

European Yearbook of International Economic Law

Marc Bungenberg
Andrew Mitchell
Editors

| *Special Issue:*

**The Australia-European Union
Free Trade Agreement**



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Special Issue

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Marc Bungenberg • Andrew Mitchell
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The Australia-European Union Free Trade Agreement

 Springer

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We would also like to thank all the readers for deciding to purchase this book. We trust that you will find inspiring and thought-provoking input in the discussion of future commercial relations between Australia and the EU within this publication and we hope that you will truly enjoy reading it.

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Overview of the Australia–European Union Free Trade Agreement



Marc Bungenberg and Andrew Mitchell

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1 Introduction

Since 18 June 2018, ten rounds of negotiations for an Australia–European Union Free Trade Agreement (‘AEUFTA’) have been held in a constructive atmosphere, demonstrating a shared commitment between Australia, the European Union (‘EU’) and its Member states to moving forward with an ambitious and comprehensive agreement. After a lengthy and arduous process disturbed by the United Kingdom’s (‘UK’) withdrawal from the EU, the United States’ hesitations regarding the EU’s global strategy, and the arrival on global shores of the COVID-19 pandemic, the

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negotiations between Australia and the EU finally appear to be nearing completion. Despite challenging times, both parties have demonstrated a shared commitment to a positive trade agenda and the mutual benefits that come with boosting trade, investment, jobs, and economic growth.

This introductory chapter offers a survey of the political and regulatory landscape in which the AEUFTA and its negotiations are now situated. By presenting an overview of the differences and values shared between Australia and the EU, this chapter provides an appropriate background for the analysis in subsequent chapters of the challenges, achievements and missed opportunities that have attended the AEUFTA negotiation process. This background encompasses existing legal and political relations between the EU, its Member States and Australia, as well as each party's trade and investment endeavours with other countries. These relations are shaped by a diverse range of issues, including digital trade, services, intellectual property, trade remedies, investment screening, and dispute settlement mechanisms.

The work presented in this volume will shed light on what will likely be the future shape of commercial relations between Australia and the EU, and the future of those economies' trade and investment negotiations.

2 The European Union and Australian Political Dynamic

Perhaps the most persistent geopolitical issue now dominating Australia-EU relations is climate policy. Even after the EU has passed its much-anticipated Carbon Border Adjustment Mechanism, Australia continues its policy of “technology not taxes”¹ approach to lowering emissions—for which it has been criticised heavily both at home and abroad.² In 2021, the Australian Government dedicated \$1.2 billion under its national Budget to developing an Australian hydrogen industry. Roughly half is to fund hydrogen and carbon capture and storage hubs, while the other half is to be invested in establishing international partnerships and low emissions projects.³ In April, Australia opened its \$50 million Carbon Capture, Use and Storage Development Fund for more significant investment in carbon recycling, negative

¹Angus Taylor, ‘Keeping our export markets free, open and tax free’ (Media Release, 4 August 2021) <<https://www.minister.industry.gov.au/ministers/taylor/opinion-piece/keeping-our-export-markets-free-open-and-tax-free>>.

²Michael Mazengarb, ‘Time to stop flirting with “blue” hydrogen and go green, experts say’ (*Renew Economy*, 14 May 2021) <<https://reneweconomy.com.au/time-to-stop-flirting-with-blue-hydrogen-and-go-green-experts-say/>>.

³Commonwealth of Australia, Budget Paper No. 1: Budget Strategy and Outlook 2021–22 (11 May 2021) 28.

emissions/direct air capture, and carbon capture and storage technologies in collaboration with economies like Japan, Singapore, and Korea.⁴

But European countries also hope to benefit and partake in Australia’s hydrogen strategy. Australia has since entered into partnership agreements with Germany⁵ and the UK.⁶ Trade missions and diplomacy efforts continue between Australia and EU countries.⁷ Trade delegates from Australia and European countries, including Australia’s key partner France,⁸ continue to discuss and review opportunities in Australian renewable energy and hydrogen production and agriculture and their shared interests in secure and reliable critical mineral supply chains.⁹ All of this comes as the EU seeks to impose its climate policies on other countries like Australia, showing an unwillingness to engage in climate issues at the same level as its UNFCCC counterparts.

