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# **Preparatory Approaches to Overcoming Regulatory NTBs in an EU–Australia FTA**

Andrew Charles Willcocks and Anne McNaughton

## **Abstract**

The issue of non-tariff barriers (NTBs) has arisen predominantly in the context of multilateral trade negotiations. Such barriers have often been revealed only after the implementation of liberalising trade obligations. As a result, they have traditionally been dealt with using approaches that rely largely on the benefit of hindsight. Such approaches involve assessment, surveillance and dispute resolution procedures. In recent times, however, the multilateral trade negotiation process—the Doha Round—has stalled. In response to this, many states and trading blocs have been negotiating bilateral and regional free-trade agreements (FTAs) (or preferential trade agreements, PTAs). This development has given rise to opportunities to anticipate NTBs by virtue of the greater level of domestic regulatory control resulting from the domestic enactment of trade treaties reciprocally incorporated into domestic law. The more frequently states negotiate similar treaty provisions, the greater the likelihood that they will be able to identify areas in which NTBs may arise, and the greater the prospect that they may be able to establish cooperative processes between domestic regulatory agencies in order to handle and possibly even remove these NTBs. There is now greater potential than in the past for introducing procedures for dealing with NTBs during the treaty negotiation phase rather than including processes in the treaty itself for handling them, on an ad hoc basis, if and when they emerge. This paper describes this development as a notional shift away from reactive procedures towards proactive ones. Australia and the EU intend to negotiate an FTA in the next few years. This paper argues that the approach to handling and possibly eradicating NTBs in such an agreement need not adopt a traditional reactive approach. Rather, it could take a more proactive approach, moving to anticipatory settings to better remove and prevent NTBs. An EU–Australia FTA may be a prime opportunity for such a shift to occur in Australia’s approach to resolving NTBs in FTAs.

## Introduction

The recent multilateral trade negotiations—the Doha Round—have run aground in part because the contracting parties are unable to agree upon a means of identifying and dealing with non-tariff barriers to trade (NTBs). A central question is how to decide on the appropriate approach to overcome this impasse.

Preparatory documents for an EU-Canada FTA suggest that the removal of NTBs under future FTAs could result in substantial improvements to gross domestic product (GDP); but they provide little detail on the regulatory innovations that might support such visions.<sup>1</sup> Some suggest that international understandings such as the EU–Australia Framework Partnership indicate future regulatory convergence, despite prevailing domestic attitudes towards international obligations suggesting that this is unlikely.<sup>2</sup> Others take the view that NTBs are an acceptable by-product of international trade, to be managed through case-by-case arbitration and transnational litigation, with systemic compliance being achieved through judicial pressure.<sup>3</sup> The World Trade Organization (WTO) also deals with NTBs in a reactive rather than proactive manner: members are required to notify the WTO of their non-tariff measures (NTMs) which the WTO assesses for compliance with allowable WTO measures.<sup>4</sup> This paper argues that successfully reducing NTBs in the context of FTAs, in practice, is best achieved if domestic regulatory agencies cooperate in identifying potential NTBs as part of FTA negotiations, rather than after they are finalised.

## Approaches to eradicating regulatory NTBs in FTAs

Measures identified as NTBs are, most often, those that serve a predominantly domestic policy imperative but which are incidentally and in effect a barrier to cross-border trade. Domestic imperatives could relate to environmental protection or food safety for example. Traditionally,

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<sup>1</sup> Cf claims that NTB removal will result in 25 per cent of the total increase to GDP gained under a future EU–Canada FTA: European Commission and Government of Canada, *Assessing the Costs and Benefits of a Closer EU–Canada Economic Partnership* (A report in response to a request formulated by leaders at the 2007 EU–Canada Summit, 2008), 167 at para. 24.

<sup>2</sup> European Commission and Commonwealth of Australia, *European Union–Australia Partnership Framework* (European Commission, Paris, signed 29 October 2008). Karen Hussey and Simon Lightfoot, "A New Era for EU–Australia Relations? Sustainable Development and the Challenge of Climate Change as Litmus Test," *The Round Table* 99, no. 410 (2010).

