

LEGISLATIVE COUNCIL BRIEF

FREE TRADE AGREEMENT AND INVESTMENT AGREEMENT BETWEEN HONG KONG AND AUSTRALIA

INTRODUCTION

At the meeting of the Executive Council on 29 January 2019, the Council ADVISED and the Chief Executive ORDERED that the outcomes of the negotiations with Australia of the Free Trade Agreement (FTA) and the Investment Agreement⁽¹⁾ should be endorsed and the two agreements should be signed with Australia.

JUSTIFICATIONS

Key Outcomes of the Negotiations

2. The FTA and the Investment Agreement are comprehensive in scope and the commitments therein are of high quality. The overall commitments go beyond those undertaken by Hong Kong and Australia respectively under the World Trade Organization (WTO), providing legal certainty to more favourable market access and treatment to one another. Key outcomes of the negotiations are summarised in paragraphs 3 to 15 below.

(A) Trade in Services

3. We have achieved high quality and balanced outcome on trade in services, building on both sides' commitments under the WTO General Agreement on Trade in Services and generally on a par with Hong Kong's and Australia's best FTA level of commitments. Hong Kong service providers will enjoy legal certainty in market access and national treatment (NT) for a comprehensive range of services in the Australian market under the four modes of supply⁽²⁾, namely cross-border supply

⁽¹⁾ When the signed Investment Agreement enters into force, the existing Agreement for the Promotion and Protection of Investments between Hong Kong and Australia, which was signed on 15 September 1993 and has been in force since 15 October 1993, shall cease to have effect.

⁽²⁾ Detailed explanations of the four modes of supply of services are at **Annex**.

(Mode 1), consumption abroad (Mode 2), commercial presence (Mode 3), and movement of natural persons (Mode 4).

4. Australia made various improvements over its commitments under the WTO (WTO-plus). They encompass sectors where Hong Kong has traditional strengths or has potential for development. These include professional services, transport services, financial services, telecommunications services, and various business services. In particular, Australia is committed under the FTA to the liberalisation of the full range of arbitration, conciliation and mediation services and certain rail transport services. Hong Kong's commitments to Australia likewise cover a wide range of services, with WTO-plus commitments in various sectors.

5. In line with the practice of modern and high quality FTAs, the two sides have also agreed on a non-discriminatory provision which enables services and service suppliers of one side to enjoy the other side's additional service commitments, if any, in their future FTAs. The obligation is not applicable though to the measures or sectors specifically reserved by Hong Kong or Australia and listed in their schedules.

6. In respect of Mode 4, the commitments of Australia and Hong Kong are generally balanced. Both include WTO-plus commitments for the categories of business visitors and intra-corporate transferees (ICT) in a wide range of sectors. In addition, Australia's commitments cover independent executives whereas Hong Kong's commitments include installers or servicers. Commitments for dependants (limited to ICTs') are made by Hong Kong to reciprocate the corresponding undertaking of Australia. Our commitments for Mode 4 by and large reflect Hong Kong's existing liberal regime on temporary entry and stay of business persons.

7. Apart from market access commitments, the two sides have agreed on other obligations to facilitate trade in services. They include tariff-free undertaking for all electronic transmissions and other facilitation measures for e-commerce; improvement of transparency of domestic regulations and streamlining of application procedures for authorisation; provision of dedicated disciplines on financial services and telecommunications; and implementation of future work programmes on educational services, professional services and legal services.

(B) Trade in Goods

8. Hong Kong and Australia have committed to eliminating all tariffs on goods originating from each other upon the entry into force of the FTA. Australia's commitment to Hong Kong is the best treatment it has extended to its other FTA partners. Australia's commitments will roughly result in an annual tariff savings for Hong Kong of about HK\$16 million⁽³⁾.

9. For the purpose of Australia affording preferential tariff treatment to goods of Hong Kong origin, the two sides have formulated a set of preferential rules of origin which include "value-based" rules⁽⁴⁾ for certain goods as well as more flexible origin rules for certain products of Hong Kong's trade interest. The set of rules allows exporters or producers to make a self-declaration of origin. To enable Hong Kong exporters to apply the rules of origin agreed in the FTA, the Secretary for Commerce and Economic Development will add the FTA to Schedule 1 of the Trade Descriptions Ordinance (Cap. 362) by notice published in gazette.