Similarly, the liberalisation of agriculture markets agreed to under the in-principle accord between Australia and the UK may act as a warning bell for the EU, which is committed to protecting its subsidised agricultural markets and maintaining its grip on its agriculture regulatory environment. Similar political tensions caused rifts between UK trade and agriculture departments.¹⁰ Meanwhile, the expansion of Australia’s agriculture sector, particularly in industries where it has long sought market access (e.g. beef, sugar, seafood, wheat and dairy),¹¹ is occurring as Australia’s emerging battery and critical minerals industries continue to create European export and investment opportunities.¹² As the EU (along with its UK

⁴Christian Porter and Angus Taylor, ‘Building Australia’s hydrogen industry through research collaborations’ (Joint Media Release, 6 July 2021) <<https://www.minister.industry.gov.au/ministers/porter/media-releases/building-australias-hydrogen-industry-through-research-collaborations>>.

⁵Angus Taylor, ‘Australia and Germany partner on hydrogen initiatives’ (Media Release, 13 June) <<https://www.minister.industry.gov.au/ministers/taylor/media-releases/australia-and-germany-partner-hydrogen-initiatives>>.

⁶Angus Taylor, ‘Australia-UK partnership to drive low emissions solutions’ (Media Release, 29 July 2021) <<https://www.minister.industry.gov.au/ministers/taylor/media-releases/australia-uk-partnership-drive-low-emissions-solutions>>.

⁷See e.g. Steven Marshall, ‘Bonjour, SA! Paris Trade Office to drive SA export growth in Europe’ (Media Release, 16 June 2021) <<https://www.premier.sa.gov.au/news/media-releases/news/bonjour,-sa!-paris-trade-office-to-drive-south-australian-export-growth-in-europe>>.

⁸Bröhmer (this volume).

⁹Dan Tehan, ‘France-Australia Joint Statement on visit to Paris’ (22 April 2021) <<https://www.trademinister.gov.au/minister/dan-tehan/media-release/france-australia-joint-statement-visit-paris>>.

¹⁰Peter Foster and George Parker, ‘UK government split over Australia trade deal’ (*Australian Financial Review*, 18 May 2021) <<https://www.afr.com/world/europe/uk-government-split-over-australia-trade-deal-20210518-p57stt>>.

¹¹See Department of Agriculture, Water and the Environment, ‘Agricultural Trade and Market Access Cooperation (ATMAC) Program’ (20 August 2021) <<https://www.agriculture.gov.au/market-access-trade/atmac>>.

¹²Australian Trade and Investment Commission, *Unlocking Australia-India Critical Minerals Potential* (Report, July 2021) 21.

and Asian competitors) continues to dominate the electric vehicle market,¹³ and Australia seeks to diversify its export markets beyond China, these developments bring Australia and Europe into even closer alignment in the international arena.¹⁴

These developments reveal a nuanced political and economic relationship between Australia and the EU. The United Kingdom's withdrawal from the EU has also created new dynamics in the realignment of international relations. Jürgen Bröhmer argues that relationships of varying intensity do not only exist between Australia and the UK, but also between Australia and the member states of the EU, and with the EU itself. On the back of discussion around intellectual property and data exclusivity protection for pharmaceuticals, this realignment and 'the significant EU reform agenda and other emerging global changes' were most recently cited by Australia's Therapeutic Goods Administration ('TGA') as important considerations in the reform of the TGA's International Engagement Strategy.¹⁵

As Bröhmer's chapter reveals, behind binding legal instruments between Australia and EU, there are both unique historical ties and emerging economic and political dynamics that will remain highly relevant to the development of the Australia-Europe relationship.

3 Dispute Resolution Procedures in the AEUFTA

Both Australia and the EU have spoken repeatedly of the rules-based international order's importance. In May 2021, the Australian Government said that the "multi-lateral rules-based trading system, with the World Trade Organization . . . at its core . . . is critical to Australia's economic recovery and prosperity".¹⁶ Both economies have not paid mere lip service to these ideals but continue to rely on dispute settlement procedures within the multilateral trade regime and under Free Trade Agreements ('FTAs'). The EU is the second biggest litigator at the WTO after the United States,¹⁷ and Australia has looked to the WTO on numerous occasions in

¹³McKinsey & Company 'McKinsey Electric Vehicle Index: Europe cushions a global plunge in EV sales' (17 July 2020) <<https://www.mckinsey.com/industries/automotive-and-assembly/our-insights/mckinsey-electric-vehicle-index-europe-cushions-a-global-plunge-in-ev-sales>>.

