What's in the UK-Australia FTA? Preliminary Reflections

The UK-Australia Free Trade Agreement (UKAFTA) is the first of the UK's new wave of FTAs since exit from the EU.[1] Some elements in the FTA are inspired by the Comprehensive & Progressive Agreement for Trans Pacific Partnership (CPTPP), to which the UK is currently acceding, though many are not. As such, it is of particular interest to parliamentarians, civil society, commentators, and policymakers.

FTAs are, however, complex, technical, and lengthy – often spanning a wide range of policy issues and sectors, from health care to agriculture, national security to digital trade. To support analysis of UKAFTA, on Friday 11 February 2022, the Trade & Public Policy (TaPP) Network hosted a virtual workshop, bringing together expertise from across the Network to consider the FTA. This report sets out the key reflections from the workshop, where speakers identified the key elements of interest and innovation within the agreement in their respective fields of expertise.

This note provides reflections on the following UKAFTA chapters: agricultural market access, SPS, environment, labour, development, gender, financial services and regulatory cooperation, cross-border trade in services and mobility, digital/innovation, investment, intellectual property, competition policy and consumer protection, SOEs and monopolies, procurement, rules of origin, TBT, national security, and dispute settlement.

Agricultural market access[2]

The difference between Australian and UK baseline (MFN) tariffs for agriculture is significant (2.3% versus 8.3% respectively for applied tariffs, on a trade weighted basis). This heavily implies that the lion's share of benefits of agricultural liberalization will go to Australian exporters (and potentially UK consumers) while the costs will be borne by import-competing firms (UK food producers).

The Department for International Trade (DIT)'s Impact Assessment estimates a reduction in gross value added (GVA), in 2019 prices, of -£94 million for agriculture, food and fisheries and -£225 million for semi-processed food. This imbalance in agriculture is reflected in the backloading of the UK's liberalization schedule, especially for beef and sheep meat: the UK's agricultural tariffs will be liberalized through tariff-rate quotas (TRQs) with the 'in-quota' tariff set at zero on entry into force (EIF) of the agreement. During the transition period, out-of-quota tariffs will be subject to the MFN rate (e.g. 12% + 253-4 GBP/kg for beef and 12% + 100-197 GBP/kg for sheep meat).

The FTA establishes TRQs for the following 10 product categories:

TRQ	Product category	Notes
1	Beef	Annual increases in TRQs for 10 years; Y10-15 subject to PSS
2	Sheep & goat meat	Annual increases in TRQs for 10 years; Y10-15 subject to PSS
3	Milk, cream, yogurt & whey	Fixed annual TRQ 20,000 mt for 5 years
4	Butter	Annual increases in TRQs for 5 years (5,500-11,500 mt)
5	Cheese & curd	Annual increases in TRQs for 5 years (24,000-48,000 mt)
6	Wheat & meslin	Fixed annual TRQ 40,000 mt for 4 years
7	Barley	Fixed annual quota of 7,000 mt for 4 years
8	Long grain rice	Fixed quota of 1,000 mt (note: no phase out)
9	Broken rice	Fixed quota of 11,500 for 4 years
10	Sugar	Annual increases in TRQs for 5 years (80,000-160,000 mt)

[1] The UK's 36 'transitioned' FTAs used the pre-existing EU FTA as a basis of negotiations under the continuity programme to secure continued access to previously accessible preferential agreements through EU membership, while the UK-Japan Comprehensive Economic Partnership Agreement (CEPA) also used the EU-Japan Economic Partnership Agreement as a basis for the new text.

[2] Tony Heron (University of York)

Between years 11-15, the beef and sheep meat tariff lines covered by the TRQs will be subject to a Product Specific Safeguard (PSS) mechanism. The PSS authorises the UK to introduce (ad valorem) tariffs up to 20%

once the specified import ceiling has been reached.[3] The application of the PSS to TRQ1 would not affect the UK's ability to use it in subsequent years. For TRQ2, however, the agreement stipulates 'if the aggregate quantity of PSS 2 [TRQ 2 – sheep meat] goods imported into the UK in a year exceeds the annual aggregate trigger quantity for that year and the UK increases the ad valorem customs duty pursuant to paragraph 1, the annual aggregate trigger quantities set out in paragraph 2 in respect of each subsequent year shall be reduced by 25%.' In effect, this limits the ability to apply a PSS on sheep & goat meat for multiple years in a row.

Product-specific safeguard trigger ceilings

Year	Quantity	
	TRQ 1 (beef)	TRQ 2 (sheep meat)
11	122,000	85,000
12	134,000	95,000
13	146,000	105,000
14	158,000	115,000
15	170,000	125,000

In addition to the PSS, the agreement contains a General Bilateral Safeguard, to address dumping and offset effects of subsidies in specific instances, and neither this nor the PSS prejudices the use of Global Safeguards, pertaining to Art XIX of GATT 1994 and the WTO Agreement on Safeguards.

Chapter 3 of the FTA also allows both countries to implement a *specific* bilateral safeguard mechanism (Ch. 3, Section D). Bilateral safeguards can only be applied on goods subject to the tariff liberalization commitments set out in the FTA. This is because liberalization of these goods is happening faster under the FTA than it otherwise would under WTO rules. The bilateral safeguard can only be applied following an investigation showing impact of the imports of those goods (Art 3.6(1)) and tariff reductions can either be suspended or raised to the standard MFN applied rate (Art 3.6(2)). Any bilateral safeguard imposed can only last a maximum of two years, with an expectation that in the second year there will be a gradual easing off and return to the tariff commitments in the FTA (i.e. progressive liberalization) (Art 3.7).

The FTA does not preclude access to the product-specific agriculture safeguard under the WTO Agreement on Agriculture (Art 5 Agreement on Agriculture). It should be noted, however, that only one safeguard can be applied at any one time (Art 3.12 UKAFTA). This does not preclude the use of anti-dumping duties or countervailing duties as these are aimed at a different kind of harm.

Sanitary & Phytosanitary (SPS) Measures[4]

The SPS Chapter covers measures related to the protection of human, animal, and plant life or health. On the one hand it confirms the Parties' obligations under the WTO SPS Agreement. At the same time, it builds on the quite different SPS Chapter of the CPTPP.

