider such provisions contained in recent FTAs, affording a good deal of policy space to the UK and Australia in relation to public policy, particularly since it is framed in self-judging language.

14. The AIP clarified that the FTA would not include an Investor-State Dispute Settlement (ISDS) mechanism. The FTA fulfils this objective as ISDS is missing. As ISDS is also absent from the UK-EU Trade and Cooperation Agreement (TCA) it now appears as though ISDS will not feature in the UK's future trade agreements (although it is noteworthy that it is contained in the CPTPP).

15. The FTA would also apparently include higher investment screening thresholds for UK investors in Australia, meaning fewer UK investments are subject to review by the Foreign Investment Review Board (FIRB). The screening thresholds can be found in the Annexes to the FTA containing Australia and the UK's respective schedules (Annex I). The specified thresholds for Australia as issued by the FIRB are indeed equal to or higher than that specified for all countries, including those with which Australia has FTAs. Furthermore, the thresholds specified in the Annex are to be indexed annually on 1 January, presumably meaning adjusted upwards to account for inflation.

16. The AIP stated 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, using the "negative listing" approaches. 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.

17. There would supposedly be a new commitment in the FTA prohibiting all residency and nationality requirements for senior managers and boards of directors, with precise application to take account of the outcome of Australia's consultations, which aim to narrow the policy space required as far as possible. This is found in Article 13.12 with 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.

18. The FTA was promised to contain MFN provisions covering investment. An MFN provision can indeed be found in Article 13.6, covering all stages of investment. It excludes application to ISDS, a feature now common in modern FTAs. There is also a National Treatment obligation in Article 13.5, fulfilling the AIP's promise to prevent discrimination based on nationality. There is an interesting limitation on the NT

obligation relating to sub-central governments: NT does not apply in relation to better treatment offered by another sub-central government (i.e. better treatment in a different Australian state).

19. The AIP stated that the 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.

20. There would purportedly be a prohibition of performance requirements with a further 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 were realized in the text of the FTA, as promised. These are among the most detailed such performance requirements seen in any modern FTA. They also prohibit the tying of an investment incentive to trade distorting performance requirements, although investment incentives linked to other kinds of performance are expressly permitted by Article 13.11.3, a highly progressive development for an FTA.

Digital trade

21. The AIP promised that the UK-Australia FTA would contain ambitious commitments on digital trade. This would include strong rules on data flows and the prohibition of unjustifiable data localisation requirements. It would also include provisions to ensure the recognition of electronic contracts and signatures and legal frameworks on electronic transactions that facilitate ecommerce. 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.

22. The AIP said 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 indicated that the FTA would include 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 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. There would be associated rules on ways of improving the accessibility of publicly available, anonymised government information. Again, all of this can be found in the text of the FTA. It is noteworthy that 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.

23. There would also be provisions 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.

24. Crucially 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 attained through Art 14.12 which requires parties to adopt a legal framework that protects of the personal information of the users of digital trade. While this is to be done by reference to international standards, it is not clear that there is an obligation that such standards will be 'world leading' 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. It is encouraging that the UK has not committed expressly to the GDPR. Its data policy aligns it more closely with Australia and the CPTPP which, generally speaking, adopts a less proscriptive approach to data protection with a view to liberalizing digital trade.

25. The AIP promised that there would be commitments in the FTA to support ongoing cooperation on important digital trade issues, including data innovation and emerging technologies, 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 – indeed RegTech is specifically mentioned in Art 14.21.1 g).

26. The digital trade component of the UK-Australia FTA is quite strong and as such fully delivers on the objectives and the AIP. It goes further than existing precedent contained in UK-Japan CEPA, for example.

What lessons and inferences for other current and future negotiations can be drawn from how the Government approached and what it secured in, the FTA with Australia?

27. Negotiating with countries that have a federal structure with sub-central governments poses unique challenges in trade negotiations. This is especially the case with services which tend to be more heavily regulated than goods and which tend to have region-specific disciplines. Legal services are a good example. The UK should keep this in mind when negotiating revisions to the UK-Canada FTA, rolled-over from the EU-Canada CETA.

28. Furthermore, the relative success of UK-Australia FTA has shown that it is essential that there is further cooperation between regulatory bodies to advance cross-border provision of services. Again for legal services, an area often over-looked in FTA negotiation, this will involve engagement with bodies such as Bar Associations and Law Societies.

29. The non-inclusion of ISDS in the investment chapter makes sense with a country such as Australia with strong rule of law and independent judiciary, as with the UK-Japan

CEPA. But this should not become a presumptive policy for the UK when negotiating agreements with partners which do not have these traditions.

30. Finally, the provisions in the Innovation Chapter on encouraging technological advancement as well as the Digital Identities provisions are cutting edge and are poised to become standard in FTAs.