¹⁴Australia Government, Australian Government Response to the Joint Standing Committee on Trade and Investment Growth Report: "Pivot: Diversifying Australia's Trade and Investment Profile" (July 2021) 2–3.

¹⁵Therapeutic Goods Administration, *International Engagement Strategy 2021-2025* (26 July 2021) 4. The TGA states that its 'alignment with European regulations for medical devices, whilst taking into account the significant reforms being implemented by the European Commission, is . . . informed by identifying the most appropriate regulatory settings for Australia': 5.

¹⁶'Supporting our region, advancing our interests and investing in trade and tourism to secure Australia's recovery' (Joint Media Release, 11 May 2021) <<https://www.foreignminister.gov.au/minister/marise-payne/media-release/supporting-our-region-advancing-our-interests-and-investing-trade-and-tourism-secure-australias-recovery>>.

¹⁷World Trade Organization, 'Disputes by Member' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm#eec>.

recent months. In 2021, a panel was established to hear Australia’s complaints over Chinese tariffs on Australian barley.¹⁸ Meanwhile, Australia requested bilateral consultations with China over its anti-dumping duties on Australian wine,¹⁹ while China requested consultations with Australia over its duties on Chinese deep drawn stainless steel sinks, windmill towers and railway wheels.²⁰

Therefore, securing a means of ensuring compliance with treaty rules remains of utmost importance to the EU and Australia in both defending and litigating claims.²¹ The Department of Foreign Affairs and Trade has stated that Australia and the EU “have common approaches to many [dispute resolution] issues, particularly in relation to enhanced transparency of proceedings” and that not all obligations will be subject to dispute mechanisms.²²

The EU Proposed Text and the report on the negotiations released by the EU and Australia indicate that the negotiations on state-to-state dispute settlement clauses may have reached the final stages, with potentially only minor issues to be resolved.²³ State-to-state dispute settlement procedures may need to be carefully negotiated with a view to preventing procedural hurdles in future proceedings.²⁴ Angshuman Hazarika’s chapter identifies potential procedural hurdles that remain within the AEUFTA negotiations and provides practical suggestions for streamlining the treaty so that these barriers can be addressed.

4 Australia and Europe in the Bilateral Arena

As Australia continues its negotiations with the EU, its trade representatives throw themselves at the negotiating tables of other existing and potential trade partners. The crisscrossing of bilateral ties between each AEUFTA party and the rest of the

¹⁸China—Anti-Dumping and Countervailing Duty Measures on Barley from Australia—Constitution of the Panel established at the request of Australia—Note by the Secretariat, WTO Doc WT/DS598/6 (6 September 2021).

¹⁹China—Anti-Dumping and Countervailing Duty Measures on Wine from Australia, Request for Consultations by Australia, WTO Doc WT/DS602/1, G/L/1390 G/ADP/D137/1, G/SCM/D132/1 (28 June 2021).

²⁰Australia—Anti-Dumping and Countervailing Duty Measures on Certain Products from China, Request for Consultations by China, WTO Doc WT/DS603/1, G/L/1391 G/ADP/D138/1, G/SCM/D133/1 (29 June 2021).

²¹European Parliament, ‘Motion for a European Parliament Resolution: towards a WTO-compatible EU carbon border adjustment mechanism’ (2020/2043(INI)) A9-0019/2021 (15 February 2021).

²²Department of Foreign Affairs and Trade, ‘Australia – EU Free Trade Agreement Summary of negotiating aims and approach’ <<https://www.dfat.gov.au/sites/default/files/a-eufta-summary-of-negotiating-aims-and-approach.pdf>>.

²³Hazarika (this volume).