While these agreements all use similar language and put scientific evidence in the centre of decisions over SPS-based non-tariff barriers, they do so in different ways. The WTO SPS Agreement has a holistic understanding of science and incorporates elements of the precautionary principle. The other two SPS Chapters do not and therefore narrow the spectrum of permissible measures. They appear to only take account of measures that are based on positive evidence and make situations in which there may be scientific uncertainty prone to legal challenges.[5]

[3] This is the average quantity over the calendar year and is not supposed to deal with one-off import surges, which are addressed separately in the FTA.
[4] Markus Wagner (University of Wollongong)
[5] See: Wagner, 'The Future of SPS Governance: SPS-plus or SPS-minus?' (2017)

It is worth pointing out that Art 6.12 UKAFTA is not an equivalent provision as it deals with measures taken in times of emergencies of short duration. The SPS Chapter contains significant provisions on bilateral cooperation and other procedural mechanisms to discuss issues between the parties as they arise. The efficacy of the Committee on SPS Measures remains to be seen as similar institutional mechanisms do not appear to have much practical effect. Its main use may be to discuss and head off what would otherwise result in formal efforts to undertake dispute settlement in the WTO, as Art 6.18 UKAFTA specifically rules out recourse to the agreement's dispute settlement mechanism – leaving the parties only the WTO if they wish to litigate formal disputes over SPS measures.

Environment[6]

The Environment chapter derives its objectives, commitments, most of its specific areas for cooperation (nine of fourteen), and its monitoring and enforcement structure from CPTPP. Thus, the UK's first trade agreement negotiated 'from scratch' marks a shift away from rolling over EU Environment chapters, which are structured differently.[7] It's possible to view the UK moving from copy-pasting one model to copy-pasting another suggesting little attention has gone in the chapter. However, the relative weight of the enforcement mechanism suggests an emphasis on environmental concerns for both sides. In CPTPP (unlike EU FTAs), non-compliance with core non-regression/non-derogation requirements can ultimately result in one party imposing sanctions on the other – in practice, the imposition of tariffs. Thus, the UK-Australia FTA may be the first where while obligations on product regulation in TBT and SPS chapters are not subject to dispute settlement, conversely (and under certain defined circumstances) failure to enforce and maintain environmental regulation can result in trade sanctions.

The UK-Australia Agreement in Principle promised that the Environment chapter would avoid 'substantive commitments' beyond CPTPP. Non-CPTPP-derived areas include commitments to cooperation on climate change, the circular economy, marine litter and sustainable forest management. Notably, the FTA affirms both Parties' commitments to the Paris Agreement, the first for an Australian FTA, though media leaks suggested that the UK failed to convince Australia to commit to limiting warming to 1.5 degrees. While the Paris Agreement states that Parties should 'pursue efforts' to do this, Australia has resisted this nationally, and cast doubt on whether it is possible globally. Thus, the climate component has been presented variously as both a diplomatic failure - and a diplomatic win - for the UK.

Labour[8]

Like much of UKAFTA, the Labour chapter (Chapter 21) is largely based on the CPTPP, including to the extent that the commitment to labour rights relates to those stated in the 1998 International Labour Organization (ILO) Declaration, rather than the more specific ILO Core Conventions, which are legally binding upon the states which have ratified them. This gives rise to some ambiguity relating to the status of these rights.

Despite the similarities, there are however aspects in which this agreement differs from the CPTPP, one of the most significant of which is already signalled in the definitions by the inclusion of a definition of modern slavery. There are three elements of this chapter which are particularly notable. First, a footnote relating to Labour Rights (Art 21.4) confirms that 'to establish a violation of an obligation [of Labour rights] a Party shall demonstrate that the other Party has failed to adopt or maintain a law, regulation or practice to encourage trade or investment.' The CPTPP in contrast requires that to establish a violation [of labour rights] a 'Party must demonstrate that the other Party has failed to adopt or maintain a statute, regulation or practice in a manner affecting trade and investment between the Parties'. While the CPTPP wording is fairly typical, for example it is also used in the USMCA, in which it is defined, the UKAFTA wording is ambiguous and would benefit from clarification. This departure from the CPTPP-type formulation for violation is more striking

[6] Emily Lydgate (University of Sussex)
[7] We noted that many of these chapters are from earlier EU model agreements and remain quite outdated: Lydgate and Anthony, 'Can the UK Government be 'world-leading' in both trade and climate policy?' UKTPO Briefing Paper 47
[8] Emily Reid (University of Southampton)

when it is noted that it is the CPTPP-type formulation which is used in the UKAFTA Agreement with regard to Enforcement of Labour Laws (Art 21.6).

Second, significantly, the chapter sets out lengthy commitments relating to modern slavery (Art 21.7). On one level cooperation in this field between these Parties is not surprising: both the UK and Australia have Modern Slavery Acts and, together with New Zealand, Canada and the US, in 2018 adopted Principles to Guide Government Action to Combat Human Trafficking in Global Supply. The commitments in Art 21.7 largely reflect the national Acts, notably relating to identifying and addressing modern slavery in supply chains. Yet, to include this level of commitment in an FTA is innovative: the extent of the Parties' commitments to impose obligations on private as well as public sector entities is particularly striking in this context.

Third, the chapter includes provision relating to non-discrimination and gender equality in employment (Art 21.8). Although this is largely aspirational, containing little in the way of new substantive commitments, the affirmation in this context can be seen as a signal by the Parties. Moreover, Art 21.16.2 provides that 'any matter arising under this Chapter', may be the subject of dispute settlement. This clearly includes Art 21.8, in contrast to the provisions of the Gender Chapter itself which are excluded from dispute settlement.[9]

Not atypically for an FTA, despite its innovations, the Chapter does not commit the Parties beyond their pre-existing commitments.