<sup>3</sup> Gary N. Horlick and Hanna Boeckmann, *What to Do before You Call the WTO: The Prelitigation Assessment of Trade Barriers* (Geneva, Switzerland: International Centre for Trade and Sustainable Development Programme on International Trade Law, Issue Paper No. 13, 2013); Iain Sandford and Maree TanKiang, "Resolving and Defusing Trade Disputes: The Potential for Creativity in the Australia–European Union Relationship," *Australian Journal of International Affairs* 65, no. 4 (2011).

<sup>4</sup> Pascal Lamy, *Monitoring and Surveillance: The Rising Agenda of the WTO* (World Trade Organization, Speech by the Director-General of the WTO to the Georgetown University Law Center Washington, DC, 22 October 2007).

efforts to reduce or remove NTBs have been made after the relevant FTA has entered into force. We suggest that a more effective way of dealing with this issue is to include the relevant domestic regulatory agencies (and other stakeholders where appropriate) in consultations during the negotiating phase of the treaties. This is desirable for two reasons. First, at this stage, such agencies can provide insights into how effectively the treaty obligations can be carried out in practice. This makes it (theoretically at least) easier to avoid situations that may give rise to NTBs rather than having to respond to them once the treaty text has been finalised. Second, such discussions ought to foster increased trust and confidence between the regulatory agencies of the respective contracting parties. This discussion is particularly timely given that Australia and the EU intend to begin discussions on negotiating an EU–Australia FTA. This will be dealt with in further detail below. Before moving to that discussion, however, it is useful to canvass a range of preliminary issues. These include clarifying definitions, particularly where the WTO has established terminology; identifying necessary changes that may be needed in Australia’s approach domestically to such negotiations; and examining briefly NTB issues that arise from aggregate FTAs. Discussion will then turn to the current Australian domestic position on the incorporation of international treaty obligations, as this has direct ramifications for the proposition of ex-ante management of NTBs in a potential EU–Australia FTA.

### **FTAs and PTAs; NTBs and NTMs—Abbreviations and definitions**

The WTO uses the abbreviation ‘PTA’ to refer to ‘*preferential trade arrangements*’, which are *unilateral* trade preferences.<sup>5</sup> It uses the term ‘regional trade agreement’ (RTA) when referring to reciprocal bilateral and regional PTAs. However, the word ‘regional’ suggests that more than one state is involved in the trade agreement, creating dissonance where ‘RTA’ is used to describe a bilateral trade agreement. Such *arrangements* are classified as non-reciprocal preferential schemes and distinguished from ‘regional trade agreements’.<sup>6</sup> However, in its World Trade Report of 2011, the WTO eschewed its preferred abbreviation ‘RTA’ and used ‘PTA’ in the broader context in which it is more usually encountered: to refer to *reciprocal* bilateral and multilateral regional preferential trade agreements. Trade agreements concluded in recent times such as the Canada–EU Free Trade Agreement and the Australia–US Free Trade Agreement are, strictly speaking, preferential trade agreements, not ‘free’ trade agreements. However, given that free trade agreement (FTA) is the generic term used for such agreements this paper also uses

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<sup>5</sup> WTO, *Database of Preferential Trade Arrangements – About* (WTO <<http://ptadb.wto.org/?lang=1>>, accessed 26 October 2013).

<sup>6</sup> [https://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](https://www.wto.org/english/tratop_e/region_e/region_e.htm).

‘FTA’ to refer to reciprocal bilateral and multilateral regional preferential trade agreements.