²⁴Hazarika (this volume).

world's key players means that Australia and Europe must keep track of each other as they seek to connect within the “spaghetti bowl” of international economic agreements.²⁵

Notwithstanding that the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (‘CPTPP’) membership already boasts a moderately long list of treaty parties, Australia seems poised to accept others to the party as well, with its Joint Standing Committee on Foreign Affairs, Defence and Trade undertaking an inquiry into whether CPTPP membership should be expanded to countries like the UK.²⁶ As Australia’s relationship with China continues on a downward path, Australia has been beckoned by Taiwan to effectively abandon its official stance on China’s ‘one China policy’ by renewing negotiations for a trade pact.²⁷ Meanwhile, the EU continues to negotiate with countries in the global south, including China, Indonesia, New Zealand, and the Philippines.²⁸

Michael Hahn examines both the legal and political framework of bilateral trade agreements.²⁹ His chapter reveals what the advent of FTAs means for the fragmentation of regulation about global issues such as digital trade. Hahn notes that preferential trade agreements would be incompatible with membership in the WTO, were it not for Article XXIV GATT and its sister provision in the GATS. Hahn shows—through his thorough and systematic analysis of these treaty provisions—that, despite the abrupt and radical change concerning the compatibility of the multilateral trading system with FTAs, “the limitations established by Article XXIV GATT are more pronounced than is often appreciated.”³⁰ However, whatever uncertain legal basis underpins the AEUFTA and the EU’s negotiations with New Zealand, these agreements will allow their respective signatories to show the global North that they share a unique and close economic partnership.

²⁵ Bhagwati J (1998) A stream of windows: unsettling reflections on trade, immigration, and democracy. The MIT Press, pp 290–291.

²⁶ Parliament of Australia, ‘Terms of Reference, Inquiry into expanding membership of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership’ <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/CPTPPMembership/Terms_of_Reference>. See also Dan Tehan ‘Japan-Australia Ministerial Economic Dialogue’ (Media Release, 15 July 2021) <<https://www.trademinister.gov.au/minister/dantehan/media-release/japan-australia-ministerial-economic-dialogue>>.

²⁷ Joyce Cheng, Dong Xing and Erin Handley, ‘Taiwan is seeking free trade deals with the US and Australia as China’s Xi Jinping vows ‘peaceful reunification’ (ABC News, 7 July 2021) <<https://www.abc.net.au/news/2021-07-07/taiwan-us-free-trade-agreement-xi-jinping-speech-australia/100269014>>; Angelica Oung, ‘Taiwan, Australia discuss hydrogen technology, trade’ (*Taipei Times*, 30 July 2021) <<https://www.taipetimes.com/News/biz/archives/2021/07/30/2003761691>>.

²⁸ European Commission, ‘Negotiations and agreements’ (22 January 2021) <https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_being-negotiated>.

²⁹ Hahn (this volume).

³⁰ Hahn (this volume).

5 Investment and Market Access in the AEUFTA

Both Australia and the EU have expressed their desire to increase investment market access liberalisation.³¹ However, a clear view of Australia’s approach to investment is perhaps impaired by its soured relationship with China. On the one hand, Australia has demonstrated—through its FTA negotiations with the UK—its partiality toward investment screening cap increases. The result is less UK firms becoming subject to the Foreign Investment Review Board’s processes. On the other hand, the federal Parliament in 2020 enacted the Foreign Arrangements Scheme, a legislative framework giving the Commonwealth effective veto power over State investment MOUs with foreign nations.³² The Government has already cancelled a raft of memoranda between State governments and Chinese firms, including under China’s Belt and Road Initiative (‘BRI’).³³ The BRI is intended to open trade routes between China and other nations through global infrastructure projects. These moves—one made almost exclusively in the political sphere and the other in the context of trade agreement brokerage—reveal Australia’s careful and multifaceted approach to foreign investment liberalisation.

At the same time, the EU has released a draft text of its EU-China Investment Agreement following 8 years of negotiation and an eventual announcement of the in-principle agreement in December 2020.³⁴ The agreement is heavily liberalisation-focused and also includes provisions on subsidies, state-owned enterprises and technology transfer. It shows the EU’s keen interest in expanding the market access of European investors abroad,³⁵ notwithstanding the political barriers potentially standing in the way of its ratification.³⁶

Jarrod Hepburn examines investment screencaps and investment market access as two potential entryways, or barriers, to greater two-way Australia-European investment.³⁷ Hepburn provides an overview of the general purpose of the envisaged

³¹ Australian Government, Department of Foreign Affairs and Trade (2018) Australia-European Union Free Trade Agreement: Objectives <www.dfat.gov.au/trade/agreements/negotiations/aeufta/Pages/australia-european-union-fta-objectives>; Council of the European Union (2018) Negotiating Directives for a Free Trade Agreement with Australia <www.consilium.europa.eu/media/35794/st07663-ad01dc01-en18.pdf>.