Development[10]

The Development Chapter is one of those that has drawn from the CPTPP, but much slimmed down reflecting the fact that UKAFTA is a North-North agreement. It has, in effect, only two substantive articles. The first copies language directly from CPTPP, setting out that the Parties 'recognise the value in undertaking joint development activities relating to trade and investment', before listing areas where such joint work may be taken, including the exchange of information, cooperation on development activities, cooperation in international fora and so on. Nothing is mandatory. Discussions on any joint activities under the Development Chapter are to be raised in the Committee on Cooperation established in chapter 27 (Cooperation). Two reasons can be put forward for the inclusion of a chapter on development, which is possibly unique among FTAs including only countries of the Global North. First, clearly it reflects the desire on the part of the UK government to use UKAFTA as a springboard to join the CPTPP. Second, it can potentially be seen to align with the UK government's desire to leverage its aid budget to support UK foreign policy more directly. Greater coordination with Australia on this would potentially assist the UK's attempt to secure greater influence in Asia.

Gender[11]

This is the UK's second gender chapter following the inclusion of a gender chapter in the UK-Japan Comprehensive Economic Partnership Agreement. The UK is one of a small group of countries that are at the forefront of including dedicated gender chapters in their trade agreements. In addition to the gender chapter (ch24), there are also dedicated gender provisions in other chapters of the agreement, including the chapters on services, SMEs, financial services, procurement, labour, and digital trade.[12] For a full assessment of the gender clauses in UK-Australia, these clauses need to be read together.

Chapter 24 aims to harness trade to advance 'gender equality' and 'inclusive growth', reaffirms WTO-based gender and trade initiatives (such as the Buenos Aires Declaration on Trade and Women's Economic Empowerment) and aims at improving cooperation in the sharing of best practices on gender sensitive trade policy and evidence-based policymaking.

[9] See the section below on Gender (Silke Trommer)
[10] James Scott (King's College London)
[11] Silke Trommer (University of Manchester)
[12] For example, see the section below on Financial Services (Andrew Lang)

It is specifically aimed at women business owners, entrepreneurs, and workers, and recognises that promoting equal opportunities requires workplace flexibility for people with care responsibilities in their private lives. However, UKAFTA stops short of addressing how trade agreements affect people of all genders in their roles as consumers, and as (unpaid) carers more widely. The Chile-Uruguay and Chile-Argentina FTAs, by contrast, integrate a number of ILO conventions (on discrimination in the workplace and workers with parental responsibilities, among others), in their gender chapters. This is a more progressive approach, from the perspective of gender equality.

Chapter 24 excludes 'all matters arising' under the chapter from dispute settlement, which raises the question of how this affects gender provisions in other chapters of the agreement that are covered by dispute settlement.

Although it provides a 'dialogue' between the Parties on matters pertaining to the chapter, it stops short of setting up a gender and trade committee, unlike Canada and Chile's model gender chapters (the other two countries that are driving the trend towards gender chapters in trade agreements). There is thus no institutional mechanism for ensuring that the Parties will cooperate on gender and trade matters in practice.

Financial services, including regulatory cooperation[13]

The structure and core elements of the financial services chapter (chapter 9) are familiar from recent trade agreements, especially the CPTPP. Financial services (FS) are carved out of the general chapters on cross-border trade in services and investment. This chapter applies to measures with respect to established FS supplier (what we think of as Mode 3, established via commercial presence), with respect to investors and investments in established FS suppliers, and with respect to another category called 'cross-border supply of FS'. This last category is a mix of Mode 1, Mode 2 (in territory of one party to a national of the other Party) and Mode 4 (by a national of one party in the territory of another) – the same format as found in CPTPP. The core disciplines of most-favoured nation, national treatment, and market access are as expected. The Agreement is largely negative list (identifying carve outs from liberalisation commitments) but national treatment and market access for Mode 1 cross-border trade in services is positive list (liberalising only those sectors identified). Chapter 30 dispute settlement applies in respect of disputes under the chapter subject to some modifications, e.g. regarding the expertise of panellists, and importantly, the prohibition of cross-retaliation outside the FS sector.[14]

Art 9.10 on 'transparency' contains most of what we see now in terms of enhanced transparency obligations in recent FTAs. Two brief comments. First, in line with other UK agreements, there is a requirement that authorisation decisions do not discriminate on the basis of gender – this is also found in other chapters and other agreements, but it is one of the contributions of UK practice, and it could be a significant achievement. Exactly what it means, and the circumstances in which it might be applied, is, however, an open question. Second, many of the specific transparency obligations are subject to language such as 'in a manner consistent with its law and regulation'. This will not always be a significant limitation, but sometimes may be. One example is where regulators need to be empowered by statutory mandate to consider extraterritorial effects – it is not clear to what extent this is true in the UK and Australia, but we know that oftentimes it is not, and this strongly limits the benefit of provisions which require such consideration.

Art 9.12 on financial data is important. There are strong disciplines ensuring the ability of FS suppliers to transfer information 'necessary for the conduct of [its] ordinary business' (personal credit information is not included in this) and prohibiting requirements to use local computing facilities.

But these strong disciplines are accompanied by important limiting provisions in subparagraphs 4 and 5. Both these paragraphs refer to 'rights' of Parties to limit data flows and require local facilities in certain circumstances, and paragraph 5 refers in an open-ended manner to any 'legitimate public policy objective'

[13] Andrew Lang (University of Edinburgh)
[14] For the 'standard' procedures, see the section below on Dispute Settlement (Holger Hestermeyer)

subject only to the familiar conditions of necessity and no arbitrary or unjustifiable discrimination. Taken together these limiting conditions may well be the controlling normative elements of this provision.

Art 9.19, entitled 'sustainable finance', is mostly couched in softer language, but it is again an important signal. In it, the Parties declare their support for the consideration of environmental, social, and corporate governance (ESG) factors in investment-decision making, including the assessment of climate-related risks and opportunities, and say they will support and work together (in existing international fora) on standards for disclosure and reporting of ESG elements.

Unlike other recent agreements, UKAFTA does not have a general cross-cutting chapter on regulatory cooperation as such, but Annex 9C to the FS chapter does establish, in the Joint Financial Regulatory Forum, a detailed framework for ongoing cooperation in respect of FS regulation. The Joint Financial Regulatory Forum, as is normal with these bodies, is a flexible structure to be used and activated as appropriate: it meets annually, it can establish expert sub-working groups to carry on work in the meantime, it would establish its own agenda early on, it is a place for the Parties to exchange information on planned regulatory initiatives, regulators (BoE, HMT, FCA, ASIC, RBA, Aus PRA) are direct participants. There is a process for reviewing a measure which is specifically raised by the other Party, and a push towards the consideration of impacts felt in the territory of the other party.