It is important to clarify the definition of ‘non-tariff barrier’ (NTB) used in this paper, because the scope of the definition has implications for the success of arguments favouring a shift in domestic regulatory approaches from ‘ex-post’ to ‘ex-ante’ settings<sup>7</sup>. For the purposes of the arguments in this paper, the phrase ‘non-tariff barrier’ (NTB) has the same meaning as that used in the Organisation for Economic Co-operation and Development’s (OECD) *OECD Economic Outlook: Sources and Methods*: ‘all barriers to trade that are not tariffs’.<sup>8</sup> The WTO uses the term ‘non-tariff measures’ (NTM). This is defined by the United Nations Conference on Trade and Development (UNCTAD) *Classification of Non-tariff Measures, February 2012 Version* as: “[p]olicy measures other than ordinary customs tariffs that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both”.<sup>9</sup> The inference is that NTMs will not be NTBs if they are not discriminatory and are consistent with internationally allowable exceptions (for example, allowable sanitary and phytosanitary, or technical barriers to trade measures).<sup>10</sup> UNCTAD’s definition is therefore a more neutral term using ‘measure’ rather than ‘barrier’. Its Trade Analysis and Information System (TRAINS) has been comprehensively tracking and classifying types of NTMs since 1994. However, this database has been criticised for being “... incomplete across countries and products ... [and] the underlying typology of measures only partially captures today’s complex NTB situation”.<sup>11</sup>

UNCTAD’s approach to classifying NTMs is similar to the method used by the WTO, described with regard to PTAs in the 2012 *World Trade Report* and discussed in the recent work of the WTO’s Robert Staiger.<sup>12</sup> He describes NTMs as ‘includ[ing] any policy measures other than tariffs that can impact trade flows’, and further divides NTMs into three separate categories: those imposed on imports (including import licensing, customs procedures and administrative

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<sup>7</sup> ‘ex-ante’ and ‘ex-post’ are Latin for ‘beforehand’ and ‘after the fact’. They are used frequently in economics including in trade discourse. The WTO glossary defines them as ‘terms used to refer to before and after a (trade) measure is applied’: [https://www.wto.org/english/thewto\\_e/glossary\\_e/ex\\_ante\\_ex\\_post\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/ex_ante_ex_post_e.htm).

<sup>8</sup> OECD Glossary of Statistical Terms: <https://stats.oecd.org/glossary/detail.asp?ID=1837> [accessed 3 December 2015].

<sup>9</sup> UNCTAD, *Classification of Non-Tariff Measures – February 2012 Version* (United Nations, 2013).

<sup>10</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (‘Sanitary and Phytosanitary Measures [SPS]’); *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (‘Agreement on Technical Barriers to Trade [TBT]’).

<sup>11</sup> OECD, *Looking Beyond Tariffs, the Role of Non-Tariff Barriers in World Trade: OECD Trade Policy Studies* (France: OECD Trade Policy Studies, 2005), 20.

<sup>12</sup> WTO, *World Trade Report 2012. Looking Beyond International Co-operation on Tariffs: NTMs and Services Regulation in the XXIst Century* (Geneva, Switzerland: World Trade Organization, 2012), 51; Robert Staiger, *Non-Tariff Measures and the WTO* (Economic Research and Statistics Division Working Paper 2012–01, WTO, 2012).

fees), those imposed on exports (including export subsidies, export quotas and export prohibitions) and behind-the-border measures imposed domestically (including health/ technical/ product/ labour/ environmental standards and internal taxes or charges).<sup>13</sup>

This paper argues that it is possible to avoid a context in which such unintended barriers emerge when establishing a PTA. This can be done if contracting parties anticipate and seek to avoid potential NTBs during the course of negotiating the PTA (i.e. ex-ante).

### **Change in approach to NTB solutions moving from deduction to induction**

As economic integration continues, whether on a multilateral, plurilateral or bilateral basis, NTBs give way to NTMs. The latter, despite potential cross-border trade inhibiting effects, may well be legitimate measures on other domestic policy grounds. This dilemma can be addressed if the focus of attention shifts from a deductive (ex-post) assessment of NTBs already in effect (as per the UNCTAD and WTO approach), to examining, during negotiations, where NTBs may arise.

This paper argues that states negotiating FTAs should include consultations between appropriate domestic regulatory agencies that would be responsible for the implementation of the FTA behind borders. Discussions between the relevant regulatory agencies of the respective negotiating states could then focus on reducing and managing any regulatory friction in a way that is trade-enhancing rather than trade-inhibiting.