10. Hong Kong and Australia will strengthen co-operation and enhance transparency in the areas of sanitary and phytosanitary measures⁽⁵⁾ as well as technical barriers to trade⁽⁶⁾, with the objective of facilitating trade as far as possible. The two sides will also simplify customs procedures, promote co-operation between their customs administrations, and strengthen the notification and consultation requirements on the use of countervailing measures.

(C) Investment

11. The two sides agreed that the Investment Agreement will

⁽³⁾ The estimated tariff savings are calculated on the basis of Hong Kong's domestic exports (excluding gold) to Australia and the average applied tariff rates of Australia in 2017.

⁽⁴⁾ Under "value-based" rules, goods may claim Hong Kong origin on the basis of the proportion (which may be different for different categories of goods) of either the value added to the goods in Hong Kong or the value of non-originating materials used in their manufacture, to the total value of the goods.

⁽⁵⁾ Sanitary and phytosanitary measures are any measures applied to (a) protect human or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in their food; (b) protect human life or health from plant- or animal-carried diseases or pests; (c) protect animal or plant life or health from pests, diseases, disease-carrying organisms or disease-causing organisms; or (d) prevent or limit other damage from the entry, establishment or spread of pests.

⁽⁶⁾ Technical barriers to trade include technical regulations, standards and conformity assessment procedures that may directly or indirectly affect trade in goods.

replace the existing Agreement for the Promotion and Protection of Investments between Hong Kong and Australia (HK-Australia IPPA). The Investment Agreement provides comprehensive protection of investments, including commitments on fair and equitable treatment; physical protection and security; compensation for expropriation; compensation for losses owing to armed conflict or civil strife; free transfers of investments and returns; and dispute settlement mechanisms. Other than these current protections, the Investment Agreement has the following improvements or additional features, as compared with the existing IPPA:

- (a) it provides NT with respect to investments;
- (b) it provides extra policy flexibility through the inclusion of certain exceptions to obligations, e.g. measures for essential security, and measures for safeguarding the balance of payments in specified situations;
- (c) it includes certain procedural improvements for investor-Party arbitration, to deal with abusive claims by investors, and to enhance transparency and efficiency of dispute settlement; and
- (d) it excludes certain measures from investor-Party arbitration, e.g. measures under specific public health programmes of Australia.

12. Overall speaking, the Investment Agreement strikes a balance between investment protection and the exercise of legitimate regulatory power, in line with international trend and Hong Kong's recent investment agreements with other economies.

13. Under the FTA, Australia improves investment market access for Hong Kong by raising the monetary thresholds for investment screening applicable to investments by Hong Kong investors. Broadly speaking, Australia extends to Hong Kong its best commitments on investment screening for its other FTA partners, except in respect of its most sensitive areas.

(D) Other Areas

14. The FTA contains provisions to facilitate access to each other's government procurement markets. The two sides' commitments are in line with the WTO Agreement on Government Procurement. Hong Kong's commitments are compatible with our domestic regime.

15. The FTA also includes commitments to ensure effective protection of intellectual property rights and promote competition. In addition, it provides for principles that enhance regulatory coherence and a transparent mechanism for consultations and settlement of possible disputes arising under the FTA. The two sides have also concluded five side instruments on legal services, professional services, scope of application, government-owned enterprises and government procurement respectively.

BASIC LAW IMPLICATIONS

16. The proposal is in conformity with the Basic Law, including the provisions concerning human rights.

FINANCIAL AND CIVIL SERVICE IMPLICATIONS

17. Additional requirements for manpower and financial resources, if any, arising from the implementation of the FTA and the Investment Agreement, including those related to the necessary enforcement activities, will be absorbed by the relevant bureaux and departments within their existing resources.

