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Status Quo and Outlook“

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ABBREVIATIONS

AANZFTA	ASEAN–Australia–New Zealand Free Trade Agreement
ABC	Australian Broadcasting Corporation
ANZCERTA	Australia- New Zealand Closer Economic Relations Trade Agreement
ANZFA	Australia New Zealand Food Authority
APEC	Asia Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
ASEM	Asia-Europe Summit Meeting
AUD	Australian Dollar
A&F	Agriculture and Food
AUS	Australia (Commonwealth of)
AUSTRADE	Australian Trade and Investment Commission
BDI	Deutscher Bund der Industrie
BREXIT	British Withdrawal from the European Union
CAP	Common Agricultural Policy
CJEU	Court of Justice of the European Union
COVID-19	Coronavirus Disease 2019/ SARS -CoV- 2
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CRTA	Committee on Regional Trade Agreements
CU	Customs Union
DFAT	Department of Foreign Affairs and Trade (Commonwealth of Australia)
ECJ	European Court of Justice
EEAS	European External Action Service
EEC	European Economic Community
EIA	European Integration Agreement
EP	European Parliament
EU	European Union
EU27	27 members of the European Union
EU28	28 members of the European Union
FTA	Free Trade Agreement
G20	Group of Twenty
GATS	General Agreement on Trade in Services

GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GI	Geographical Indications
GPA	Agreement on Government Procurement
GVC	Global Value Chain
HM	Her Majesty (the Queen)
IMF	International Monetary Fund
IP	Intellectual Property
IPR	Intellectual Property Rights
ITO	International Trade Organisation
JRC	Joint Research Centre
KAFTA	Korea- Australia Free Trade Agreement
KOREU	Korea- European Union Free Trade Agreement
MEP	Member of the European Parliament
MFN	Most-favoured-Nation
NTB	Non-Tariff Barrier
NTM	Non-Tariff Measure
NZ	New Zealand (Realm of)
OECD	Organisation for Economic Cooperation and Development
PMV	Passenger Motor Vehicles
PS	Partial Scope Agreement
PSR	Product-Specific-Rules
PTA	Preferential Trade Agreement
PTT	Preferential Tariff Treatment
PwC	Price Waterhouse Coopers
R&D	Research and Development
RCEP	Regional Comprehensive Economic Partnership
RoO	Rules of Origin
RTA	Regional Trade Agreement
SIA	Sustainability Impact Assessment
SME	Small and Medium-Sized Enterprises
SoE	State-owned-Enterprises
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade

TCF	Textiles, Clothing, Foodware
TEU	Treaty of the European Union
TFA	Trade Facilitation Agreement
TFEU	Treaty on the Functioning of the European Union (Lisbon Treaty)
TIFA	Trade and Investment Framework Agreement
TPP	Trans-Pacific Partnership
TRIPS	Trade-related Aspects of Intellectual Property Rights Agreement
TRQ	Tariff-Rate-Quota
TSD	Trade-sustainability Development
TWG	Trade Working Group
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
US/USA	United States of America

Credits

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Abstract

This thesis presents the genesis of the Australian-EU Free Trade Agreement (FTA) currently under negotiation, evaluating the challenges and opportunities connected with this FTA and researching the status quo of the negotiation process as well as the outlook for the future.

It evaluates the history of the development of the trade relationship between the two parties as well as the legal frameworks that induced the changes of perceptions in the course of time between the EU and Australia in terms of trade relations. The paper presents the changes in perception over the decades, from the legal framework of the EEC's CAP, one of the main reasons for Australia's frustration up to the EU-Australia Framework Agreement of 2008, which laid the groundwork for a new type of relationship, cumulating in the current FTA negotiations. This elaboration provides a better understanding not only for the objectives on both sides and the development and the status quo of the ongoing negotiations.

Taking example of this FTA, the paper evaluates the general role of FTAs as tools for obtaining trade liberalisation. The thesis argues that RTAs- especially FTAs - have become the new type of bi- and multilateral agreements, made possible by Article 24 of GATT, but developed far beyond the initial, narrow area the original GATT initiators had envisioned. It also argues that the motives of FTAs are not any more purely economic, but also political. In this context, the paper addresses the general challenges that these new FTAs are facing, such as compliance with WTO agreements and the interoperability of different agreements on different levels. It also gives regard to the fact that they are not any more purely focused on border market access but to a greater extent on domestic regulations and standards that have an impact on market access. A comprehensive documentation of the wording of the official negotiation reports on selected topics in the timeline of the negotiation rounds up to round 6 is provided. The outlook after seven rounds of negotiations not only addresses the current status of negotiations between Australia and EU but also highlights the divergent positions on a number of remaining issues as well as the situation after 2020, when Australia will most likely have parallel negotiations about an FTA with the UK. As the negotiations are still ongoing only limited details about the progress of the negotiations in form of the official reports of both groups were available, but they could be augmented by some additional statements from the negotiation teams and several academic voices. Further research on the remaining rounds of negotiations, the final framework of the FTA - especially how critical issues like GI, TSD or Investor Protection could finally be solved - and the implementation of this agreement is strongly suggested.

1. Introduction

The European Union and the Commonwealth of Australia are already currently close economic trading partners. In 2018, the EU27 was the third largest export destination to Australia after China and Japan and before the United States, and Australia ranked 19th amongst the largest trade in goods partners of the European Union. Trade between the two parties so far has been conducted on the basis of the 2008 EU-Australian Partnership Framework. Following up on this Framework, the European Union (EU) in 2018 authorised the start of trade negotiations for Free Trade Agreements (FTAs) with both the Commonwealth of Australia and the Realm of New Zealand.

This paper will be focused on the objectives and challenges of the proposed FTA, the course of negotiations as well as on the status quo and on the outlook regarding the negotiations. This not only requires an evaluation of the current situation from both viewpoints, but also a look at the historic development of the trade relations between Australia and the EU, from a time when trade-protectionism was the policy of choice on both sides to a situation where both sides experienced the impact of the improvement of their trade relations.

The first part of this paper takes a look at the historic development of the trade relations between Australia and the European Union including the special role of the UK in this relationship. Brexit has created a new and very special situation. The impact of Brexit on the FTA between Australia and EU27 is therefore addressed in detail in chapter 2.6.

The paper presents the legal frameworks that induced the changes of perceptions in the course of time between the EU and Australia in terms of trade relations. From the legal framework of CAP, a main driver of Australia's frustration and reorientation to the EU-Australia Framework Agreement laying the groundwork for a new relationship and the current FTA negotiations. It aims to provide a better understanding not only of the objectives and the development of the ongoing negotiations, but also for their status quo and outlook. It also evaluates the role of FTAs as tools for obtaining trade liberalisation.

This thesis argues that RTAs, especially FTAs have become the new type of bi- and multilateral agreements, made possible by Article 24 of GATT, but developed far beyond the initial, narrow area the original GATT initiators had envisioned and that the motives of FTAs are not any more

purely economic but also political. The paper evaluates the current framework of trade agreements of both Australia and the EU as this provides a better understanding of the context of objectives, challenges and opportunities connected with the FTA in negotiation.

The objectives and aims as well as the challenges and opportunities are addressed in chapter 2.4 and 2.5. In the latter, the paper is presenting some of the general challenges these new FTAs are facing, like the compliance with WTO agreements and the interoperability of different agreements on different levels as well as the fact that they are not any more purely focused on border market access but to a greater extend on domestic regulations and standards that have an impact on market access. A specific legal challenge of the EU regarding the competence between the EU and the Member States to conclude trade agreements is also covered and the paper presents how the “fast track” solution the European Commission has chosen following Opinion 02/15 of the ECJ is preventing this FTA from being subject to ratification by all Member States.

This paper covers the ongoing rounds of negotiations including round 6, but not the recent round 7 which was held via video conference due to the COVID 19 situation. It covers the development and progress of the main topics reflected in the official reports of the negotiation teams and has also obtained some statements on challenges, progress and outlook from the negotiation teams, which contribute to the last chapters of this thesis. The paper provides a comprehensive documentation of the negotiation reports on selected topics presenting the official wordings of the reports of both parties in the timeline of the negotiation rounds up to round 6. The outlook presented in 2.8 not only addresses the current status of negotiations between Australia and EU but also the still divergent positions on several issues as well as the situation after 2020, when Australia will most likely have parallel negotiations about an FTA with the UK.

2. Australia and European Union Free Trade Agreement - Status Quo and Outlook

2.1 The history of trade relations between the EU and the Commonwealth of Australia

Pre 1973

Looking at the origin of the European-Australian relationship it has to be noted that the first Europeans to land in Australia were the Dutch. Willem Janszoon landed in 1606 and the Dutch named the land, where they landed several times, New Holland.¹

Great Britain's relations with Australia actually started in 1770, when Captain Cook mapped the part of the coast of Australia called New South Wales, which seventeen years later became the first British colony in the new territory. On February 7, 1788 the British Crown Colony of New South Wales was formally established. In the course of time up to the year 1859 five additional colonies were added. On January 1, 1901 the British Parliament passed legislation that allowed these six colonies to form the Commonwealth of Australia as an independent nation.²

Close ties existed between Great Britain and Australia. In World War I Australia supported Britain and its Allies and in World War II it was the protector of the British colonies in the Pacific against Japan. Until 1949 the two countries had a common national law and final constitutional ties between Great Britain and Australia were cut by the Australia Act 1986, when similar legislation was passed by both the Parliament of Australia³ and the Parliament of the United Kingdom⁴

¹ "Janszoon Maps Northern Australian Coast" (*National Museum of Australia* April 15, 2020) <<https://www.nma.gov.au/defining-moments/resources/janszoon-maps-northern-australian-coast>> accessed May 15, 2020

² "Australia : History" (*Australia : History | The Commonwealth*) <<https://thecommonwealth.org/our-member-countries/australia/history>> accessed May 15, 2020

³ "Australia Act 1986" (*Australia Act 1986*) <<https://www.legislation.gov.au/Details/C2004A03181>> accessed May 27, 2020

⁴ "Australia Act 1986" (*Legislation.gov.uk* February 17, 1986) <<http://www.legislation.gov.uk/ukpga/1986/2>> accessed May 27, 2020

The time period leading up to 1973 was shaped by protected trade relations with a notable degree of exclusivity. The United Kingdom was the main and almost exclusive trading partner to Australia where “meat, dairy and other agricultural goods”⁵ could be exported without difficulty or barriers. “Despite the establishment of formal diplomatic ties between Canberra and Brussels as early as March 1960”⁶ and the appointment of an official Australian representative to the EEC, Mr. Edwin McCarthy, the relationship between the Commonwealth of Australia and continental Europe was not at its best. For the Europeans, precisely for the six founding nations of the European Economic Community (EEC) in 1958, the “world beyond Suez”⁷ was not significantly attractive and a close economic partnership with Australia- which was seen as “geographically distant, relatively prosperous and lacking in great political clout”⁸ was not considered a priority. In the UK both in the Conservative and Labour Party Euro-scepticism was influential. Harold Wilson said in 1961 “if there has to be a choice, we are not entitled to sell our friends and kinsmen down the river for a problematical and marginal advantage in selling washing machines in Dusseldorf”.⁹

Australia on the other hand sought to “preserve its a strong partnership with the UK. Intimately linked to this was the prospect of a possible British accession to the EEC and the potential damage that British moves to join a continental bloc could inflict upon Commonwealth cohesion, Australia’s defence interests in Asia and its trade opportunities in Europe.”¹⁰

In the course of the 1960s first MacMillan and then Heath tried to bring the UK into the EEC and it was this new orientation of Great Britain towards the EEC that had great influence on

⁵ Jane Drake-Brockman and Patrick Messerlin, editors. *Potential Benefits of an Australia-EU Free Trade Agreement: Key Issues and Options*. University of Adelaide Press, 2018. p 4-6
www.jstor.org/stable/j.ctv9hj94m. Accessed 27 May 2020.

⁶ Philomena Murray and Andrea Benvenuti, “EU-Australia Relations at Fifty: Reassessing a Troubled Relationship” (2014) 60 *Australian Journal of Politics & History* 431

⁷ *ibid*

⁸ *ibid* p 433 see footnote 4

⁹ See footnote 6 in Nauro Campos and Fabrizio Coricelli, “Britain's EU Membership: New Insight from Economic History” (*VOX, CEPR Policy Portal* February 3, 2015) <<https://voxeu.org/article/britain-s-eu-membership-new-insight-economic-history>> accessed May 27, 2020

¹⁰ Murray Philomena and Benvenuti Andrea (n4) p 433

Australian foreign policy, reaching from the role of the United States to the opening to the Asian markets, as this paper will address in the course of this chapter. However it also sparked a discussion in Australia about its relationship to the UK. “Not surprisingly, former Prime Minister Paul Keating in full cry during the republican debate could not resist a swipe at the country that walked out on us and joined the Common Market”¹¹

There are many scholars, describing the rise of Australian resentment as a result of Great Britain’s pro-European policy. From Carl Bridge blaming Britain as “the initiator of the rapid decline in Anglo-Australian trade in the 1960s”¹² to Stuart Ward who describes that

“there prevailed a typical emotional reaction, which reflected a widespread feeling that Britain’s steady drift towards Europe was morally dubious – even treacherous. A deeply inscribed sense that the Macmillan Government was breaking some imagined code of British conduct informed the Australian response at all levels: in official, ministerial, parliamentary, and public debate.”¹³

It was not the Macmillan Government, but Ted Heath, the strongly pro-European prime minister, who finally brought the UK into the EEC after the failed attempts in 1963 and 1967. And it was not Heath alone, but there was a broad consensus that Great Britain should join EEC. For quite some time it remained uncertain, but then in 1972 as Tinkell recalled

“it started to look as if the negotiation might succeed, Heath took an increasing interest and more or less brushed aside the bureaucrats who had been involved previously. He was very keen that the final result should be his and no one else’s and went to Paris to make the final agreement. Ever since the rebuffs in the 60s, he had felt it was his duty to get this right, and he saw it as his crowning achievement. From the beginning we knew we were joining more than just a free trade area”.¹⁴

¹¹ Stuart Ward, *Australia and the British Embrace: The Demise of the Imperial Ideal* (Melbourne University Press 2001) p 1

¹² Bridge, Carl (1991) (ed.) *Munich to Vietnam: Australia’s Relations with Britain and the United States since the 1930s*, Melbourne: Melbourne University Press.

¹³ Ward (n 11) p 71

¹⁴ Crispin Tickell, “How Britain Negotiated Its Entry to the EEC – Then Failed to Play Its Part” (*The Guardian* June 25, 2016) <<https://www.theguardian.com/politics/2016/jun/25/how-britain-negotiated-its-entry-to-the-eeec-then-failed-to-play-its-part>> accessed May 27, 2020

“With the UK at the time still regarded in Canberra as an indispensable defence and economic partner, as well as the linchpin of the British Commonwealth”¹⁵ the concept of European integration was viewed by Australia with scepticism and hesitation. Nevertheless, unification and cooperation in Europe was not entirely perceived negatively by Australia as it welcomed “integration as an important contribution to the political and economic stabilisation of Western Europe — then painfully emerging from the ashes of a long and disastrous world war and rapidly transitioning into a phase of protracted and dangerous Cold War tensions.”¹⁶ In 1972 the shift in UK-Australian trade relations became obvious. Australia announced the intention to withdraw a number of preferences to Great Britain and the termination of the Trade Agreement between Australia and Great Britain as a consequence of the preparations to become a member of the European Economic Community in 1973.¹⁷

When Great Britain finally became a member of the EEC it still was the most important trading partner of Australia but suddenly Australia found itself shut off from the European market. As George Brandis, Australian High Commissioner to the UK recalled later, “at first, our response was to keep high tariff walls around ourselves, as protection from international competition. It was a manifest failure. We made poorer products at a higher cost than we should have”,¹⁸ and he added that, “by 1980, Australia’s GDP per capita ranking had fallen to 19th in the world – from 7th in 1950 and 2nd in 1913”.¹⁹

1973-1980

With the accession of the United Kingdom to the EEC and the adoption of the Common Agricultural Policy (CAP) by the new member state, Australian agricultural products lost competitiveness both in the UK as well as in other countries of the European continent. This development led Australia to refocus its foreign trade policy on having “to find, not without some political resentment, alternative export markets in Asia for its agricultural goods”²⁰

¹⁵ Murray Philomena and Benvenuti Andrea (n 4) p 433

¹⁶ *ibid*

¹⁷ DFAT, “Australia’s Trade Through Time” (*DFAT – Trade Through Time*) <<https://tradethroughtime.gov.au/>> accessed May 27, 2020

¹⁸ George Brandis, “Britain Was Once a Global Trading Power - After Brexit It Can Be Again” (| *Australian British Chamber of Commerce* February 11, 2019) <<https://www.britishchamber.com/blog/britain-was-once-global-trading-power-after-brexit-it-can-be-again-george-brandis-qc-australian>> accessed May 27, 2020

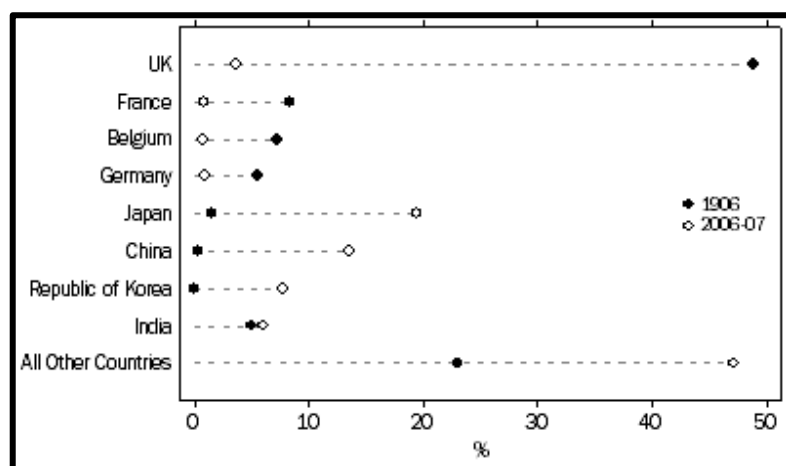
¹⁹ *ibid*

²⁰ Drake-Brockman and Messerlin (n 3) p 4-6

This process to focus on new markets had already started, when Great Britain made the first attempt to join the EEC in the early 1960s. The change of importance of export destinations in the course of the decades starting from 1906 to the years 2006/07 is presented in Exhibit 1, which clearly shows how Australia turned or was turned away from Europe²¹.

Exhibit 1 Comparison of Export Destinations for Australia between 1906 and 2006/07

Source: Australian Bureau of Statistics



As shown in Exhibit 2, the development of Australia's trade relations with Japan is a very prominent example for this shift already in the 1960s. A 6.83% rise with Japan in comparison to a 5.81% drop with the UK. This trend continues in the 1970s. "In 1971–72, it took 27.8% of Australia's total exports and by the middle of the decade this had climbed to over 30%. In 1977–78, as Australia's principal export market, it took 32.3% of total Australian exports".²²

²¹ "100 Years of International Trade Statistics" (*Australian Bureau of Statistics, Australian Government* December 10, 2007)
<<https://www.abs.gov.au/AUSSTATS/abs@.nsf/0/618AFF5416C64078CA2573E9001016FE?OpenDocument>>
accessed May 27, 2020

²² Commonwealth Parliament and Parliament House, "Australia and Japan-A Trading Tradition" (*Parliament of Australia* April 14, 2013)
<https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Completed_inquiries/1999-02/japan/report/c05> accessed May 27, 2020

Exhibit 2: Australia's Export Focus 1963 - 1969

Source: Parliament of Australia

	1963–64 %	1964–65 %	1965–66 %	1966–67 %	1967–68 %	1968–69 %
United Kingdom	18.40	19.47	17.40	13.39	13.94	12.59
Japan	17.53	16.62	17.29	19.39	21.09	24.36
United States	10.09	9.96	12.44	11.88	13.22	14.23 ^[41]

Looking at the Balance of Trade with China as shown in Exhibit 3 it can be seen that Australia's position compared to the EEC was very strong in terms of exports to China at the beginning of the 1960s but Australia's exports to China significantly declined during the second part of the 1960s, as presented in Exhibit 3.²³

Exhibit 3: China's Trade in the 1960s

Source: Compiled by Liang-Shing Fan from the tables in J.Deleyne, *The Chinese Economy 159-60 (1973)*

	1961			1965		
	Export	Import	Net	Export	Import	Net
EEC*	147.3	109.2	+ 38.1	194.0	231.0	– 37.0
EFTA†	118.4	58.9	+ 59.5	132.0	113.0	+ 19.0
Japan	30.9	16.7	+ 14.2	225.0	245.0	– 20.0
Australia	7.1	161.4	– 154.3	26.8	198.0	– 171.2
Canada	3.2	122.8	– 119.6	13.4	67.5	– 54.1
Hong Kong and Macao	180.0	17.3	+ 162.7	406.3	12.5	+ 393.8

²³ Liang-Shing Fan, *The Economy and Foreign Trade of China*, 38 *Law and Contemporary Problems* 249-259 (Summer 1973) < <https://scholarship.law.duke.edu/lcp/vol38/iss2/7/>> accessed May 27, 2020

	1969			1971		
	Export	Import	Net	Export	Import	Net
EEC*	268.5	297.9	– 29.4	272.0	323.0	– 51.0
EFTA†	160.0	171.8	– 11.8	152.0	183.6	– 31.6
Japan	234.0	390.0	– 156.0	322.0	578.0	– 256.0
Australia	33.6	120.0	– 86.4	39.0	27.0	+ 12.0
Canada	25.2	112.8	– 87.6	22.0	195.0	– 173.0
Hong Kong and Macao	450.0	6.0	+ 444.0	550.0	11.0	+ 539.0

*European Economic Community.
†European Free Trade Association (1970 data is used instead of 1971).
Source: compiled from tables in J. DELEYNE, THE CHINESE ECONOMY 159-60 (1973).