³² *Australia’s Foreign Relations (State and Territory Arrangements) Act 2020* (Cth).

³³ Ben Westcott, ‘Australian government tears up Victoria’s Belt and Road agreement with China, angering Beijing’ (*CNN Business*, 22 April 2021) <<https://edition.cnn.com/2021/04/22/business/australia-china-belt-and-road-initiative-intl-hnk/index.html>>.

³⁴ European Commission, ‘EU-China investment negotiations’ (22 January 2021) <https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159343.pdf>.

³⁵ Gisela Grieger, ‘EU-China Comprehensive Agreement on Investment: Levelling the playing field with China’ (European Parliament, Briefing, International Agreements in Progress, March 2021).

³⁶ Jakob Hanke Vela, Merkel: China must make ‘significant progress’ on forced labor before EU ratifies trade deal (*Politico*, 13 June 2021) <<https://www.politico.eu/article/germany-chancellor-angela-merkel-eu-china-trade-investment-deal-labor-rights/>>.

³⁷ Hepburn (this volume).

provisions on investment screening and investment market access in the AEUFTA and an assessment of the particular value of these provisions in the Australia-EU relationship. Although the AEUFTA could potentially address both issues, offering enhanced market access in particular sectors and/or offering higher screening thresholds, evidence remains unclear on whether higher screening thresholds play a significant role in encouraging more investment. In light of current economic and political uncertainties, AEUFTA negotiators may also be tempted to include broad negative list reservations to their market access commitments, preserving their flexibility to meet future policy challenges. Both Australia and Europe have recently demonstrated such a predisposition toward greater controls over foreign investment.

6 Digital Trade

With the multilateral regime lagging behind,³⁸ digital trade is now dominating the bilateral and regional trade agreement environment, with many countries opting to go beyond their commitments in existing agreements, either by entering into new digital trade treaties or reforming old ones to adapt them to the new data economy. Australia's run of digital-focused agreements over the past few years, particularly with Asian countries, culminated in the Australia-Singapore Digital Economy Agreement (DEA), an amendment of the existing Singapore–Australia Free Trade Agreement.³⁹ A second version of the Thailand–Australia Free Trade Agreement is likely to feature a similar addition.⁴⁰ But now Australia is discussing the potential for regional digital trade agreements with the likes of the United States,⁴¹ a key forebearer of the CPTPP's e-commerce chapter, an agreement from which the United States later withdrew. Australia's undertakings in the CPTPP reveal that Australia is open to clear prohibitions on data localization, provided there are exceptions to match.⁴² The Singapore-Australia DEA shows Australia is moving forward with personal information protection, protections for cryptography, source

³⁸ However, see World Trade Organization, 'Co-convenors of e-commerce negotiations: We are heartened by progress made so far' (*World Trade Organization*, 16 March 2021) <https://www.wto.org/english/news_e/news21_e/ecom_16mar21_e.htm> and World Trade Organization, 'Further progress cited in e-commerce negotiations' (*World Trade Organization*, 22 July 2021) <https://www.wto.org/english/news_e/news21_e/jsec_22jul21_e.htm>.

³⁹ *Singapore – Australia Free Trade Agreement* [2003] ATS 16 (signed 17 February 2003, entered into force 28 July 2003) as amended by *Australia – Singapore Digital Economy Agreement* [2020] ATS 13 (signed 6 August 2020, entered into force 8 December 2020).

⁴⁰ Phusadee Arunmas, 'Thailand, Australia mull economic deal' (*Bangkok Post*, 6 August 2021) <<https://www.bangkokpost.com/business/2160723/thailand-australia-mull-economic-deal>>.

⁴¹ James Riley, 'Australia-US in talks on digital trade pact' (*InnovationAus*, 7 June 2021) <<https://www.innovationaus.com/australia-us-in-talks-on-digital-trade-pact/>>.

