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An Analysis of the UK–Australia FTA's Investment Chapter

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Abstract

This paper analyses the investment chapter of the UK–Australia Free Trade Agreement (FTA), which is the first truly new FTA that the UK has concluded since leaving the EU. The paper highlights that while the UK–Australia FTA's investment chapter is clearly based on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which the UK has applied to join and which Australia is a Party to, there are some significant departures from CPTPP. For example, the FTA introduces additional requirements for a legal entity to qualify as protected investor; the FTA's investment liberalisation obligations extend further than CPTPP; and the FTA applies the general exceptions provisions incorporated into the wider Agreement to the entire investment chapter, unlike CPTPP. The paper argues that in certain areas where the CPTPP's approach was copied into the UK–Australia FTA this is undesirable (eg the provisions concerning the international minimum standard of treatment/fair and equitable treatment, and the annex clarifying the scope of indirect expropriation). The paper offers specific suggestions on how the UK could adjust its approach to these and other investment-related issues in future negotiations that it will be undertaking in the coming years.

A. Introduction

1. **Context of the UK–Australia FTA**. This paper analyses the investment chapter of the UK–Australia Free Trade Agreement (FTA), which was signed in December 2021, based on an Agreement in Principle (AIP) reached by the Parties in June 2021.[1] While the UK has concluded some 36 so-called 'roll-over agreements', aimed at replicating existing FTAs of the European Union (EU) given the UK's departure from the EU, the UK–Australia FTA is the first truly new FTA that the UK has concluded.[2] Significantly, several of the UK's 'roll-over agreements' include a commitment to negotiate an entirely new FTA in the

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[1] For the text of the FTA see https://www.gov.uk/government/collections/free-trade-agreement-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-australia For the text of the AIP see https://www.gov.uk/government/publications/uk-australia-free-trade-agreement-negotiations-agreement-in-principle/uk-australia-fta-negotiations-agreement-in-principle For an overview of various aspects of the UK–Australia FTA see Trade and Public Policy Network, 'What's in the UK-Australia FTA? Preliminary Reflections' March 2022, https://s3.eu-west-2.amazonaws.com/tappnetwork.prod/documents/TaPP_UKAFTA_Reflections.pdf

[2] On 28 February 2022 the UK– New Zealand FTA was signed, which is the second new rather than rollover agreement that the UK has concluded. For the text see https://www.gov.uk/government/collections/uk-new-zealand-free-trade-agreement This paper does not analyse the UK–New Zealand FTA as this will be the subject of a future analysis.

coming years (eg the agreements with Canada and Mexico),[3] and/or commitments to review existing commitments or negotiate new commitments on investment issues (eg the agreements with Canada, Singapore, the Eastern and Southern Africa trade bloc and Kenya).[4] Accordingly, the suggestions made by this paper concerning various aspects of the UK–Australia FTA's investment chapter are likely to be relevant to future negotiations the UK will be undertaking in the coming years.

2. **Structure of this paper**. Overall, this paper highlights that while the investment chapter of the UK–Australia FTA is clearly based on the investment chapter of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which the UK has applied to join, the FTA's investment chapter contains some significant departures from CPTPP. Most obviously, unlike the CPTPP, the UK–Australia FTA does not include an Investor–State Dispute Settlement mechanism. Accordingly, the investment chapter must be viewed in light of the fact that it is only subject to the FTA's general State–State dispute settlement mechanism. This paper begins by analysing who and what qualifies as a protected investor and protected investment under the UK–Australia FTA (section B). This section highlights that in relation to legal entities as investors, the FTA, in a variation from CPTPP, adds a requirement that 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. In relation to natural persons as investors, the FTA fails to clarify adequately the status of persons who are duals nationals of the UK and Australia. Section C analyses investment protection obligations in the FTA – specifically, the international minimum standard/fair and equitable treatment, protection against expropriation, national treatment and most-favoured-nation treatment – which are largely identical to those found in CPTPP. This section offers specific suggestions on how the UK should adjust its treaty practice if it chooses to include these obligations in future agreements, to further clarify these obligations and better protect policy space. Section D analyses exceptions applicable to the FTA's investment chapter, highlighting that unlike the CPTPP, in the UK–Australia FTA the general exceptions provisions incorporated into the FTA are applied to the entire investment chapter. It offers suggestions on issues that the UK should clarify in future treaty practice, if it chooses to apply general exceptions provisions to the investment chapters of future FTAs. Section E considers provisions of the FTA's investment chapter that attempt to address the relationship between the investment protection or liberalisation obligations and environmental, health or other regulatory concerns. It argues that these provisions are at best likely to serve as interpretative context; they do not provide a basis for the UK to adopt measures that are inconsistent with the FTA's obligations. Section F turns to investment liberalisation commitments, where the FTA goes somewhat further than the CPTPP. For example, the FTA's investment chapter includes certain additional prohibitions on performance requirements beyond those found in CPTPP, contains a stronger prohibition on imposing nationality or residency requirements for senior managers and boards of directors, and includes a market access obligation not found in CPTPP. However, all these obligations are subject to significant reservations in each Party's (and particularly Australia's) schedules of non-conforming measures. Finally, the paper considers the carve-out from dispute settlement for foreign investment screening decisions contained in the FTA (section G) and a new clarification,