In principal, the main driver of Australia's frustration and reorientation were the accession of Great Britain to the EEC in principle, but especially CAP, the EEC common agricultural policy, already launched in 1962, the aim of which was to

- “support farmers and improve agricultural productivity, ensuring a stable supply of affordable food;
- safeguard European Union farmers to make a reasonable living;
- help tackle climate change and the sustainable management of natural resources;
- maintain rural areas and landscapes across the EU;
- keep the rural economy alive by promoting jobs in farming, agri-foods industries and associated sectors.”²⁴

The legal framework of CAP as fundament for the agricultural policy of the EU is laid down in the Treaty on the functioning of the European Union (TFEU). The elements of the CAP work are based on four regulations:

- “rules for direct payments to farmers (Eu regulation 1307/2013)
- a common organisation of the markets in agricultural products (EU regulation 1308/2013)
- support for rural development (EU regulation 1305/2013)
- financing, management and monitoring of the common agricultural policy (EU regulation 1306/2013).”²⁵

In the early 1970s both the world food crisis and the opening of Great Britain's food market for EEC food production surpluses put pressure on agricultural imports from third markets like that of Australia. At that time 44% of Australia's export were agricultural exports and as imports from non-members were restricted, Australia was confronted with a decline in market share of its exports to Europe.²⁶

²⁴ European Commission, “The Common Agricultural Policy at a Glance” (*European Commission* May 15, 2020) <https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance_en> accessed May 27, 2020

²⁵ *ibid*

²⁶ DFAT (n15)

Several attempts to challenge the CAP policy on a multilateral GATT level like the rounds on CAP 1960-62, 1964-67 and 1973-79 were not successful. Initiatives by the United States of America, Australia and several other countries to challenge the outcomes of the CAP policy through the dispute settlement provisions of GATT did not have an impact either.²⁷

Already at the end of the 1970s the Australian frustrations were obvious. In March 1978 the Minister for Special Trade Representations declared that “trade was causing great strains between Australia and the EEC”, the cause for these strains being the CAP system of the EEC, and that “we are efficient producers of agricultural products ... Yet the EEC is denying us the opportunity, the right, to compete in its markets. Worse, the EEC is disposing of the surpluses caused by its policies at heavily subsidised prices on third markets in which we would otherwise sell our products”. He further explained that “Australia is the country worst affected by the enlargement of the EEC and its common agricultural policy” and that there is also a bad situation for the export of beef “as a result of the imposition of increasingly protective mechanisms” and applying EEC’s common agricultural policy to UK’s imports “has practically stopped exports of sugar and butter to the EEC”.²⁸ As a consequence, the Australian Government started its own research to be able to present the recklessness of the CAP.²⁹

In the second half of the 1970s, Australia continued to set clear signs of a stronger orientation of its trade policy away from Europe towards the Asian-Pacific regions. Exports to Japan made up a stunning 30% of all goods and services exports of Australia in 1976 and in the same year Australia closed the Papua New Guinea-Australia Trade and Commercial Relations Agreement 1976. In 1978 Australia created the Export Expansion Grants Scheme to support the expansion of exports by giving subsidies to Australian exporters. Following a major economic reform in China, the largest Asian country became the sixth largest trading partner of Australia, which later led to becoming its top trading partner in 2006.³⁰

²⁷ Alan Swinbank and Carsten, “The Changed Architecture of the EU’s Agricultural Policy Over Four Decades: Trade Policy Implications for Australia” [2017] Australia, the European Union and the New Trade Agenda 76 – 80

²⁸ Ransey Victor Garland, “Australia - EEC Trade Relations in Perspective“ Address to the Committee for the Economic Development of Australia, Melbourne March 17, 1978 <
https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/HPR08004224/upload_binary/HPR08004224.pdf;fileType=application/pdf#search=%221978%20EEC%22> accessed May 20, 2020

²⁹ Swinbank Alan and Daugbjerg Carsten n 25 p 78-79

³⁰ DFAT (n15)

1980 – 1990

In 1983 an important step was taken by Australia's first bilateral trade agreement, the Australia New Zealand Closer Economic Agreement (ANZCERTA). The Australian government saw it as "one of the world's most open and successful free trade agreements and two-way trans-Tasman merchandise trade has increased at an average annual rate of around eight per cent in the thirty years since its adoption".³¹ ANZCERTA's key interests and benefits including those added over time are:

"All tariffs and quantitative import or export restrictions on trade in goods originating in the Free Trade Area are prohibited under ANZCERTA.

Contains measures to minimise market distortions in trade in goods, including through domestic industry assistance and export subsidies and incentives.

The harmonisation of Trans-Tasman food standards through the Australia New Zealand Food Authority (ANZFA) Agreement of 1995 means lower compliance costs for industry, fewer regulatory barriers, and more consumer choice.

Mutual recognition of goods and occupations removes technical barriers to trade and impediments to the movement of skilled personnel between jurisdictions without the need for complete harmonisation of standards and professional qualifications."³²

Already starting in the second half of the 1970s and continuing through the 1980s the course changed, not only by closing bi- and multilateral trade agreements but also by more actively promoting trade and foreign investments. The Australian Trade Commission was founded based on the 1985 Australian Trade Commission Act³³, and the Cairns Group was set up in Australia in August 1986. The latter is a coalition of 19 countries that are agricultural exporters, and together make up more than a quarter of all agricultural exports in the world. Its goal is to fight for free and fair trade in agriculture. Members are countries from six continents both developing and developed ones and include Argentina, Australia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Peru, the Philippines, South Africa, Thailand, Uruguay and Vietnam.³⁴

³¹ Australian Trade and Investment Commission, "Australia New Zealand Closer Economic Agreement (ANZCERTA)" <<https://www.austrade.gov.au/Australian/Export/Free-Trade-Agreements/ANZCERTA>> accessed May 27, 2020

³² DFAT, "Australia-New Zealand Closer Economic Relations Trade Agreement" (DFAT December 2018) <<https://www.dfat.gov.au/trade/agreements/in-force/anzcerta/Pages/australia-new-zealand-closer-economic-relations-trade-agreement>> accessed May 27, 2020

³³ "Australian Trade Commission Act 1985" (*Australian Trade Commission Act 1985*) <<https://www.legislation.gov.au/Details/C2012C00044>> accessed May 27, 2020

³⁴ "Cairns Group Statement" (*Department of Foreign Affairs and Trade* February 24, 2016) <https://cairnsgroup.org/Pages/vision_statement.aspx> accessed May 27, 2020

The early 1980s marked the beginning of a more liberal position of Australia in terms of trade policy and tariffs. David Robertson notes that

“in Australia, deregulation of the financial sector at the end of 1983 broke the stranglehold of regulation and opened other economic sectors to liberalisation, including trade policy. The Hawke Government accepted the idea that unilateral liberalisation brought major benefits to an economy, whereas reciprocity was a slow process bringing uncertain returns. It was presented strongly to the Australian public as the only way to prevent the country becoming a ‘banana republic’.”³⁵

During the 1980s as a result of the CAP system, the budget problems generated by the high subsidies for agricultural products created pressure on this system in the European Union. The introduction of milk quotas in 1984 is just one example. Another example was the introduction of a new system of agricultural stabilisers due to the growing overproduction of products like cereals.³⁶ Attempts to reform CAP were difficult, not only because of the complicated decision process of the EEC but there was the obstacle of the Council of Ministers which, other than the Commission itself, had many members with strong farm lobbies like those of Ireland, Germany or France who did not want any reform that could hurt their farmers.³⁷

With the standstill of the EEC-Australia relationship a solution could only be envisioned by a multilateral initiative. As Murray describes, this was the “inauguration of a new GATT Round at Punta del Este (Uruguay) in September 1986” and “Australia’s contribution to its launch and to the creation of the Cairns Group - a coalition of fourteen farm exporting countries — signalled a renewed interest on Canberra’s part in both the GATT process and multilateral trade diplomacy as means of persuading the EC to reform its agricultural policies”.³⁸

1986 marked a starting point of a long way towards more free trade on a global basis. Starting “the Uruguay Round of multilateral trade negotiations remains the largest successful attempt in human history to liberalize global trade.”³⁹ What followed was a painstaking process to attempt

³⁵ David Robertson, “Reciprocity and Protectionism in Australia’s Trade Policy” (1997) 4 *Agenda - A Journal of Policy Analysis and Reform*

³⁶ Swinbank, Alan & Carolyn Tanner (1996), *Farm Policy and Trade Conflict: The Uruguay Round and CAP Reform* (The University of Michigan Press: Ann Arbor).

³⁷ *ibid*

³⁸ Murray Philomena and Benvenuti Andrea, “EU-Australia Relations at Fifty: Reassessing a Troubled Relationship” (2014) 60 *Australian Journal of Politics & History* 431

³⁹ Lucian Cernat and others, “Consumer Benefits from EU Trade Liberalisation: How Much ...” <https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156619.pdf> accessed May 27, 2020

to liberalise almost everything from agricultural products, textiles to manufacturing and services like banking, waste management etc.⁴⁰ Almost all nations in the world were involved. The EU offer in the final Uruguay Round “reduced import tariffs on average by 37% for all WTO partners...for consumers, the Uruguay Round made considerable progress in liberalizing two sectors of major importance to individual spending: agricultural products and textiles and clothing”.⁴¹At the same time the EU started “an ambitious bilateral negotiating agenda, especially since the conclusion of the Uruguay Round”.⁴²

Australia is a WTO member since January 1995 and a member of GATT since January 1948.⁴³

1990-2000

Early 1990 started in Australia with an ambitious initiative by the Australian Government, called “Building a Competitive Australia“. It encompassed not only the reduction of general tariff rates within four years to a rate of five per cent, also the tariffs for both Passenger Motor Vehicles (PMV) and for Textiles, Clothing, Foodware (TCF) were set to be reduced down to 15 per cent (PMV) respectively 25 per cent (TCF) by year 2000. ⁴⁴ It has to be mentioned that the announcement of this program in 1991 promoting trade liberalisation was made in a time of high unemployment and economic recession. Prime Minister Hawke used a very clear language in presenting this initiative by the Australian Government.

“Mr Speaker, the most powerful spur to greater competitiveness is further tariff reduction. Tariffs have been one of the abiding features of the Australian economy since Federation. Tariffs protected Australian industry by making foreign goods more expensive here; and the supposed virtues of this protection became deeply embedded in the psyche of the nation. But what in fact was the result?

Inefficient industries that could not compete overseas; and higher prices for consumers and higher costs for our efficient primary producers. Worse still, tariffs are a regressive burden-the poorest Australians are hurt more than the richest.” ⁴⁵

⁴⁰ ibid

⁴¹ ibid

⁴² ibid

⁴³ WTO, “Australia and the WTO” <https://www.wto.org/english/thewto_e/countries_e/australia_e.htm> accessed May 27, 2020

⁴⁴ Michael Emmery, “Australian Manufacturing: A Brief History of Industry Policy and Trade Liberalisation” (*Parliament of Australia* October 19, 1999) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900/2000RP07> accessed May 27, 2020

⁴⁵ Bob Hawke, “*Building a competitive Australia*“ (*PARLIAMENTARY STATEMENT BY THE PRIME MINISTER* March 12, 1991) <<https://pmtranscripts.pmc.gov.au/sites/default/files/original/00008270.pdf>> accessed May 27, 2020

He was supported by Treasurer Keating who clearly damned the protective policy of tariffs and their use as an instrument for industrial development. It was a passionate call for the liberalisation of international trade to make Australia competitive and efficient:

“The package of measures announced today ends forever Australia's sorry association with the tariff as a device for industrial development.

By turning its back on tariffs, Australia will be further propelled in its quest for international trade and efficiency, a search begun with the opening up of the economy in 1983 when we floated the dollar and abolished exchange controls.

As in all nations before it, the pursuit of trade and competition has instilled in Australia a thirst for greater efficiency at home and a larger dominion abroad.”⁴⁶

As the recession continued, a programme for business growth and employment was introduced by the Australian Government in 1992 and “these positive measures no doubt helped to detract attention from the critics of trade liberalisation and the across-the-board programme to reduce tariffs announced in 1991 continued to operate as scheduled”⁴⁷, so when in 1996 the Keating Government ended, “most tariffs had been reduced to five per cent and the scheduled reductions in tariffs for PMV and for TCF up to the year 2000 are continuing as planned”.⁴⁸

Europe and the EEC had faced a similar development. Rising unemployment as a result of growing imports from Asian countries like Japan⁴⁹ had triggered the fear that a liberal trade policy would create even more “unemployment and pose a direct threat to the social and political peace that the post-war welfare state had achieved. Given this situation, many concluded that increased protectionism was necessary”.⁵⁰

Even countries like West Germany, basically free trade minded, had negotiated restrictions for sensitive areas and, “at the EU level, manifestations of an increasingly restrictive trade policy

⁴⁶ Paul Keating, “*Building a competitive Australia*” (PARLIAMENTARY STATEMENT BY THE TREASURER March 12, 1991) < <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansard%2F1991-03-12%2F0019;query=Id%3A%22chamber%2Fhansard%2F1991-03-12%2F0018%22> > accessed May 27, 2020

⁴⁷ Emmery n 42

⁴⁸ *ibid*

⁴⁹ R.C. Hine, *The Political Economy of European Trade: An Introduction to the Trade Policies of the EEC* (St. Martin's Press New York 1985)8-9

⁵⁰ Brian T Hanson (1998). What Happened to Fortress Europe?: External Trade Policy Liberalization in the European Union. *International Organization*, 52, p 58 doi:10.1162/002081898550554

included the unwillingness of the European Economic Community to make substantial new concessions under the renewed Lomé Convention and the retention of tight safeguards under the Generalized System of Preferences.”⁵¹ For most of the member states of the EU the recession of the 1990s was the largest since World War II. Between 1991 and 1994 average unemployment within the EU reached 11 percent.⁵²

Although protectionism as a consequence of hard times and a “fortress Europe could be expected, the external trade barriers have not increased during the 1990s. To the contrary, an overview of trade policy developments during this period reveals a remarkable pattern of trade policy liberalization”.⁵³

From 1990 on, individual member states of the EU had abolished numerous quantitative restrictions against imports from non-member states and the EU had negotiated multilateral and bilateral trade agreements which provided improved market access for imports from non-member states.⁵⁴

Both on the European side and on the Australian side, the 1990s were the times of bilateral and multilateral trade agreements signalling a trend for more free trade, but it has to be noted that “the most prominent ones on the European side were the so called Europe Agreements”,⁵⁵ whereas the focus of Australian bilateral and multilateral trade agreements had been on the Asian-Pacific side and beyond. One example is the 1993 APEC Ministerial Meeting with the

⁵¹ *ibid* p 58-59

⁵² *ibid* p 59, Hanson (n 48) also noted that “Moreover, the number of people employed in the EU declined by 4 percent in this period—a decline twice as large as in any comparable period since World War II—and has been felt throughout the EU. From 1991 to 1994, Italy suffered a decline in employment of over 1.7 million. The United Kingdom lost almost nine hundred thousand jobs, following a decrease of almost the same size in 1990. Spain lost over eight hundred thousand jobs, the former West Germany lost almost six hundred thousand jobs, and the former East Germany lost more than a million jobs during these three years.”

⁵³ *ibid* p 59

⁵⁴ *ibid* p 59-60

⁵⁵ *ibid* p 60, Hanson notes that „these bilateral preferential trade agreements between the EU and six central European countries (Bulgaria, the Czech Republic, Hungary, Poland, Romania, and the Slovak Republic) were concluded between 1991 and 1993 and allow most industrial products originating in these countries to enter the EU market free of tariffs and quantitative restrictions. Increased market access was even granted in the most sensitive sectors, such as textiles, apparel, and steel. Bilateral free-trade agreements were also signed with Estonia, Latvia, and Lithuania in 1994, which removed EU tariffs and quantitative restrictions on their imports. A free-trade agreement negotiated with Turkey in 1995 allowing the free movement of industrial goods beginning in January 1996 is notable for its potential threat to EU textile and apparel producers.²⁸ Of the other free-trade agreements negotiated by the EU, some of the most important are with Switzerland, Norway, Israel, and Slovenia.“

participation of “Australia, Brunei Darussalam, Canada, Chile, the People's Republic of China, Hong Kong, Indonesia, Japan, the Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, the Republic of the Philippines, Singapore, Chinese Taipei, Thailand, and the United States of America”.⁵⁶ It was not only the further opening in the direction of the Asian Pacific through this series of bilateral agreements, but also towards the United States of America. The Trade and Investment Framework Agreement (TIFA) was signed end of 1992 which should “reduce and eliminate impediments and obstacles to trade and investment between the two countries.”⁵⁷

There was also progress in the Australian-European Community relations. 1994 an agreement about cooperation regarding scientific and technical cooperation had been concluded, which was the first one that the EU concluded with an industrialised country, that was not a member of the Community. This cooperation was based on an exchange of letters in 1991 that already “established a framework for collaboration and dialogue between the European Commission and the Australian government”.⁵⁸

Towards the end of the 1990s with their scenario of multiple bilateral and multilateral trade agreements with a lot of different nations on both sides, it was obvious, that both sides wanted to open a new chapter in their relationship in general and with trade in particular. The Australia European Joint Declaration on Relations between the European Union and Australia was signed in Luxembourg on June 26, 1997.⁵⁹

⁵⁶ “1993 APEC Ministerial Meeting” (*APEC* November 1993) <https://www.apec.org/Meeting-Papers/Annual-Ministerial-Meetings/1993/1993_amm> accessed May 27, 2020

⁵⁷ *1993 Trade Policy Agenda and 1992 Annual Report of the President of the United States on the Trade Agreements Program* p 54 https://play.google.com/books/reader?id=UJhXxxUV_70C&hl=de&pg=GBS.PA109 accessed May 15, 2020

⁵⁸ Agreement relating to scientific and technical cooperation between the European Community and Australia - Declaration of the Council and the Commission L188, 22/07/1994, p. 18 <https://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=326> accessed May 10, 2020

⁵⁹ JOINT DECLARATION ON RELATIONS BETWEEN THE EUROPEAN UNION AND AUSTRALIA 1997 <https://eeas.europa.eu/sites/eeas/files/1997_joint_declaration_en.pdf> accessed May 20, 2020

On the economic side it underlined that the EU is one of Australia's important economic partners and that the two partners wanted to extend their trade relationships even further and so the signatories stressed

“our common commitment to free and open market principles and the strengthening of the multilateral trading system in accordance with the aims and principles of the WTO, and the development of a healthy and prosperous world economy; we recognize the importance of strengthening the multilateral trading system and will continue to work together to support further trade liberalization, greater transparency and the implementation of the WTO and OECD principles concerning both trade in goods and services and investment”.⁶⁰

Moving into the 2000s a clear picture emerged. The influence of Europe, especially that of the UK diminished whereas the influence of the Asia Pacific further increased. In 1999 “the United Kingdom accounts for 35% of investment stock in Australia (down from 73% in 1949), but the US' share has doubled to 32% since 1949. The sources of foreign investment have diversified with Japan (5.4%), the Netherlands (3%), Germany (2.2%) and Switzerland (2.1%) accounting for significant investments in Australia”.⁶¹

End of the 1990s, exactly on Saturday, 6 November 1999 Australians were asked in a Constitutional Referendum if they agreed to “alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and the Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament”.⁶² The vote of the Australian citizens was clear: A majority of 54.87% voted against Australia becoming a republic. The proposal to change Australia into a republic was defeated in all Australian States.⁶³

The post 2000 period in the trade relations between Australia and the EU was dominated by a reconciliation between the EU - Australia following a long period of tensions regarding the

⁶⁰ “SIGNATURE OF THE JOINT DECLARATION ON RELATIONS BETWEEN THE EUROPEAN UNION AND AUSTRALIA” (*European Commission* June 26, 1997)
<https://ec.europa.eu/commission/presscorner/detail/en/PRES_97_213> accessed May 27, 2020

⁶¹ DFAT, “INVESTMENT PROFILE SHIFTS” (*DFAT – Trade Through Time*)
<<https://tradethroughtime.gov.au/>> accessed May 26, 2020

⁶² Michael Kirby, “The Australian Republican Referendum 1999 - Ten Lessons” (*Law and Justice Foundation - The Australian Republican Referendum 1999 - Ten Lessons* March 3, 2000)
<<http://www.lawfoundation.net.au/ljf/app/&id=DF4206863AE3C52DCA2571A30082B3D5>> accessed May 27, 2020

⁶³ *ibid*

mutual relations and the general perceptions on both sides. Murray argues that trade was the first reason for this new approach on both sides which started in the 1990s, as already mentioned. “From the early 1990s, Australia’s major trading partner was the EU. Australian officials and businesses recognised that the EU constituted a stable market for its exports. The negative perception of the EU as a ‘fortress’ to all Australian goods was slowly changing”.⁶⁴

Step by step the EU had become an important economic partner for Australia and in 2001/02 “accounted for 20% of all Australian overseas transactions compared with 17 % for the USA and 13% for Japan and ASEAN respectively. The EU was also the largest source of Australian imports (22% share of total imports, mainly medicines, cars and telecommunications equipment)”.⁶⁵

For Australia the EU was number three of its export markets and the EU was the leading investor, holding 33% of foreign investments in Australia. This development was accompanied by bilateral agreements regarding the trade in wine and increased cooperation in science and technology.⁶⁶

A further step in this process of relieving tensions was the signing of the Agenda for Cooperation in April 2003 which set the course for future cooperation for the next five years in the areas of “Security and Strategic Issues, Trade , Education and Science and Technology, Transport, Environment , Development Cooperation , Migration and Asylum”.⁶⁷ Both sides were convinced that they, under the Joint Declaration of 1997, had already

“achieved a dynamic work program and intensified exchanges between Australia and the European Union to make progress on a diverse range of common interests“ and that they have “created a framework for frank but constructive consultations in areas where we have diverging assessments and perspectives“ showing „the increasing breadth of our engagement and heightened cooperation”.⁶⁸

⁶⁴ Murray Philomena and Benvenuti Andrea (n 4) p 443

⁶⁵ “Commissioner Patten to Visit Australia and New Zealand 16 - 24 April 2003” (*European Commission - European Commission* April 15, 2003) <https://ec.europa.eu/commission/presscorner/detail/en/IP_03_546> accessed May 27, 2020

⁶⁶ *ibid*

⁶⁷ EEAS, “Australia and the European Union: An Agenda for Cooperation” <http://eeas.europa.eu/archives/docs/australia/docs/australia_cooperation_en.pdf> accessed May 27, 2020

⁶⁸ *ibid*

One year later, in April 2004 a stocktake of the relationship and the priorities for the future was taken on a Ministerial and Commissioner level showing the joint activities based on the 1997 Joint Declaration ⁶⁹ and reflecting the “contemporary geopolitical context and specific areas of interest and concern for the EU and Australia”.⁷⁰

The mutual areas of interest were defined as

- “Increased exchanges on security and strategic issues including counterterrorism;
- Deeper dialogue on development co-operation especially in the Pacific;
- Strengthening links on education and science and technology;
- Closer co-operation on environmental issues, including bilateral climate change projects;
- Pursuing common interests in civil aviation and continued cooperation on the Galileo Satellite System;
- Continued co-operation to improve the international trade environment, especially with regard to developing countries;
- Continued dialogue on migration and asylum issues”.⁷¹

Up to 2008 the Agenda for Cooperation of 2003 remained the main guideline for Australian – EU relations. Finally, the increase in economic relations as well as the general increase in mutual contacts and the depth in interaction between the EU institutions and the Australian Government resulted in a new agreement in 2008. The goal of this new Partnership Framework was laid down in five key points:

- “1) strengthening bilateral and multilateral dialogue and cooperation in support of shared foreign policy and global security interests;
- 2) promoting and supporting the multilateral rules-based trading system, and consolidating and expanding the bilateral trade and investment relationship;
- 3) enhancing regional and bilateral cooperation and coordination in relation to the Asia and Pacific regions;
- 4) seeking opportunities to cooperate on climate change, environment, energy security, fisheries and forestry;
- 5) strengthening cooperation in science, research, technology and innovation, education and culture and to facilitate the movement of people”.⁷²

⁶⁹ EEAS, “Stocktake of Australia-EU Cooperation and Dialogue Under the 1997 Joint Declaration on Relations Between Australia and the European Union” (EEAS 2004)
<https://eeas.europa.eu/sites/eeas/files/2004_ministerials_stocktake_en.pdf> accessed May,10 2020