Art 9C.3 establishes as one of the three core principles of regulatory cooperation that 'the Parties shall, wherever practicable, work to achieve mutual compatibility of their respective regulatory and supervisory frameworks for financial services in areas of common interest'. The Annex places a strong emphasis on the development and use of international standards as a basis for this cooperation. But it also contains important and novel language on deference even in the absence of harmonisation based on international standards: 'The Parties shall, wherever agreeable and in accordance with their respective regulatory and supervisory frameworks, defer to the regulatory and supervisory frameworks of the other Party.' It is not clear precisely what this means, but we can speculate that it may entail greater use of formal recognition arrangements, different kinds of exemptive relief, and perhaps some pragmatically modified practices of scrutiny and supervision where it is appropriate to relay on a foreign regulator's judgment and information. Importantly, Art 9C.7 sets out a framework for managing the process of terminating a deference arrangement: it notes some circumstances in which this could happen; provides for written notification; a mandatory period of consultations and possible mediation; and requires a sufficient time for service suppliers to apply for host state authorisation and for measures to protect acquired to be passed. An important difference in relation to this Annex: disputes are subject to mediation, not formal dispute settlement under Chapter 30. This Annex is important, and future UK FTAs are likely to have further developments in this area. Of course, it is only a structure: a set of institutions, agreed objectives and principles, awaiting a specific agenda and action on specific regulatory measures. It is not subject to dispute settlement and there are few *clear* commitments.

Cross-Border Trade in services and mobility[15]

The Cross-Border Trade in Services (CBTS) Chapter is primarily modelled on the CPTPP subject to deviations referred below. This means that from a regulatory commitments perspective, the agreement contains the provisions one would expect in an agreement between two advanced economies. For example, it contains a ratchet clause for existing measures by which unilateral liberalization by a Party of an existing measure is brought into the agreement and it also contains a forward-looking most-favoured nation clause subject to specified exceptions.

The regulatory area where there is the most deviation from CPTPP, is with respect to Domestic Regulation. The article strengthens the language in the CPTPP by incorporating the farther-reaching language in the Reference Paper on Services Domestic Regulations adopted by the participants in that Joint Statement Initiative at the WTO, combined with some language from the UK-EU TCA Text. In that respect it lays out a

[15] Kirk Haywood

clearer framework for procedural and transparency requirements around some licencing, qualifications and technical standards than present in the CPTPP.

The four sectoral annexes draw from a combination of language from the CPTPP and the UK-EU TCA. In some instances, this synthesis works well. The Annex on express delivery services is an example of this for its clarity. In others, the merging produces uncertain results. This is the case with, for example, the provisions on feeder services between ports of one party. While such services would ordinarily be referring to cabotage, and in the UK-EU TCA from which they are taken they would be cabotage, in the UK-Australia FTA the scope of the Annex has been narrowed to 'international' maritime transport only and this scope would, by definition, exclude cabotage, leaving the provision to have an unclear practical effect.

On the Market Access commitments for non-financial services, Australia has based its offer on that with Japan under the Japan-Australia Economic Partnership Agreement (JAEPA). This would represent the best commitment for Australia outside of that with New Zealand, which is of a different nature. The additionality for the UK with Japan being used as the basis of the offer, as opposed to a CPTPP template, is that that there is no blanket regional level carveout in the Australian commitments, as is the case in the CPTPP. With respect to additions beyond Japan, in the Annex I NCMs, the UK has secured better commitments on law firm profit sharing and travel agents. On Annex II NCMs, the UK has secured better commitments than those present in JAEPA and CPTPP by removing the cross-cutting carveout for future market access measures at the regional level The only minus on both Japan and CPTPP is a new cross-cutting carveout for residence requirements for senior managers and board of directors. Such carveouts can be commercially meaningful, and this is the only area where one could critique the commitments. The UK has based its offer to Australia on the UK-EU TCA, with only two changes each under the Annex I NCM schedule and the Annex II NCM schedule. This is a significant policy choice, perhaps the most important in the CBTS, by virtue of the fact that the UK's commitment to the EU in the TCA is, for an FTA/EPA commitment, very high quality. By providing it in the first non-rollover agreement, it does set expectations from other advanced economies that are open on services that they would seek to get better than this level of offer.

On the movement of people market access commitments, the Parties commit to remove quotas, economic needs tests and labour market testing- which is an important commitment. As with the CBTS market access commitments, Australia's commitment here is again based on CPTPP with modifications. The modifications are the duration of the independent executive where the stay period has extended from 2 to 4 years, and contractual service suppliers where the stay period has increased from 1 to 4 years. There is a novel definition of independent executive in the Australian schedule which equates more closely with the corresponding UK definition for investor. We therefore do not see any commitments for self-employed on the Australian side that mirrors the UK commitment for them under the category of independent professionals.

For the mutual recognition of professional services, in keeping with the standard practice, the agreement does not by itself grant recognition, but rather creates pathways for such recognition to occur through the conclusion of agreements or arrangements by the relevant competent authorities. The language here perhaps could have been bolder as it imposes only the lightest of touches. For example, the provisions only require Parties to 'consider, or encourage relevant bodies to consider, subject to laws and regulations, whether or [how to conclude agreements for recognition]' and to 'consider, if feasible…encoura[ing] its relevant bodies to consider implementing procedures.' The value addition of these provisions is the regulatory dialogue it establishes through the Professional Services Working Group. In that respect the mutual recognition provisions should not be seen as the end point of liberalization, but the beginning of a process and its success will hinge on future actions.

Finally, on the mobility side letters, it should be first noted that they sit with but not within the agreement, and do not create the same kind of rights and obligations. The most significant inclusion is the Australia Innovation and Early Careers Skills Exchange Pilot which could provide Australia with access to talent in the innovation-dependent fields for which the visa is being offered and benefit the UK by pilot participants returning with new ideas from the fast-moving Asia-Pacific region. Another noteworthy change is with respect to increasing the age range for the working holiday maker and youth mobility scheme to 35. This change levels the playing field for the UK with respect to Canada, France and Ireland.