[3] UK– Canada Trade Continuity Agreement (TCA) art IV; UK-Mexico TCA art 9.
[4] UK– Canada TCA art V; UK–Singapore FTA, Joint Declaration on Investment Review; Eastern and Southern Africa States–UK EPA art 52(e)(ii). UK–Kenya EPA art 3(b)(ii).

within the obligation concerning free transfers, which aims to protect the Parties' ability to apply their domestic law on economic sanctions (Section H).

B. Definition of protected investors and investments

The FTA places significant limitations on which actors qualify as an 'investor of a Party' and which kinds of economic activities qualify as an 'investment'. This is important because these terms determine the range of situations to which most of the obligations in the investment chapter apply.[5]

3. **Legal entities as investors**. The definition of 'enterprise of a Party', which in turn defines which enterprises count as an 'investor of a Party', excludes shell companies controlled by nationals of third countries or by nationals of the host state, by requiring 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.[6] This is a welcome variation on the CPTPP's approach, which only requires that an enterprise is constituted under the law of a Party in order to gain that Party's nationality.[7] In future negotiations, the UK should consider building on the approach in the FTA by providing explicit guidance on the factors that an interpreter must consider in determining whether an enterprise is carrying out 'substantial business activities' in the territory of a Party and thus qualifies as an investor of a Party. For example, the 2019 Netherlands Model BIT, which is being used as a basis for renegotiating the Netherlands' significant stock of older investment treaties, includes a set of indications that an interpreter must consider in each specific case, in order to determine whether a legal person has 'substantial business activities' in the territory of a Party and thus qualifies as a protected investor.[8] If, in future agreements, the UK wishes to include as protected investors legal entities that are 'owned or controlled' by nationals of a Party or by legal entities with substantial business activities in the territory of a Party, the UK should provide explicit guidance on when an enterprise is to be regarded as being 'owned or controlled' by another actor. For example, the Australia–Uruguay BIT includes a definition of when a company is to be regarded as owned or controlled by another actor, in the somewhat different context of a provision enabling each Party to deny the benefits of the Agreement to a company that is owned or controlled by a natural person or a company of a non-Party, or of the denying Party, and has no substantial business activities in the territory of the other Party.[9]

4. **Natural persons as investors**. The FTA does not expressly regulate the situation of investors who are dual nationals of Australia and the UK. The definition of 'investor of a Party' in Article 13.1 includes a 'national' of a Party, which is defined in Article 1.4 of the FTA in relation to Australia and the UK to include those persons who are citizens or permanent residents of Australia or the UK respectively.[10] The result is there is nothing in the FTA that would prevent a person who, for example, is, a citizen of the UK and has spent

[5] UK–Australia FTA arts 13.2(1) and 1.4 (definition of 'covered investment').
[6] UK–Australia FTA art 13.1.
[7] CPTPP art 9.1 (definitions of 'enterprise of a Party' and 'investor of a Party').
[8] See 2019 Netherlands Model BIT art 1(c).
[9] See Australia–Uruguay BIT (2019) arts 1(1)(e), 11(1)(a).
[10] In the CPTPP, the definition of 'national', which in turn defines 'investor of a Party', similarly includes both persons who hold the nationality of a Party (as determined according to the Party-specific definitions in Annex 1-A) and persons who are a permanent resident of a Party: CPTPP art 1.3 (definition of 'national').

their entire adult life in the UK, but who is also an Australian citizen, relying on their Australian nationality to claim protection under the treaty in relation to an investment located in the UK (ie what is in reality a domestic investment). The urgency of this issue is reduced because the FTA does not contain an investor–State dispute settlement mechanism. However, in future agreements the UK should explicitly address the situation of dual nationals as protected investors. For example, contemporary investment treaties often provide that any person who is a dual national with the nationality of both treaty parties 'shall be deemed to be exclusively a national of the Party of his or her dominant and effective nationality'.[11] Those investment treaties that, like the UK–Australia FTA, provide protection to permanent residents of a Party, also often include a clarification that a natural person who is a permanent resident of one Party and a citizen of the other Party 'shall be deemed to be exclusively a national of the Party of his or her citizenship'.[12]