⁷⁰ Philomena Murray and Margherita Matera, “Australia and the European Union: Trends and Current Synergies” (University of Melbourne May 2019) <<https://arts.unimelb.edu.au/school-of-social-and-political-sciences/research/further-research-projects/australias-relationship-with-the-european-union/news-and-events/australia-and-the-european-union-trends-and-current-synergies>> accessed May 27, 2020

⁷¹ *ibid* p 4

⁷² EEAS, “European Union – Australia Partnership Framework” (EEAS 2008)
<http://www.eeas.europa.eu/archives/docs/australia/docs/australia_pfw_2008_en.pdf> accessed May 27, 2020

2008 – 2013

From 2008 on, based on the Australia-EU Partnership Framework noticeable progress was made both in the political dialogue as well as in the scope of cooperation in fields like science and research, education, environmental matters, nuclear energy as well as global security issues. The framework also “allowed for the broadening of consultations within the United Nations (UN) and other global forums on security issues of international importance.”⁷³

One year after the signing of the Framework a review by the partners was conducted to evaluate the progress made and as Murray puts it, it was “a remarkable set of achievements in a short period of time that reflected what has come to be dubbed a modern relationship.” and the EU and “its impact and scope were increasingly recognised by successive Australian governments - somewhat reluctantly by the Howard government but more positively by the Rudd (2007-10) and Gillard (2010-13) governments.”⁷⁴

The first clear official statement, that Australia was actively seeking a Treaty level agreement with the EU came in October 2010. Prime Minister Julia Gillard, during a visit to Brussels for the Asia-Europe Summit Meeting (ASEM), where Australia became a member of ASEM, announced that her country wanted to intensify its cooperation with the EU through a new trade treaty.⁷⁵ The newspaper ‘The Australian’ wrote about this statement: “Capturing the significance of the proposed treaty, Ms Gillard likened Australia’s relationship with Europe to an engagement. ‘Now we’re looking to get married’, she said”.⁷⁶

⁷³ Nina Markovic, “Australia's Relations with the European Union: towards a Deeper Regional Engagement” (*Parliament of Australia* November 7, 2013)
<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/AustEU> accessed May 27, 2020

⁷⁴ Murray and Benvenuti, (n 4) p 445

⁷⁵ Nina Markovic, “Australia's Evolving Relationship with the European Union: An Update” (*Parliament of Australia* January 10, 2014)
<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/EUAustUpdate> accessed May 27, 2020

⁷⁶ Joe Kelly, “Gillard Seeks New Treaty with Europe - The Australian” (*The Australian* October 5, 2010)
<<https://www.theaustralian.com.au/national-affairs/gillard-firms-up-aus-europe-relationship/news-story/b3bc3c264f5572305b480790e01d142d>> accessed May 27, 2020

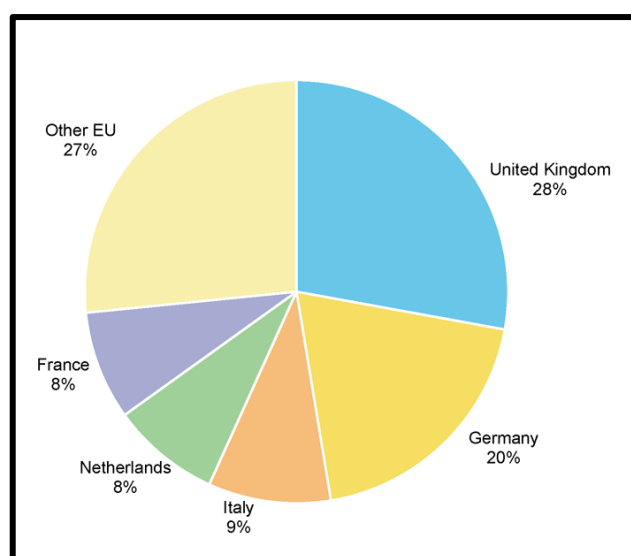
The first steps towards negotiations of an FTA between Australia and the EU were then taken in October 2011 when negotiations on “a treaty-level Framework Agreement” were started. The 50th anniversary of diplomatic relations between Australia and the EU in 2012 provided another opportunity to intensify the dialogue through the existing channels like “diplomatic ties, cultural and education institutions, business councils and global forums, including the United Nations and Asia–Europe Meeting (ASEM)”.⁷⁷ A Government Briefing from that time notes that “increasing numbers of high-ranking EU officials have visited Australia in recent years, including the Presidents of the European Council and the European Commission, the EU’s foreign policy chief and a large number of EU ministers”.⁷⁸ The same Briefing presented an overview on the status of EU-Australia trade relations and noted that

“in 2012, the value of trade in goods and services between Australia and the EU was \$81.6 billion. The EU accounted for 13.2% of Australia’s total trade in goods and services. The balance of trade on goods and services with Europe recorded a deficit of \$34.4 billion. Key imports from the EU included medicinal substances, passenger motor vehicles and civil engineering equipment. Australia’s main exports to the EU were gold, coal and agricultural products.”⁷⁹

Australia’s most important trading partners from the European Union in 2012 are presented in Exhibit 3⁸⁰, the largest being the United Kingdom.

Exhibit 3: Australia’s main individual trading partners from the EU in 2012

Source: Department of Foreign Affairs and Trade



⁷⁷ Markovic (n 70)

⁷⁸ *ibid*

⁷⁹ *ibid*

⁸⁰ *ibid*

During a visit of the Australian Governor-General in Brussels in June 2013, José Manuel Barroso, the President of the European Commission, commented that “bilateral relations between Australia and the EU were moving to a much higher degree of cooperation and political alliance”⁸¹ A visit that was also the start of the Australia-EU Leadership Dialogue.

Post 2014 to present-day

Not only Australia and the EU were moving forward towards a trade agreement at a Treaty level but also New Zealand and the EU. In a joint statement in March 2014 President Van Rompuy, President Barroso and Prime Minister Key declared the commitment of both the EU and New Zealand. “We agreed to reflect on options to progress the trade and economic relationship, including the parameters for the possible opening of negotiations to further liberalise trade and investment between the EU and New Zealand”.⁸²

One year later on October 29th, 2015 the three leaders issued a joint press statement: “Today we committed to start the process for negotiations to achieve swiftly a deep and comprehensive high-quality Free Trade Agreement (FTA). Discussions to define the scope and overall approach to the negotiations should start as soon as possible”.⁸³

In 2017 the EU Commission assumed that “from the Australian and New Zealand perspective, the EU, their biggest trade and investment partner, is a "missing link", as there is no FTA between both sides”,⁸⁴ but it also stressed in an impact assessment regarding the Recommendation for a Council Decision authorising the opening of negotiations for a Free Trade Agreement with Australia that

“both Australia and New Zealand have an active trade agenda and concluded FTAs with several partners including China, South Korea, and all countries from the Association of Southeast Asian Nations (ASEAN). Both Australia and New Zealand participate in the Trans- Pacific Partnership (TPP) and are engaged in the Regional Comprehensive Economic Partnership

⁸¹ *ibid*

⁸² “Joint Declaration by President Van Rompuy, President Barroso and Prime Minister Key on Deepening the Partnership between New Zealand and the European Union” (*European Commission* March 25, 2014) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_14_83> accessed May 27, 2020

⁸³ “Statement of the Presidents of the European Council and the European Commission and the New Zealand Prime Minister” (*European Commission* October 29, 2015) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_15_5947> accessed May 27, 2020

⁸⁴ “COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT” (*European Commission* September 13, 2017) <<https://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-293-F1-EN-MAIN-PART-1.PDF>> accessed May 27, 2020

(RCEP) and other bilateral negotiations such as with India. These agreements provide preferential access for goods, services and investment originating from these countries to Australia and New Zealand. However, while Australia and New Zealand have concluded numerous FTAs, the EU does not have preferential bilateral trade arrangements with either of them. This leaves the EU's economic operators with comparably less favourable conditions to access these markets.”⁸⁵

Among the developed countries Australia was one of the fastest growing economies, the European Union one of the most important trade partners and the biggest foreign direct investor in Australia. Given the fact that both Australia and New Zealand had signed bilateral trade agreements with many non-EU countries this EU impact assessment in 2017 concluded that

“EU economic operators face comparably less favourable conditions to access the Australian and New Zealand markets. EU investors are in a less favourable position compared to investors from countries which Australia and New Zealand have included investment protection in their FTAs or bilateral investment protection agreements. The limited scope of the current agreements, which address non-tariff measures only within their respective scope, and the absence of tariff liberalisation as well as any further opening of service and public procurement markets create unnecessary burdens and additional costs for EU businesses, including small and medium sized enterprises (SMEs), and an unfulfilled potential for trade in goods and services. As a result of FTAs between Australia and in particular the US, Japan, South Korea and China, in practice it is only the EU that has to pay import duties to import its cars to Australia. The situation will be similar in New Zealand's case when the TPP or other bilateral FTAs would enter into force. EU automotive exports are the most significant export items; EU exports of automotive products including cars to Australia amounted to €5.7 billion (18% of total EU exports to Australia) and to New Zealand €0.4 billion (15% of total EU exports to New Zealand)”.⁸⁶

This summary of the impact assessment very clearly shows one of the main motives of the EU in moving towards signing an FTA with Australia.

Like the EU Australia was convinced to start negotiations on an FTA with the European Union. In the course of time Australia more and more acknowledged that “the EU was becoming a type of normative actor in at least two ways - firstly, as a regulatory norms-setter in trade and, secondly, in seeking to influence international norms in democracy promotion and good governance”⁸⁷ but it was not only the issue of trade relations, but also “in addition, Australian ministers and officials came to perceive that they and the EU shared common concerns about

⁸⁵ *ibid* p 4

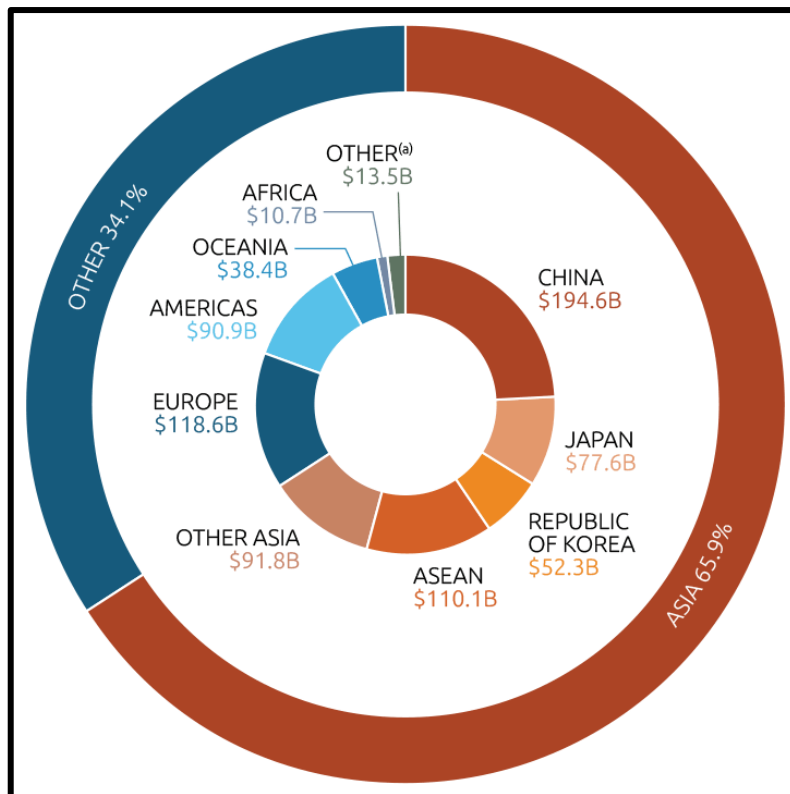
⁸⁶ *ibid* p 7

⁸⁷ Murray and Benvenuti, (n 6) p 445

regions that were not stable in terms of democracy. This concern about stability was particularly manifested in discussions regarding Asia and the Pacific.”⁸⁸ Exhibit 4 shows the dependence of Australia in terms of two-way trade with the Asian region in 2017/18, one of the motives for the EU to pursue closer ties to Australia.

Exhibit 4: Australia's Two-Way Trade by Region 2017-18

Source: Australian Department of Foreign Affairs and Trade 2019



There was also a common understanding regarding the US as an important ally and a common concern about China being a large trading partner despite being a democracy nor an ally. In its official statements the Australian Government declared “Australia and the European Union (EU) are natural partners, with a shared commitment to the rule of law, global norms and free and open markets” and the message given by the Australian Government was very clear: “We want an FTA with the EU to set the benchmark for what can be achieved between like-minded partners”.⁸⁹

⁸⁸ *ibid*

⁸⁹ DFAT, “Australia-European Union Free Trade Agreement” (DFAT)
<https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/Pages/default> accessed May 27, 2020

The main benefits expected from an FTA with the EU by the Australian Government were summarised as

- “Significantly improved market access for Australian exports
- Guaranteed access for Australian services providers
- Expansion of two-way investment flows
- A more predictable and seamless business environment
- Rules to support the digital economy and innovation
- Reduced costs and red tape, particularly for small and medium-sized enterprises
- Greater consumer choice”⁹⁰

So finally, on May 22, 2018 the EU Council adopted the negotiating directives for free trade agreements with Australia and gave a green light for the start of the negotiations between the two parties. In June 2018 EU Commissioner Malmström travelled to Australia to open the talks at the political level.⁹¹ In her press conference with Prime Minister Turnbull she stated, that the EU “have made an impact assessment that shows that trading goods between Australia and the EU, if we have this ambitious agreement in place, could increase with 37 per cent.”⁹² But the Commissioner also mentioned the activities Australia had undertaken in terms of trade agreements with different partners around the world, a fact already addressed in the course of this chapter. She said that the EU

“have of course seen your ambitious trade agenda, the Trans Pacific agreement and others, so of course, our businesses are eager to have the same access to your market, to have a level playing field important for our exports, military equipment, machinery, chemicals, processed food and services. For you, I know that having access to 500 million people or consumers, is offering major opportunities for business.”⁹³

The positive results of the assessments on both sides about the impact of a Free Trade Agreement (FTA) and the positive experiences with the process of the improvement of trade relations during the last decade had set the course for the start of ambitious negotiations for an FTA between the two partners.

⁹⁰ DFAT, “What Are the Potential Benefits of an Australia-EU FTA?” (*DFAT*)
<<https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/Pages/australia-european-union-fta-fact-sheet>>
accessed May 27, 2020

⁹¹ European Commission, “Commission Welcomes Green Light to Start Trade Negotiations with Australia and New Zealand” (*European Commission News Archive* May 22, 2018)
<<https://trade.ec.europa.eu/doclib/press/index.cfm?id=1843>> accessed May 27, 2020

⁹² “Press Conference on EU-Australia Free Trade Agreement” (*Malcolm Turnbull* June 18, 2018)
<<https://www.malcolmturnbull.com.au/media/press-conference-on-eu-australia-free-trade-agreement>> accessed May 27, 2020

⁹³ *ibid*

2. 2 FTAs in the framework of international trade agreements

After World War II there was a series of attempts to establish an international body or at least an agreement to liberalize global trading. The summit at Bretton Woods in 1944 had an ambitious goal. Beside the World Bank and the International Monetary Fund (IMF) there should be a third organization, the International Trade Organization (ITO) which should be “an agency within the United Nations to set rules on not only on trade but on employment, commodity agreements, business practices, foreign direct investment, and services”.⁹⁴

Although the Charter was agreed, it was not ratified by the U.S. and some other countries , putting an end to the ITO in 1950.

Instead of the ITO, which initially was negotiated among 50 countries, 23 countries signed a trade agreement in October 1947 which came into effect in summer 1948, the General Agreement on Tariffs and Trade (GATT). It was amended in several rounds of negotiations over the years and finally led to the establishment of the World Trade Organisation (WTO) in 1995.⁹⁵

The main goal was “to put an end to harmful trade protectionism, that had sent global trade down 66% during the Great Depression”.⁹⁶

In order to reach this goal an important rule was that all members must accept most favoured nation (MFN) status to all other countries being a member of GATT. Already at the beginning there were exceptions. They excluded special tariffs with the British Commonwealth and custom unions and they also allowed tariffs if a removal of such tariffs would result in serious problems for domestic producers.

⁹⁴ Kimberly Amadeo, “GATT: Definition, Purpose, History, Pros, and Cons” (*The Balance* March 30, 2020) <<https://www.thebalance.com/gatt-purpose-history-pros-cons-3305578>> accessed May 28, 2020

⁹⁵ WTO, “WTO in Brief” <https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm> accessed May 28, 2020

⁹⁶ Amadeo (n 94)

Trade without discrimination was the central motive of the WTO as successor of GATT too and the MFN is a central provision in the three main agreements which are the basis of WTO:

General Agreement on Tariffs and Trade (GATT) (Article 1)⁹⁷

General Agreement on Trade in Services (GATS) (Article 2)⁹⁸

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
(Article 4)⁹⁹

This GATT/WTO regulation of most-favoured nation (MFN)¹⁰⁰ which demanded that each country offers its most liberal conditions in terms of trade to all GATT/WTO members, conflicted with the many bilateral trade agreements many countries already had in place or signed in the course of time, because the zero tariff of a FTA would have to be applied (in theory) to all GATT/WTO members. However, the GATT agreement provided an exception to this provision by its Article 24.¹⁰¹ This article let countries close FTAs “as long as the FTA moves countries significantly close to free trade and as long as countries notify the GATT/WTO of each new agreement. The simple logic is that an FTA is in the spirit of the GATT since it does involve trade liberalization.”¹⁰²

In the course of time a great number of countries have concluded bilateral or multilateral types of trade agreements, so called Regional Trade Agreements (RTA). The WTO defines 4 different types¹⁰³ of these agreements:

“A Free Trade Agreement (FTA), as defined in in Paragraph 8(b) of Article XXIV of GATT 1994;”¹⁰⁴

⁹⁷ WTO, “WTO Legal Texts” <https://www.wto.org/english/docs_e/legal_e/legal_e.htm#GATT94> accessed May 28, 2020

⁹⁸ *ibid*

⁹⁹ *ibid*

¹⁰⁰ WTO, “Understanding the WTO - Principles of the Trading System” <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#nondiscrimination> accessed May 28, 2020

¹⁰¹ WTO, “GATT: Article XXIV” <https://www.wto.org/english/tratop_e/region_e/regatt_e.htm> accessed May 28, 2020

¹⁰² “The General Agreement on Tariffs and Trade (GATT)” <https://saylordotorg.github.io/text_international-trade-theory-and-policy/s04-05-the-general-agreement-on-tarif.html> accessed May 28, 2020

¹⁰³ WTO, “Brief Introduction to Regional Trade Agreements (RTAs)” (*REGIONAL TRADE AGREEMENTS INFORMATION SYSTEM*) <https://rtais.wto.org/UserGuide/RTAIS_USER_GUIDE_EN.html#_Toc503517704> accessed May 28, 2020

¹⁰⁴ WTO (n 101), p 8(b) defines “A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those

A Customs Union (CU), as defined in Paragraph 8(a) of Article XXIV of GATT 1994;¹⁰⁵
An Economic Integration Agreement (EIA), as defined in Article V of GATS;¹⁰⁶
A "Partial Scope" Agreement (PS)".¹⁰⁷

As mentioned, the basic provision for FTA's is Article 24 of GATT 1994 but "FTA spread much more widely than the framers of the original GATT envisaged. FTA have grown out of a narrow area in which they were to operate as contemplated by the framers of the GATT 1947".¹⁰⁸

Many legal problems regarding the relationship of WTO rules and FTAs are still not resolved. One reason for the increase of bilateral and regional trade agreements is that they are much more flexible than the multilateral level of GATT and the WTO with its big number of involved member countries. FTAs "can be created faster and be more targeted to the interests of the participants as the participant countries are likely to be neighbouring countries and the number of members much smaller".¹⁰⁹ To monitor the compliance of RTA's with WTO regulations the Committee on Regional Trade Agreements (CRTA) has to be notified and prepares an analysis which can be accessed by the other WTO members to "examine and scrutinise the agreement against WTO rules"¹¹⁰

The motives for bilateral agreements like FTA's are not purely economic, but political as well. "The 'competitive liberalisation' argument for FTAs is based on sensitive trade and cross-

permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories."

¹⁰⁵ *ibid*, para 8(a)

¹⁰⁶ WTO, "General Agreement on Trade in Services" (*WTO*) <https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#articleV> accessed May 28, 2020

¹⁰⁷ WTO, "Decision of 28 November 1979 (L/4903)" <https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm> accessed May 28, 2020
"Partial Scope" which is not defined or referred to in the WTO Agreement, means that the agreement covers only certain products. Partial scope agreements are notified under p 4(a) of the Enabling Clause.

¹⁰⁸ Mitsuo Matsushita, "Regionalism and the Disciplines of the WTO: Analysis of Some Legal Aspects under Article XXIV of the GATT" (2005) 13 Asia Pacific Law Review 191

¹⁰⁹ Lilian Corbin Lilian and Mark Perry, *Free Trade Agreements: Hegemony or Harmony* (Springer 2019) p 5

¹¹⁰ DFAT, "WTO and Free Trade Agreements" (*DFAT*) <<https://www.dfat.gov.au/trade/organisations/wto/Pages/the-world-trade-organization-wto-free-trade-agreements>> accessed May 28, 2020

border issues that could not be dealt with under the multilateral settings such as the WTO, but it could be effectively negotiated in bilateral agreements”.¹¹¹

As Conconi argues, there are two main factors for the linking of trade agreements with non-trade issues. The first of these two factors “relies on the idea that linkage can facilitate cooperation across countries, allowing them to exchange concessions across different policy issues”¹¹² The other main factor “is based on the idea that firms with global supply chains lobby governments to reduce tariffs and to include in trade agreements provisions to protect their tangible and intangible assets.”¹¹³

¹¹¹ Thangavelu SM and Toh MH, *Bilateral “WTO-Plus” Free Trade Agreements: The WTO Trade Policy Review of Singapore 2004*. (September 2005) *The World Economy*, 28(9), 1211–1228.