Digital/innovation[16]

Provisions on digital (mainly in chapter 14) are more extensive than previous UK trade agreements and the CPTPP, and draw extensively on the Australia-Singapore Digital Economy Agreement (DEA) 2020 (see Table 1). Although the digital trade commitments aim at 'binding' existing practices and increasing cooperation rather than requiring changes to current regulations or policies, they nonetheless have substantial implications for the scope of future UK policy in important areas including data protection, online harms, regulation of AI, digital identities, financial regulation, and cyber security.

Digital trade facilitation: A series of articles aim at enabling all types of business to leverage efficiency gains from digitalisation in cross-border transactions, by helping economic actors move from analogue to digital systems and promoting interoperability. These include commitments not to impose customs duties on electronic transmissions (Art 14.3); to try an implement 'paperless trade' whereby customs and other trade compliance paperwork can be completed digitally (Art 14.8); to ensure that contracts made by electronic means have equivalent effect to their paper counterparts (Art 14.5); to facilitate the use of digital transferable records (Art 14.4); to facilitate the use of e-authentication and electronic trust services (Art 14.6); and to promote compatibility between regulatory regimes for digital identities (Art 14.7) and e-invoicing systems (Art 14.9).

Data governance: There is a strongly worded commitment not to 'prohibit or restrict' cross-border flows, including personal information (Art 14.10) and not to require the localisation of data (Art 14.11), subject to a public policy exception in both cases. While very similar to UK-Japan, CPTPP and DEA, the EU has not made an analogous commitment its trade agreements out of concern that the public policy exception is too narrow to safeguard the GDPR.[17] The article on personal information protection (Art 14.12) is weaker than EU trade agreements which aims to carve out personal data regulations from specific trade disciplines. In tandem with the FTA, the UK is considering whether to grant Australia data adequacy. If the UK grants adequacy and the EU does not, the UK will need to be careful not to undermine its own adequacy decisions from the EU through inadvertent onward transfers of EU data.[18]

Regulation of AI and emerging technologies: There is a prohibition on government measures that require companies to divulge their source code (Art 14.18), subject to a public policy exception. Although the wording provides slightly more leeway for regulators previous agreements, the carveouts may not be sufficient to enable policymakers to fully mitigate existing and potential risks that could emerge from the widespread use of algorithms.[19] UKAFTA is the first to have a stand-alone chapter on innovation (Chapter 20) which aims to spur innovation in AI and emerging technologies via specific cooperation activities (Art 20.4) and a government-to-government 'Strategic Innovation Dialogue' (Art 20.5) which will meet 'at least once every two years'.

Competition and consumer protection in the digital economy: Like other recent trade agreements, the emphasis is on the promotion of AI and commitments to address potential adverse impacts on competition and consumer protection are less developed. Notably the provisions in UKAFTA regarding competition policy are even less ambitious than the DEA as there is no explicit commitment to promote competition in digital markets. While there are general commitments to promote online consumer protection (Art.14.16), and limit spam (Art 14.17), unlike the Australia-Singapore DEA, no mention is made of the Parties cooperating to address online harms.[20]

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[16] Emily Jones, University of Oxford. For more detailed analysis see Jones, Garrido Alves, Kira, and Tavengerwei, 'Digital Trade Provisions in the AUS-UK FTA: Submission to International Trade Select Committee' (19 February 2022)

[17] Note that the UK-EU TCA contains a commitment not to impose localisation requirements (Article 201) but it includes no general commitment not to prohibit or restrict cross-border flows. See also Yakovleva and Irion, 'Pitching Trade against Privacy: Reconciling EU Governance of Personal Data Flows with External Trade' (2020) 10 International Data Privacy Law 201.

[18] Meyers and Mortera-Martinez, 'The Three Deaths of EU-UK Data Adequacy' (*Centre for European Reform*, 15 November 2021). See also G. Greenleaf, *Asia-Pacific Free Trade Deals Clash with GDPR and Convention 108*, SSRN Scholarly Paper, ID 3352288 (2018).

[19] See Dorobantu, Ostmann and Hitrova, 'Source Code Disclosure: A Primer for Trade Negotiators' in Borchert and Winters (eds), *Addressing Impediments to Digital Trade* (CEPR Press 2021).

[20] On the limitations of the provisions on competition, see also the section below on Competition policy (Peter Holmes).

Table 1: Comparison of UKAFTA provisions on digital trade with other recent agreements

Provision	AUS-UK	AUS-Sing	UK-Japan	CPTPP
Issue 1: Trade Facilitation				
Customs duties on electronic transmissions	✓	✓	✓	✓
Paperless trade	✓	✓	-	(✓)
Electronic contracts	✓	-	✓	-
Electronic transferable records	✓	✓	-	-
E-authentication and trust services	✓	✓	✓	✓
Digital identities	✓	✓	-	-
E-invoicing systems	✓	✓	-	-
Issue 2: Cross-border data flows				
Free flow of data & data localisation	✓	✓	✓	✓
Personal information protection	✓	✓	✓	✓
Financial data - free flow	✓	✓	✓	✓
Financial data – localisation	✓	(✓)	✓	-
Open government data	✓	✓	(✓)	✓
Data innovation	✓	✓	-	-
Issue 3: Innovation and regulation of new technologies				
Algorithms and source code	✓	✓	✓	✓
Cryptography	✓	✓	✓	-
AI and emerging technologies	✓	✓	(✓)	-
Strategic Innovation Dialogue	✓	(✓)	-	-
Issue 4: Regulation of digital platforms				
ISP liability (copyright)	✓	✓	✓	✓
Open internet access	(✓)	✓	✓	(✓)
Competition in digital markets	-	✓	-	-
Issue 5: Online consumer protection				
Online consumer protection	✓	✓	✓	✓
Spam	✓	✓	✓	✓
Online harms	-	✓	✓	✓
Issue 6: Cybersecurity				
Cybersecurity	✓	✓	-	(✓)

Notes: ✓ = provision is present; (✓) provision is present but less specific; - = no provision.