5. **Scope of protected investments**. The definition of 'investment' in the UK–Australia FTA is copied from the CPTPP and contains several important limitations on what counts as a protected investment. The FTA requires that an asset must have 'the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'.[13] These characteristics are drawn from investor–State case law that has developed the idea that the term 'investment' has certain objective characteristics. The purpose of such objective criteria is to exclude assets that do not meet such criteria (eg if they do not include a long-term commitment of capital) from qualifying as a protected investment, even if they take one of the forms of assets listed in the treaty. The definition of investment in the FTA also excludes certain assets from counting as an investment (eg an order or judgment entered in a judicial or administrative action) and provides some guidance on whether certain types of assets may have the characteristics of an investment (eg various forms of debt – see footnote 2 to article 13.1). In future agreements, the UK should consider whether to provide additional clarifications or limitations in the definition of protected 'investments', beyond those found in the CPTPP, as copied into the FTA. For example, recent EU investment treaties, as well as the recent model BITs of the Netherlands and Canada, are more definitive in excluding claims to money arising solely out of a cross-border commercial contract for the sale of goods or services from qualifying as a protected investment.[14]

C. Investment protection obligations in the UK-Australia FTA

6. The FTA, consistent with the AIP, includes investment protection obligations that are identical to those contained in the CPTPP's investment chapter, for example concerning protection against expropriation, the international minimum standard of treatment (including fair and equitable treatment), and national treatment and most-favoured-nation (MFN) treatment. This is understandable given the UK's application to accede to the CPTPP and the interest in aligning the UK–Australia FTA with the CPTPP's investment chapter, which would also apply between the Parties. However, in future negotiations, in relation to the international minimum standard and the protection against expropriation, the

[11] Australia–Uruguay BIT (2019) art 2.2. Comprehensive Economic and Trade Agreement Between Canada and the European Union (CETA) art 8.1 (definition of 'natural person').
[12] Eg Canada Model BIT 2021 art 1 (definition of 'national'). CETA art 8.1 (definition of 'natural person').
[13] UK–Australia FTA art 13.1.
[14] Compare UK–Australia FTA art 13.1 fn 2 with 2019 Netherlands Model BIT art 1(a); 2021 Canada Model BIT art 1(c)(i); CETA art 8.1 ('For greater certainty, claims to money does not include').

UK should depart from the CPTPP model and adopt an approach that provides greater clarity on the content of these obligations and better protects the UK's policy space.

7. **Minimum standard of treatment**. In relation to the international minimum standard of treatment, and fair and equitable treatment, I would advise that if the UK chooses to include these obligations in future agreements, it would be better served by moving away from the CPTPP model (which reflects United States treaty practice since the early 2000s), and instead adopting what is known as a 'closed-list' approach to defining the categories of conduct that violate FET or the international minimum standard. For example, Canada's 2021 Model BIT does not include any reference to FET, and, in relation to the guarantee of treatment in accordance with the international minimum standard, specifies exhaustively the categories of conduct that violate this obligation.[15] The reason for referring to the international minimum standard, rather than FET, is likely that in investor–State case law there is a long running view that FET may entitle investors to a higher standard of protection than the customary international minimum standard. Other States that have recently reconsidered their approach to investment treaties, such as India and Brazil, have also deliberately omitted any reference to FET, and employed provisions that specify exhaustively the categories of conduct that violate the international minimum standard.[16] EU investment treaties have since 2015 included provisions on FET that specify exhaustively the categories of conduct that violate the FET standard.[17] The basic reason for adopting a 'closed list' approach to defining FET or the international minimum standard is that it enables the treaty parties to reduce the discretion conferred on adjudicators and remove controversial aspects of these standards that have been developed in investor–State case law (eg protections concerning regulatory stability or investors' legitimate expectations).