¹¹² Paola Conconi, “Linking Trade Policy to Non-Trade Issues: Selected Survey of the Literature” (*Université Libre de Bruxelles (ECARES), CEPR and CESifo* September 2018)
<<https://ec.europa.eu/research/participants/documents/downloadPublic?documentIds=080166e5be0f6cfe&appId=PPGMS>> accessed May 28, 2020

¹¹³ *ibid*

2.3 The EU and the Australian Frameworks of Trade Agreements

2.3.1 The EU framework of trade agreements

The EU is a member of a single or common market which goes much further than other trade agreements. In a single market the members not only try to remove all barriers of trade, but they also agree to harmonise the standard of products, to a common competition policy, to harmonise environmental- and labour legislation as well as tax breaks and subsidies.¹¹⁴

All this is practiced in the single market of the European Union, “based on four freedoms of movement – of goods, services, labour and capital. As part of belonging to this system, member states get access to – and the ability to influence – the procedures by which its laws are made”.¹¹⁵ As members of a single market the members of the EU do not have the right to negotiate their own individual trade agreements to prevent that individual preferential deals with third countries are done, excluding the other members.¹¹⁶

As multilateral international agreements negotiated on the WTO levels are a complex and slow process, the EU considers FTA’s as central for the EU trade policy as e.g. the Deutsche Bund der Industrie (BDI) puts it

“the central pillar of rules-based and open trade should always be the WTO. It is the first-best way to open markets worldwide and to set new rules for trade. However, Free Trade Agreements (FTAs) can be – and have been for years – a sensible complement to the multilateral trading order. With the WTO being in crisis, they are further gaining in economic and political importance.”¹¹⁷

The EU has numerous free trade agreements (FTAs) with countries all over the world. These FTAs usually go beyond preferential tariff treatments (PTT) and very often contain regulations

¹¹⁴ John P Salter, “What Is the Difference between a Free-Trade Area and a Single Market?” (*UK in a changing Europe* February 3, 2017) <<https://ukandeu.ac.uk/explainers/what-is-the-difference-between-a-free-trade-area-and-a-single-market/>> accessed May 28, 2020. (John Paul)

¹¹⁵ *ibid*

¹¹⁶ *ibid*

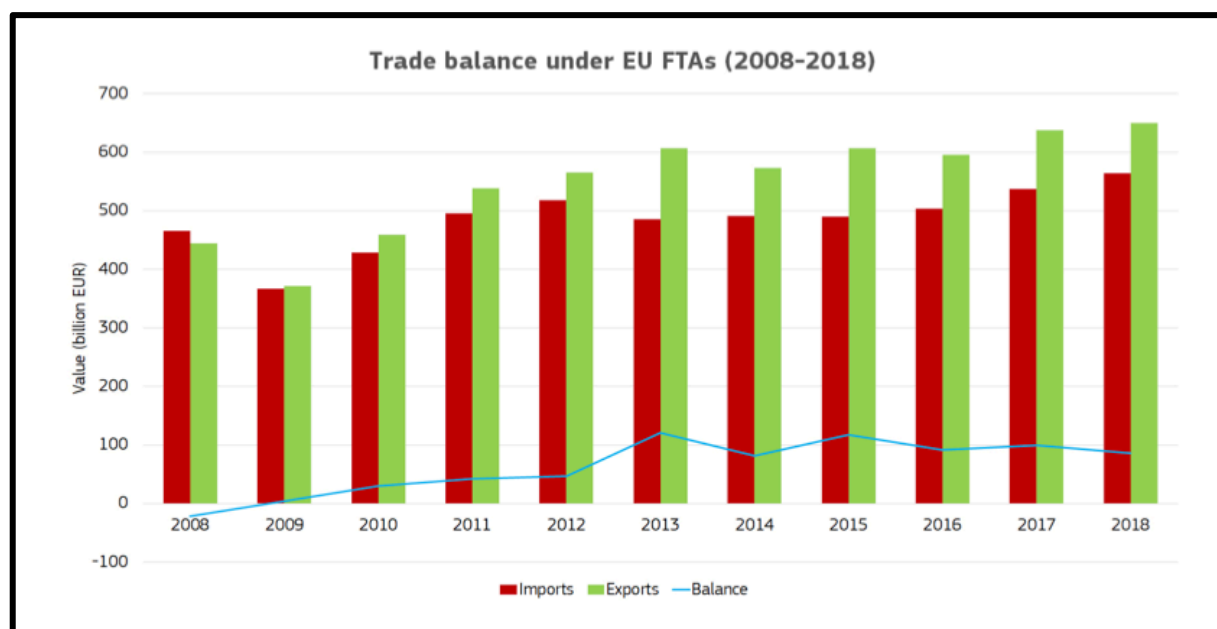
¹¹⁷ BDI, “Setting New Rules – The Free Trade Agreements of the ...” (*BDI* March 2, 2020) <<https://english.bdi.eu/article/news/opening-market-setting-new-rules-free-trade-agreements-of-the-eu/>> accessed May 28, 2020

on “trade facilitation and rule-making in areas such as investment, intellectual property, government procurement, technical standards and sanitary and phytosanitary issues”.¹¹⁸

Most of the FTAs of the EU go beyond the basic rules WTO has established and include rules for competition, foreign direct investment and regulation regarding environmental or civil rights and security issues. Where such regulations are not included, like older agreements with Chile or Mexico, containing just a basic, pure economic approach, the EU seeks to modernize it.¹¹⁹

Exhibit 5: Trade balance under EU FTAs (2008-2018)

Source: 2019 Report on Implementation of EU Free Trade Agreements



As presented in Exhibit 5, the latest report of the EU on trade agreements shows that in “2018 33% of EU exports and 29% of EU imports were covered by preferential trade agreements. These agreements continued to produce a solid trade surplus of €84.6 billion, while EU trade with the rest of the world showed a slight trade deficit of €24.6 billion for the first time since 2014”.¹²⁰

¹¹⁸ European Commission, “Free Trade Agreements” (*Trade Helpdesk* November 19, 2019) <<https://trade.ec.europa.eu/tradehelp/free-trade-agreements>> accessed May 28, 2020

¹¹⁹ BDI (n 117)

¹²⁰ European Commission, “2019 Report on Implementation of EU Free Trade Agreements” <https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158387.pdf> accessed May 28, 2020

This report also stated, that “the new generation of preferential trade agreements are also an important instrument for promoting European values related to workers’ rights and environmental protection, including climate change”.¹²¹ A joint study of the Joint Research Centre (JRC), the European Commission’s Science and Knowledge Service and the European Commission’s Directorate General for Trade reports that 36 million jobs in the EU of which 13,7 million are jobs done by women, are created by exports outside the European Union. The number of these jobs saw a big increase between over the course of the last decade. The study also notes that “export-related jobs are, on average, 12% better paid than jobs in the rest of the economy. European workers from all Member States benefit from EU exports”.¹²² Legal enforcement of the EU trade agreements with other countries, is provided by a “dispute settlement mechanism in all its trade agreements so that the EU and its trading partners can resolve disputes... and is modelled after the WTO dispute settlement system.”¹²³

The framework of trade agreements of the European Union¹²⁴ consists of three main types:

- “Customs Unions
 - eliminate customs duties in bilateral trade, and;
 - establish a joint customs tariff for foreign importers.
- Association Agreements, Stabilisation Agreements, (Deep and Comprehensive) Free Trade Agreements and Economic Partnership Agreements
 - remove or reduce customs tariffs in bilateral trade.
- Partnership and Cooperation Agreements
 - provide a general framework for bilateral economic relations and leave customs tariffs as they are”.¹²⁵

For a complete overview of the EU’s trade agreements in place, under adoption or ratification and being negotiated a link to the relevant document is provided in the footnotes.¹²⁶

¹²¹ *ibid*

¹²² *ibid*

¹²³ European Commission, “Disputes under Bilateral Trade Agreements” <<https://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/bilateral-disputes/>> accessed May 28, 2020

¹²⁴ European Commission, “Negotiations and Agreements” <https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/index_en.htm#_under-adoption> accessed May 28, 2020

¹²⁶ A comprehensive documentation about the EU’s trade agreements including those negotiated or on hold can be accessed via <https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/index_en.htm#_under-adoption>

2.3.2 The Australian framework of trade agreements

Australia considers free trade agreements (FTAs) as “a vital part of Australia's continued economic growth”.¹²⁷ Currently Australia has 13 free trade agreements with 20 countries. Additional new bilateral and regional FTAs are under negotiation.¹²⁸

Similar to the EU, Australia has concluded a wide range of different trade agreements on a regional, bilateral or multilateral level. It is also a member of APEC, OECD and G20.

Australia considers the World Trade Organisation (WTO) as “the foundation of Australia’s trade policy”.¹²⁹ Australia adheres to the existing set of WTO regulations and to the “dispute settlement system to maintain a predictable and stable global trading environment”. Australia is therefore “a strong supporter of compliance with WTO rules relating to FTAs, including the requirement for these agreements to liberalise ‘substantially all trade’ between parties.”¹³⁰

In the Foreign Policy White Paper 2017, the first in 14 years,¹³¹ Australia’s Government stated on Australia’s policy regarding free trade agreements that “our FTAs provide a competitive edge to our agricultural producers and complement the Government’s efforts to secure and maintain access for many of our agricultural products under other countries’ technical and biosecurity regulations.”¹³²

They also addressed the bigger picture for Australia by adding that “our FTAs complement Australia’s advocacy for reform of international investment law in forums such as the G20,

¹²⁷ DFAT, “About Free Trade Agreements” <<https://www.dfat.gov.au/trade/about-ftas/Pages/about-free-trade-agreements>> accessed May 28, 2020

¹²⁸ *ibid*

¹²⁹ Michael Dean, “Why Is Australia So Keen on Free Trade Agreements? - AIIA” (*Australian Institute of International Affairs* June 29, 2018) <<http://www.internationalaffairs.org.au/australianoutlook/why-is-australia-so-keen-on-free-trade-agreements/>> accessed May 28, 2020

¹³⁰ *ibid*

¹³¹ Lisa Cornish, “Australia Has Released Its New Foreign Policy White Paper - What Now for NGOs?” (*Devex* December 1, 2017) <<https://www.devex.com/news/australia-has-released-its-new-foreign-policy-white-paper-what-now-for-ngos-91662>> accessed May 28, 2020

¹³² DFAT, “2017 Foreign Policy White Paper” (*DFAT*) p 60 <<https://www.dfat.gov.au/about-us/publications/Pages/2017-foreign-policy-white-paper>> accessed May 28, 2020

WTO and OECD. Finally, we make our FTAs ‘living agreements’ with substantial built-in forward negotiating agendas and work programs”.¹³³

Australia, like the European Union, sees FTAs as an important tool for trade liberalisation providing

“tariff reductions that provide a competitive edge for our exporters in Australia’s most commercially - significant export markets; safeguarding against the risk of protectionist policies in other countries; greater economic integration with important trading partners; and greater access for Australian consumers and businesses to an increased range of goods and services at more competitive prices”.¹³⁴

It has to be noted, that the significant increase in bi- and multilateral FTAs concluded by Australia was also due to “a loss of confidence in the ability of the WTO to progress trade liberalisation, a desire to expand coverage beyond the matters dealt with by the WTO agreements, such as investment, intellectual property, and services and a desire by the parties to bi-lateral agreements to capitalise as soon as possible on the expansion of their economies.”¹³⁵

An investigation in 2016 by the Australian Centre for International Economics concluded that the country’s median household earnings surpassed by 8000 AUD the value that they “would have had if it were not for three decades of trade liberalisation by successive Australian governments”. This study also came to the conclusion that “1 in 5 jobs in Australia depends on trade and 1 in 7 jobs in Australia rely on exports”¹³⁶

The Free Trade Agreement Utilisation Study by PwC on the impact of FTAs concluded that “Australia’s FTAs play an important role as an enabler to Australian businesses.”¹³⁷ It reported that “78% of Australian importers use at least one FTA to source product offshore, 62% of

¹³³ *ibid*

¹³⁴ Dean (n 129)

¹³⁵ Parliament of Australia, “Free Trade Agreements” (November 29, 2016) <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TransPacificPartnership/Report_165/section?id=committees/reportjnt/024012/24254> accessed May 28, 2020

¹³⁶ Dean (n 129)

¹³⁷ PwC, “Free Trade Agreement Utilisation Study” (DFAT February 2018) <<https://www.dfat.gov.au/about-us/publications/trade-investment/Pages/free-trade-agreement-utilisation-study-pwc-report>> accessed May 28, 2020

Australian exporters use at least one FTA to get their product into export markets, 35% of Australian services firms state that FTAs are influencing their export strategies”.¹³⁸

A current, comprehensive list of Australia’s FTA in force, concluded but not yet in force, as well as FTAs under negotiation and prospective FTA negotiations can be found on the website of the DFAT.¹³⁹

¹³⁸ Ibid

¹³⁹ The list of Australia’s FTAs can be found at < <https://www.dfat.gov.au/trade/agreements/Pages/trade-agreements>>

2.4 The objectives of the Australia-European Union Free Trade Agreement

2.4.1 The objectives of the Australia-European Union Free Trade Agreement from an Australian perspective

Australia sees itself “at the forefront of concluding modern, comprehensive FTAs. Our FTAs aim to maximise tariff reductions for Australian exporters, open up services markets, and set rules to enhance trade and investment, reduce regulatory risk and support further liberalisation.”

¹⁴⁰ As a consequence, Australia is expanding the scope of its trade agreements to make sure “that by 2020 we have agreements with countries that account for over 80 per cent of our trade”.¹⁴¹

Dean argues, that Australia through its FTAs can get “similar in-principle opportunities and benefits as multilateral and other types of legally binding liberalisation” and they also have the advantage that negotiations and implementation can be achieved much faster than with multilateral agreements. They “can play an important role in creating and enforcing liberalising rules on trade and investment issues that are not currently covered by the WTO”.¹⁴²

When Prime Minister Turnbull met the EU Trade Commissioner Malmström to announce the start of the first negotiation round on 18 June 2018 he focused in his statement on the core of the political objectives: more jobs, more investments through free trade. “We know that trade means jobs. Free trade and open markets mean more jobs for Australians and for Europeans. More opportunities, more investment.” He mentioned that there is about \$165 billions of European investment in his country and that there is Australian investment in Europe of about \$100 billion. A market “of over 500 million people with a GDP of over \$17 trillion” is waiting and provides a big chance. “There is the opportunity to do so much more and create so many more jobs. We are not ever going to give up on the opportunities to create more markets, more opportunities for Australians to invest, to export, to trade because we know that means jobs.”¹⁴³

¹⁴⁰ DFAT, “Australia – EU Free Trade Agreement Summary of Negotiating ...”
<<https://www.dfat.gov.au/sites/default/files/a-eufta-summary-of-negotiating-aims-and-approach.pdf>> accessed May 28, 2020

¹⁴¹ *ibid*

¹⁴² Dean (n 129)

¹⁴³ “Press Conference on EU-Australia Free Trade Agreement” (*Malcolm Turnbull* June 18, 2018)
<<https://www.malcolmturnbull.com.au/media/press-conference-on-eu-australia-free-trade-agreement>> accessed May 28, 2020

In its paper “Australia-European Union Free Trade Agreement: Objectives”¹⁴⁴

the Australian Government has listed the principal objectives for Australia in the negotiations of an FTA with the European Union:

- “ - Expand trade in goods
- Improve access for services providers
- Increase investment between Australia and the EU
- Promote balanced protection and enforcement of intellectual property rights
- Secure competitive opportunities
- Promote shared values on trade and sustainable development
- Establish legal and institutional arrangements to ensure the efficient and effective implementation of the FTA”.¹⁴⁵

To involve Australian businesses from all areas and all sizes, the Australian Government has invited stakeholders throughout the course of the negotiations “to consider and comment on the commercial, economic, regional and other impacts that could be expected to arise from an Australia - EU FTA”.¹⁴⁶ The submissions received are published on the website of the Department of Foreign Affairs and Trade (DFAT).

The Australian Government has committed itself and the Department of Foreign Affairs and Trade to a maximum of “transparency and a strongly consultative approach throughout these trade negotiations”¹⁴⁷ and declared the intention to maintain the steady contact with stakeholders on all issues that may be relevant to the negotiations about the FTA.

Regarding its objectives for the FTA negotiations with the European Union the Australian Government published a document in which Australia's broad negotiating aims and approach are summarized.¹⁴⁸ Similar to the Negotiating Directives for a Free Trade Agreement with Australia published by the Council of the EU this Summary of Negotiating Aims and Approach

¹⁴⁴ DFAT, “Australia-European Union Free Trade Agreement: Objectives”
<<https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/Pages/australia-european-union-fta-objectives>>
accessed May 28, 2020

¹⁴⁵ *ibid*

¹⁴⁶ DFAT, “EUFTA Submissions: DFAT”
<<https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/submissions/Pages/aeufta-submissions>> accessed May 28, 2020

¹⁴⁷ DFAT (n 144)

¹⁴⁸ *ibid*

published by the Australian Department of Foreign Affairs and Trade (DFAT) can be regarded as the main guideline for the negotiating team. It is the 'script' and foundation for the negotiations of the Australian delegation and the benchmark for the outcome of the negotiations in terms of initial objectives. As it can be considered the primary source regarding the objectives and guideline for the negotiation strategy of the Australian Government, selected chapters are presented in the following, adapted and shortened form, citing the original wording of this document wherever appropriate ¹⁴⁹. The full text of the document cited in the following can be accessed on the website of DFAT¹⁵⁰.

Trade in Goods

Australia's objective is a "significantly improved market access for Australian agricultural and industrial products" and demands that "in addition to commitments on tariffs, the chapter will incorporate or build upon Australia and the EU's World Trade Organization (WTO) obligations including national treatment obligations". The aim is "to ensure imported goods are not treated less favourably than similar goods produced domestically". An objective is also that this chapter "include provisions that prohibit export duties".

Rules of Origin

Australia states, that it is committed "to securing rules of origin that facilitate market access and reflect modern production processes, global value chains, and commercial transportation arrangements". The aim is seeking "provisions with which traders are already familiar, including with respect to origin documentation".

Customs and Trade Facilitation

Australia wants "to include commitments to facilitate trade while allowing the Parties to maintain effective customs control" in this context Australia states that "Provisions on Customs and Trade Facilitation should build upon existing disciplines and commitments under the WTO Agreement on Trade Facilitation" Australia is committed to "include WTO-plus commitments to expedite customs procedures and improve business certainty, including with respect to advance rulings, temporary admission, and perishable goods" and also to "work with the EU to

¹⁴⁹ *ibid*

¹⁵⁰ The full text of the document "Australia – EU Free Trade Agreement Summary of Negotiating Aims and Approach" can be accessed via < <https://www.dfat.gov.au/sites/default/files/a-eufta-summary-of-negotiating-aims-and-approach.pdf>>

improve cooperation in customs matters, including with respect to mutual recognition of Authorised Economic Operator programmes”. Although Australia “ does not typically include detailed anti-fraud provisions in FTAs” it is willing to consider “provisions to prevent fraud while maintaining appropriate protections for traders who follow the rules”.

Trade in Services and Investment Services

Australia’s negotiating directives state that one objective is “to lock in access for Australian services exporters, and create new opportunities in sectors such as education, financial and professional services.” It is aim to “enhance certainty on conditions of stay and reduce barriers to temporary labour mobility for skilled professionals, in a manner consistent with existing immigration and workplace relations frameworks.” Australia sees the FTA as “an opportunity to address behind-the-border barriers to services trade, including exploring ways to increase regulatory coherence”. A framework for “mutual recognition of professional qualification” should be developed and “commitments on telecommunications which support an open and competitive telecommunications sector, at both the wholesale and retail level, and reflect the changing nature of global telecommunications” should be negotiated.

Investment

One of the objectives is “to improve market access for Australian investment and increase investment into Australia, including through obligations which ensure the free flow of capital related to investments between our economies”. Australia is expecting from the EU “not to impose residency and/or citizenship requirements on senior representatives of Australian companies established in the EU” and will “uphold the government's right to regulate for legitimate public purpose and screen investments for national interest”. In this chapter Australia also specifically mentions that “on 22 May, the EU Council authorised the Commission to open trade negotiations with Australia (9102/18). In a separate decision (8622/18), the Council noted that the Commission had not presented a recommendation for a negotiating directive for an investment agreement”.

Government Procurement

One goal of Australia is “to achieve comprehensive and improved access to government procurement opportunities in the EU” which means agreement “to rules, procedures and requirements that are consistent with both parties' existing international government

procurement obligations to provide business with certainty and transparency when tendering for government procurement opportunities”.

Trade and Competition, including subsidies and state-owned enterprises

Australia underlined its approach “to include chapters on competition and state-owned enterprises (SOEs) in FTAs” with the aim that “market access outcomes for Australian goods and services exports are not undermined by anti-competitive activities, including by ensuring that state-owned enterprises compete with private enterprises on a level playing field” and to be able “to use SOEs to deliver public services in FTAs”. It is further underlined that “Competition chapters typically include provisions on the enforcement of competition law, principles of transparency, due process, procedural fairness and non-discrimination” and also contain regulations which requires “SOEs to act in accordance with commercial considerations when buying or selling goods, and that they are regulated in an impartial manner”.

Small and Medium-sized Enterprises

Regarding SMEs Australia sees “much common ground on maximising the benefits of FTAs for small and medium-sized enterprises (SMEs)” and states that “both Parties are keen to enhance SMEs' access to information on rules, regulations, and procedures, and to reduce costs and red tape for SMEs. Australia and the EU will continue to discuss how best to implement these measures to ensure that SMEs can take advantage of the agreement”.

Digital trade

Regarding digital trade Australia wants “to establish ambitious digital trade commitments that strike a balance between facilitating modern trade and ensuring appropriate protections for consumers”. It expects that “high-quality rules on issues such as data flows and localisation will create a more certain and secure online environment and support increased growth of e-commerce between Australia and the EU”.

2.4.2 The objectives of the Australia-European Union Free Trade Agreement from a European perspective

The TFEU defines in its Article 3(1)(3) that the common trade policy is under the exclusive competence of the EU.¹⁵¹ In Article 205 of TFEU it is laid down that “The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union”.¹⁵²

The Commission Staff Working Document Recommendation for a Council Decision authorising the opening of negotiations for a Free Trade Agreement with Australia from September 13th, 2017 states, that the initiatives general objectives are coherent with the European Union’s general trade policy by “promoting smart, sustainable and inclusive growth through the expansion of trade and Investment and relevant rules“ and by “creating job opportunities and welfare gains; increasing consumer benefits” as well as “improving Europe’s competitiveness in global markets and strengthening cooperation on trade-related issues with a like-minded partner”.¹⁵³ This was confirmed by the final Recommendation for a Council Decision from the same date.¹⁵⁴ Regarding the specific objectives, the working document states that these general objectives ‘translate’ into specific goals and describes three areas of objectives of the initiative:

- “reap the benefits of enhanced trade and investment flows between the EU and Australia and between the EU and New Zealand respectively by reducing barriers for trade and investment, taking into account the EU agricultural sensitivities, and by exploring forward-looking regulatory cooperation in appropriately selected areas, such as public procurement, intellectual property investment protection and to increase opportunities through specific mechanism and simplified procedures for SMEs;
- level the playing field with other countries that already enjoy preferential treatment due to their FTAs with Australia and New Zealand;
- provide a new framework with comprehensive, progressive and up-to-date set of rules for the EU-Australia and EU-New Zealand trade and investment relationships including for

¹⁵¹ “Consolidated Version of the Treaty on the Functioning of the European Union” (*EUR-Lex*) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012E/TXT>> accessed May 20, 2020

¹⁵² Ibid; more in Ramses A Wessel and Joris Larik *EU External Relations Law: Text, Cases and Materials* (Hart Publishing, Bloomsbury Publishing Plc 2020)

¹⁵³ “COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT” n 93

¹⁵⁴ “COUNCIL DECISION Authorising the Opening of Negotiations ...” (September 13, 2017) <<http://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-472-F1-EN-MAIN-PART-1.PDF>> accessed May 28, 2020

the promotion of sustainable development in line with the general EU trade policy objectives. This is also to be seen in the light of the political framework agreements recently concluded with the two countries”.¹⁵⁵

The final Recommendation for the Council Decision also stressed that the objectives comply with the principles of the TEU “to consolidate and support human rights (Article 21 para 2(b) TEU)”.¹⁵⁶

To gather feedback from all industry stakeholders the Commission used an online questionnaire for public consultation, containing the following topics: “(1) Trade in Goods, (2) Trade in Services, Investment liberalisation and Digital trade. (3) Rules (Transparency, Good Regulatory Practice and Regulatory cooperation; Intellectual Property Rights; Competition; Public Procurement; SMEs; Sustainable development), (4) Other issues.”¹⁵⁷

The Commission received 108 responses from a wide range of stakeholders.¹⁵⁸

More than fifty percent of all respondents “considered that the EU's current bilateral relationship with Australia and New Zealand is not satisfactory and should be improved”, only twenty percent said they are satisfied. The main objectives to improve the trade relations with Australia and New Zealand named by the stakeholders were “reducing existing trade and investment barriers, providing a level playing field with non-EU competitors and creating a comprehensive and up-to-date framework to address broader issues related to sustainable development”.¹⁵⁹ The European Commission also carried out an “ex-ante analysis on the potential impacts”.¹⁶⁰ This study of the EU-Australia (and EU-New Zealand) FTA showed, that overall positive outcomes on the macroeconomic level are expected. The impact “of an EU-AUS FTA and an EU-NZ FTA respectively on aggregate economic trends is expected to

¹⁵⁵ “COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT” n 93

¹⁵⁶ “Consolidated Version of the Treaty on European Union” (*Official Journal of the European Union* C326/13 October 26, 2012) <https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF> accessed May 28, 2020

¹⁵⁷ European Commission, “Questionnaire on an EU-Australia Free Trade Agreement” (*European Commission* 2018) <https://trade.ec.europa.eu/consultations/index.cfm?consul_id=255> accessed May 28, 2020

¹⁵⁸ “COUNCIL DECISION Authorising the Opening of Negotiations ...” n 153 p 4

¹⁵⁹ “COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT” n 93

¹⁶⁰ “COUNCIL DECISION Authorising the Opening of Negotiations ...” n 153 p 5

be broadly positive in the long term”. But the study relativized that this will be “broadly dispersed over time and across industries, while negative externalities will be concentrated in a small number of sectors, mainly in the agricultural industries. The sectors in Europe expected to be most challenged under the increased liberalization scenario are dairy and ruminant meat.”