Investment[21]

While the investment chapter of UKAFTA is based on CPTPP, there are some significant differences. Most obviously, unlike CPTPP, the FTA's investment chapter does not contain an Investor–State Dispute Settlement mechanism – it is instead only subject to the FTA's general State–State dispute settlement chapter. Concerning who qualifies as an investor of a Party, the FTA adds a requirement that an enterprise must be 'carrying out substantial business activities in the territory' of the Party whose nationality it claims or be owned or controlled by a national of that Party or by an enterprise that is carrying out substantial business activities in the territory of that Party. The investment liberalisation commitments in the FTA go somewhat further than CPTPP. For example, the FTA includes certain additional prohibitions on performance requirements beyond those in CPTPP. The FTA also goes further than CPTPP in imposing an absolute prohibition on a Party imposing nationality or residency requirements for senior managers or directors of an enterprise that is a covered investment. The FTA also includes a market access obligation not found in CPTPP's investment chapter. However, all these liberalisation obligations are subject to substantial reservations in each Party's (and particularly Australia's) schedules of existing and potential future non-conforming measures. The investment protection obligations in the FTA (e.g. international minimum standard of treatment and protection against expropriation) are largely identical to those found in CPTPP. The obligation to permit free transfers in relation to investments includes a clarification, not in CPTPP, that the provision does not 'prevent a Party from applying its law relating to the imposition of economic sanctions in good faith'. Unlike CPTPP, the investment chapter is subject to the general exceptions provisions that are incorporated into the FTA.[22]

Intellectual Property (IP)[23]

The key aim of the IP Chapter is to strike a difficult balance between protecting innovation whilst promoting and protecting the public interest and health and not 'unreasonably restrain[ing] trade or adversely affect[ing] international transfers of technology'. This is articulated under the core principles, the wording of which matches CPTPP. The Chapter reflects the fact that this is an agreement between two developed economies with advanced IP regimes granting strong protections to copyright, trademark and patent holders, and between countries that are already parties to numerous international conventions on these matters. It reaffirms more conventions and is more comprehensive in protections than CPTPP, which includes countries with more heterogenous IP regimes. For instance, when it comes to exceptions to granting patents, both agreements exempt diagnostic, therapeutic and surgical methods as well as plant, animal and biological processes. However, unlike CPTPP, UKAFTA allows additional protection of patents to be granted to take account of the time needed to give pharmaceuticals marketing authorization.

Another key difference with respect to CPTPP relates to the treatment of Geographic Indications (GIs). Australia protects GIs through its regular trademark system. The Scotch Whisky Association has trademarked 'Scotch Whisky' in Australia, and only distilleries within the Association can sell products with that name in Australia. The UK, however, follows the EU GI regime, whereby GIs are registered separately, and all producers in the GI area are protected. The text on GI allows for the co-existence of both systems and is written with a future EU-Australia trade agreement in mind. It is expected that in a future EU-Australia agreement, Australia will have to create a register for GIs, something acknowledged by UKAFTA noting that were this to happen Australia will consider a list of UK GIs for inclusion in the register. The procedure for registration will afford interested parties an opportunity to object, and is not automatic, as is made clear in the Side Letter on the matter. In case an agreement between the EU and Australia fails, the Committee on IP Rights is tasked with engaging on bilateral consultations on GIs.

[21] Joshua Paine (University of Bristol)
[22] For a detailed discussion of the investment aspects of the UK–Australia FTA see Joshua Paine, Submission to International Trade Committee Inquiry into UK–Australia FTA.
[23] Maria Garcia (University of Bath)

Finally, it is interesting to find an article on environmental considerations in the destruction of seized counterfeit goods (Art 15.96) in an IP chapter. However, the article merely recognizes the importance of considering this, it does not create a clear obligation to destroy goods in an environmentally sound manner, nor does it clarify what that could be, so its significance in practice remains uncertain.

Competition policy and consumer protection[24]

Chapter 17 of UKAFTA covers competition policy and consumer protection and is almost entirely based on Ch 16 of CPTPP (itself cut and pasted from the draft TPP agreement with the same title). The UK-Australia text is not a word-for-word transplant but is fundamentally similar. It reflects US priorities which historically have been to exclude binding commitments on competition from trade agreements and rely on the muscle and extraterritorial reach of US Anti-Trust to address US concerns. The point of Ch 17 is not to address cross-border anti-competitive restraints to trade as is the focus of EU trade and competition proposals and FTA provisions, but rather to ensure that (CP)TPP countries with no competition law introduce a basic minimum.

Like chapter 16 of the CPTPP and TPP, UKAFTA Ch 17 mainly focuses on ensuring compliance with some core principles. The half page Art 17.1 states that there must be non-discriminatory laws to proscribe anti-competitive agreements and practices and to address anti-competitive mergers, and to have an independent competition agency. But it also provides that (Art 17.1.3) that there can be 'certain exemptions' provided they are transparent and based on public policy grounds. The next 2 pages are intended to ensure partners ensure procedural fairness (n.b. for firms), transparency and the right to bring a private action. Rules are general but based on US principles. It is hard to see anything that would require the UK to change anything. Unlike EU FTAs there is no explicit ban on anti-competitive activities that affect trade. Arts 17.6 and 17.7 on cooperation and consultation are weak, with possibilities spelled out rather than new obligations. They identify what cooperation 'may include'. This includes the possibility of exchange of confidential information, but none of the cooperation options are obligations. Indeed chapter 17 is in any case excluded from formal dispute settlement.

By contrast, Chapter 12 on Telecommunications contains much more specific obligations to ensure competition in *telecoms* markets. Art 12.5 creates obligations on Access to Essential Facilities and Unbundled Network Elements and Art 12.7 requires Competitive Safeguards against abuse by incumbents. These provisions parallel the WTO GATS Telecoms Annex, which contains competition provisions going well beyond anything in the goods field.

