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Australia's newest FTAs with Hong Kong and Indonesia – towards a more open APEC services environment

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Australia recently signed two bilateral free trade agreements (FTAs) with APEC members – Indonesia and Hong Kong, China. While market access gains for services providers are likely to be modest, both agreements represent positive steps toward more open regulation of services in the region. They build on outcomes in previous FTAs. They include commitments that support modern services trade. More significantly, they bind the parties to legal frameworks to foster more open, predictable and transparent regulation of services trade, investment and data.

This reflects the growing importance of services and investment to trade – liberalising trade is no longer just about tariffs – and the impact of data flows for trading services and investing in foreign markets. It is consistent with recent comprehensive trade agreements and complementary to APEC's agenda to advance more competitive services in the region and create a favourable environment for business in the digital age.

Australia's newest FTAs

The Australia Hong Kong Free Trade Agreement (AU/HK FTA) is the first between the parties. Hong Kong is not currently a party to the Comprehensive Progressive Trans Pacific Partnership Agreement (CPTPP), or participating in the Regional Comprehensive Economic Partnership Agreement (RCEP) negotiations.

The bilateral agreement with Indonesia - the Indonesia Australia Closer Economic Partnership Agreement (IACEPA) - builds on the ASEAN/Australia/New Zealand Free Trade Agreement (AANZFTA - with NZ and ASEAN members). Indonesia and Australia are also currently negotiating the RCEP (along with other ASEAN members, New Zealand, Japan, Korea, China and India).



Both bilateral agreements will enter into force following completion of the necessary domestic government procedures.

Important for services

Build frameworks for liberalisation

The AU/HK FTA builds on existing FTAs and WTO commitments to advance liberalisation of services. The agreement builds on Hong Kong's WTO commitments in the General Agreement on Trade in Services (GATS). The resulting commitments are more comprehensive than in Hong Kong's previous FTAs with other APEC economies, including in the important area of financial services trade.

The AU/HK FTA 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, though there are some differences. Like CPTPP, it includes a Most Favoured Nation (MFN) provision to capture future liberalisation and extend its benefits to the parties.

The scope of financial services activity covered by the AU/HK FTA is more comprehensive than Hong Kong's previous agreements and reflects modern ways in which these services are traded. For example, there are provisions to permit the supply of electronic payment services for payment transactions, to allow for the supply of 'new financial services' and for freedom of cross border payments and transfers.

The chapter also includes 'new' commitments to expand access for exports of wealth management services, and to address regulatory impediments to facilitate trade. For example, it includes provisions to improve the transparency of regulatory decision making and to encourage the streamlining of application procedures for authorisation to supply financial services.

Australia's financial services exports to the region, including to Hong Kong, are significant and growing (total cross border financial services exports to Hong Kong grew by over 23 per cent between 2016/17 and 2017/18). Given Hong Kong's position as a leading regional financial services hub, a key base for business and a major capital market in East Asia, there are opportunities to grow this trade and contribute to expanded investment activity across the region.



Create a more favourable investment environment

The IACEPA creates a framework to enhance regulatory certainty for investors in Indonesia. It includes binding commitments to further market opening, to improve the transparency of the legal framework, and to protect investments made by investors.

Investments benefit from commitments to national treatment, prohibitions on performance requirements, and the provision of free transfers. Building on AANZFTA, market access commitments for investment are structured through a 'negative list' - the adoption of a combined list covering services and investment measures is a first for Indonesia in a bilateral FTA. Plus there is an MFN provision to ensure investments receive the benefit of future liberalisation.

The investment protection provisions include detailed rules on the arbitration process on ISDS, as well as safeguards to allow governments to regulate in the public interest. This reflects modern practice in FTAs and is consistent with work on reform of ISDS procedures at the international level.

Indonesia's resources sector for example, can benefit from a more open and stable environment for foreign investment. Indonesia is currently focusing on building its energy security, spreading resources income across the regions and improving its taxation and regulatory framework to encourage investment in the sector.