¹⁶¹

The analysis mentions “potential barriers in the procurement markets” but stated that all partners would “gain from the liberalization of public procurement”. It further stated a positive effect on SMEs in terms of new market access and trade and investment liberalization as well as “limited but positive effects” on wages, which would be “more significant in Australia than the EU”. Benefits could also be expected for consumers in the EU and in Australia.¹⁶²

Regarding the environmental assessment “the only area of limited concern refers to a potential pressure on ecosystems and biodiversity exercised by the expected expansion of the agricultural sector that is characterized by a highly inefficient use of inputs such as water and nitrogen”.¹⁶³

The European Parliament adopted a resolution to start negotiations on an FTA with Australia and New Zealand in February 2016 and in October 2017 a resolution containing recommendations to the Council regarding the negotiating mandate. In the resolution the Parliament “called on the Council to authorise the Commission to start negotiations with Australia”. The MEPs also put forward a number of aspects that should be included in the negotiating directives. These included, among other things, the creation of new opportunities for EU companies in obtaining contracts with public authorities in strategic sectors, “the inclusion of a specific chapter devoted to generating business opportunities for micro-enterprises and SMEs; special treatment for some sensitive agricultural products” and “a request that consideration should be given to the exclusion of the most sensitive sectors; and the preservation of governments' right to regulate with a view to achieving legitimate policy objectives”.¹⁶⁴

¹⁶¹ European Commission, “Ex-Ante Study of the EU- Australia and EU-New Zealand ...” (*Publications Office of the EU* September 5, 2017) <http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc_155505.pdf> accessed May 28, 2020

¹⁶² *ibid*

¹⁶³ *ibid*

¹⁶⁴ European Parliament, “Legislative Train Schedule” <<https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-australia-fta>> accessed May 28, 2020

On June 25, 2018 the Council published the negotiating directives for a Free Trade Agreement with Australia from May 2018, from which selected chapters will be presented in the following text in an adapted, shortened form, directly citing the original wording wherever appropriate. Like the comparable document published by the Australian Government these negotiating directives can be considered as the fundament and at the same time as a kind of checklist for the negotiations of the EU delegation and the benchmark for the outcome of the negotiations in terms of initial objectives.¹⁶⁵

Trade in Goods

The objective is to negotiate the “highest possible degree of trade liberalization” and to “cover substantially all trade in goods between the parties”. This includes the elimination of Tariffs “on most lines... on the entry into force of the Agreement”. There should be only a minimum of exceptions for the “most sensitive products, which should be negotiated at the finest level of detail.” One example for these exceptions could be “some agricultural products... for which partial liberalisation such as tariff rate quotas or longer transitional periods or other arrangements should be considered”. Here it is expressly mentioned to take into account “among others the specific concerns for the Union's outermost regions and outcomes in other trade agreements.” Other aims mentioned under these topics are the elimination of all customs duties or taxes on exports or “any measures of equivalent effect” and “no new ones should be introduced”. This includes “any ban or restriction on trade between the Parties, including quantitative restrictions or authorisation requirements, which are not justified by the specific exceptions.”

Rules of origin

Rules of origin and provisions “should be trade facilitating and simpler and should take into account the standard preferential rules of origin of the EU and the interests of EU”.

Customs and trade facilitation

The report notes that provisions “to facilitate trade between the parties, while ensuring effective controls” should be included and “commitments on rules, requirements, formalities and

¹⁶⁵ European Commission, “Negotiating Directives for a Free Trade Agreement with Australia 7663/18 ADD 1” (May 2018) <<http://data.consilium.europa.eu/doc/document/ST-7663-2018-ADD-1-DCL-1/en/pdf>> accessed May 27, 2020

procedures of the parties related to import, export and transit” should be ambitious and “go beyond WTO Trade Facilitation Agreement.”

The “effective implementation and application of international rules and standards in the field of customs and other trade-related procedures, including WTO provisions, WTO Trade Facilitation Agreement and World Customs Organisation instruments and the revised Kyoto Convention” should be promoted and “provisions to promote exchange of best practice and experience, relating to particular areas of mutual interest” should be included as well as issues “such as the modernisation and simplification of rules and procedures, standardised documentation, tariff classification, transparency, mutual recognition and inter-agency co-operation.” Further objectives are the promotion of “convergence in trade facilitation, building on the WTO Trade Facilitation Agreement and other relevant international standards and instruments as appropriate” as well as the promotion of “effective and efficient IPR enforcement by customs authorities on all goods under customs control. “The challenges faced by SMEs should be taken into account in the negotiations on trade facilitation, “while ensuring a level playing field for all economic operators.” A further aim should be the Establishment of a “Protocol on Mutual Administrative Assistance in Customs Matters”.

Trade in Services, Foreign Direct Investment and Digital Trade

The Provisions “should have substantial sectorial coverage and should cover all modes of supply” as well as “no *a priori* exclusion from its scope other than the exclusion of audio-visual services.” Services related to the “exercise of governmental authority as defined by Article I-3 of the GATS shall be excluded from these negotiations.” A further aim of the negotiations should be “the progressive and mutual liberalisation of trade in services and foreign direct investment with regard to establishment by eliminating restrictions to market access and national treatment, beyond the Parties’ WTO commitments and offers submitted in the context of the negotiations of the Trade in Services Agreement.”

Other objectives named are “ rules concerning performance requirements related to foreign direct investment” and “regulatory disciplines” covering “regulatory provisions on transparency; framework for mutual recognition of qualifications, licenses or certifications granted in relation to the supply of services, including of professional qualifications” as well as “horizontal provisions on domestic regulation, such as those ensuring impartiality and due process with regard to licensing and qualification requirements and procedures”. It shall also

include “regulatory provisions for specific sectors including notably telecommunication services, financial services, delivery services and international maritime transport services”.

The aims for digitalisation of trade are “rules covering digital trade and cross-border data flows, consumer protection in the online environment, electronic trust and authentication services, open internet access, unsolicited direct marketing communications, improvement of the conditions for international roaming and addressing unjustified data localisation requirements, while neither negotiating nor affecting the EU’s personal data protection rules and without prejudice to the EU legislation”. The enforcement of “exceptions on the supply of services justifiable under relevant WTO rules (Article XIV and XIVbis of the GATS)” should not be precluded and “procedural commitments for the temporary entry and stay of natural persons for business purposes pursuant to the Parties’ commitments in Mode 4” may be included. Nevertheless “nothing in the Agreement should prevent the Parties from applying their national laws, regulations and requirements regarding entry and stay, provided that, in doing so, they do not nullify or impair the benefits accruing from the Agreement” and the “laws, regulations and requirements existing in the EU regarding working conditions and labour rights should continue to apply.” The negotiation directives regarding this topic also demand that the “agreement should reaffirm that it does not prevent the EU, its Member States and their national, regional and local authorities from regulating economic activity in the public interest, to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection and the promotion and protection of cultural diversity.” The negotiations should aim at the preservation of the “high quality of the EU’s public services in accordance with the Treaty on the Functioning of the European Union (TFEU) and in particular Protocol No 26 on Services of General Interest and taking into account the EU’s reservations in this area, including GATS.”

Geographical Indications ¹⁶⁶

“Direct protection and effective recognition through the agreement of a list of GIs (wines, spirits, agricultural products and foodstuffs), at a high level of protection building upon Article 23 TRIPs, including against evocation, enhanced enforcement (including administrative/ex-

¹⁶⁶ It should be noted that Australia has not -like the EU- put a specific chapter in the negotiation directives for its negotiation team. It just mentions once that “Australia is open to considering the protection of geographical indications in a mutually acceptable way that will include consultation with agricultural and other stakeholders”.

officio), co-existence with "bona fide" prior trademarks, protection against subsequent genericness, and provisions on adding new GIs" should be provided by the agreement. Existing conflicts that concern "individual prior rights, for example related to plant varieties, trademarks, generic or other legitimate prior uses" should be solved "in a satisfactory manner." Protection of GIs regarding third country markets should be arranged and "all GIs listed in the Agreement should be effectively protected as of the date of entry into force of the Agreement." The relationship "between the Agreement and the existing EU- Australia Wine Agreement" should be addressed in the negotiations.

Public Procurement

"Comprehensive and improved mutual access to public procurement markets going beyond Australia's offers in its accession to the WTO Government Procurement Agreement (GPA)" should be an aim of the negotiations, including "comprehensive coverage of procurement at all levels of government (including national and sub-central), including in the utilities sector, state owned enterprises and undertakings with special or exclusive rights, and procurement of goods, services and public works." The parties should "recognise the particularities and the sensitivities of their respective procurement environments" and "consider covering commitments for public private partnerships / concessions in line with respective legislation in this area". It is also stated that "national treatment should ensure treatment no less favourable than that accorded to locally-established suppliers or service providers."

Regarding procedural commitments it is stated that they "should be based on the rules, procedures and requirements established under the WTO GPA." and mentioned that "commitments should ensure due process (such as including effective review mechanism, transparency in covered procurement, use of electronic means, avoiding local content or local production requirements and allowing for the inclusion of non- discriminatory rules for environmental and social considerations in the procurement procedures. "The negotiation directives also demand "specific language on transparency in order to ensure clarity on applicable procurement rules and on available procurement opportunities in order to provide businesses with easily available information".

Small and Medium-sized Enterprises

Regarding SMEs a specific chapter on this issue in the Agreements is demanded and the provisions "should assist SMEs to take full advantage of the trade opportunities provided by the Agreement, inter alia through increasing the level of awareness among small and medium

sized enterprises and enhancing their access to information about their trade and investment opportunities” SMEs should get access to relevant information “on rules, regulations and procedures related to doing business, including public procurement.”¹⁶⁷

¹⁶⁷ All citations in the forgoing summary of the negotiation directives taken from European Commission, “Negotiating Directives for a Free Trade Agreement with Australia 7663/18 ADD 1” (May 2018) <<http://data.consilium.europa.eu/doc/document/ST-7663-2018-ADD-1-DCL-1/en/pdf>> accessed May 27, 2020

2.5 Major challenges and opportunities of the FTA

2.5.1 Major challenges

It would go beyond the scope of this work to evaluate the whole range of detailed challenges and opportunities connected with an FTA between Australia and the European Union, so the focus of this chapter will be on some of the main challenges and opportunities addressed in literature and by the partners in the negotiations in their public statements as well as on some of the challenges connected with international trade agreements in general.

Some of the principal challenges on both a global and an international level as well as on a regional and domestic level are system inherent with RTAs like the Australia and European Union Free Trade Agreement. They are not specific to this FTA but to RTA's in general. and they should be considered too, when discussing the challenges of this FTA.

It takes two to tango, as the saying goes, but there are others dancing on the dancefloor too. Every of these bilateral or multilateral dancers do their own dance with its own rhythm and rules. And they dance with different partners at the same time. Or as Bhagwhadi has put it in a more academic way: The increase in PTAs has become one of the biggest challenges of trade liberalization. He argues that the uncontrolled increase in PTAs has created a complex system where for instance it is very difficult to identify which product is produced to what extend and in which country due to different rules of origin. He calls this phenomenon the “spaghetti-bowl syndrome”, being the cause for high complexity and for the loss of transparency.¹⁶⁸

The high volume of RTAs in their different forms both bilateral and multilateral which relate to each other in many complex ways have created a challenge of high priority in a world of multilateralism, which the EU has identified as the “interoperability” of different agreements.¹⁶⁹

¹⁶⁸ Jagdish Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (Oxford University Press 2008)

¹⁶⁹ Annmarie Elijah and others, *Australia, the European Union and the New Trade Agenda* (Australian National University Press 2017) p 11

The World Trade Organization acknowledged that “while a convergence of public policy design would facilitate matters from a purely trade perspective, we recognise that respect for differing social preferences is paramount. We must work towards a shared understanding of what constitutes a level playing field”.¹⁷⁰ As Elijah et al argue, the trade agenda of these new FTAs is not anymore only focused at border market access, but much more how domestic regulations and locally set standards are impacting market access. One of the main challenges of FTAs therefore is how

“to address regulatory divergences between countries and regions relating to technical and environmental standards for manufactured goods and basic agricultural and food products; licensing, qualifications and certification procedures impacting on the supply of tradeable services; conditions applying to foreign direct investment, including rights of establishment, investment protection, repatriation of profits and dispute settlement; and competition policies, including the disciplining of monopoly and oligopoly power and public procurement policies”.¹⁷¹

The negotiations between the EU and Australia about this Free Trade Agreement (FTA) are set in a scenario that Beeson and Murray describe as “coping with great power rivalry in the Asia-Pacific”¹⁷² which they consider as testing times for regionalism and ask

“whether rising powers or regions can fill the leadership gap that the US is apparently vacating. Might regional bodies provide evidence of autonomy from the US or China? Might they be potentially isolated, or could they develop new capacity? In this new regional space is it becoming a case of less US, more Russia, more China, and even more EU?”¹⁷³

In times where the US is retreating from free trade and a liberal trade agenda, the both partners have continuously stressed their mutual interest in “defending the multilateral trading system” and the principle of liberal trade.¹⁷⁴ However “there are differences in approaches and in their priority of interests which will have an impact on the ongoing FTA negotiations”.¹⁷⁵ This is

¹⁷⁰ WTO, “The Future of Trade: The Challenges of Convergence” (WTO April 24, 2013) p 29 <https://www.wto.org/english/thewto_e/dg_e/dft_panel_e/future_of_trade_report_e.pdf> accessed May 29, 2020

¹⁷¹ Elijah n 169 p 5

¹⁷² Mark Beeson Mark and Philomena Murray, “Testing Times for Regionalism: Coping with Great Power Rivalry in the Asia-Pacific” (*UWA Profiles and Research Repository* November 21, 2019) <[https://research-repository.uwa.edu.au/en/publications/testing-times-for-regionalism-coping-with-great-power-rivalry-in->](https://research-repository.uwa.edu.au/en/publications/testing-times-for-regionalism-coping-with-great-power-rivalry-in-) accessed May 29, 2020

¹⁷³ *ibid* p 4

¹⁷⁴ Murray P and Matera M, “Australia and the European Union: Towards Deeper Engagement” (*The University of Melbourne* October 2019) p 9 <<https://findanexpert.unimelb.edu.au/scholarlywork/1439594-australia-and-the-european-union--towards-deeper-engagement>> accessed May 20, 2020

¹⁷⁵ *ibid* p 9

reflected in the main objectives that both parties have set out in their negotiating directives, presented in chapter 2.4 of this paper. As Murray and Matera argue, “a key challenge for the interlocutors will be adjusting their approaches to EU-Australia bilateralism for the sake of setting a global example of what can be achieved between ‘like-minded partners’”.¹⁷⁶

One legal challenge of FTAs regarding the European Union in general is the issue of legal competence between the EU and the Member States. Is the EU able to conclude a Trade Agreement like this FTA alone on its own or is a ratification by each individual Member State necessary? In connection with one of the first new type FTAs between the EU and Singapore, dealing with a broader range of matters beyond pure trade matters, the Commission requested an opinion of the ECJ in regard to Article 218(11) TFEU “to determine whether the EU had exclusive competence enabling it to sign and conclude the envisaged agreement by itself.”¹⁷⁷ This was triggered by the fact that both the Commission and the European Parliament thought so, but the Council and the Member States “asserted that the EU could not conclude the agreement by itself, because certain parts of the agreement fell within a competence shared between the EU and the Member States, or even within the exclusive competence of the Member States”.¹⁷⁸ The ECJ gave the following opinion:

“The Free Trade Agreement between the European Union and the Republic of Singapore falls within the exclusive competence of the European Union, with the exception of the following provisions, which fall within a competence shared between the European Union and the Member States: the provisions of Section A (Investment Protection) of Chapter 9 (Investment) of that agreement, in so far as they relate to non-direct investment between the European Union and the Republic of Singapore; the provisions of Section B (Investor-State Dispute Settlement) of Chapter 9; and the provisions of Chapters 1 (Objectives and General Definitions), 14 (Transparency), 15 (Dispute Settlement between the Parties), 16 (Mediation Mechanism) and 17 (Institutional, General and Final Provisions) of that agreement, in so far as those provisions relate to the provisions of Chapter 9 and to the extent that the latter fall within a competence shared between the European Union and the Member States”.¹⁷⁹

¹⁷⁶ *ibid* p 10

¹⁷⁷ Pascal Kerneis, “Limits to European Union Negotiating Competence” [2018] *Potential Benefits of an Australia-EU Free Trade Agreement: Key Issues and Options* 95 p 83
<https://www.researchgate.net/publication/328522467_The_limits_of_the_European_Unions_competence_The_principle_of_conferral> accessed May 20, 2020

¹⁷⁸ *ibid* p 82

¹⁷⁹ “OPINION 2/15 OF THE COURT (Full Court) ECLI:EU:C:2017:376” (*CURLA* May 16, 2017) para 305
<<http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN>> accessed May 29, 2020

The Council dealt with Opinion 2/15 of the ECJ and concluded in May 2018 that “negotiating EU-only trade agreements should not lead to a loss of negotiation leverage for the EU to obtain ambitious standalone investment agreements” and “that the future EU - Australia FTA and EU–New Zealand FTA would be EU full exclusive competence, since the European Commission, in a first phase, did not ask for a mandate to negotiate investment protection”.¹⁸⁰ But the Council declared that “Association Agreements, depending on their content”, should be considered as mixed agreements.¹⁸¹

With this conclusion the Council made the way free for the “fast track” plan of the Commission under Jean Claude Juncker for the Free Trade Agreement with Australia, which he announced during his State of the Union speech to the European Parliament in September 2017.¹⁸²

By excluding the elements defined in the Opinion 2/15 as being of joint competence between EU and Member States mainly investor- state dispute settlement provisions, the EU avoided the challenge of the painstaking ratification process by all Member States.¹⁸³ The challenge created by this situation is the question if “the goal of the Commission of a ‘comprehensive trade policy’ that involves the inclusion of investment protection in EU free trade agreements (FTAs) (is) going to be abandoned?” as well as the fact that the EU by itself can only negotiate and conclude (without including its Member States) by excluding “investment and investor-state dispute settlement provisions from their scope. Such components should therefore be concluded separately as mixed agreements if the EU wishes not to ‘pollute’ a purely ‘EU-only’ agreement with ‘mixed’ provisions”.¹⁸⁴

¹⁸⁰ “Draft Council Conclusions on the Negotiation and Conclusion of EU Trade Agreements” (*Council of the European Union* May 8, 2018) para 4 <<http://data.consilium.europa.eu/doc/document/ST-8622-2018-INIT/en/pdf>> accessed May 29, 2020

¹⁸¹ *ibid*

¹⁸² Brett Mason, “EU to Approve Free-Trade Negotiations with Australia and NZ” (*Bilaterals.org* May 22, 2018) <<https://bilaterals.org/?eu-to-approve-free-trade&lang=en>> accessed May 29, 2020

¹⁸³ “Opinion 2/15 and EU Competence for Common Commercial Policy” (*Maastricht University* September 17, 2017) <<https://www.maastrichtuniversity.nl/blog/2017/09/opinion-215-and-eu-competence-common-commercial-policy>> accessed May 29, 2020

¹⁸⁴ *ibid*

Both literature and official papers like the Trade SIA Report¹⁸⁵ see the reduction of existing barriers to trade and investment and the situation of SMEs as key issues. Murray and Matera note that “agriculture market access will be a difficult issue” and that trade remedies, government procurement but also the EU’s Geographical Indications demands will present challenges.¹⁸⁶ Piug argues that for trade in goods “behind-the-border barriers remain high” and for “trade in services, the non-unitary constitutions of Australia and the EU continue to make professions and trades dependent on protectionist subnational regulation”. He adds, that “agriculture is no longer a priority for both sides, but it still has the potential if not to block, then certainly to interrupt what should be a practical negotiation.”¹⁸⁷

In the last decades A&F had been a smaller part of Australia’s EU trade, but the reason “is partly due to high tariffs and NTMs inhibiting that trade. Both parties have strongly held offensive and defensive concerns that are likely to result in robust FTA negotiations” and “additionally, as with other parts of this FTA negotiation, the UK’s proposed exit from the EU will complicate some aspects of the A&F talks with the EU27, particularly with respect to splitting current TRQs”.¹⁸⁸

Elij and others stress, “that some of the predictable, sensitive issues that will challenge the Australia–EU negotiations relate to agriculture” and mention that the issues negotiators will have to deal with include tariffs and quotas and “a range of NTBs, including packaging, labelling, certification and health and safety”.¹⁸⁹ In a recent article on the prospects for the future of the FTA Murray underlines, that despite the common grounds challenges remain for Australia and the EU , “regarding such material factors as public procurement and geographical

¹⁸⁵ European Commission, “Trade Sustainability Impact Assessment in Support of FTA ...” (*European Commission* December 2019) <http://trade-sia-australia.eu/images/reports/EU-AUS_Draft_Final_Report.pdf> accessed May 29, 2020