8. **Expropriation**. In relation to the provisions on expropriation, the UK should aim to refine the CPTPP approach followed in the UK–Australia FTA in the annex that clarifies the scope of indirect expropriation. Specifically, paragraph 3(b) of Annex 13B of the UK–Australia FTA could be further refined to provide greater guidance on when, if at all, non-discriminatory regulatory measures may constitute an indirect expropriation. This provision provides that: 'Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment do not constitute indirect expropriations, except in rare circumstances'.[18]

9. Unlike the CPTPP (which reflects US treaty practice), some other States in their investment treaties routinely provide explicit guidance on what may amount to the 'rare circumstances' when non-discriminatory regulatory measures may constitute an indirect expropriation. For example, EU investment treaties typically define such rare circumstances as 'when the impact of a measure or series of measures is so severe in light of its purpose that it appears

[15] 2021 Canada Model BIT art 8(1).
[16] See eg Brazil–India BIT (2020) art 4.1; Brazil–United Arab Emirates BIT (2019) art 4.2; Belarus–India BIT (2018) art 3.1; India Model BIT 2015 art 3.1. Note that Brazil also sometimes includes a clarification that: 'For greater certainty, the standards of "fair and equitable treatment" and "full protection and security" are not covered by this Agreement and shall not be used as interpretative standards in investment dispute settlement procedures': eg Brazil–United Arab Emirates BIT Art 4(3).
[17] CETA art 8.10(2); EU–Singapore Investment Protection Agreement art 2.4(2). EU–Vietnam Investment Protection Agreement, art 2.5(2); EU–Mexico Global Agreement (as updated) ch 17 art 15(2).
[18] UK-Australia FTA Annex 13B.3(b).

manifestly excessive'.[19] South Korea's investment treaties in the last 15 years have also provided guidance on what constitutes such 'rare circumstances', for example referring to 'when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect'.[20] Another, in my view preferable, approach is to remove the qualification around 'rare circumstances' altogether, so as to provide the more clear-cut guidance that: 'A non-discriminatory measure of a Party that is adopted and maintained in good faith to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation, even if it has an effect equivalent to direct expropriation'.[21] Significantly, Canada shifted to using this approach in the expropriation provision of its 2021 Model BIT, after previously using an approach since 2004 that included a qualification for 'rare circumstances' where a non-discriminatory regulatory measure may constitute an indirect expropriation.[22] The Association of South East Asian Nations has also repeatedly used an expropriation annex that omits the qualification for rare circumstances, instead providing that: 'Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute expropriation'.[23]

10. **National treatment and MFN treatment**. The national treatment and MFN treatment obligations in the investment chapter of the FTA are copied with minor alterations from the CPTPP, and include a clarification that 'For greater certainty, whether treatment is accorded in "like circumstances" under Article 13.5 (National Treatment) or Article 13.6 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives'.[24] This footnote resulted from a longer 'Drafters' note' developed in the original TPP investment chapter negotiations, which emphasises that the national treatment and MFN obligations 'do not prohibit all measures that result in differential treatment. Rather, they seek to ensure that foreign investors or their investments are not treated less favourably on the basis of their nationality'.[25] The UK should retain this clarification to the national treatment and MFN obligations in future treaty practice.

D. Exceptions applicable to the investment chapter

[19] CETA Annex 8-A(3). EU–Singapore IPA, Annex 1(2). EU–Vietnam IPA, Annex 4(3). EU–Mexico Global Agreement ch 17 Annex on Expropriation.
[20] United States–Korea FTA Annex 11-B(3)(b) (2007, unchanged in 2018 amendments). From many similar examples see eg India–Korea CEPA (2009) Annex 10-A(3)(b); Japan–Korea–China Trilateral Investment Agreement (2012) Protocol, para 2(c); China–Korea FTA (2015) Annex 12-B(3)(b); Korea–Vietnam FTA (2015) Annex 9-B(c)(ii); Central America–Korea FTA (2018) Annex 9-C(4)(b).
[21] 2021 Canada Model BIT art 9.3.
[22] Such rare circumstances were defined as 'when a measure … is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith': Canada–Colombia FTA (2008) Annex 811(2)(b); Canada–China FIPA (2012) Annex B.10(3).
[23] ASEAN–Australia–New Zealand FTA (2009) Annex on Expropriation and Compensation, para 4; Similarly: Hong Kong–ASEAN Agreement on Investment (2018) Annex 2(4); ASEAN Comprehensive Investment Agreement (2009) Annex 2.4; Indonesia–Australia CEPA Annex 14-B(4); Regional Comprehensive Economic Partnership (RCEP) (2020) Annex 10B(4).
[24] UK–Australia FTA art 13.5 footnote 9.
[25] 'Drafters' Note on Interpretation of "In Like Circumstances" Under Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment)', para 2, available at https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/Interpretation-of-In-Like-Circumstances.pdf