### **Individual and aggregate FTAs: the spaghetti bowl, NTB and induction**

Some commentators have likened the complexities of PTAs to that of a spaghetti bowl—Jagdish Bhagwati pointed out in his 1996 commentary *Preferential Trade Agreements: the wrong road* that PTAs are ultimately discriminatory, and in aggregate create a web of barriers to trade. He commented:

FTAs are two-faced: they ensure free trade for members and (relative) protection against non-members ... and yet today's politicians imagine themselves to be statesmen endorsing free trade when they embrace these inherently discriminatory PTAs. [A]s PTAs proliferate, the main problem that arises is the accompanying proliferation of discrimination in market access and a

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<sup>13</sup> Ibid., 2.



whole maze of trade duties and barriers that vary among PTAs. I have called this outcome the “spaghetti bowl” phenomenon.<sup>14</sup>

Bhagwati’s early predictions relating to aggregate difficulties ring true in relation to current difficulties with the Doha multilateral, and the explosion of PTAs in its place:

[I would] permit ... PTAs in two cases. First, I would permit a PTA that is building a common market with full factor mobility, a common external tariff, and even political integration. Second, I would permit a PTA where it represents the only way to achieve multilateral free trade among nations because the multilateral trade negotiations (MTN) process made available by the GATT/WTO is stalled.<sup>15</sup>

With the Doha round stalled and the second-best option of PTAs in vogue, nations interested in freer trade flows have the capacity to inductively install harmonised regulatory systems inside draft PTAs that can minimise the spaghetti bowl arising from PTAs already in force. However, as Bhagwati’s culinary vision depicts, such systems cannot be merely ad hoc, or seek to resolve NTBs by aspirational ex-post working committees that meet after FTAs enter into force, otherwise problematic disorder via aggregate will almost certainly prevail. It is one thing to consider a perfectly functioning PTA that tries to resolve NTBs via a diplomatic ad hoc joint committee; it is quite another to then consider the operation of two working but inconsistent PTAs overlapping and both having ad hoc joint committees that do not work together. This notion is particularly alarming when one considers that the number of FTAs in force around the world exceeds 400.<sup>16</sup>

With regard to the aggregate problem, an alternate conception of NTB reduction and elimination could be introduced. This may be achieved through greater international cooperation between states negotiating FTAs. Negotiations on matters concerning measures behind borders would be undertaken to improve harmonisation across FTAs.

### **Australia’s FTAs: implementation matters**

The manner in which Australia’s FTAs are conceived and implemented is often the subject of

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<sup>14</sup> Jagdish Bhagwati, “Preferential Trade Agreements: The Wrong Road. (Symposium: Free Trade Areas: The Challenge and Promise of Fair vs Free Trade)”. *Law and Policy in International Business* 27, no. 4 (1996): 865.

<sup>15</sup> *Ibid.*, 869.

<sup>16</sup> WTO, *Regional Trade Agreements* <[https://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](https://www.wto.org/english/tratop_e/region_e/region_e.htm) as at 2 May 2016>).



anxiety in political circles, particularly in relation to the transition from political gesture to transparent functional instrument. Former Australian Trade Minister Craig Emerson, commenting on what in 2013 was a potential PTA between China and Australia, stated that '[Australia and China] could have a low ambition FTA, like a trophy to sit on the national mantelpiece ... but we want it to do work'.<sup>17</sup> The comment neatly describes the dichotomy between domestic political gain and transparent trade benefit, particularly that the former could conceivably exist along a continuum without the latter. The progression of a PTA from political ambition to successful technical instrument exists along the same ex-post timeline described above. Thus, the same shift to an anticipatory approach mentioned above might apply to the political conception of PTAs: functional failure of a PTA after it enters into force is possible (the trophy), and it is therefore politically desirable to anticipate success through ex-ante positioning before a negotiating party agrees to sign the trade treaty. It may accordingly be argued that the psyche of politicians and trade negotiators is at least primed for the regulatory conversion argued for in this paper, since political actors already cite operational functionality as a condition of ratification, rather than it being a merely hoped-for outcome after entry into force.

### **International legal approaches to treaty implementation**

In order to discuss how domestic regulatory approaches towards trade treaties might be altered, it is useful to observe briefly certain international legal perspectives on the implementation of treaties into domestic law.