¹⁸⁶ Murray P and Maderna M, “Australia and the European Union: Trends and Current Synergies” (*University of Melbourne* May 2019) <https://arts.unimelb.edu.au/__data/assets/pdf_file/0009/3078720/tanpear-policy-report-2019.pdf> accessed May 29, 2020

¹⁸⁷ Gonzales V Puig, “EU-Australia FTA: Economic Drivers and Difficulties - AIIA” (*Australian Institute of International Affairs* June 15, 2018) <<http://www.internationalaffairs.org.au/australianoutlook/eu-australia-fta-economic-drivers-and-difficulties/>> accessed May 29, 2020

¹⁸⁸ Drake-Brockman J and Messerlin PA (eds), *Potential Benefits of an Australia-EU Free Trade Agreement: Key Issues and Options* (University of Adelaide Press 2018) p 183

¹⁸⁹ Elijah A and others, *Australia, the European Union and the New Trade Agenda* (Australian National University Press 2017) p 99

indications” and she states that “the EU and Australia have different hierarchies of preferences on agriculture, the wine market, sustainable development and environmental issues. Agriculture is expected to feature prominently in the final rounds of negotiations on the FTA”.¹⁹⁰ Procurement is regarded as a possible challenge by several scholars (Murray, Hoekman) for the conclusion of the negotiations “given that Australia uses public purchasing to support small and medium-sized enterprises, indigenous communities and Australian industry more generally”¹⁹¹ and it is added that “procurement liberalisation is more complex than tariff reduction or removal, as it involves regulation and may affect specific sectors”.¹⁹² A vital aspect of this topic will be the issue of transparency, covered extensively in public procurement literature.¹⁹³

Public Procurement as well as Geographic Indications are some of the topics that contain special challenges for the position of SMEs. Both sides -as presented in 2. 4- have the objective to provide better market access for their SMEs in all areas through the FTA. The SIA recommends that the “EU Member States and Australia should agree to establish a one-stop-shop for SMEs in the Member States and Australia”¹⁹⁴ and also suggests “to establish a public-private cooperation ‘SME task force’ in both Parties, linking the Chambers of Commerce and SME representatives up with the relevant ministry departments”.¹⁹⁵

Past FTAs indicates that the EU “has very little motivation to concede on geographic indicators”, so this is “one area that is likely to prove particularly divisive in the negotiations”.¹⁹⁶ But the Australian negotiation team will have “to be careful to ensure that tensions over geographic indicators don’t scupper market access gains in other areas from being realised”.¹⁹⁷

¹⁹⁰ Philomena Murray, “Reflections on EU–Australia Engagement and Prospects for the Future” (2019) 5 Global Affairs 509 p 511

¹⁹¹ Bernhard Hoekman, “Government Procurement” in Drake-Brokeman and Messerlin (eds) n 187 p 123

¹⁹² *ibid*

¹⁹³ Evenett SJ and Hoekman BM, “Government Procurement: Market Access, Transparency, and Multilateral Trade Rules” (2005) 21 European Journal of Political Economy 163

¹⁹⁴ European Commission, “Trade Sustainability Impact Assessment in Support of FTA ...” (n 184) p 183

¹⁹⁵ *ibid* p 53

¹⁹⁶ Elijah A and other (n 169) p 115

¹⁹⁷ *ibid* p 116

Regarding the issue of GI, Murray notes, that this will be “an area of significant divergence” but hints that “both EU and Australian officials have indicated that, although this will be an issue that will take time to resolve, they are both committed to adopting a pragmatic approach to identify where compromises can be made”.¹⁹⁸

In an interview with ABC Senator Birmingham stated that

“Australia doesn’t like the idea of geographical indications but this is a not-negotiable element from the European Union” and he added “that we will put up a strong fight in terms of areas of Australian interests and ultimately what we’re trying to do is get the possible deal that ensures Australian businesses and farmers can get better access to a market engaging 500 million potential customers”.¹⁹⁹

Already from the start of the FTA negotiations, the EU had always made clear that the issue of GIs will be considered as an important issue. Commissioner Malmström underlined that “obviously agriculture and what we can call geographical indications are very important to us. I think this is probably the chapter that would be the most difficult one”.²⁰⁰

Regarding the challenge of the digital trade area, Lee-Makiyama argues that if “assuming Australia’s textual proposals are to be based on the CPTPP, the negotiations on e-commerce would likely pose a challenge to conclusion of the FTA”²⁰¹, refers to the example of the EU-Japan EPA and argues further that “Australia and the EU will only achieve more meaningful results if Australia negotiates more persuasively as a ‘demandeur’ than Japan or the US, or if the internal politics in Europe change their course during the process of Australia-EU negotiations”.²⁰² An important part of this challenge are “cross-border commercial data flows”, which are a “the real backbone of the digital economy, and important to sustaining growth of

¹⁹⁸ Murray and Matera (n 174) p 11

¹⁹⁹ “Europe seeking feta and scotch beef protection as Australia pushes back on processor claims” (ABC News, 13 August 2019) <https://www.abc.net.au/news/2019-08-13/europe-wants-feta-protected-australia-delays-prosecco-fta-talks/11404496> accessed May 20, 2020

²⁰⁰ “Press Conference on EU-Australia Free Trade Agreement” (*Malcolm Turnbull* June 18, 2018) <<https://www.malcolmturnbull.com.au/media/press-conference-on-eu-australia-free-trade-agreement>> accessed May 29, 2020

²⁰¹ Hosuk Lee-Makiyama, “*E-Commerce and Digital Trade*” in Drake-Brokeman and Messerlin (eds) n 187 p 220

²⁰² *ibid*

output and employment in all sectors of the economy, including small and medium-size enterprises.”²⁰³

In many areas of negotiations there are also sometimes hidden cross-effects creating challenges for the negotiations. As one example, the water issue should be mentioned. As the SIA report states, that the FTA

“is likely to create an impact on water quality and quantity in Australia, most importantly through the predicted expansion of the beef and sheep meats sector, which creates nitrogen run-off into freshwaters causing a worsening of water quality through eutrophication. Secondly, the sector requires freshwater as input for production and thus pressures on water scarcity will also increase, *ceteris paribus*.”²⁰⁴

2.5.2 Opportunities

The opportunities and benefits envisioned and expected by both parties have already been presented by the definition of objectives and desired outcomes in chapter II. d, so they need not be repeated in all details, but the focus here should rather be on the opportunities that may be created by such an FTA with an impact that go beyond just the two partners of this agreement.

Pomfret and Sourdin argue that Australia has not been a major participant in the Global Value Chain (GVC), as for instance evident in the car industry, however an FTA between Australia and the EU that promotes “deep integration could stimulate Australian participation in EU-centred value chains and provide a possible link between EU and East Asian chains.”²⁰⁵

Australia has gathered valuable experience with the ASEAN-Australia-NZ FTA (AANZFTA) Messerlin and Parc consider it as an important opportunity that “Australia and the EU should make their utmost efforts to design the Australia-EU FTA while taking into account the existing and successful provisions of the Korea-EU FTA (KOREU) and of the Korea-Australia FTA (KAFTA)”.²⁰⁶

²⁰³ Elijah A and others (n 169) p 157

²⁰⁴ European Commission, “Trade Sustainability Impact Assessment in Support of FTA ...” n 184 p 118

²⁰⁵ Richard Pomfret and Patricia Sourdin, “*Global Value Chains* “ in Drake-Brokeman and Messerlin (eds) n 187 p 105

²⁰⁶ Patrick Messerlin and Jimmyn Parc “*A European Perspective on the Australia-EU Free Trade Agreement*” in Drake-Brokeman and Messerlin(eds) n 187 p 56

Damuri adds that the Australia-EU Free Trade Agreement “could help reduce negative impacts from mega-regionalism in the Asia-Pacific, regain economic share in the region and balance its economic influence. The opportunity exists to achieve broader regulatory coherence and harmonisation of trade governance”.²⁰⁷

The opportunity of the Australia-EU Free Trade Agreement (FTA) could not only be seen in context with the Asia-Pacific but also, as stated in a report by the European Parliament “in a global context where many governments are questioning the benefits of trade” where it can provide “the opportunity to demonstrate the benefits of trade liberalisation which is framed by clear rules and commitments to fairness”.²⁰⁸

Simon Birmingham, Australia’s Trade Minister in an interview with ABC said that “symbolism is important in the face of US-China trade conflicts. It is actually critical to send the message that countries stand for trade”.²⁰⁹

“The increasing power vacuum in the global trading system” argue Murray and Matera “represents a major threat to international institutions... while also providing a window of opportunity for the EU and Australia to become rule-setters and leader” and exercise “first mover advantage”.²¹⁰

²⁰⁷ Drake-Brokeman and Messerlin n 187 p XXX

²⁰⁸ European Parliament, “Trade Negotiations with Australia and New Zealand” (*European Parliament* June 2019) p 51
<[http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603479/EXPO_STU\(2019\)603479_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603479/EXPO_STU(2019)603479_EN.pdf)>
accessed May 20, 2020

²⁰⁹ Collin Brinsden, “Aust-EU Negotiate in Face of Trade Wars” (*The West Australian* July 13, 2019)
<<https://thewest.com.au/politics/aust-eu-negotiate-in-face-of-trade-wars-ng-s-1955301>> accessed May 26, 2020

²¹⁰ Murray and Matera n174 p 9

2.6 The Brexit situation

The decision by the UK to leave the European Union sparked an ongoing discussion among academics as well as politicians and political commentators about the impact on the Australia-EU FTA as well as for the trade relations between the UK and Australia.

As already mentioned in chapter 2.1, before 1973 Australia had close ties with Great Britain and did not care much about Europe. This special trade relation based upon the Imperial Preference for products from Commonwealth Members ended in 1973 when the UK became a member of the European Common Market. At first this led to big disappointment in Australia and a sometime hostile relationship towards this new situation in Europe. But “despite past friction, economic cooperation increased over the years. Trade and investment relations intensified, and the EU became one of Australia’s most important trading partners”.²¹¹

The message from the Australian side about their strategy as an answer to the new situation of Brexit was very clear. In July 2017 Turnbull in a press conference together with May in Downing street said, that his country will be ready for a trade agreement with the UK, but he also stated that his country will try to conclude one with the EU.

“As Britain moves to completing its exit from the EU, we stand ready to enter into a free trade agreement with the UK as soon as the UK is able to do so. Once Brexit is achieved, we look forward to speedily concluding a free trade agreement. At the same time, we are looking forward to the early conclusion of a free trade agreement with the EU.”²¹²

The UK Government made it clear that “an early priority for the UK’s independent trade policy will be to negotiate a comprehensive FTA with Australia”²¹³ and emphasized that “Australia is also one of our closest allies, sharing the same head of state, HM the Queen, and cooperating extensively across security, prosperity and defence. We are both active supporters of the international rules-based system and the UK works closely with Australia in many multilateral

²¹¹ Philomena Murray and Margherita Matera, “Brexit and Australia: The Way Forward” (*The University of Melbourne* July 2, 2016) <<https://pursuit.unimelb.edu.au/articles/brexit-and-australia-the-way-forward>> accessed June 1, 2020

²¹² Rowena Mason, “Australia Ready to Do Post-Brexit Trade Deal – but EU Comes First” (*The Guardian* July 10, 2017) <<https://www.theguardian.com/politics/2017/jul/10/australia-ready-to-do-post-brexit-trade-deal-but-eu-comes-first>> accessed May 27, 2020

²¹³ “Public Consultation on Trade Negotiations with Australia: Summary of Responses” (*GOV.UK* July 18, 2019) <<https://www.gov.uk/government/consultations/trade-with-australia>> accessed June 1, 2020

forums including the United Nations (UN), G20, World Trade Organization (WTO) and the Commonwealth.”²¹⁴ The main demands stakeholders named in this study in regard to an Australia-UK FTA were

“The UK’s existing labour standards and environmental protections should not be reduced or negatively impacted by any future FTA with Australia.

There could be benefits to the UK from lowering or removing tariffs with Australia, but there may be some industries that would be best supported by maintaining existing tariffs. Any UK-Australia FTA should ensure a level playing field for UK businesses

The UK’s existing product standards should be maintained through any future UK-Australia FTA. A future UK-Australia FTA could have a beneficial impact on services trade between both countries.”²¹⁵

As shown in Exhibit 6 the top priorities of the respondents of this study were Tariffs as the main priority, followed by Product Standards, Regulation and Certification and Customs Procedures.²¹⁶

Exhibit 6: Top priorities selected by different respondent groups

Source: Public Consultation on Trade Negotiations with Australia, *GOV.UK* 2019

Type of respondent (Total number)	First most selected priority (Total selected by)	Second most selected priority (Total selected by)	Third most selected priority (Total selected by)
Individuals (114)	Product Standards, Regulation and Certification 70	Tariffs 69	Customs Procedures 63
Businesses (32)	Tariffs 10	Services 7	Trade Remedies and Dispute Settlement 4
Business Associations (31)	Tariffs 10	Product Standards, Regulation and Certification 5	Services 5
NGOs (26)	Tariffs 17	Product Standards, Regulation and Certification 14	Labour and Environment 14
Public Sector Bodies (6)	Tariffs 4	Competition/ Investment 3	Sanitary and Phytosanitary Measures 3

²¹⁴ ibid p 5

²¹⁵ ibid p 16-17

²¹⁶ ibid p 18

As already mentioned in 2.5, one of the main challenges for EU 27 will be to balance the cumulative impact “of any likely EU27-UK and UK-Australia FTA that might be negotiated”.²¹⁷ Swinbank argues that, “we might confidentially predict that one of the EU’s offensive interests in the agri-food domain will be enhanced protection on Australian markets for the EU’s extensive list of products bearing geographical indications of origin (GIs), as it has done in FTA agreements with other nations”²¹⁸ but “it is less easy to imagine what the UK’s offensive interest over agri-food trade in a future FTA with Australia might be, which would enable it to present the overall package as advantageous for the UK’s farm, food and drink industries.”²¹⁹ Following Swinbank’s argumentation there is, for the UK on the one hand “a strong political imperative to conclude FTAs as quickly as possible, and certainly before the next general election, scheduled for 2022, to demonstrate to the British electorate the success of its policies”²²⁰ but on the other hand the incentive for Australia might not be as big because “no longer is the UK the obvious outlet for Australian trade. Australia has newer, closer and more dynamic markets in the Asia-Pacific region and would no longer benefit from Commonwealth preferences in a free-trade UK”.²²¹ Messerlin and Parc state, that the Australia-EU FTA is “of more commercial interest for the EU27 than for the EU28”²²² and they argue that

“in the case of trade in goods, the UK’s share of exports to Australia is closely in line with its weight in total EU28 GDP, and that indeed Germany may have larger offensive interests in Australia than does the UK. The fact that the UK’s share of Australian imports is much higher than its share in EU28 GDP is unlikely to change the EU interest in the Australia-EU FTA, whereas it should boost Australia’s interest in gaining better market access to the EU”.²²³

They add, that there is a different situation in regard to service and investments where the UK represents “more than a third of EU28 exports of services to Australia and almost half of EU28

²¹⁷ Alan Swinbank, “Brexit, Ireland and the World Trade Organization: Possible Policy Options for a Future UK–Australia Agri-Food Trade Agreement” (2018) 72 *Australian Journal of International Affairs* 371 p 9

²¹⁸ *ibid* p 10

²¹⁹ *Ibid*

²²⁰ *Ibid*

²²¹ *Ibid*

²²² Patrick Messerlin and Jimmyn Parc, “*A European Perspective on the Australia-EU Free Trade Agreement*” in Drake-Brokeman and Messerlin(eds) (n 187) p 47

²²³ *ibid* p 47

imports of services from Australia”.²²⁴ This is significantly more than Germany, being the second largest partner in service trading. Regarding investments, the differences are even bigger. “The UK represents more than half of EU28 investments in Australia and two-thirds of Australia’s investment in the EU28”.²²⁵

Winters states, that, “if Australia is willing to deal on EU terms - and not to try to undercut the EU view of agricultural and food policies- it seems that an Australia-EU FTA could be made politically more likely by Brexit.”²²⁶ and he concludes that if the EU wants to send the signal “that life is better on the inside than the outside (this is undoubtedly a political objective of the European Commission in the Brexit process), what would be better than to sign some new trade agreements, especially with one of the UK’s oldest and deepest friends?”²²⁷. In his opinion the “Brexit clearly creates some political pressure for the EU to show that it can still pursue trade agreements and with greater alacrity and purpose without the UK”.²²⁸ It seems likely , that Brexit might increase the time pressure both on the progress of the AUS-EU27 negotiations as well as on the progress of talks about an UK-AUS Trade Agreement. The two countries have established a Joint Trade Working Group (TWG) already in 2016 to “scope out the parameters of a future, comprehensive free trade agreement (FTA) and exchange views on global trade policy issues and developments”, four working group meetings had been held and “Working Group leads have maintained regular contact”.²²⁹ The Australian Government also states that “both governments have committed to ensure an expeditious transition to FTA negotiations when the UK has left the European Union (EU)”.²³⁰

If an outcome creating a balanced and positive cumulative effect in this triangle of agreements between EU27-UK, EU-AUS and UK-AUS could finally be reached, it would benefit all partners. It should not be forgotten that not only the EU27 and the UK do have deep European roots, but also -despite the geographical distance- Australia.

²²⁴ ibid

²²⁵ ibid

²²⁶ Alan Winters, “*What difference does Brexit make?*” in Drake-Brokeman and Messerlin(eds) n 187 p 72

²²⁷ ibid p 71

²²⁸ ibid p 62

²²⁹ DFAT, “Prospective Australia-United Kingdom Free Trade Agreement”
<<https://www.dfat.gov.au/trade/agreements/prospective/aukfta/Pages/australia-uk-fta>> accessed June 4, 2020

²³⁰ ibid

2.7 6 (7) Rounds of negotiations and the Status quo

As an Australian Official, involved in the negotiations put it, the biggest hurdle taken so far was to arrive at the negotiation level at all. “Reaching agreement from both the Australian Government and the European Union to launch the negotiations in the first place required sustained effort from both sides...We had to overcome preconceptions based on historically different approaches on trade policy issues, such as in earlier WTO agriculture negotiations”.²³¹

When official negotiations for an EU-Australian Free Trade Agreement started in 2018 the groundwork was already laid, based on the EU-Australia Framework Agreement²³², which was signed by the parties to “enhance cooperation between Australia and the EU to tackle challenges in foreign and security policy, sustainable development, climate change, and economic and trade matters”.²³³

The European Parliament had outlined its priorities for the negotiations in order to give its approval and called upon the Council and the Commission “to fully respect the distribution of competences between the EU and its Member States, as can be deduced from CJEU Opinion 2/15 of 16 May 2017, in its decision on the adoption of the negotiating directives”.²³⁴

Objectives and negotiating guidelines had been published by both partners, as presented in chapter 2.5 of this paper, so the negotiating stage was set and on June 18, 2018 the negotiations were officially launched by EU Commissioner Malmström and Australia’s Trade Minister Ciobo in the Australian capital of Canberra. The partners announced that the first formal meeting between the two teams of negotiators will take place in the city of Brussels from July 2 - 6, 2018.²³⁵ Both partners committed themselves in their public statements to a transparent

²³¹ Statement by an Australian Official (with the request to be identified in this way) to the author of this thesis via email dated May 19, 2020

²³² European Parliament non-legislative resolution of 18 April 2018 on the draft Council decision on the conclusion on behalf of the Union of the Framework Agreement between the European Union and its Member States, of the one part, and Australia, of the other part (15467/2016 – C8-0327/2017 – 2016/0367(NLE) – 2017/2227(INI))

²³³ DFAT, “Framework Agreement between the European Union and Australia” (DFAT 2017) <<https://www.dfat.gov.au/geo/europe/european-union/Pages/australia-european-union-eu-framework-agreement>> accessed June 1, 2020

²³⁴ European Parliament, “Recommendation to the Council on the Proposed Negotiating Mandate for Trade Negotiations with Australia” (*europarl.europa.eu* October 19, 2017) <https://www.europarl.europa.eu/doceo/document/A-8-2017-0311_EN.html> accessed June 1, 2020

²³⁵ European Commission, “EU and Australia Launch Talks for a Broad Trade Agreement” (*Press release* 18 June 2018 Brussels) <http://europa.eu/rapid/press-release_IP-18-4164_en.pdf> accessed June 1, 2020

negotiation-process and started to publish reports after each round of negotiations. Frequent stakeholder briefings were held in connection to all most all rounds of negotiations so far, documented in the negotiation reports. These negotiation reports are published after each round of negotiations independently by each side.