11. **General exceptions provisions**: The FTA, consistent with the AIP, contains general exceptions provisions that apply to the entire investment chapter. The general exceptions provisions in Article XX of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the General Agreement on Trade in Services (GATS) are incorporated by reference into the FTA and applied to many chapters of the Agreement, including the investment chapter.[26] This differs from the CPTPP where the general exceptions provisions incorporated into the Agreement do not apply to the investment chapter.[27]

12. In approaching future negotiations, the UK should reflect on whether incorporating trade law exceptions into the investment context, is, in fact, a desirable strategy for protecting policy space. In short, in the limited investor–State case law that has been decided under treaties containing such general exceptions provisions, the provisions have not been effective at protecting policy space. For example, in the 2017 Award in *Bear Creek v Peru*, under the Canada–Peru FTA, the Tribunal reasoned that the presence of a general exceptions provision, based on Article XX of the GATT, meant that it could not consider case law concerning the 'police powers' doctrine, which is a flexibility that exists within the protection against expropriation, which prevents certain regulatory measures from counting as an expropriation.[28] Recently, in *Eco Oro v Colombia*, a dispute under the Canada–Colombia FTA, an investor–State tribunal considered a GATT Article XX-style general exceptions provision after having found a breach of the minimum standard of treatment. Problematically, the Tribunal held that even though Colombia's measures satisfied the conditions of the general exceptions provision, this only meant that Colombia was entitled to enact its environmental measure without finding itself in breach of the FTA, it did not remove the obligation of Colombia to pay compensation for the breach of the international minimum standard that had been found.[29] The result is that on the basis of the admittedly limited investor–State case law available, it is doubtful whether including general exceptions provisions in investment treaties has the intended effect of increasing States' policy space. Some commentators have also cautioned that the conditions for invoking GATT Article XX-style exceptions are often harder to satisfy than the flexibilities for regulatory measures that have been recognised within investment protection obligations as interpreted in the majority of investor–State case law.[30] Significantly, Canada, which routinely included GATT Article XX-style general exceptions in its investment treaties from the mid-1990s onwards, appears to have recently departed from that strategy, with no such exception being used in the 2021 Canada Model BIT.

13. If the UK decides to include general exceptions provisions that are applicable to investment chapters in future FTAs, it should explicitly clarify the relationship between such provisions and other flexibilities that may exist, for example under particular investment protection obligations, or other provisions in an investment chapter intended to safeguard

[26] UK–Australia FTA art 31.1(1) and (3).
[27] CPTPP Art 29.1.
[28] *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Award (30 November 2017) paras 471-474.
[29] *Eco Oro v Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021) paras 822-837.
[30] See eg Céline Lévesque, 'The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy' in Roberto Echandi and Pierre Sauve (eds), *Prospects in International Investment Law and Policy* (CUP 2013) 365–7. Andrew Newcombe, 'General Exceptions in International Investment Agreements' in Marie-Claire Cordonier Segger, Markus W Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 356-7, 367-369.

regulatory space (eg right to regulate provisions, discussed below).[31] The UK could also clarify that any measure that is covered by a general exceptions provision cannot give rise to an obligation to pay compensation to an investor. This clarification would be particularly relevant to any agreements that include investor–State dispute settlement. Finally, if the UK continues to include general exceptions provisions in the investment chapters of its FTAs, it should consider whether to follow the example provided by the investment treaty practice of certain States and, at least for the investment chapter, relax the conditions contained in GATT Article XX and GATS Article XIV, thus making the exceptions easier to satisfy. For example, Turkey has in its investment treaties over the last decade replaced the requirement from GATT Article XX that a measure is 'necessary' to protect human, animal or plant life or health, which has been interpreted in a demanding manner in World Trade Organization (WTO) case law, with the less demanding test that a measure is 'designed and applied' for that purpose.[32] Another drafting option that could make general exceptions provisions somewhat easier to satisfy is to replace existing references that measures must be 'necessary' with the requirement that measures must be 'related to' or 'bear a reasonable relationship to' the permissible aims listed in the exceptions provision.[33]

14. **Taxation Exception**: As foreshadowed in the AIP, the FTA contains an exception for taxation measures, which establishes that with respect to the investment chapter, only the obligations on expropriation and performance requirements apply to taxation measures.[34] Unlike the CPTPP, this exception does not include what is known as a 'filter mechanism' which would give the Parties' taxation authorities, where they agree, control over the application of the obligations concerning expropriation and performance requirements to taxation measures.[35] It is likely that the CPTPP's filter mechanism was omitted by negotiators because the UK–Australia FTA does not include investor–State dispute settlement, meaning if both Parties agree that a taxation measure is not an expropriation, no State–State dispute settlement proceedings would be brought.