Many 'teachings in international law' commence an exploration of the domestic implementation of treaties with a discussion of the theoretical concepts of dualistic and monistic approaches.<sup>18</sup> Antonio Cassese provides a history of the dualistic approach:

The doctrine started from the assumption that international law and municipal legal systems constitute two distinct and formally separate categories of legal orders ... [for international law t]o become binding on domestic authorities and individuals, it must be 'transformed' into national law ... [The conception] advocated the need for national legal systems to comply with international rules by turning them into national norms binding at the domestic level.<sup>19</sup>

The consequences for sovereign entities operating under the dualistic implementation doctrine

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<sup>17</sup> Paul Osborne, "Aust-China Free Trade Talks Set for May," *Australian Associated Press General News*, 9 April 2013.

<sup>18</sup> Antonio Cassese, *International Law*, 2nd ed. (Oxford: Oxford University Press, 2005), 213.

<sup>19</sup> *Ibid.*, 214–15.

(such as Australia) is that international trade treaties may be duly ratified, but do not have an effect on domestic authorities and individuals until the treaty is transformed or incorporated into ‘national law regulating the internal functioning of the State and the relations between the State and individuals’.<sup>20</sup> In dualist systems it is possible for PTAs to be ratified, but where the treaty obligations are not then transformed into domestic law, the PTA will not be binding on the authorities and individuals within the state, who were intended to cooperate with and benefit from the PTA. We could refer to failing to give effect domestically to duly ratified treaties that have entered into force as ‘treaty purgatory’. Bhagwati called this ‘two-faced’. The motivations behind sovereign entities placing a PTA in such treaty purgatory are discussed in the following section.

Australia has a dualist system in international law. In order for treaties to be given effect domestically, parliament must enact appropriate legislation. This was confirmed in the Australian High Court case *Minister for Immigration and Ethnic Affairs v Teoh* (1995),<sup>21</sup> in which Mason CJ and Deane J stated that treaty provisions ‘do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute’ and that ‘a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law’.<sup>22</sup>

The contrasting approach to implementation of international law is the monist tradition, which, as Cassese points out, is based on a number of propositions: firstly, that there exists a unitary legal system embracing various legal orders operating on various different levels; secondly, that international law is ‘at the top of the pyramid and validates or invalidates all the legal acts of any other legal system’;<sup>23</sup> and thirdly, that the subjects of international law and national law are not different: ‘both in municipal law and in international law individuals are the principal subjects of law’.<sup>24</sup> Although Australia does not adopt a monistic approach to the incorporation of treaties, there remains a potential for the misconception that ratified treaties are automatically binding on individuals and authorities in Australia.

Key to this discussion is the point at which a party to a PTA moves to give effect to trade treaty obligations. If a PTA is ratified containing a clear objective to achieve freer trade objectives

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<sup>20</sup> Ibid., 214.

<sup>21</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995), 128 ALR 353.

<sup>22</sup> Ibid. at 361–362 as per Mason CJ and Deane J.

<sup>23</sup> *International Law*, 215.

<sup>24</sup> Ibid.

through the eradication of NTBs,<sup>25</sup> then there is a risk that obligations will remain unmet if this work is not carried out with binding authority. A similar risk exists if obligations are instead consigned to ad hoc committees and working groups that rely on irregular diplomatic meetings. Such relegation of the handling of NTBs to these committees and working groups in the name of ex-post good faith implementation of obligations is a recipe for the creation of NTBs. This distinction is clear between the hypothetical group of nations agreeing to be bound by a PTA and implementing their obligations into domestic law when the treaty enters into force, as contrasted with a group ratifying a PTA that contains aspirational provisions to be given effect at some time, when an ad hoc committee may or may attempt to gain diplomatic consensus between all parties. In effect, the trade treaty that is placed in domestic treaty purgatory in this manner is the political trophy, containing few binding regulatory means to achieve its expressly stated ends.

Thus, an argument might be mounted that international law requires contracting states to be primed for ex-ante preparation prior to a PTA entering into force. The alternative is that treaty objectives remain unmet through unanswered questions as to how binding cross-domestic regulatory enmeshment should occur via ad hoc diplomatic committees after the PTA has already commenced.