It is also worth remarking that the UK and Australia have both signed much more detailed self-standing agreements affecting competition policy with each other and with the US. For example: the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities includes modalities for possible exchange of agency confidential information; the USA/Australia Mutual Antitrust Enforcement Assistance Agreement (1999) provides for exchange of confidential information; and the US/UK Mutual Legal Assistance Treaty (1994) covers criminal aspects of anti-trust with strong obligations including extradition for criminal price fixing etc.

In sum, the UK-Australia competition chapter does not deal with cross border competition issues, but other elements of the FTA and bilateral competition agreements do address these issues. This likely reflects the US hostility to the WTO trade and competition agenda in the early 2000s. But with changing perceptions of the global role of Big Tech, we may yet see changes on this front in any case.

State-owned Enterprises (SOEs) and monopolies[25]

The SOE chapter in UKAFTA is copied from the SOE chapter in the CPTPP and in this regard, the UK has clearly not been a norm entrepreneur as far as SOE regulation is concerned.

[24] Peter Holmes (University of Sussex)
[25] Ming Du (Durham University)

The SOE chapter includes some good points: (1) a clear definition of a SOE; (2) clear substantive obligations on SOEs (non-discrimination, commercial considerations, and the regulation of non-commercial assistance); (3) extensive and enforceable transparency provisions; (4) confirmation that SOEs do not enjoy sovereign immunity in domestic courts and (5) rules to ensure that the subsidisation of SOEs' overseas operations (via commercial presence - mode 3) is captured if it causes adverse effects to the interests of the other party.

On the other hand, there are still weaknesses: (1) a rigid definition of a SOE may create loopholes as corporate structures are adjusted to evade commitments; 2) SOEs are no longer required to base their business decisions 'solely' on commercial considerations; 3) extensive exceptions and carve-outs may severely erode the limited substantial obligations; 4) and a failure to incorporate sensible provisions developed in other recent mega-regionals, such as outright prohibition of certain types of harmful subsidies.

Finally, two unexpected elements arise: the SOE chapter does not apply to audio-visual services (presumably reflecting the position of national broadcasters); provisions to ensure SOEs are permitted to give more favourable treatment to indigenous persons and organizations in the purchase of goods and services.

Procurement[26]

The procurement chapter builds on the UK's and Australia's commitments under the WTO Government Procurement Agreement (GPA) and seeks to create a GPA+ regime both in terms of more demanding substantive obligations (e.g. obligations concerning electronic publication of contract opportunities; inclusion of a clause on environmental, social and labour considerations; or a clause on SME access to procurement opportunities), as well as economic coverage (e.g. through the inclusion of concession/build-operate-transfer contracts, or the reclassification of some entities for the purposes of subjecting them to lower value thresholds requiring equal access).

However, in some aspects (and following the same approach in CPTPP as well as the EU's bilateral FTAs e.g., with Singapore which the UK also 'transitioned'), UKAFTA deviates in ways that alter or reduce the substantive obligations of the Parties towards each other compared with the GPA baseline (i.e., GPA-). This is notably the case concerning national treatment obligations (where the text is *varied* in a way that creates uncertainty on the scope of equal access for UK and Australian suppliers offering third country goods and services), as well as the remedies available under domestic review procedures (where the text *extends* the possibility of excluding access to remedies on public interest grounds). Both GPA- issues raise questions on their effectiveness, not only between the UK and Australia, but also for both *vis-à-vis* other GPA members.[27]

Rules of Origin[28]

UKAFTA provides substantial tariff liberalization for most of the UK exports to, and imports from, Australia. However, the benefit of tariff liberalization partly depends on firms being able to satisfy or meet the rules of origin. For example, the EU-UK Trade and Cooperation Agreement (TCA) is a zero tariff and zero quota agreement but up to October 2021, the preference utilization rate was only around 70%, indicating that 30% of UK exports to the EU that were potentially eligible for preferential access paid tariffs. In UKAFTA, the change in tariff classification (CTC) rule is applied to about 36.6% of the products, whereas in comparison in the TCA the figure is 13.4%. In UKAFTA, the wholly obtained rule is never used, whereas it appears in 9.5% of cases in the TCA. In UKAFTA, in 22.6% of cases, the CTC rule it is specified at quite an aggregate (HS 2-digit) level. Particularly, the case for Animal and animal products where 100% of the rules are the CTC rule specified at the aggregate level; vegetable products (91%), foodstuffs, beverages and tobacco where this is the case for 64% of products, and textiles and clothing where the share is 46%. The need to satisfy more than one rule is never applied while is in 63% of cases in TCA. In UKAFTA, rule of value-added (VA) or CTC is applied in 58.2% of cases.

[26] Albert Sanchez-Graells (University of Bristol)
[27] For further details of the procurement analysis see Sanchez-Graells, 'The procurement chapter in the UK-Australia free trade agreement – GPA+ or GPA complex?' (2022) and Sanchez-Graells, Written Evidence to the House of Lords International Agreement's Committee Inquiry on "UK-Australia trade negotiations" (27 Jan 2022).
[28] Yohannes Ayele (University of Sussex)

UKAFTA also only provides for the bilateral cumulation of rules of origin which reduces the possibility of including inputs from third countries (though this will have a read across to any future commitments under CPTPP, where the rules on cumulation are more liberal). Finally, with respect to providing proof of origin to claim zero tariffs, the UK-AUS FTA provides two options: Self-certification provided by the exporter or producer or self-certification by the importer i.e., importers knowledge without the need to complete the declaration of origin, which is very similar with provisions in TCA or UK-Japan CEPA.

Technical Barriers to Trade (TBT)[29]

The TBT Chapter in UKAFTA reaffirms the rights and obligations of both Parties in the WTO TBT Agreement in Art 7.4. As with the institutional provisions of the SPS Chapter, the TBT Chapter includes executive cooperation provisions, with requirements to provide rationales for deviating from e.g. international standards, guidelines or recommendations (Art 7.6 (3)). Also, as in other agreements, private parties are able to participate in the development of technical regulations, standards, and conformity assessment procedures. The TBT Chapter incorporates at times highly technical details, e.g. on the permissibility of detachable labels and an Annex specifically addressing cosmetics, reflecting a more narrow sector-specific approach to the reduction of trade barriers than what is customarily found at the WTO, but is increasingly common in FTAs.