E. Provisions concerning investment and environmental, health or other regulatory objectives

15. The investment chapter of the FTA includes a provision, typically known as a right to regulate provision, which provides that:

> 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.[36]

This provision is copied from the CPTPP. Such provisions have generally been seen as ineffective because of the qualification that the provision only applies to measures

[31] For a similar view see Wolfgang Alschner and Kun Hui, 'Missing in Action: General Public Policy Exceptions in Investment Treaties' in Lisa Sachs, Jesse Coleman and Lise Johnson (eds), *Yearbook on International Investment Law and Policy 2018* (OUP 2019) 392.
[32] From many see eg Cambodia–Turkey BIT (2018) art 4(1)(a). Uzbekistan–Turkey BIT (2017) art 5(1)(a); Ghana –Turkey BIT (2016) art 7(1)(a); Kenya–Turkey BIT (2014) art 4(1)(a) Pakistan–Turkey BIT (2012) art 5(1)(a).
[33] Freya Baetens, 'Protecting Foreign Investment and Public Health Through Arbitral Balancing and Treaty Design' (2022) 71 International and Comparative Law Quarterly 139, 175-177.
[34] UK–Australia FTA, art 31.4(3)(c) and (d).
[35] Compare CPTPP art 29.4(8).
[36] UK–Australia FTA art 13.17.

'otherwise consistent' with the Agreement.[37] Accordingly, it would not provide a basis for adopting measures that are inconsistent with the obligations contained in the FTA, although investor–State tribunals have sometimes accepted that such provisions can serve as interpretative context that informs how investment protection obligations are to be construed.[38] In future negotiations, the UK should consider omitting the 'otherwise consistent' qualification. This approach has been adopted in right to regulate provisions in recent investment treaties concluded by the EU, Colombia, Hungary and the United Arab Emirates, as well as recent model BITs developed by the Belgium–Luxembourg Economic Union, Canada, Colombia, the Netherlands and the Slovak Republic.[39] By omitting the 'otherwise consistent' qualification, these provisions provide a stronger basis for such provisions being interpreted in a manner that increases States' policy space. However, even where the 'otherwise consistent' qualification is omitted, such provisions are only likely to serve as interpretative context; they do not provide a basis for parties to adopt measures inconsistent with the relevant treaty.[40]

16. The investment chapter of the FTA includes a further provision (Article 13.18) in which the Parties 'recall the provisions of this Agreement that are applicable to promoting mutually supportive investment and environmental outcomes and that are consistent with the sovereign right of each Party to set its levels of environmental protection'. This provision cross-references to other relevant provisions in the FTA, for example in the exceptions and environment chapters and the annexes of non-conforming measures. At most Article 13.18 would act as interpretative context that would serve to remind an interpreter of the investment chapter of these other aspects of the FTA, and the importance that the Agreement accords to the right of each Party to set its levels of environmental protection. In future treaty practice, the UK may wish to attempt to provide more specific guidance on how environment-focused provisions are intended to interact with provisions on investment protection or liberalisation. For example, while the environment chapter of the UK–Australia FTA recognises the Parties' sovereign right to establish their own levels of environmental protection and adopt or modify their environmental laws accordingly, the FTA does not provide any significant guidance on how this right interacts with the Parties' obligations under the investment chapter,[41] beyond the acknowledgment in Article 13.18 that various provisions of the Agreement are aimed at 'promoting mutually supportive investment and environmental outcomes that are consistent with the sovereign right of each Party to set its levels of environmental protection'.

F. Investment liberalisation obligations in the UK–Australia FTA

[37] Eg Lise Johnson, Lisa Sachs and Nathan Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (2019) 58 Colum. J. Transnat'l L. 58, 101. Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 508.
[38] See *David R Aven et al v Costa Rica*, ICSID Case No UNCT/15/3, Award (18 September 2018) paras 412–13 743; *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No ARB/11/33, Award (3 November 2015) paras 387–90, 445–6, 458; *Infinito Gold Ltd v Costa Rica*, ICSID Case No ARB/14/5, Award (3 June 2021) paras 772–81.
[39] For a list of the relevant provisions see Joshua Paine, 'Autonomy to Set the Level of Regulatory Protection in International Investment Law' (2021) 70(3) *International & Comparative Law Quarterly* 696, 717 footnote 101.
[40] For similar assessments see eg Catharine Titi, 'The Right to Regulate' in Makane Moïse Mbengue and Stefanie Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer 2019) 170–171 (suggesting the equivalent provision in CETA 'serves as an interpretive statement … it does not appear to provide a concrete actionable right'). Johnson, Sachs and Lobel (n 37) 101. Baetens (n 33) 160-161, 166.
[41] UK–Australia FTA, art 22.3(2).