### **Avoiding NTBs in future PTAs—moving from political trophy to treaty workhorse**

The domestic and international expectations (political and legal) prior to the ratification of any Australian PTA are that a trade treaty will result in carrying out treaty objectives by all parties from the time of ratification. However, these are subject to the manner in which domestic regulatory systems have been primed to involve the relevant parties' systems prior to and during PTA negotiations. The default Australian setting appears to assign ex-post reactive means to achieving treaty ends (removal of NTBs) through ad hoc committees and working groups created after the binding PTA has entered into force. We therefore suggest that any PTA that assigns work to ad hoc diplomatic committees charged with addressing NTBs at some time in the future is likely to ensure more NTBs emerging, particularly given the explosion of overlapping PTAs since the stalling of the Doha Round.

It appears possible for PTAs to be ratified in dualist systems but not be given the proper domestic

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<sup>25</sup> *Agreement Establishing the Asean–Australia–New Zealand Free Trade Area (AANZFTA)*. Chapter 1, Article 1 'Objectives': 'The objectives of this Agreement are to (a) progressively liberalise and facilitate trade in goods among the Parties through, *inter alia*, progressive elimination of tariff and non-tariff barriers in substantially all trade in goods among the Parties'.

implementation required to have a binding effect on individuals and authorities within domestic regulatory frameworks. This puts at risk treaty purgatory and a resulting potential for an increase in NTBs under the PTA. It is a settled principle of international law that treaty obligations ought to be carried out by parties in good faith to achieve the objectives of the treaty, even when resultant obligations may clash with domestic law. Yet, even though the stated objectives of many Australian PTAs are to reduce tariff barriers and NTBs, the means by which such objectives are to be achieved are examined by ad hoc working groups and committees operating after the PTA enters into force. Thus, despite outward appearances that trade treaties are ready to achieve their stated objectives at the time of entry into force, many Australian PTAs that are signed and ratified by parties may lack the regulatory apparatus to achieve their purpose, and may remain stubbornly stuck in the political trophy cabinet rather than proceeding to ‘do work’.

If we accept that the objective of most PTAs is to ‘progressively liberalise and facilitate trade in goods among the Parties through progressive elimination of tariff and non-tariff barriers’<sup>26</sup> we must also accept this as the treaty objective at international law. On closer examination of the provisions of a PTA instrument, one often finds a regulatory design that does not contain the binding tools required to clearly achieve such ambitious objectives across multiple sovereign parties, particularly in relation to NTBs. Instead of PTAs containing proactive, anticipatory machinery ready to handle matters from entry into force, we find the spare parts of reactive, ad hoc assemblages, to be convened at unspecified times to handle matters on a piecemeal and non-binding basis. Rather than relying on the ex-post reactive approach to NTBs used by the WTO, therefore, we suggest that PTAs are a binding instrument of international law that can be uniquely tailored by the parties to it before entry into force. Thus an opportunity exists for parties to change approach to ex-ante settings in order to better anticipate NTBs. Such settings would involve domestic regulatory agencies being involved early in the process of the treaty negotiations in order to facilitate a smoother coordination after the PTA enters into force.

### **Ex-post to ex-ante: from “state–state” to “state–supranational body–state”**

If the birth of a PTA begins with the idealistic and political ambitions of separate sovereign entities, then it is not a stretch to argue that the resulting fledgling treaty instrument could easily be compromised by the external forces of the political and regulatory worlds receiving it. Indeed, the failure of PTAs to thrive and deliver promised free-trade benefits, having been politically

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<sup>26</sup> Agreement Establishing the Asean–Australia–New Zealand Free Trade Area (AANZFTA).