Round 1: July 2-6, 2018 in Brussels

The EU team was headed by Chief Negotiator and Deputy Director General for Trade of the European Commission, Ms Helena König. The negotiating team from Australia was led by Chief Negotiator and First Assistant Secretary at the Australian Department of Foreign Affairs and Trade, Ms Alison Burrows. The talks in this first round of negotiations were held in 17 working groups. Both sides stressed in their reports that the meeting was conducted in “a very good and constructive atmosphere and showed a shared commitment to negotiate an ambitious and comprehensive agreement”²³⁶ and that “discussions were wide-ranging and facilitated a greater understanding of both parties' objectives and positions”.²³⁷ It was agreed that follow up on certain items will be undertaken via videoconferencing prior to the next meeting “towards resolving outstanding issues”.²³⁸

Round 2: November 19-23, 2018 in Canberra

16 different working groups addressed almost all themes of a future FTA. Both sides presented the written proposals that were exchanged prior to this meeting. They explained relevant connections with international agreements as well as “involvement of different levels of government”.²³⁹ Australia reported that it presented a proposal “on professional services and customs trade facilitation Texts provisions that both sides could agree upon were agreed in principle and several follow-up activities to be done prior to the next meeting were decided.”²⁴⁰

²³⁶ European Commission, “Report of the 1st Round of Negotiations for a Free Trade ...” (*European Commission* July 2018) <http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157182.pdf> accessed June 1, 2020

²³⁷ DFAT, “Australia-EU FTA - Overview of the First Negotiating Round, Brussels, 2-6 July 2018” (*DFAT* July 2018) <<https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/Pages/aeufta-round-1>> accessed June 1, 2020

²³⁸ *ibid*

²³⁹ European Commission, “Report of the 2nd Round of Negotiations for a Free Trade ...” (*European Commission* December 2018) <https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157568.pdf> accessed June 1, 2020

²⁴⁰ DFAT, “Australia-EU FTA - Negotiating Round Two, Final Report, Canberra, 19 to 23 November 2018” (*DFAT* December 2018) <<https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/Pages/aeufta-round-2>> accessed June 1, 2020

As a special activity of this round the Chief negotiators hosted a joint briefing of stakeholders from “across peak bodies, business, industry groups and civil society”²⁴¹ and gave an update on the status of the negotiations. Topics covered in the discussion with stakeholders were “transparency, market access, intellectual property, taxation, customs, dispute settlement and review mechanisms, animal welfare and environmental protection”.²⁴²

Round 3: March 25 – 29, 2019 in Canberra

Both sides, like in the previous reports, stated the good and constructive atmosphere of the talks. Like in the last round negotiators started to agree in principle to wordings that could be accepted by both sides.²⁴³ The Australian side mentioned that differences on wordings in many areas could be narrowed, “both sides continued to work hard towards the shared goal of delivering ambitious outcomes for exporters, small businesses and consumers”.²⁴⁴

and that both sides “are working towards a first exchange of market access offers when we are both ready to do so”.²⁴⁵ Like in round 2 a joint stakeholder briefing was organized within round 3 where the Chief Negotiators presented an update and the EU Chief Negotiator informed about “the launch of the EU Sustainability Impact Assessment”.²⁴⁶

Round 4: July 1-5, 2019 in Brussels

In this round the number of working groups was extended to 18. Text proposals and their comments that had been provided for different chapters were discussed and follow up actions ahead of the next round decided.²⁴⁷ The Australian side mentioned in its report that “We have not yet started the market access stage of negotiations, but both sides discussed the parameters

²⁴¹ *ibid*

²⁴² *Ibid*

²⁴³ European Commission, “Report of the 3rd Round of Negotiations for a Free Trade ...” (*European Commission* April 2019) <http://trade.ec.europa.eu/doclib/docs/2019/april/tradoc_157864.pdf> accessed June 1, 2020

²⁴⁴ DFAT, “Australia-EU FTA – Report on Negotiating Round Three, Canberra, 25-29 March 2019” (*DFAT* April 2019) <<https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/Pages/aeufta-round-3>> accessed June 1, 2020

²⁴⁵ *ibid*

²⁴⁶ *ibid*

²⁴⁷ European Commission, “Report of the 4th Round of Negotiations for a Free Trade ...” (*European Commission* July 2019) <http://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158277.pdf> accessed June 1, 2020

for exchanging initial market access offers for goods, as well as separately for services and investment and government procurement”.²⁴⁸

Round 5: October 14-18, 2019 in Canberra

Whereas the EU’s general part of the report on this round is restricted to the standard formulations used in every of the six reports and contains no further information, the Australian side informed that “following Australia’s publication of the list²⁴⁹ of product names the EU wants Australia to protect as geographical indications (GIs) and an initial exchange of goods market access offers, we had a positive and constructive fifth round of negotiations”.²⁵⁰ A further stakeholder briefing was held during this round with a discussion about issues like “market access offers, GIs, intellectual property rights, temporary movement of people, e-commerce, environmental protection, telecommunications; SPS and the new European Parliament.”²⁵¹

Round 6: February 10 - 14, 2020 in Canberra

The number of working groups in this round was further extended to 22 working groups and sub-groups. Text proposals for different chapters were discussed and agreement in principle on text parts that could be agreed upon by both sides could be achieved.²⁵² The Australian side informed that “exchanged ambitious initial market access offers on services and investment and government procurement” were exchanged ahead of the round and that this “ marks the exchange of all the initial market access offers in the negotiations, with the initial goods offer having already been exchanged before the fifth round.” In the Australian report it is also

²⁴⁸ DFAT, “Australia-EU FTA – Report on Negotiating Round Four ...” (DFAT July 2019) <<https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/Pages/aeufta-round-4>> accessed June 1, 2020

²⁴⁹ DFAT, “List of EU FTA Geographical Indications” (DFAT October 2019) <<https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/public-objections-gis/Pages/list-of-european-union-geographic-indications-gis>> accessed June 1, 2020

²⁵⁰ DFAT, “Australia-EU FTA – Report on Negotiating Round Five, Canberra, 14-18 October 2019” (DFAT October 2019) <<https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/Pages/aeufta-round-5>> accessed June 1, 2020

²⁵¹ *ibid*

²⁵² European Commission, “Report of the 6th Round of Negotiations for a Free Trade ...” (European Commission February 2020) <https://trade.ec.europa.eu/doclib/docs/2020/february/tradoc_158656.pdf> accessed June 1, 2020

mentioned that “We made constructive and consistent progress across the chapter text.”²⁵³ The stakeholder briefing was attended by over 100 stakeholders and the discussion covered topics like “market access, digital trade; climate change; geographical indications (GIs); privacy; ‘sensitive’ EU products; financial services; conformity assessments; innovation; research & development (R&D); technical barriers to trade (TBTs); small and medium sized enterprises (SMEs); innovation; research; intellectual property (‘IP’); copyright; trademarks; Australian automobile sector; labour market testing; movement of natural persons; cheese and dairy; public education; and pharmaceuticals”.²⁵⁴

The following part of this chapter reflects the development of the negotiations in regard to selected topics by presenting the original wording of the official negotiation reports²⁵⁵ of the two negotiation teams side by side in the timeline of the negotiation rounds.

TRADE IN GOODS	EU	AUSTRALIA
Round 1 Brussels 2 - 6 July 2018	Australia and the EU agreed to exchange data on tariffs and trade and on the technical modalities for the exchange of offers. Both sides also discussed a proposal by the EU for a text for rules on trade in goods. Next steps include discussions more in detail of the key articles of the text before the next round.	Positive discussions were held on trade in goods, technical barriers to trade, customs procedures and trade facilitation, rules of origin, trade remedies, technical barriers to trade, energy and raw materials and sanitary and phytosanitary measures and animal welfare. On goods and market access, Australia and the EU discussed technical details regarding tariff negotiations and trade statistics. Both Parties agreed to consider proposals on

²⁵³ DFAT, “Australia-EU FTA – Report on Negotiating Round Six, Canberra, 10-14 February 2020” (DFAT February 2020) <<https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/Pages/aeufta-round-6>> accessed June 1, 2020

²⁵⁴ *ibid*

²⁵⁵ European Commission, “EU-Australia Trade Agreement Negotiations” (European Commission Directorate-General for Trade February 27, 2020) <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=1865>> accessed June 1, 2020 ; DFAT, “Australia's Free Trade Agreements (FTAs)” (DFAT February 2020) <<https://www.dfat.gov.au/trade/agreements/Pages/trade-agreements>> accessed June 1, 2020

		various aspects of the text, provide further information and clarification on respective processes within their own economies, and follow-up within their respective systems on outstanding issues, as appropriate.
Round 2 Canberra 19-23 Nov 2018	In the same constructive atmosphere as in the 1st round, both sides resumed work on the text on rules for trade in goods, closing six articles and agreeing on a number of definitions. The EU and the Australian sides then engaged in a discussion on expectations for initial market access offers, addressing a number of elements, such as sensitivities, degrees of ambition and link between market access and progress in other chapters under negotiation. Both sides will continue to work towards achieving the necessary degree of progress across all areas that will enable the exchange of initial market access offers to take place.	We made strong progress on a number of provisions in the Trade in Goods chapter, with many articles of text now agreed. Australia and the EU also held further detailed and useful discussions on market access for goods, including the establishment of 'benchmarks' for initial offers.
Round 3 Canberra 25-29 March 2019	The two sides discussed open provisions of the text as regards national treatment on internal taxation, elimination of customs duties, fees and formalities, customs valuation, repaired goods, remanufactured goods, import and export monopolies, import and export restrictions, origin marking, export licensing procedures, and preference utilisation. Articles on repaired goods and preference utilisation have been agreed in principle.	Australia and the EU held further constructive discussions on National Treatment and Market Access for Goods Chapter, with most provisions now agreed. The Parties also discussed the parameters for future initial goods market access offers.

Round 4 Brussels 1-5 July 2019	Both sides discussed open provisions of the consolidated text as regards national treatment on internal taxation, elimination of customs duties, fees and formalities, customs valuation, repaired goods, remanufactured goods, import and export monopolies, import and export restrictions, origin marking, and export licensing procedures. Final text provisions in the article on elimination of customs duties were provisionally agreed. The two sides discussed expectations for the future exchange of initial offers on market access for goods, notably degrees of ambition and conditions for an exchange to take place.	Australia and the EU made further progress on the <i>National Treatment and Market Access for Goods</i> chapter, with many provisions now agreed. The Parties also held constructive discussions goods market access.
Round 5 Canberra 14 – 18 October 2019	The two sides discussed the exchanged initial market access offers for goods. They indicated areas where further improvements on the offer constitute an important objective in future exchanges. The two sides discussed open provisions of the consolidated text as regards national treatment, fees and formalities, customs valuation, remanufactured goods, import and export monopolies, origin marking, and export licensing procedures.	Australia and the EU made progress on the <i>National Treatment and Market Access for Goods</i> chapter, with most provisions now agreed. The Parties also continued discussions on market access for goods, following the exchange of initial offers in early October.

Round 6 Canberra 10-14 February 2020	The two sides continued discussions on the market access offers for goods that had been exchanged ahead of the previous round. They also discussed open provisions of the consolidated text as regards imports and exports restrictions, customs valuation, remanufactured goods, and non-tariff measures.	The Parties continued positive discussions on goods market access, building on the exchange of high-ambition initial offers in October 2019. Chapter text on Trade in Goods is now well advanced.
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RULES OF ORIGIN

EU

Australia

<p>Round 1</p> <p>Brussels</p> <p>2-6 July 2018</p>	<p>On the basis of a textual proposal, both sides compared approaches on Rules of Origin in EU and in Australian FTAs and discussed two main aspects of the Protocol on Rules of Origin: (i) general provisions and (ii) proof of origin and verification. Both sides identified a number of areas of convergence in approaches and noted some differences.</p>	<p>No report on this topic</p>
<p>Round 2</p> <p>Canberra</p> <p>19-23 November 2018</p>	<p>A discussion was held on the basis of the EU's proposed text for a protocol on Rules of Origin and Origin Procedures. Australia provided detailed comments on Rules of Origin (Section A) and initial comments on Origin Procedures (Section B), and the EU further explained its approach. A number of convergent and divergent positions were identified and will form the basis for further discussions. Both sides agreed to try to table their offers on product specific rules of origin ahead of the next round.</p>	<p>Australia and the EU made steady progress during their first in-depth Rules of Origin text discussions. We agreed on a number of articles in principle, and on a way forward to exchange and discuss Product Specific Rules at following rounds.</p>
<p>Round 3</p> <p>Canberra</p> <p>25-29 March 2019</p>	<p>The group discussed the three parts of the chapter on rules of origin: general provisions, origin procedures and product specific rules. Discussions on the general provisions and origin procedures are based on a text combining EU's and Australia's proposals. The group made further progress on the general provisions. Both sides continued detailed discussions identifying the differences and similarities in different origin concepts. On product specific rules, both sides presented</p>	<p>Australia and the EU made steady progress during discussions on Rules of Origin text. Australia and the EU exchanged initial Product Specific Rules (PSRs) proposals ahead of the third round and had constructive discussions on both sides' positions.</p>

	their respective approaches for agricultural and industrial products.	
Round 4 Brussels 1-5 July 2019	The group discussed three parts of the Chapter on rules of origin: general provisions, origin procedures and product specific rules. Both sides continued detailed discussions identifying the differences and similarities in different origin concepts. On product specific rules, both sides compared their respective approaches for agricultural products.	Australia and the EU held useful Rules of Origin (ROO) discussions, including in-depth exchanges on key, trade facilitating elements of the ROO text. We held the first detailed discussions on each side's proposals for Product-Specific Rules for agricultural products.
Round 5 Canberra 14-18 October 2019	The discussions concerned three parts of the chapter on rules of origin: general provisions, origin procedures and product specific rules. Both sides continued discussions on the differences and similarities in rules determining the origin of products and origin procedures. On product specific rules, both sides compared their respective approaches for some industrial products.	The Rules of Origin group had detailed discussions across Sections A and B of the chapter text, as well as on the Product Specific Rules for Minerals, Chemicals and Plastics, Leather, Textiles, Clothing and Footwear and Machinery. Although differences between positions remain, Parties identified further similarities and opportunities to bridge the gap in those positions.
Round 6 Canberra 10-14 February 2020	Both sides discussed approaches on origin procedures. Although they now agree on basic principles, still a number of differences were identified in relation to respective rights and obligations of importers and exporters. They were able to bridge some previously identified differences in the general provision on rules of origin. Both sides continued the first reading of respective proposals of product specific rules of origin to identify similarities and differences.	The Rules of Origin group discussed all areas of the text, as well as the Product-Specific Rules for metals, vehicles, other manufactured products, paper, wood, ceramic and glass. There remain some significant differences between positions, but Parties made progress in agreeing text and have a work plan to bridge the gap in positions.

CUSTOMS AND TRADE FACILITATION

<p>Round 1</p> <p>Brussels</p> <p>2-6 July 2018</p>	<p>The EU presented a draft text. Both sides discussed to go beyond the WTO Trade Facilitation Agreement (TFA) where appropriate. Questions and initial views on specific articles of the proposed text were discussed so as to better understand their objectives. Further comments will be provided before the next round.</p>	<p>Positive discussions were held on trade in goods, technical barriers to trade, customs procedures and trade facilitation, rules of origin, trade remedies, technical barriers to trade, energy and raw materials and sanitary and phytosanitary measures and animal welfare. On goods and market access, Australia and the EU discussed technical details regarding tariff negotiations and trade statistics.</p> <p>Both Parties agreed to consider proposals on various aspects of the text, provide further information and clarification on respective processes within their own economies, and follow-up within their respective systems on outstanding issues, as appropriate.</p>
<p>Round 2</p> <p>Canberra</p> <p>19-23 November 2018</p>	<p>Both sides discussed all the articles based on the EU text proposal and the comments provided by Australia. Some articles were agreed and substantial progress was made on others.</p>	<p>Australia and the EU made steady progress during their first in-depth Rules of Origin text discussions. We agreed on a number of articles in principle, and on a way forward to exchange and discuss Product Specific Rules at following rounds.</p>
<p>Round 3</p> <p>Canberra</p> <p>25-29 March 2019</p>	<p>The group discussed the three parts of the chapter on rules of origin: general provisions, origin procedures and product specific rules. Discussions on the general provisions and origin procedures are based on a text combining EU's and Australia's proposals. The group made further progress on the general provisions. Both sides continued detailed discussions identifying the differences and similarities in different origin concepts. On product specific rules, both sides presented their respective approaches for agricultural and industrial products.</p>	<p>Australia presented its proposal on customs trade facilitation – a mutual recognition arrangement for authorised economic operators. We discussed chapter text proposals shared since the first round, agreeing on some provisions. We also agreed to exchange further proposals on outstanding text ahead of the third round.</p>

Round 4 Brussels 1-5 July 2019	The two sides resumed the discussion on the chapter on the basis of the consolidated text from the previous round. All outstanding articles were discussed and good progress was made. Brackets were removed in a number of Articles. Two Articles, namely Article X.6 (Transit and Transshipment) and X.8 (Post clearance audit) were provisionally agreed. Partial agreement was achieved on several other articles.	Australia and the EU agreed or partially agreed to provisions throughout the Customs and Trade Facilitation chapter, which builds on the Parties' existing obligations under the WTO Agreement on Trade Facilitation.
Round 5 Canberra 14-18 October 2019	Both sides continued the discussion on the basis of the text as agreed in the previous round and the comments and attributions provided before the round. Constructive discussions took place and all articles of the chapter were discussed. Good progress was made on a number of Articles of the chapter.	Australia and the EU held further fruitful discussions on the Customs and Trade Facilitation chapter. The Parties reached agreement on additional elements of the chapter, including on the key aspects of Temporary Admission.
Round 6 Canberra 10-14 February 2020	Both sides discussed all articles in the chapter and continued to make good progress, most notably in relation to the article setting out the objectives of the chapter and the article on advanced rulings.	The Parties further advanced the Customs and Trade Facilitation chapter by agreeing on two additional articles of the text (Objectives and Advance Rulings). The chapter remains on track to deliver outcomes above and beyond the WTO Agreement on Trade Facilitation.

<p>Round 1</p> <p>Brussels</p> <p>2-6 July 2018</p>	<p>The EU and Australia had two days of constructive and comprehensive discussions on government procurement in a positive atmosphere. Discussions covered, first of all, the overall legal framework and practices in procurement both with respect to the EU and Australia, including central and sub-central levels. Secondly, the discussions focused on the EU text proposal and related questions on procurement rules. In this context, the exchanges concerned, in particular, the aspects related to electronic procurement, the access to procurement opportunities, challenges in collecting statistics, as well as sustainable procurement. It was agreed to continue the exchanges on this basis on rules and on each other's procurement frameworks with the view to exploring further opportunities.</p>	<p>Australia and the EU also held constructive discussions on competition (including state-owned enterprises and subsidies), trade and sustainable development, government procurement and small and medium-sized enterprises.</p> <p>The EU has not yet proposed any other legal or cross-cutting chapters, including in relation to institutional arrangements and general provisions and exceptions.</p>
<p>Round 2</p> <p>Canberra</p> <p>19-23 November 2018</p>	<p>The discussion focussed on the architecture of the draft chapter, i.e. whether it was preferable to include Government Procurement Agreement disciplines by reference or replicate them in full length. Australia provided presentations on procurement by sub-central entities in Australia, AusTender (the e-procurement system at Commonwealth level), and the procurement of Government Business Enterprises. Both sides explained their respective drafting proposals.</p>	<p>We continued to deepen our understanding of each other's procurement frameworks and existing commitments. We focused on how to achieve transparent and competitive access to government procurement opportunities for each other's suppliers.</p>

Round 3 Canberra 25-29 March 2019	The text of the chapter was discussed extensively. Some small parts were accepted in principle by both sides. The approach of referencing the Government Procurement Agreement (GPA) was discussed in detail. The EU side made a presentation to explain its approach to the coverage of sub-central entities and utilities under the GPA. The EU request for additional market access coverage was presented and explained.	Australia and the EU made steady progress on government procurement. Both sides provided further explanation of our respective approaches to the chapter, agreed on several provisions, and set up progress for future rounds.
Round 4 Brussels 1-5 July 2019	Considerable progress was achieved regarding the text of the chapter. On market access, following the submission of an EU request, the Australian side is preparing a market access request to be submitted prior to the next negotiation round.	Australia and the EU continued to make steady progress on government procurement. We agreed to a number of provisions which accommodated both parties' respective government procurement processes.
Round 5 Canberra 14-18 October 2019	Important progress was achieved regarding the text of the chapter, which is now nearly complete. A first discussion took place concerning the scope of the chapter, based on both sides' respective market access requests. An exchange of market access offers is intended to take place prior to the next round.	We agreed provisions that accommodate both of the Parties' respective government procurement processes. Australia and the EU continued to discuss the interests of suppliers in each other's government procurement markets.
Round 6 Canberra 10-14 February 2020	Further progress was achieved on the text of the chapter. An open discussion was held on the first market access offers that had been exchanged prior to the round.	We had a positive first round of market access negotiations, and both sides now have a better understanding of each other's offers and needs. We continued to advance the chapter text.

SERVICE AND INVESTMENT

EU

Australia

<p>Round 1</p> <p>Brussels</p> <p>2-6 July 2018</p>	<p>Both sides exchanged views on their approaches and expectations in a range of areas, including investment liberalisation, cross border trade in services, temporary entry, domestic regulation, mutual recognition, financial services, telecommunications, delivery services, and maritime services. Both sides confirmed their strong mutual interest in these areas and intention to achieve a state-of-the-art text in terms of obligations and disciplines focusing on behind the border barriers, and a highly ambitious result for market access liberalisation. Similarly, on digital trade/e-commerce, the EU and Australia explained their respective approaches, both confirming the objective of being ambitious and forward looking on this topic. The EU and Australia also discussed the main elements of a capital movement chapter on a conceptual basis.</p>	<p>Negotiations on services and investment were constructive and informative. Both sides explained our respective regulatory systems and preferred FTA practice. The Commission explained how the European Court of Justice opinion on the Singapore-EU FTA had affected its recent FTA practice. Officials had useful exchanges on intellectual property rights, geographical indications, and services scheduling. Australia provided an overview of its approach to e-commerce and answered EU questions on our approach.</p>
<p>Round 2</p> <p>Canberra</p> <p>19-23 November 2018</p>	<p>The discussions on services and investment in this round were based on the EU text proposal. A comprehensive and in-depth analysis of the objectives, approach and the substance of the proposal took place. It was agreed to work on the basis of the EU text in most areas. The Australian side will confirm which text proposed by the EU side they can</p>	<p>The EU presented its proposed Investment Liberalisation and Trade in Services text, with dedicated discussions on cross-border trade in services, financial services, entry and temporary stay, domestic regulation, professional services and telecommunication services. Australia indicated areas of convergence with our own practice where</p>

	<p>accept and provide detailed alternative proposals ahead of the next round in order to facilitate progress. Both sides also discussed the approach proposed by the EU side to scheduling commitments, notably providing full transparency regarding measures at sub- national level and taking market access commitments for both services and manufacturing and primary industry sectors on which the Australian side will conduct internal consultations.</p>	<p>we could likely accept EU text, and others that would require further analysis or consultation. Australia presented a proposal on professional services, including elements relating to market access and the recognition of professional qualifications. We had preliminary discussions regarding services and investment market access. Our discussions on Investment Liberalisation and Capital Movements were based on text proposals made by the EU prior to the round. The EU provided background information on its proposals, and Australia noted areas where the proposals were consistent with its recent practice. Australia signalled areas where we could accept the EU's proposals between rounds and issues that would require consideration. Australia also noted we would consider making additional text proposals prior to the next round.</p> <p>The two sides discussed our respective e-commerce/digital trade texts. Both texts contain disciplines on key e-commerce issues like e- authentication, non-imposition of customs duties, data localisation, protection of personal information, prevention of unsolicited electronic messages, source code and cooperation. There are differences, however, on the scope and/or detail of a number of the disciplines. Both sides agreed that the texts would be merged into one document for the next round.</p>
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Round 3 Canberra 25-29 March 2019	Based upon the initial EU proposals for texts comprehensively dealing with the liberalisation of services and investment, both sides have been able to achieve consolidated texts during this round, containing Australian and EU attributions and substantially reflecting common views in many areas.	We share ambition with the EU on achieving high-quality outcomes on services and investment. We held dedicated sessions on investment liberalisation, capital movements, cross-border trade in services, financial services, entry and temporary stay, professional services and telecommunication services. We were able to make progress in agreeing a number of threshold issues, including in relation to structure, core provisions and definitions. In relation to outstanding issues, we identified areas of commonality and options for progress at future rounds.
Round 4 Brussels 1-5 July 2019	Both sides discussed in detail all the proposed chapters of this title, including the general provisions, investment liberalisation, cross-border trade in services, domestic regulation, mutual recognition, professional services, financial services, delivery services, maritime services, and the temporary movement of natural persons.	We held dedicated sessions on investment liberalisation, capital movements, cross-border trade in services, financial services, entry and temporary stay, domestic regulation, professional services, delivery services, international maritime transport services and telecommunication services. We were able to make progress in agreeing the text of a number of the core services and investment definitions and commitments, and in exchanging views on areas of the text where the Party's past practices differ.
Round 5 Canberra 14-18 October 2019	A constructive and comprehensive discussion took place in relation to investment and cross-border services liberalisation, capital movements, financial services, professional services, the movement of natural	We agreed to exchange initial services and investment market access offers in coming months. Similar to previous rounds, we held dedicated sessions on investment liberalisation, capital movements, cross-

	<p>persons, and telecommunications, which facilitated mutual understanding on outstanding issues and allowed substantial text to be agreed. Both sides discussed parameters for a first exchange of offers intended to take place ahead of the next round.</p>	<p>border trade in services, financial services, entry and temporary stay, professional services, and telecommunication services. We made progress in agreeing rules, provisions and commitments that will facilitate our two-way services trade and investment.</p>
<p>Round 6 Canberra 10-14 February 2020</p>	<p>The services and investment discussions made continued progress during this week, with many areas close to agreement. Key discussions focused on the initial services and investment offers which were exchanged ahead of the round.</p>	<p>Australia and the EU had preliminary discussions on services and investment market access, following the exchange of initial offers prior to the round.</p> <p>We held dedicated sessions on investment liberalisation, capital movements, cross-border trade in services, financial services, entry and temporary stay, professional services, delivery services and maritime services. We continued to make progress in agreeing rules, provisions and commitments to facilitate our two-way services trade and investment.</p>

DIGITAL TRADE

EU

Australia

Round 1 Brussels 2-6 July 2018	NOT MENTIONED	NOT MENTIONED
Round 2 Canberra 19-23 November 2018	Both sides discussed in detail their respective approaches based on the textual proposals. The EU side provided clarifications and explanations of its Digital Trade title proposal. Both sides exchanged useful information on several aspects of their regulatory systems with relation to some of the elements discussed. The discussions showed that there were many areas of convergence between the two approaches. Overall, both sides confirmed their objective of being ambitious and forward-looking on this topic.	NOT MENTIONED
Round 3 Canberra 25-29 March 2019	Both sides went through the EU and Australian proposals in detail. Where possible, the two texts were merged in a single document with Australian and EU attributions, including agreeing text in principle on areas of convergence.	Round 3 was our first opportunity to consider the Australian and EU e-commerce/digital trade chapter texts side by side, and our focus was on merging the two texts into one document. We discussed the provisions in detail, indicating where we could work with each other's text, and where we needed to undertake further consultation and analysis.
Round 4 Brussels 1-5 July 2019	Both sides went through the merged version of the Digital Trade / E-Commerce text in detail, in particular focusing on the articles on which new text attributions were sent prior to the round by both sides. Progress was made on a number of provisions.	We discussed issues where we have a common approach, such as not imposing customs duties on electronic transmissions, paperless trading, consumer protection and spam. We clarified our respective positions on data flows and protection of personal data.