There are also potential benefits for Australia - the energy and mining sector is already an important investor - about one-third of Australia's \$10 billion in foreign direct investment in Indonesia is allocated to the mining sector. Indonesia is also one of the top export destinations for Australian exporters of Mining Equipment, Technology and Services (METS) and remains an area of future growth in the resources sector.

Support modern services trade

New FTAs reflect the growing significance of services and investment to trade – outcomes are no longer just about tariffs. Data flows and e-commerce are also now important for trading services and investing in foreign markets.

Both the AU/HK FTA and the IACEPA adopt rules governing regulatory frameworks dealing with these issues, drawing on provisions for data flows and storage in existing FTAs. Hong Kong and Indonesia have made commitments on the free flow of data for the first time in an FTA.



For example, in the AU/HK FTA, Australia and Hong Kong have committed to allow for the free flow of data without mandatory local data storage requirements. In IACEPA Australia and Indonesia guarantee the free flow of data across borders for service suppliers and investors as part of their business activities. While the agreement does not prohibit data localization requirements, it does commit the parties not to introduce new laws that make their existing laws on local storage of data more restrictive.

Trade rules for the free flow of information and data increase certainty and enable businesses, many of them SMEs, 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. The potential benefits are large - digital trade currently supports up to A\$43 billion in economic value in Australia's economy. This is estimated to rise to A\$193 billion by 2030, with exports growing by more than 200 per cent.

Complementary to APEC

Contribute to more open and competitive services in the digital economy

Harnessing the full potential of the digital economy is a priority for APEC in 2019. APEC Trade Ministers have affirmed 'the need to work together to create an enabling and non-discriminatory environment that fosters innovation and allows businesses and entrepreneurs to thrive' in the digital age.

APEC economies recognise this involves a broad range of policy actions, including addressing regulatory barriers and improving domestic regulation of services to increase competitiveness.

FTA frameworks for predictable, transparent and non-discriminatory trade, investment and data flows (with regard to appropriate domestic laws) can encourage policy settings that support this goal. APEC can lead in facilitating dialogue among policy makers, engaging the private sector and building capacity on how FTAs can contribute.



Promote consistent and high quality regional trade arrangements

Bilateral agreements can serve as building blocks toward regional FTAs involving APEC economies. Approaches to investment liberalisation and e-commerce in IACEPA for example, build on past outcomes of the AANZFTA, and can contribute to future outcomes in the RCEP. They can also help inform work on the concept of an eventual Free Trade Area of the Asia-Pacific (FTAAP).

Similarly, APEC can advance shared regulatory principles to inform international trade rules in regional and multilateral agreements. Provisions on e-commerce in the AU/HK FTA and IACEPA can be considered positive steps toward greater consensus on internationally accepted rules on digital trade. APEC Members Chile, Singapore and NZ have recently agreed to launch negotiations on a Digital Economy Partnership Agreement (DEPA). WTO members are negotiating a possible agreement on digital trade and are considering multilateral disciplines on domestic services regulation.

A greater convergence in rules for services trade is delivering slow but steady improvements in the ability of services firms to do business throughout the APEC region. Australia's two most recent FTAs are steps towards a more integrated APEC services market.

[1] See APEC Trade Ministers Statement, Viña del Mar, Chile, 18 May

2019 <https://www.apecchile2019.cl/apec/media/news/apec-trade-ministers-issue-statement>

[2] Australia already has FTAs with six of its eight most important trading partners (China, Japan, Korea, the US, Singapore, and NZ and ASEAN). The AU/HK FTA will make this seven.

Negotiations are currently underway with the EU, which will account for all eight.

[3] Hong Kong has indicated it intends to join the RCEP once it is concluded.

See <https://www.legco.gov.hk/yr18-19/english/panels/ci/papers/ci20190416cb1-863-3-e.pdf>

[4] Hong Kong has bound more commitments for services than in other agreements. Hong Kong currently has FTAs with China (June 2003), New Zealand (March 2010), EFTA (June 2011), Chile (September 2012), Macao (October 2017), ASEAN (November 2017) and Georgia (June 2018).

[5] For example, the coverage of investors and the scheduling approach for market access commitments differs.

[6] The commitment is subject to conditions such as registration and local presence requirements, and government measures to protect personal data and personal privacy.