distorted, is a cause of widespread academic lament.<sup>27, 28</sup> It does not help that bartering regulatory frameworks in the PTA negotiation room risks the later emergence of incoherence in regulatory design, and parties needlessly scrapping for regulatory primacy almost guarantees divergent regulatory frameworks across multiple PTAs. While the politicisation of both tariff and non-tariff aspects of trade may be the law in non-preferential trade, for which there are only general international instruments of regulatory control (e.g. GATT/WTO), similar politicisation of non-tariff components in the PTA context could be minimised if domestic regulatory agencies are involved at some level at the negotiation stage of any PTA. It is argued, therefore, that unlike the tariff lines and services exchange contained within a PTA, the PTA's obligations surrounding NTB ought not be held hostage to the same Darwinian fortune, nor subjected to ex-post treatment by non-binding ad hoc committees. Such treatment is arguably a recipe for hatching subsequent unintended (or intended) NTBs. Instead, through reference to the inductive capabilities of sovereign entities described above, the regulatory frame of a PTA might be better manufactured domestically, in a transparent pre-negotiation setting with input from domestic stakeholders, using international standards and frameworks to aid in regulatory integration with other parties.

As part of this integration, negotiating parties might consider setting up a supranational administrative body under the PTA, to administer the PTA on a permanent basis in order to achieve its stated objectives. Such a body would act as a central point for parties to lodge domestic or international standards, and would be the entity to which the trade in all PTA parties would turn for information, implementation matters, trade data and commercially responsive dispute resolution. Appeals of its decisions would be referred to the WTO Dispute Settlement Body. Parties would not lose the sovereign ability to control and administer internal markets via WTO allowable measures in their own jurisdictions (e.g. phytosanitary measures, labels, technical specifications). Instead, parties would, on an ongoing basis, submit their domestic standards and other measures to the body as a central point of contact for the trade under the PTA, which could then parse similar standards for other parties, and for those joining the PTA in the event of a plurilateral trade agreement. Where parties do not submit domestic standards or measures on some aspect of the PTA trade that requires clarification, the supranational body would have the authority to draw on WTO principles and international standards, and implement them consistently across all parties to the PTA.

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<sup>27</sup> Clint Peinhardt and Todd Allee, "Failure to Deliver: The Investment Effects of US Preferential Economic Agreements," *The World Economy* 35, no. 6 (2012).

<sup>28</sup> Jagdish Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (Oxford; New York: Oxford University Press, 2008).

An implementation of this alternative model might be considered in respect of the proposed PTA between the EU and Australia. It would represent an opportunity for Australia to gain new regulatory understandings from the EU, and for a new range of flexibility in the construction of Australian trade agreements with other parties in the future. The subsequent PTA modelled on the suggested ex-ante approach might then be introduced as a binding WTO-plus instrument built on international regulatory standards. With appropriate pre-emptive regulatory planning on the part of each contracting party, and a supranational regulatory body to administer it, such a PTA may better survive, and better serve in the delivery of its trade objectives while achieving international regulatory normativity in the image of (and having coherence with) WTO and GATT principles.

## **Conclusion**

Taking the alternate ex-ante positioning described in this paper as a whole, it posits that the use of an ex-ante approach by negotiating states to the ways in which they unilaterally prepare for the domestic implementation of international contractual obligations may have ramifications for the future of world trade beyond merely dealing with NTBs. Such a shift would necessarily involve a change in regulatory approach by negotiating states with regard to the contractual and binding nature of trade treaties to which they agree. It would also involve a shift from trading partners agreeing on ineffective and incompatible regulatory systems in the name of achieving any negotiated outcome possible, to the image of forward-looking innovative states, unilaterally and transparently preparing for binding international trade integration against a backdrop of internationally compatible regulatory systems, in the interests of coherent and realised domestic economic and social outcomes. An accompanying shift in approach to the domestic preparation and according treatment of treaties, as described here, would also necessarily change the way contractual treaty obligations obtain binding authority on sovereign state behaviour; not via the reactive measures imposed by other parties to a treaty or through international pressure from the WTO, but instead through the operative anticipations of a third, non-sovereign treaty-based authority vested in a supranational administrative body at the consent of parties to a treaty. Such a shift for preferential trade treaties disables traditional notions of ex-post means of resolving NTBs using hindsight. Instead, it operates ex-ante, by pre-emptively sending control and management upwards, into a binding supranational PTA administrative body that sits in the regulatory space above the contracting parties, and below the level of (and in compliance with) international multilateral actors such as the WTO.

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