⁴² *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (signed 8 March 2018) ('CPTPP') incorporating the *Trans-Pacific Partnership Agreement* (signed 4 February 2016) arts 14.11, 14.13.

code and open government information, and soft commitments on artificial intelligence, amongst other things. But things like the EU’s data protection regimes are likely to raise additional sticking points.

Neha Mishra assesses the significance of the Digital Trade chapter of the AEUFTA and focuses on the disciplines necessary to boost digital trade.⁴³ In the author’s view, the EU and Australia are likely to agree upon conventional digital trade disciplines, as well as provisions on online consumer trust and spam, and more contemporary disciplines on source code disclosure and data localisation. Although these disciplines can undoubtedly contribute to boosting digital trade between Australia and the EU, data flows and data protection will remain more contentious in the ongoing negotiations, given the differences in the negotiating parties’ data protection laws, and “the EU’s exceptionally defensive approach to data protection.”⁴⁴

Mishra emphasises that the negotiations provide an opportunity for adopting more profound disciplines on digital trade facilitation that would have significant implications for start-ups and regulatory cooperation in more insipient areas such as artificial intelligence and open government data.

7 The Demise of Investment Protection?

Australia has a long and inconsistent history with investment protection. The Australia–United States FTA and the Australia–Malaysia FTA both lack an investor-state dispute settlement (‘ISDS’) mechanism,⁴⁵ the latter omission reflecting Australia’s former ISDS policy encapsulated within the former Labor Prime Minister Julia Gillard’s statement that:

the Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses . . . In the past, Australian Governments have sought the inclusion of [ISDS] procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice . . .⁴⁶

Australia’s approach has since been adjusted. Now the national Liberal government, in power since 2013, takes a case-by-case approach.⁴⁷ That approach is demonstrated in Australia’s in-principle agreement with the UK, who shares

⁴³ Mishra ([this volume](#)).

⁴⁴ Mishra ([this volume](#)).

⁴⁵ *Australia–United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) (‘AUSFTA’); *Malaysia–Australia Free Trade Agreement*, signed 22 May 2012 (entered into force 1 January 2013) (‘MAFTA’).

⁴⁶ Department of Foreign Affairs and Trade, Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity (April 2011) 14.

⁴⁷ Julie Bishop, ‘Free Trade Focus’ (28 March 2013).

Australia's approach to ISDS negotiation.⁴⁸ The agreement outline reveals that the final version of the trade treaty will not include provisions for ISDS.⁴⁹

The European story is perhaps more unique and linear. The EU was the first to propose a revised system of investment protection that centres around strengthened transparency requirements and a more permanent investment court. It first did so when it attempted to negotiate for such a system in the Transatlantic Trade and Investment Partnership.⁵⁰ The EU's reforms were later incorporated into the EU–Canada Comprehensive Economic and Trade Agreement ('CETA') and other agreements.⁵¹ It involves strengthened transparency requirements and a more permanent investment court, including an appeals mechanism and the use of impartial tribunal members.⁵²

The AEUFTA seems to go further than just excluding ISDS by resorting exclusively to state-to-state provisions. Instead, it takes a liberalisation-focused approach to investment flows. Esmé Shirlow introduces the contours of the bilateral investment relationship between the EU and Australia in this context, to situate the FTA's relevance to the investment flows between these parties.⁵³ She examines why the FTA adopts an exclusively liberalisation-focused approach to address whether the exclusion of investment protection and ISDS mechanism from the scope of the FTA is a strategic omission on the part of one or both parties.⁵⁴ She considers whether such omission is a missed opportunity, and in particular what focus the investment-related provisions of the treaty will adopt and what impact the FTA is likely to have vis-à-vis investors and existing investment treaties.

⁴⁸UK Government, 'The United Kingdom's exit from and new partnership with the European Union' (Policy Paper, 2 February 2017) 35.

⁴⁹Department of Foreign Affairs and Trade, 'Australia-UK FTA negotiations: agreement in principle' (16 June 2021) <<https://www.dfat.gov.au/trade/agreements/negotiations/aukfta/australia-uk-fta-negotiations-agreement-principle#dispute>>.

⁵⁰European Commission, Concept Paper: Investment in TTIP and Beyond—The Path for Reform (May 2015) 4.

⁵¹See Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Canada-European Union, OJ L 11/23 (entered into force provisionally on 21 September 2017) Chapter 8, Section F ('CETA'); *Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam* [2020] OJ L 11/23 (entered into force 1 August 2020) Chapter 3, Section A and Chapter 8.