[7] For example, Australia's specific commitments for cross border trade (which mirror those in CTPP) allow for HK to provide financial advisory and investment services, and portfolio management services to collective investment schemes, subject to conditions.

[8] For example, there is a requirement for regulatory authorities to provide information on the status of applications of businesses seeking authorisation to supply services.



[9] For example, pre authorisation requirements for Australian banks seeking to establish in Hong Kong as fully incorporated banks are eased relative to GATS commitments.

See <https://dfat.gov.au/trade/agreements/not-yet-in-force/a-hkfta/a-hkfta-outcomes/Pages/a-hkfta-outcomes-services.aspx>

[10] Australian cross-border exports of financial services were \$4.57 billion in 2017-18, and grew by over 15 per cent from 2016-2017 levels. Of these, exports to Hong Kong were valued at \$280 million (6 per cent) which grew by 23.9 per cent from 2016- 2017. This figure however does not capture the full scale of exports from this industry – it does not account for the value of financial services “embodied” in exports of other goods and services, or the value of financial services sold in foreign markets by branches of Australian companies established offshore. See DFAT, Trade in Services Australia 2017-18.

[11] PwC (with ITS Global), Free Trade Agreement Utilisation Study 2017.

[12] Whereby commitments generally apply to all sectors and measures except for those identified as ‘non conforming measures’ listed in an annex to the agreement. This is in contrast to a ‘positive list’ approach whereby only identified measures and sectors listed are subject to treaty obligations.

[13] Indonesia’s bilateral FTA with Japan includes a negative list for investment liberalisation commitments but a positive list for services commitments. The General Review of the AANZFTA involves updating the agreement to include negative list market access schedules of reservations for investment. See <https://dfat.gov.au/trade/agreements/in-force/aanzfta/Pages/general-review-of-the-asean-australia-new-zealand-fta.aspx>

[14] Including: expedited review of claims that are frivolous or manifestly without legal merit; mechanisms to deter unmeritorious claims; on request, the parties may issue interpretations of the agreement, which must be followed by ISDS tribunals; time limits on bringing a claim, and; a requirement for arbitrators to comply with rules on independence and impartiality, including on conflicts of interests. See <https://dfat.gov.au/trade/agreements/not-yet-in-force/iacepa/outcomes-documents/Pages/outcomes-investment.aspx>

[15] Refer to the work of the UNCITRAL Working Group III on Investor State Dispute Settlement Reform at https://uncitral.un.org/en/working_groups/3/investor-state

[16] Austrade <https://www.austrade.gov.au/australian/export/export-markets/countries-and-economies/indonesia/industries/resources-and-energy-to-indonesia>

[17] Australian Financial Review, ‘Miners want ISDS in Indonesia free trade agreement,’ October 16, 2018

<https://www.afr.com/news/economy/trade/miners-want-isds-in-indonesia-free-trade-agreement-20181016-h16ozb>

[18] Austmine (Robert Trzebski, Chief Operating Officer).

[19] See Article 13.12. This would prevent a party that currently has no data localisation requirements from enacting laws to this effect (subject to permitted exceptions).

[20] See <https://www.export.org.au/publications/from-resource-boom-to-digital-boom-capturing-australias-digital-trade-opportunity-at-home-and-abroad>

[21] APEC Trade Ministers Statement, Viña del Mar, Chile, 18 May

2019 <https://www.apecchile2019.cl/apec/media/news/apec-trade-ministers-issue-statement>

[22] In 2004 in Chile, ABAC proposed a study on the feasibility of a FTAAP. Since then, the concept of FTAAP as a long-term contribution to APEC’s regional integration agenda has been progressing through work programs within APEC and trade agreements among APEC economies. Ibid.



[23] The DEPA seeks to 'deepen and strengthen cooperation in digital areas, establish new international approaches for digital trade issues, and explore new frontiers in the digital economy, such as digital identities, e-payments, cross-border data flows and artificial intelligence.'
See <https://www.apecchile2019.cl/apec/media/news/joint-ministerial-statement-on-the-launch-of-digital-economy-partnership>