ECONOMIC IMPLICATIONS

18. Signing the FTA and the Investment Agreement with Australia has positive economic implications for Hong Kong as it will help foster closer economic ties and facilitate investment flows between the two places. In broad terms, the FTA and the Investment Agreement will provide Hong Kong with better access to the Australian market and hence create more business and investment opportunities, which are beneficial to Hong Kong's long-term economic growth. The agreements will also help strengthen Hong Kong's role as an international trade, commercial and financial centre.

SUSTAINABILITY IMPLICATIONS

19. The FTA and the Investment Agreement with Australia will create more business opportunities and help increase trade and investment

flows between Hong Kong and Australia. Enhancing our economic links with Australia will help reinforce Hong Kong's position as an international trade, economic and financial hub.

LEGISLATIVE IMPLICATIONS

20. Implementation of the FTA would require legislative amendments as set out in paragraph 9 above.

PUBLIC CONSULTATION

21. We conducted a one-month public consultation exercise on the proposed FTA between Hong Kong and Australia from April to May 2017 to help develop our negotiation positions and better gauge the local business community's areas of interest. We sought views from major trade and industrial associations, professional bodies and the general public, and their feedback was positive.

PUBLICITY

22. Details of the FTA and the Investment Agreement, including the full texts, will be uploaded onto the Trade and Industry Department's website (www.tid.gov.hk). A press release will be issued and a spokesperson will be available to answer media enquiries.

BACKGROUND

23. Australia is an important trading partner of Hong Kong. It was Hong Kong's seventh largest services trading partner in 2017, with the total services trade between the two sides amounting to HK\$44 billion. It was also our 20th largest merchandise trading partner in 2018, and the total merchandise trade was about HK\$54 billion. On investment, as at the end of 2017, Australia ranked eighth among Hong Kong's destinations of outward direct investment, with a stock of HK\$134 billion, and it ranked 17th among Hong Kong's sources of inward direct investment, with a stock of HK\$33 billion. Negotiations of the FTA and the Investment Agreement commenced in May 2017 and were concluded in November 2018. The two agreements will enter into force after the

completion of the respective necessary internal procedures by Hong Kong and Australia.

ENQUIRIES

24. For enquiries, please contact Mr Owin FUNG, Assistant Director-General of Trade and Industry, at 2398 5309.

Trade and Industry Department
26 March 2019

EXPLANATIONS OF THE FOUR MODES OF SUPPLY FOR TRADE IN SERVICES

Cross Border Supply (Mode 1)

The cross border mode of supply refers to the supply of a service from the area of an FTA party into the area of the other FTA party. If Party A of an FTA makes commitment in respect of Mode 1, a service supplier of the other Party of the FTA (i.e. Party B) can supply the service within the area of Party B to service consumers in the area of Party A, without being physically present in the area of Party A. An example is the supply of consultancy service through telecommunications, fax or mail etc.

Consumption Abroad (Mode 2)

The consumption abroad mode of supply refers to the supply of a service in the area of an FTA party to the service consumer of the other FTA party. If Party A of an FTA makes commitment in respect of Mode 2, a service supplier of Party B can, within the area of Party B, provide the service to consumers of Party A who are present in the area of Party B. An example is the supply of hotel services.

Commercial Presence (Mode 3)

The commercial presence mode of supply refers to the supply of a service by a service supplier of an FTA party, through commercial presence in the area of the other FTA party. If Party A of an FTA makes commitment in respect of Mode 3, a service supplier of Party B can provide the service within the area of Party A through commercial presence in the area of Party A. This covers the presence of juridical persons (e.g. corporations, joint ventures, partnership, sole proprietorship, trust, association) as well as representative offices, branches etc.

Movement of Natural Person (Mode 4)

The movement of natural person mode of supply refers to the supply of a service by a service supplier of an FTA party, through the presence of their natural persons in the area of the other FTA party. If Party A of an FTA makes commitment in respect of Mode 4, a service supplier of Party B can provide the service within the area of Party A through the presence of natural persons of Party B. This covers natural persons who are themselves service suppliers, as well as natural persons who are employees of service suppliers (e.g. accountants of accounting firms).