⁵²Dickson-Smith K (2016) Does the European Union have new clothes? Understanding the EU's new investment treaty model. *J World Invest Trade* 17(5):773, 799–810.

⁵³Shirlow ([this volume](#)).

⁵⁴Shirlow ([this volume](#)).

8 Services

Given that services trade represents a third of Australia’s two-way trade relationship with the EU,⁵⁵ it perhaps comes as no surprise that trade in services has emerged as one of the most discussed areas in the AEUFTA negotiations. However, at the time of publication of this book, the outcomes of the negotiations for this area remain unknown. Australia’s recent in-principle agreement with the UK may foreshadow the deal struck between Australia and the EU regarding professional and education services liberalization.⁵⁶ Charlotte Sieber-Gasser offers unique insights into trade in services within the context of the AEUFTA, from the conflicting standpoints of both parties.⁵⁷ Sieber-Gasser explains that while we can expect substantial liberalisation in professional and education services, along with temporary movement of persons, the currently proposed regulatory structure of the AEUFTA service chapter otherwise suggests limited regulatory innovation. Ultimately, the chapter itself does not aim to deliver substantial and particularly progressive rules with regard to services trade liberalisation. However, as individual schedules of commitments in services trade liberalisation in AEUFTA are expected to be identical to the offers submitted by both sides in the 2016 Trade in Services Agreement (‘TiSA’) negotiations, Sieber-Gasser expects the services chapter to have a role in re-enforcing each parties’ commitment to engage at the plurilateral level in modernising and deepening international trade in services regulation.

9 Subsidies

The issue of subsidies has perhaps been thrown into greater contention than ever before by the COVID-19 pandemic, with many governments resorting to grants and subsidies to boost domestic industries. China imposed anti-dumping duties on Australian barley out of fears that Australian grain subsidies risk undercutting local Chinese industry.⁵⁸ Within the AEUFTA context, Australian potato growers in 2020 attempted to lobby the government to launch anti-dumping measures against the EU over fears the European Commission’s subsidies on European potatoes as

⁵⁵Department of Foreign Affairs and Trade, ‘Australia – EU Free Trade Agreement Summary of negotiating aims and approach’ <<https://www.dfat.gov.au/sites/default/files/a-eufta-summary-of-negotiating-aims-and-approach.pdf>>.

⁵⁶Department of Foreign Affairs and Trade, ‘Australia-UK FTA negotiations: agreement in principle’ (16 June 2021) <<https://www.dfat.gov.au/trade/agreements/negotiations/aukfta/australia-uk-fta-negotiations-agreement-principle#dispute>>.

⁵⁷Sieber-Gasser (this volume).

⁵⁸*China—Anti-Dumping and Countervailing Duty Measures on Barley from Australia—Request for Consultations by Australia*, WTO Doc WT/DS598/1, G/L/1382 G/ADP/D135/1, G/SCM/D130/1 (21 December 2020).

part of its COVID-19 relief package would flood the Australia market with cheap French fries.⁵⁹

The pandemic has thrown into doubt the circumstances in which governments can directly subsidise domestic industries at risk of being materially affected or otherwise apply emergency safeguard tariffs to particular goods. Philipp Reinhold examines the regulation of subsidies within the context of European trade policy and considers what can we expect from the AEUFTA. Although the subsidy rules are only one element of comprehensive negotiations and are not at the forefront of EU-Australia trade, they will continue to form an important part of international trade rules in the future, and thus both countries should not pass over the opportunity to engage in the further development of international subsidy law.⁶⁰ Rheinhold notes that, on the one hand, subsidy rules can serve as a template for further agreements and as a political signal with regard to multilateral reforms of WTO subsidy law. On the other hand, Australia can use the opportunity to negotiate provisions that make it easier for Australian companies to deal with a new EU subsidy regime.⁶¹

10 Competition

Even though competition is not a classic trade-related area, it is becoming increasingly popular and is taken into account in almost all modern trade agreements. Competition aspects play a crucial role for companies worldwide and the distortion of competition does not only affect the trade flows between countries but also the national welfare. Although there are no international rules against the restriction of competition, numerous countries try to regulate cooperation and coordination in the field of competition regulation either by including rules in FTAs or in so called dedicated competition agreements. Mareike Fröhlich examines future approaches in the AUSFTA and points out possible regulatory gaps.⁶² She draws a comparison with similar agreements of the EU and Australia, such as with the United Kingdom or Canada, which deal with cooperation possibilities in the international fight against restraint of competition and international merger control, respectively. This contribution concludes, that a new starting point could be the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities, which was concluded in 2020 at the executive level and to which Canada, the United Kingdom and the USA have also signed, in addition to Australia.

