



Australia-Hong Kong Free Trade Agreement & Indonesia-Australia Comprehensive Economic Partnership Agreement

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Summary

Australia's recent FTAs with Indonesia (IACEPA) and with Hong Kong, China (Hong Kong) (AU/HK FTA) are important agreements with key trading partners, and notably our first bilateral trade agreement with Hong Kong.

Both are significant in that they bind the parties to legal frameworks to foster more open, predictable and transparent regulation of services trade, investment and data in the region.

This is consistent with recent comprehensive trade agreements like the Comprehensive Progressive Trans Pacific Partnership (CPTPP). It reflects the growing importance of services and investment to trade and the impact of data flows for trading services and investing in foreign markets.

Services

Both the AU/HK FTA and the IACEPA represent positive steps toward more open regulation of services in the region. While market access gains for services providers are modest, the FTAs build on outcomes in previous agreements. They include commitments to support modern services trade.

The AU/HK FTA for example, builds on Hong Kong's World Trade Organization (WTO) commitments in the General Agreement on Trade in Services (GATS) by 'binding' more open existing regulation. Market access commitments in AU/HK are also more comprehensive than in Hong Kong's previous FTAs with other APEC economies.

The agreement binds Hong Kong to a framework for services liberalisation that is more in line with comprehensive agreements like the CPTPP. There is a dedicated chapter on financial services which has a similar scope and structure to the CPTPP.¹ Like CPTPP, it includes a Most Favoured Nation (MFN) provision to capture future liberalisation.

The AU/HK also reflects modern ways in which services are traded. For example, the scope of financial services activity covered by the AU/HK FTA is more comprehensive than Hong Kong's previous agreements (ie: coverage of the supply of electronic payment services for payment transactions; the supply of 'new financial services' and freedom of cross border payments and transfers).

¹ Though there are some differences. For example, the coverage of investors and the scheduling approach for market access commitments differs.



Investment

Investment is important for trade, and regulation of investment in FTAs is important for providing certainty to businesses trading and investing in the region. Broad and comprehensive liberalisation helps grow foreign direct investment (FDI) and allows business to leverage the benefits of FTAs. As trade expands (or contracts), supply chains are further integrated and more FTAs are negotiated, investment decisions become more strategic.

The IACEPA creates a framework which should enhance regulatory certainty for investors in Indonesia. Binding commitments to liberalise investment, provisions to improve the transparency of the legal framework, and obligations to protect investments made by investors are important elements. Plus, the inclusion of an MFN provision is valuable for ensuring investments receive the benefit of future liberalisation.

Investor-state dispute settlement (ISDS) provisions in the IACEPA reflect modern practice in FTAs, including safeguards excluding certain ISDS claims, intended to grant governments wide policy space to pursue public policy objectives.² The AU/HK Investment Agreement includes an additional specific exclusion from the ISDS mechanism for claims relating to tobacco and smoking products.

Safeguards are important but they should not be used to discriminate against particular products. Specific product exclusions to the ISDS mechanism, while intended to protect the regulatory scope of governments, could potentially have unintended outcomes which limit rather than advance this goal.³

Broadly worded general safeguard provisions are preferable as they do not discriminate against legally traded products and do not confine the public policy subject matter which is legitimately excluded from investment claims. They arguably provide a stronger safeguard measure for a broader range of public policy goals.

E-commerce and data

Trade rules for the free flow of information and data increase certainty and enable businesses to more easily and cost effectively engage across markets. Digital trade rules can also contribute to the development of policy frameworks that support productivity improvements in domestic sectors, underpinning production and quality improvements, and enhancing international competitiveness.

² For Australia for example, measures related to the PBS, Medicare Benefits, TGA and the Office of the Gene Technology Regulator.

³ For example, singling out one particular product could imply less protection is accorded to others for equally important public objectives. Mitchell, Andrew, Voon, Tania and Whittle, Devon, 'Public Health and the Trans-Pacific Partnership Agreement (2014). *Asian Journal of International Law*, vol. 5(2) <https://ssrn.com/abstract=2393670>



Both agreements adopt rules governing regulatory frameworks dealing with these issues, drawing on provisions for data flows and storage in existing FTAs. Hong Kong and Indonesia's commitments on the free flow of data are the first for each in an FTA.

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