Round 5 Canberra 14-18 October 2019	Both sides discussed all provisions of the Digital Trade text in detail, in particular focusing on the articles on which new text attributions were provided intersessionally. Progress was made on a number of provisions.	Australia and the EU made good progress on digital trade/e-commerce with a number of provisions agreed that accommodate the Parties' respective processes. We continued to improve each other's understanding of our respective positions on data flows and protection of personal data.
Round 6 Canberra 10-14 February 2020	Both sides discussed all provisions of the Digital Trade text in detail. Provisions on open internet access and online consumer trust were agreed. Progress was made and clear pathways forward were developed on a number of provisions.	Substantive progress was made on digital trade. We reached agreement on a few provisions and developed compromise texts on some key outstanding issues for both sides to consider. Both sides reiterated their respective positions on data flows and protection of personal data.

TRADE AND SUSTAINABLE DEVELOPMENT

<p>Round 1</p> <p>Brussels</p> <p>2-6 July 2018</p>	<p>The EU and Australia presented their perspectives on the TSD chapter based on their existing FTA precedents and current developments, including the EU's recent 15-point action plan on TSD. Both sides exchanged information on their respective systems, including their practice as regards references to international commitments in their bilateral agreements, and the division of competence on TSD issues between different levels of government. A number of follow-up actions were agreed.</p>	<p>Australia and the EU also held constructive discussions on competition (including state-owned enterprises and subsidies), trade and sustainable development, government procurement and small and medium-sized enterprises. (No individual report on Trade & Sustainable Development Chapter)</p>
<p>Round 2</p> <p>Canberra</p> <p>19-23 November 2018</p>	<p>Both sides discussed the principles behind their approach to TSD provisions on trade and labour, multilateral environmental agreements, climate change, biodiversity, and forests, as well as TSD institutional provisions and mechanisms: TSD subcommittee and national contact points, transparency, dispute settlement (government consultations and panel of experts). Discussions also touched upon TSD aspects of civil society mechanisms of the FTA (Civil Society Forum). The EU side recalled its TSD 15 point's action plan and the importance it attaches to the ratification of all fundamental conventions of the International Labour Organisation (ILO).</p>	<p>Both sides discussed our respective FTA precedents and practices for commitments on labour and the environment consistent with internationally agreed principles, standards and rules. We discussed in general terms possible issues to be included in a future text. On labour issues, we covered labour standards, decent work, the fundamental ILO Conventions, and potential areas for cooperation. On environmental protection, we discussed multilateral environment agreements, including climate change, conservation and trade, biodiversity and environmental goods and services. Australia presented on implementation of the Sustainable Development Goals and sustainable forestry and trade. Both sides</p>

		discussed institutional provisions and dispute settlement.
Round 3 Canberra 25-29 March 2019	The EU side presented its recently submitted textual proposal. In line with the EU TSD 15-points action plan it includes up-scaled commitments, including on climate change, labour and corporate social responsibility. Both sides discussed the proposal and Australian comments, including on topics such as: right to regulate, multilateral labour standards and agreements, including core labour standards, multilateral environmental governance and agreements, trade and climate change, biological diversity, sustainable forest management, sustainable fisheries, as well as institutional provisions.	Australia provided initial comments on the EU's proposed Trade and Sustainable Development chapter. The discussion covered commitments on labour standards, decent work and the fundamental ILO conventions and protocols. We also discussed commitments in relation to multilateral environment agreements, including trade and climate change, sustainable fisheries and forestry, as well as trade and conservation and biodiversity. Australia presented proposals on forced labour, corporate social responsibility, sustainable forest management and environmental goods and services. Both sides discussed cross-cutting and institutional issues, including options to reference trade and gender issues. Australian experts gave presentations on climate change and agriculture and the circular economy.
Round 4 Brussels 1-5 July 2019	Both sides continued discussions based on EU and Australian text proposals. Discussions covered all sections of the TSD Chapter, including general provisions and definitions, as well as provisions on trade and: labour, multilateral environmental agreements, climate change, biodiversity, sustainable fisheries and aquaculture, forests, gender and Corporate Social Responsibility / Responsible Business Conduct. Both sides discussed the	Australia and the EU discussed provisions on labour standards and multilateral environmental agreements, including on climate change. Both sides provided further explanation of their respective approaches to the chapter. We agreed on a number of provisions on corporate social responsibility and sustainable fisheries management.

	<p>respective provisions, comments and attributions. Both sides provided more details on their labour, environmental, climate and CSR legislation and practices and concentrated on identifying similarities and divergences between them. A number of follow up actions in relation to various TSD provisions were agreed. The EU side recalled its TSD 15 point's action plan and the importance of ratification of all fundamental International Labour Organisation (ILO) Conventions and of the effective implementation of the Paris Agreement.</p>	
<p>Round 5 Canberra 14-18 October 2019</p>	<p>Both sides continued discussions based on EU textual proposals and Australia's reactions to it. Discussions covered all sections of the TSD chapter, including general provisions and definitions, as well as trade and labour, multilateral environmental agreements, climate change, environmental goods and services, biodiversity, sustainable fisheries and aquaculture, forests, gender and Corporate Social Responsibility (CSR) / Responsible Business Conduct. Both sides discussed also provisions on the right to regulate and levels of protection, scientific and technical Information as well on institutional and dispute settlement aspects. Both sides also provided more details on their labour, environmental, climate and CSR legislation and practices and concentrated on identifying similarities and divergences</p>	<p>We had useful discussions on all aspects of the Trade and Sustainable Development chapter, including the objectives, definitions, right to regulate and levels of protection, dispute settlement, multilateral labour standards, trade and gender, sustainable fisheries, and multilateral environmental agreements, including climate change, biodiversity and conservation. We made good progress on provisions covering trade and sustainable forest management and responsible business conduct.</p>

	<p>between them. The EU side recalled, inter alia, the importance of ratification and effective implementation of all fundamental International Labour Organisation (ILO) Conventions, as well as the importance of the effective implementation of the Paris Agreement by both sides.</p>	
<p>Round 6 Canberra 10-14 February 2020</p>	<p>Both sides continued discussions based on the EU text proposal and Australia's follow-up attributions and new proposals. Discussions covered all articles of the TSD Chapter. Discussions also covered provisions on the right to regulate and levels of protection, scientific and technical Information as well on institutional and dispute settlement aspects. Both sides provided more details on their labour, environmental, climate and CSR legislation and practices. A number of follow up actions were agreed. The EU side presented the European Green Deal Communication of 11 December 2019 and the importance of ratification and effective implementation of all fundamental ILO Conventions, and recalled the importance of the effective implementation of the Paris Agreement by both parties.</p>	<p>We discussed all aspects of the chapter, including commitments in relation to multilateral labour standards, trade and gender and multilateral environment agreements. We covered a broad range of trade and environmental issues, including climate change, biodiversity and wildlife conservation, as well as cooperation on the circular economy and sustainable oceans economy. We agreed provisions on responsible business conduct and made further progress on trade and sustainable fisheries and forest management.</p>

The results of Round 7, which took place from 4-15 May -due to the COVID19 situation by video conference- are not included here as the official reports of the latest round of negotiations were not available at the deadline for the final draft of this paper. But EU Chief Negotiator König commented that “the 7th round with Australia took place just recently, 4-15 May, by video conference. We have had steady progress but still a number of issues that remain under negotiation. As we always say, substance comes first and therefore we try not to set specific aims as regards timing for conclusion”.²⁵⁶

The status quo is that progress across all chapter-texts of the negotiated agreement could be achieved and that “initial market access offers and initial market access requests” were made.²⁵⁷ But as the Australian side noted, the negotiations are conducted on the basis that “nothing is agreed until everything is agreed.”²⁵⁸

The key issues to reach an overall agreement as mentioned by the Australian side after the latest round of negotiations are

- “- Commercially-meaningful market access which would allow trade to flow, especially in terms of improving our current limited access for agricultural goods
- Outcomes which promote two-way investment, including in infrastructure
- New two-way procurement opportunities
- Outcomes which allow our service suppliers to transact business across the EU
- Enhanced rules on digital trade
- Outcomes which assist small-and medium-sized enterprises and facilitate trade
- Outcomes which support global supply chains”.²⁵⁹

Key issues to reach an overall agreement mentioned by the EU negotiation team after the latest round of negotiations:

- “- One of the key challenges is related to agriculture market access - for sensitive agricultural products only partial liberalisation such as tariff rate quotas, longer transition periods or other arrangements are considered
- Discussions on services will continue to be at forefront of the issues
- Lowering market access barriers and remaining tariffs

²⁵⁶ König H, Statement by EU Chief Negotiator to the author of this thesis via email, dated May 25, 2020

²⁵⁷ Australian Official (n 231)

²⁵⁸ *ibid* - The original question was: “Considering the Status Quo of negotiations, what are the main topics already agreed upon and what are the remaining unsolved topics? The answer: “We negotiate on the basis that “nothing is agreed until everything is agreed”. After seven rounds of negotiations, we have made progress across the chapter texts. We have also made initial market access offers and initial market access requests.”

²⁵⁹ *ibid*

- Facilitating trade for our SMEs and negotiate specific chapter on SMEs.
- Ensuring the protection of EU's traditional food and drink products with distinct geographical indications
- Improved access to public procurement is also considered important.
- High ambitions on TSD, including climate as evidenced by the EU text proposal for the TSD chapter”.²⁶⁰

As already mentioned, the EU directives for the negotiations from the Council “do not include investment protection and Australia is fully aware”,²⁶¹ which is confirmed by the Australian side. “The EU doesn’t have a mandate to include ISDS in the Australia - EU FTA. Both sides understand that.”²⁶² But it is not the aim of the European Union “to abandon investment protection in general. On the contrary, we are currently negotiating the possible establishment of a Multilateral Investment Court”.²⁶³

²⁶⁰ König (n 256)

²⁶¹ *ibid*

²⁶² Australian Official (n 231)

²⁶³ König (n 256)

2. 8 Outlook

The initial timetable for the conclusion of the negotiations as set by the Commission at the start of the negotiations in 2017 could not be met. In his State of the Union speech Commission President Jean Claude Juncker declared, that he wants “all of these agreements (with Australia and New Zealand) to be finalised by the end of this mandate”.²⁶⁴

Although steady progress could be achieved due to the negotiation reports on both sides, there are “still a number of issues that remain under negotiation”²⁶⁵ but as the EU negotiation team states “substance comes first and therefore we try not to set specific aims as regards timing for conclusion. In our experience, even the quickest negotiations still needed 2 to 3 years, most however took longer than that.”²⁶⁶

One of the key challenges dominating the outlook on the remaining rounds of negotiations is related to agricultural market access, a problem clearly foreseen by both sides. The Australian objective is “improving our current limited access for agricultural goods”²⁶⁷, whereas the EU negotiation team states that “for sensitive agricultural products only partial liberalisation such as tariff rate quotas, longer transition periods or other arrangements are considered.”²⁶⁸

Other challenges that remain to be solved are challenges in areas where the systems of the EU and Australia are different “as regards the protection of Geographical Indications or areas of Intellectual Property Rights, where an acceptable result for both sides will have to be negotiated”.²⁶⁹

²⁶⁴ EEAS, “Launching Trade Negotiations with Australia” (EEAS September 15, 2017) <[https://eeas.europa.eu/delegations/australia_me/32195/Launching trade negotiations with Australia](https://eeas.europa.eu/delegations/australia_me/32195/Launching%20trade%20negotiations%20with%20Australia)> accessed June 1, 2020

²⁶⁵ König (n 256)

²⁶⁶ *ibid*

²⁶⁷ Australian Official (n 231)

²⁶⁸ König (n 256) The full text of this part of the statement: “One of the key challenges is related to agriculture market access. This was foreseen already in the negotiating mandates. For sensitive agricultural products only partial liberalisation such as tariff rate quotas, longer transition periods or other arrangements are considered. There are also some challenges in areas where the EU and Australian systems are different, for example as regards the protection of Geographical Indications or areas of Intellectual Property Rights, where an acceptable result for both sides will have to be negotiated.”

²⁶⁹ *Ibid*

The caveat that there is no agreement unless everything is agreed upon supports the assumption that the voices of the lobby groups and the political players on both sides might get louder. Australia's Trade Minister Simon Birmingham said in November 2019 that he wants to conclude the Free Trade Agreement with the EU by end of 2020.²⁷⁰ Not an easy task for the negotiation teams as in the same interview -stating that he "didn't want to prejudge the negotiations"- opposed the EU targets on climate change as well as the EU demands on GI.²⁷¹ A comment that is in line with an earlier statement in which he said that "there won't be a deal unless it gets clear wins for Australian regional communities and agricultural industries overall."²⁷²

At the end of this year a different scenario will be the background of the remaining negotiation rounds, if the agreement cannot be concluded by end of 2020. The EU27 will not only negotiate with Australia about the FTA but will most likely still be in negotiations with the UK about an after Brexit Trade Agreement, whereby the UK will start the official negotiations about an UK-Australia FT A. But both sides stress, that they want to take the time needed and König don't see specific aims in regards of timing for conclusion²⁷³ Or as the Australian side puts it "We still have a long way to go in market access negotiations, to find the balance between each side's offensive and defensive interests" but "both sides are committed to early conclusion of the FTA negotiations. I am positive that we will both be able to achieve satisfactory outcomes in the interests of our peoples, businesses, economies, and trade and investment relations".²⁷⁴

²⁷⁰ Anthony Galloway, "Australia to Fight Europe on Climate Demands in Free-Trade ..." (*The Sydney Morning Herald* November 29, 2019) <<https://www.smh.com.au/politics/federal/australia-to-fight-europe-on-climate-demands-in-free-trade-deal-20191128-p53f3y.html>> accessed June 1, 2020

²⁷¹ *ibid*

²⁷² Mike Foley, "EU Deal Is Dead If Ag Loses out: Birmingham" (*Farm Online* September 11, 2019) <<https://www.farmonline.com.au/story/6380868/eu-deal-is-dead-if-ag-loses-out-birmingham/>> accessed June 1, 2020

²⁷³ König (n 256) notes in her e-mail statement that "substance comes first and therefore we try not to set specific aims as regards timing for conclusion. In our experience, even the quickest negotiations still needed 2 to 3 years, most however took longer than that".

²⁷⁴ Australian Official (n 231)

3. Conclusions

Looking at the development of the trade relationship between Australia and the EU in the last decades and at the common general objectives communicated by the two “like minded “ partners regarding the conclusion of an FTA, it can be concluded that Australia as well as the EU both have a bigger agenda than just reducing trade barriers. Promoting -as the EU said- “smart, sustainable and inclusive growth” and “shared values on trade and sustainable development” as Australia named it, puts the aim of this FTA and its negotiations in a larger, global frame.

In a time, where the US cannot be regarded as reliable partner in trade liberalisation and China not as partner on the idea of an open, democratic world there is both the chance of a more chaotic future or the chance of new power networks built by comprehensive trade agreements.

This thesis has argued, that FTAs have become a new, inclusive type of bi- and multilateral treaties that goes far beyond the initial idea made possible by Article 24 of GATT. From the facts and arguments presented it can be concluded, that the Australian-EU FTA has the chance to become one more important example for this development. It can further be concluded that both parties -although being committed to their obligations regarding WTO - have realized the limitations they are facing by the WTO rules and that a faster and more open process of multilateral liberalisation can only be achieved by this type of new trade agreements. But should be noted that there are also critical voices, cited in this paper, arguing that the uncontrolled increase in bi- and multilateral agreements creates a complex system of high complexity and a loss of transparency.

The findings support the conclusion that the flexibility of this type of agreements allows a flexible strategy on key issues like Investor-State-Dispute-Settlement. The exclusion of this topic in the FTA allows the fast tracking of the conclusion without the painful process of individual ratification by every Member State’s parliament -as it was intended by the “fast track” plan of the European Commission. But at the same time – as stated by the EU negotiation team - it is not planned to abandon investor protection entirely but suggested to establish a Multilateral Investment Court.

The different impact assessments done by both parties and presented in this paper suggest an overall win-win situation, but some tough milestones still lie ahead on the way to conclusion of the FTA. The clear message of the EU to protect its “sensitive” agricultural products and traditional food and drink products and Australia’s message to improve the limited access of its agricultural goods are just two examples of one challenging topic, which -as this paper explained- might not be the most important, but at least one of the most emotional topics.

Due to the broad range of topics negotiated by as many as 22 sub-groups of the negotiation teams this thesis had to be focused on selected topics. As the negotiations are still ongoing only limited details about the progress of the negotiations in the form of the official reports of both groups were available, but they could be augmented by some additional statements from the negotiation teams and several academic voices. This FTA between Australia and the EU is a very current example of the new type of Trade Agreements and -once concluded- will set guidelines for Trade Agreements with other countries. Therefore further research on the remaining rounds of negotiations, the final framework of the FTA - especially how critical issues like GI, TSD, Investor Protection could finally be solved - and the implementation of this agreement is strongly suggested. The triangle of FTA negotiations between AUS - EU27, EU27 - UK and AUS - UK will provide an interesting terrain for additional academic research.

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Deutsche Kurzfassung

“Freihandelsabkommen (FTA) zwischen Australien und Europäische Union - Status Quo und Ausblick”

Diese Arbeit widmet sich der Genesis des derzeit in Verhandlung befindlichen Freihandelsabkommens zwischen Australien und der Europäischen Union und bewertet die mit diesem Freihandelsabkommen verbundenen Herausforderungen und Chancen. Sie untersucht den Verlauf des Verhandlungsprozesses, den Status Quo sowie die Aussichten für die Zukunft. Ein kurzer Exkurs in die Geschichte der Entwicklung der Handelsbeziehungen zwischen den beiden Partnern trägt zum besseren Verständnis des Veränderungsprozesses bei, der in den letzten Jahrzehnten im Bereich der Handelsbeziehungen zwischen der EU und Australien stattgefunden hat.

Es wird ausführlich auf die rechtlichen Rahmenbedingungen eingegangen, die im Laufe der Zeit zu diesem Wandel zwischen der EU und Australien in Bezug auf die Handelsbeziehungen geführt haben. Dies reicht vom rechtlichen Rahmen der Gemeinsamen Agrarpolitik (CAP) der Europäischen Union welche 1962 beschlossen wurde, einem der Hauptgründe der ursprünglichen Frustration Australiens in Richtung EU bis zum Abschluss des Europäisch-Australischen Rahmenabkommens 2008, das das Fundament für eine neue Art der Handelsbeziehungen legte, welche in diesem FTA noch weiter liberalisiert werden sollen.

Anhand des Beispiels EU-Australien wird die allgemeine Rolle von Freihandelsabkommen bei der Erlangung von Handelsliberalisierungen untersucht. Es wird argumentiert, dass mit den regionalen Handelsabkommen (RTAs) und insbesondere Freihandelsabkommen eine neuen Art von bilateralen und multilateralen Abkommen entstanden ist, die durch Artikel 24 des GATT ermöglicht wurden, sich jedoch weit über den ursprünglichen, engen Bereich hinaus entwickelten, den die Initiatoren des GATT vorgesehen hatten. Es wird aufgezeigt, dass die Motive von Freihandelsabkommen nicht mehr nur rein wirtschaftlicher, sondern auch politischer Natur sind. In diesem Zusammenhang befasst sich das Papier mit den allgemeinen Herausforderungen, denen sich diese neuen Freihandelsabkommen stellen müssen, wie der Einhaltung von WTO-Übereinkommen und der „Interoperabilität“ verschiedener Übereinkommen auf verschiedenen Ebenen.

Es wird auch darauf hingewiesen, dass FTAs dieser neuen Art sich nicht mehr ausschließlich auf Zölle und Tarife konzentrieren, sondern in größerem Ausmaß auf innerstaatliche Vorschriften und Standards, die Auswirkungen auf den faktischen Marktzugang haben. Diese Arbeit präsentiert auch eine umfassende Dokumentation des Wortlautes der offiziellen Verhandlungsberichte zu ausgesuchten Themenbereichen in der Zeitleiste der Verhandlungsrunden bis zur sechsten Runde. Der Ausblick („Outlook“) nach sieben Verhandlungsrunden beschäftigt sich nicht nur mit dem aktuellen Stand des Dialogs zwischen Australien und der EU, sondern untersucht auch die unterschiedlichen Positionen zu den kontroversiellen Themen.

Da die Verhandlungen zum Zeitpunkt der Verfassung dieser Arbeit noch andauern, stehen nur eingeschränkte Details über den Verhandlungsfortschritt der jeweiligen Verhandlungsrunden in Form offizieller Verhandlungsberichte beider Parteien zur Verfügung. Diese werden jedoch durch zusätzliche Statements aus den Verhandlungsteams und akademischen Stimmen ergänzt, um ein klareres Bild vom Status Quo und den noch zu bewältigenden Herausforderungen zeichnen zu können.

Abschließend wird weitere, begleitende wissenschaftliche Arbeit zu den noch ausstehenden Verhandlungsrunden, der Fragestellung wie kontroversielle Positionen im Bereich GI, TSD oder Anlegerschutz gelöst werden und der anschließenden Implementierung dieses Abkommens empfohlen.