17. **Prohibitions on Performance Requirements.** Consistent with the AIP, the investment chapter of the FTA includes all of the prohibitions on performance requirements in the CPTPP, as well as certain additional prohibitions on performance requirements that the UK has also agreed to in other recent FTAs, such as the EU–UK TCA and the UK–Japan CEP.[42] These additional prohibition on performance requirements, beyond those in CPTPP, include provisions preventing the Parties from imposing a requirement for an investor to locate its regional or world headquarters in the territory of a Party, or to achieve a given level of research and development in a Party's territory.[43] The AIP included a 'commitment to consult' on two further prohibitions on performance requirements, additional to those found in CPTPP, which do not appear in the final text of the FTA, concerning local hiring requirements (eg a requirement to employ a given number or percentage of a Party's nationals), and export restrictions.[44] In contrast, these prohibitions appear in some other recent FTAs signed by the UK, such as the EU–UK TCA and the UK–Japan CEP.[45] The UK–Australia FTA is identical to the CPTPP in clarifying that the Parties retain the ability to condition receipt of an advantage on an investment on a requirement to locate production, train or employ workers, construct particular facilities, or carry out research and development, in a Party's territory.[46] The FTA also includes an obligation of Australia to 'work towards further liberalisation and transparency' in relation to some of the prohibitions on performance requirements contained in the investment chapter.[47] Specifically, Australia has an obligation to conduct consultations at the regional level of government in relation to non-conforming measures that are maintained or may be adopted in future at the regional level of government, and to notify the UK of the outcome of these consultations and amend Australia's schedules of non-conforming measures accordingly.[48] However, this provision falls short of an obligation to remove the relevant performance requirements, which are currently covered by entries in Australia's schedules of non-conforming measures.[49]

18. **Prohibition on nationality or residency requirements for senior managers and boards of directors.** The AIP noted that the FTA would include 'a new commitment 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 are seeking to narrow the policy space required as far as possible'. The FTA includes a provision that prohibits a Party from requiring that an enterprise that is a covered investment appoint to senior management or board of directors natural persons of a particular nationality, or who are resident in the territory of the Party.[50] This goes beyond the equivalent provision in the CPTPP, where the provision on senior managers only prohibits requirements as to nationality and a Party is permitted to require that a majority of the board of directors of an enterprise be of a particular nationality or be resident in the Party.[51] However, the provision in the FTA (article 13.12) is subject to substantial reservations in Australia's schedule of non-conforming measures. Specifically, in

[42] UK–Australia FTA art 13.11(1)(a)-(h) and (k) are found in CPTPP Art 9.10, whereas art 13.11(1)(i)-(j) are not. Compare EU-UK TCA, art SERVIN.2.6(1); UK–Japan CEP, art 8.11(1).
[43] UK–Australia FTA, art 13.11(1)(i)-(j).
[44] See also UK-Australia FTA Art 13.11(10).
[45] See UK–Japan CEP Art 8.11(1)(f) and (i); EU-UK TCA art SERVIN.2.6(1)(i) and (k).
[46] UK–Australia FTA, art 13.11(3).
[47] UK–Australia FTA, art 13.13(8).
[48] UK–Australia FTA, art 13.13(8)-(9).
[49] Australia's Annex 1 Schedule, entry 45; Australia's Annex II Schedule, entry 30.
[50] UK–Australia FTA, art 13.12.
[51] CPTPP art 9.11.

Australia's schedule of potential future non-conforming measures, it reserves the right to adopt requirements that senior managers be resident in Australia or that a minority of the board of directors be of a particular nationality or be resident in Australia.[52] Australia's schedule of existing non-conforming measures also removes a variety of existing measures that impose residency or nationality requirements, for example for company directors, from being subject to the obligation in Article 13.12.[53]