⁵⁹Brad Thompson, 'Potato growers spitting chips over European dumping threat' (*Australian Financial Review*, 21 May 2021) <<https://www.afr.com/companies/agriculture/potato-growers-spitting-chips-over-european-dumping-threat-20200521-p54v5z>>.

⁶⁰Reinhold ([this volume](#)).

⁶¹Reinhold ([this volume](#)).

⁶²Fröhlich ([this volume](#)).

11 Conclusion

Together, these insightful and thought-provoking chapters contribute to the passionate discussion on the future of commercial relations between the European Union and Australia. This publication makes not only a relevant academic contribution, but also supports the progress of the ongoing AEUFTA negotiations. At the time of publication, negotiation outcomes for some areas, like trade services, are unknown. Other areas, about which we can make firmer conclusions, may continue to be reconsidered or reshaped before an agreement is finalised.

However, the negotiation process's uncertainty is perhaps a reflection of the uncertain legal, political and economic global atmosphere to which the treaty parties themselves continue to contribute.

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Existing Legal and Political Relations Between the EU, Its Member States, and Australia



Jürgen Bröhmer

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Abstract The relationship between Australia, the European Union and member states of the European Union have a long history based on shared values, democratic political systems, and a strong foundation in the rule of law. Historically, the ties to the United Kingdom have been and remain special, not least because Australia was and, albeit to a much lesser degree, can still be understood as a (now) fully sovereign partial reflection of the UK in the southern hemisphere, which whom it shares a language, a legal history based on the common law, a colonial past and, not least, a head of state. But there are close ties with other countries as well. France is a power with substantial interests in the greater area around Australia. France is also a close

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strategic security partner. The relationship with the EU has been problematic in the past because of profound differences of opinion concerning agriculture. UK membership in the EU initially jeopardized Australia's trade relationship with the UK. Brexit is seen to create new opportunities albeit at a much smaller scale than the concerns raised by the UK's joining the EEC/EU. Relative to Australia's primary natural resources of iron ore and coal and relative to the growth of China as a market for Australia's natural resources, including agricultural products, the UK, and the EU, play a significantly smaller role today. This paper attempts to present an overview of the various bi- and multilateral relationships that are the foundation for the envisaged AU-EU FTA.

1 Introduction

The United Kingdom's exit from the European Union¹ has created new dynamics in the realignment of international relations. After 40 years of membership in the EU with its exclusive jurisdiction over external trade (in goods), the UK must negotiate trade agreements with other partners to replace what was previously provided by the EU. Conversely, states outside the EU must now reassess their relationships both to the UK (and, to a lesser degree, to the EU). They cannot rely exclusively on dealing with the EU to cover any special (trade) interest they may have regarding the UK. Given the historically founded special relationship between Australia and the UK, it is not surprising that the Brexit process has been followed closely in Australia. The 2017 Foreign Policy White Paper of Australia refers to the United Kingdom as one of Australia's most important partners and stipulates that Brexit will "change the framework of our engagement."²

Relationships of varying intensity do not only exist between Australia and the UK; they also exist between Australia and the member states of the EU and with the EU itself. This paper attempts to provide an overview of the existing framework of relations between the EU, its member states, and Australia. Whereas the emphasis is on legal instruments, the legal perspective is not exclusive as there are unique historical ties that have remained impactful in the development of these relationships. Australia's ongoing negotiations concerning FTAs with both the UK and the EU will also be briefly presented.

¹Henceforth referred to as UK and EU.

²Australian Government, 2017 Foreign Policy White Paper, p. 80, <https://www.dfat.gov.au/publications/minisite/2017-foreign-policy-white-paper/fpwhitepaper/pdf/2017-foreign-policy-white-paper.pdf> (last accessed 9 September 2021).