National security[30]

Art 31.2 UKAFTA presents broad security exceptions for the two Parties, far beyond that which is offered under the WTO. In 2019, two WTO dispute settlement panels reviewed the security exceptions of the General Agreement on Tariffs and Trade (GATT) and found that the exceptions were not entirely subject to the invoking WTO Member's determination. A Member could decide what actions were 'necessary' to take but needed to demonstrate that such actions fell into one of the listed circumstances for invoking the exceptions. In other words, the language of the exceptions required WTO panels to make an objective determination as to whether the Member invoked the exceptions properly, thereby justifying the Member's breach of the WTO rules.

Australia and the UK have removed the 'objectivity' of the GATT's security exceptions, suggesting that the governments seek to maximize their discretion when invoking the security exceptions. Whereas, for example, a panel had to review whether an invoking Member protected its essential security interests 'in time of war or other emergency in international relations', UKAFTA only states that a Party applies measures 'that it considers necessary for the [...] protection of its own essential security interests.' This phrasing is far broader than the exceptions found in other comparable agreements, such as the EU-Canada Comprehensive and Economic Trade Agreement (CETA). Coupled with the breadth of measures (defined broadly to cover any law, regulation, procedure, requirement, or practice), Art 31.2 may prove to be the exception that swallows the rule. It remains unclear how the Parties would assess measures with mixed motives – for example, regulations that address environmental protection *and* economic security goals. There remains no recourse to assess the good faith of the Parties when invoking the security exceptions, and a Party may withhold of 'any information' which may be 'contrary to its essential security interests.' Nor is there discussion as to how the Parties may review the measures in any way, rendering it impossible for the Parties to evaluate the temporal dimensions or internal supervision of these measures. Without temporal boundaries to the invocation of the security exceptions, Parties lack the means to assess whether actions were taken *before* or *during* a time where essential security interests were at stake.

The implication of Art 31.2 is that there is no way to monitor when actions simply become protectionist. With little clarity as to the reviewability of the security exceptions or the proper analytical framework, this may prove to be problematic for the Parties in the future. Ultimately, it appears the exceptions are meant to operate as a diplomatic tool rather than a legal exception. However, the history of the WTO experience proves that ambiguity on these issues may prove problematic if the security exceptions are invoked in a dispute. As a final word, Art 31.2 serves as an important model for other governments.

[29] Markus Wagner (University of Wollongong)
[30] Mona Paulsen (London School of Economics)

Dispute settlement[31]

Like almost all modern free trade agreements, UKAFTA provides for state to state dispute settlement, i.e. a process for resolving disputes arising under the agreement between the two state parties. As noted above, the agreement does not provide for the vastly more controversial investor-state dispute settlement (ISDS) procedure, which would allow investors from one state party to commence arbitration against the other state party.

The provisions on dispute settlement in the agreement are not a carbon copy of the CPTPP provisions or of the provisions of another treaty, but one can clearly see how provisions in various FTAs including the CPTPP served as inspiration and models for the UKAFTA mechanism. The basics of the mechanism will be familiar to anyone studying FTAs – a one instance dispute resolution process inspired (originally) by the GATT/WTO mechanism: the process begins with consultations and continues, if those fail, with the request for establishment of a panel. A (normally) 3-person panel issues an interim report and then a final report. If there is a finding of inconsistency with or violation of the FTA, the losing party has to comply with it within a reasonable period of time (and the possibility of a compliance review before the reconvened panel) or else grant compensation or face suspension of concessions until it complies (with the possibility of a compliance review before the original panel after the adoption of temporary remedies should there be a dispute as to whether there now is compliance with the original ruling).

While much of this is well-travelled territory, a couple of particularities deserve to be mentioned. This regards first the scope of the dispute settlement procedure: The provisions apply to all disputes on the application or interpretation of the agreement unless otherwise provided in the agreement. Some chapters are entirely exempt from dispute settlement (most remarkable in that regard are the SPS and TBT chapters) and the trade remedies chapter exempts countervailing duties, anti-dumping duties, and global safeguards from dispute settlement, leaving dispute settlement to apply to bilateral safeguards only. The reason for the exemption of SPS, TBT and the mentioned trade remedies from dispute settlement is likely that the FTA does not add much to WTO law in this regard in any event. Other chapters modify the dispute settlement provisions (e.g. by establishing pre-dispute settlement procedures or demanding special expertise of arbitrators) – this applies to the environment, labour, transparency and anticorruption as well as the financial services chapters. The chapters differ significantly in how the references to the dispute settlement chapter are drafted (e.g. Art. 22.26(1) refers to Art. 30.7 and 30.8 only, Art 21.16(11) refers to Art 30.8 and thereafter recourse to the other provisions of the Chapter). It is not entirely clear whether these differences point to material differences or are the result of a lack of legal scrubbing.

A second point worth noting regards claims that can be raised. Art. 30.4 UKAFTA is visibly based on Art 28.3 (CP)TPP, but improves on that provision. It only provides for two types of cases: alleged inconsistency of a measure and a claim of a failure to carry out obligations. Unlike the CPTPP provision it does not provide for non-violation complaints (a traditionally contentious and at times vague ground for a dispute). A third noteworthy point is the choice of forum clause (Art 30.5), which resolves the issue of forum-shopping for substantially equivalent obligations contained in other treaties. In those cases, the complaining party can choose the forum for dispute settlement, thereby excluding other fora unless the chosen one fails to rule on the merits of the claim.

Regarding the procedure itself, the FTA follows the trend of setting tight deadlines and establishing even tighter deadlines for cases of urgency. At times, one wonders whether the sheer number of different deadlines is really necessary. A final remark concerns the choice of arbitrators: the chapter does not establish rosters of arbitrators, unlike many of the UK's continuity FTAs. This does not necessarily mean a change of approach. It could, instead, be a consequence of the realistic assumption that UKAFTA is unlikely to see much dispute settlement in practice. Where WTO obligations exist, the Parties are likely to use WTO dispute settlement – and in the future the Parties are likely to use CPTPP dispute settlement procedures for their relations with each other.

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