19. **Market Access obligation and non-discrimination obligations applicable to the pre-establishment phase.** Consistent with the AIP, the FTA includes a market access obligation that is not found in CPTPP's investment chapter.[54] This provision prevents a Party from adopting measures that restrict market access to foreign investors based on quantitative limitations concerning various issues, such as the number of enterprises that may carry out a specific economic activity, or limitations on the participation of foreign capital in terms of a maximum percentage limit on foreign shareholdings.[55] The market access provision is very similar to that found in the investment liberalisation provisions of other FTAs the UK has recently concluded, such as the EU–UK TCA and the UK–Japan CEP.[56] However, it must be emphasised that the obligation is subject to significant reservations in Australia's schedule of existing non-conforming measures and Australia's Annex II Schedule concerning sectors where it reserves the right to adopt future non-conforming measures.[57] The UK's Annex II schedule, where it specifies the sectors or activities in respect of which it may adopt or maintain measures to which the market access obligation will not apply, also establishes carve-outs for a wide range of sectors or activities, including, for example, public utilities, publicly funded education, health and social services, railway transport, and air carriers and airports.[58] As in the CPTPP, the national treatment and MFN obligations in the investment chapter of the FTA apply to the pre-establishment phase of investments, again subject to the reservations contained in each Party's schedules of non-conforming measures.[59]

G. Carve-out from dispute settlement for foreign investment screening decisions

20. The investment chapter of the FTA contains a provision (Annex 13C) that removes from the scope of the FTA's dispute settlement chapter decisions by either Party under their domestic legal frameworks for the screening of foreign investments. This carve-out is broadly worded, covering any 'decision or requirement' under the legislation that is identified for both Parties (in the case of the UK, the *National Security and Investment Act 2021* and public interest grounds under Part 3 of the *Enterprise Act 2002*). Such carve-outs of investment screening decisions from both investor–State and State–State dispute settlement are frequently found in recent investment treaties and investment chapters of FTAs.[60] The UK should continue to pursue such a carve-out from dispute settlement mechanisms in future negotiations, to remove the potential for challenges to decisions taken pursuant to its domestic legal framework for the screening of foreign investments.

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[52] Australia's Annex II Schedule, entry 17.
[53] See, for example, Australia's Annex I Schedule, entries 2, 10 and 11.
[54] UK–Australia FTA art 13.4.
[55] UK–Australia FTA art 13.4(1)(a).
[56] EU-UK TCA art SERVIN.2.2; UK–Japan CEP art 8.7.
[57] See, for example, Australia's Annex I Schedule, entries 6, 10-11, 33; Australia's Annex II Schedule, entries 5-6, 11, 13-16, 19-21, 28-29.
[58] See, for example, the UK's Annex II schedule, entries II-1, II-8, II-9, II-10, II-11.
[59] UK–Australia FTA arts 13.5(1)-(2), 13.6(1)-(2).
[60] See eg CPTPP Annex 9-H; RCEP art 17.11.

H. Clarification concerning economic sanctions in free transfers provision

21. Consistent with the AIP, the investment chapter of the FTA includes a clarification, not found in CPTPP, that the provision requiring each Party to permit investors to freely make transfers related to protected investments shall not 'be construed to prevent a Party from applying its law relating to the imposition of economic sanctions in good faith'.[61] While economic sanctions could potentially be covered by other flexibilities in the FTA (eg the security exception in Article 31.2(b)), this clarification has a broader potential scope of application. In a setting where the UK may increasingly be applying sanctions unilaterally, or otherwise outside of the UN Charter framework, this clarification should be retained in future treaty practice concerning the free transfer obligation. The UK could also consider broadening the clarification into a clarification or exception that would apply to the entire investment chapter (not just the free transfer guarantee), to prevent economic sanctions that the UK adopts from being challenged under other investment protection obligations.

I. Conclusion

22. Overall, the investment chapter in the UK–Australia FTA is only one step in the UK's development of a post-Brexit approach to foreign investment protection and liberalisation issues. The UK's approach to these issues will become clearer as it concludes further new FTAs or more specific (re)negotiations that have been foreshadowed on investment issues. The UK will also need to evaluate, what, if anything, to do about the 90-odd Bilateral Investment Treaties in force to which the UK is a Party. Given Australia is a Party to CPTPP (which the UK has applied to join), meaning the CPTPP's investment chapter may in future apply between the UK and Australia alongside the UK–Australia FTA, it is notable that in the FTA the Parties chose to adopt some significant variations on CPTPP's investment chapter. While some of these variations are welcome (eg the addition of a 'substantial business activities' requirement for legal entities to qualify as protected investors), the above analysis has offered specific suggestions on issues where, in my view, the UK should refine its approach in future agreements. In future treaty practice the UK should also aim to depart from certain aspects of the CPTPP approach that were copied into the UK–Australia FTA – for example, the provisions on the international minimum standard and fair and equitable treatment, or the annex clarifying the scope of indirect expropriation, for the reasons outlined in section C above.

[61] UK–Australia FTA art 13.10(6).