

# The Challenge of Implementing Preferential Trade Agreements in Developing Countries – Lessons for Rule Design

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## Abstract

The latest generation of Preferential Trade Agreements (PTA) features a diversity of ‘deep integration’ provisions, which mandate a wide range of border and behind-the-border regulatory and institutional reforms in areas such as food safety and technical standards, customs administration, government procurement, competition policy, or services liberalization. The implementation of such obligations frequently presents developing countries with major challenges, as they face varieties of domestic structural and behavioural constraints. With a view to a better understanding of such challenges and how they can be effectively addressed, the World Bank has launched a series of case studies on PTA implementation in a dozen selected developing countries from around the world. This paper summarizes the main results of a forthcoming World Bank Report, which provides an overview of the findings of the country case studies with respect to the implementation of PTA provisions in seven complex border and behind-the-border policy areas. Drawing from the empirical evidence of the case studies and the conclusions of modern policy implementation theory, the authors suggest that the challenges associated with PTA implementation in developing countries can, at least partially, be addressed through built-in flexibilities, i.e. the customization of PTA rule design to country specific structural and behavioural characteristics, and the establishment of effective institutional mechanisms that are equipped with strong mandates to monitor, analyse, support, and adjust implementation processes over time.

## I. Introduction

The recent surge of preferential trade agreements (PTAs) is fast reshaping the architecture of the world trading system and the trading environment of developing countries. As of end-2010, 278 PTAs have been notified by WTO members, around half of which have come into force during the last 15 years. South-South PTAs represent no less than two thirds of all PTAs and North-South agreements make for one quarter.<sup>1</sup>

The nature and content of regional agreements is also evolving rapidly, as is the global trade environment. One important dimension of more recent PTAs is their deepening scope, including more comprehensive treatment of border regulatory measures such as trade facilitation and standards, and complex behind-the-border regulatory issues, such as competition policy, investment policy, government procurement, and intellectual property. Often these policies are not covered in the current WTO rule-book, nor are they on the table in Doha negotiations.<sup>2</sup>

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<sup>1</sup> WTO (2011): *The WTO and Preferential Trade Agreements – From Coexistence to Coherence*, World Trade Report 2011, Geneva. p.55 At: [www.wto.org/english/res\\_e/publications\\_e/wtr11\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr11_e.htm)

<sup>2</sup> *ibid*: pp. 128-133

The increasing number, breadth and depth of PTAs has been extensively documented and discussed in contemporary literature.<sup>3</sup> The same applies to the negotiation processes of these agreements, which frequently attract much attention from policy makers, academics, think tanks, and other non-governmental organizations. At the same time, there is only limited knowledge of the challenges that are associated with the actual implementation of PTAs and how these can be effectively addressed through the design of PTAs.<sup>4</sup> Yet, for many developing countries and private sector operators, the multitude and increasing depth of PTAs pose a major challenge in terms of implementation and administration. This is particularly so with regard to the implementation of complex border and behind-the-border regulatory reforms that are directly mandated or implicitly required by PTA obligations.

In light of this knowledge gap, in 2010, the International Trade Department of the World Bank commissioned 13 country case studies (namely, Cote d'Ivoire<sup>5</sup>, Egypt<sup>6</sup>, Ghana<sup>7</sup>, Jordan<sup>8</sup>, Morocco<sup>9</sup>, Sri Lanka<sup>10</sup>, Tanzania<sup>11</sup>, Thailand<sup>12</sup>, Trinidad & Tobago<sup>13</sup>, Turkey<sup>14</sup>, Uruguay<sup>15</sup>, Vietnam<sup>16</sup>, and Zambia<sup>17</sup>) to collect available data on the implementation of countries' obligations under the PTAs to which they are party. Moreover, the researchers were tasked to identify the country specific and policy area specific challenges and obstacles that country government, administrations, and the private sector were confronted with in the course of implementation processes. The results of this exercise, and the lessons drawn from the data analysis, are presented in a forthcoming World Bank overview report, titled 'Implementing Preferential Trade Agreements for Development'. The report draws particular attention to the implementation of the complex border and behind-the-border policies that are mandated by contemporary PTAs, e.g. food safety standards, trade facilitation measures and customs

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<sup>3</sup> See, for instance: Baldwin, Richard & Patrick Low (2009): 'Multilateralising Regionalism: Challenges for the Global Trading System', Cambridge: Cambridge University Press. Estevadeordal, Antoni & Suominen, Kati & Teh, Robert (2009): 'Regional Rules in the Global Trading System' Cambridge: Cambridge University Press. Heydon, Kenneth & Woolcock, Stephen (2009): 'The rise of Bilateralism: Comparing American, European and Asian Approaches to Preferential Trade Agreements', United Nations University Press, Tokyo, Japan.

<sup>4</sup> Hoekman, Bernard (2010): *North-South Preferential Trade Agreements*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): 'Preferential Trade Agreement Policies for Development – A Handbook', World Bank, Washington D.C.. p105

<sup>5</sup> Cote d'Ivoire - study prepared by Mr. Salik Kone, Assistant Research Professor in Economics at Cocody University in Abidjan

<sup>6</sup> Egypt - study prepared by Mr. Ahmed Ghoneim, Associate Professor of Economics at Cairo University, Egypt.

<sup>7</sup> Ghana - study prepared by Mr. John Hawkins Asiedu, Economist and Evaluation and Private Sector Development Specialist the Trade and Industry Ministry of Ghana.

<sup>8</sup> Jordan - study prepared by Mr. Riad al Khouri, Dean of Business School, Lebanese French University Erbil, Kurdistan, Iraq and Senior Economist at the William Davidson Institute University of Michigan at Ann Arbor.

<sup>9</sup> Morocco - study prepared by Ms. Cherkaoui Mouna, Professor for Economics at Mohamed V University in Rabat, Morocco.

<sup>10</sup> Sri Lanka: study prepared by Mr. Dushni Weerakoon, Deputy Director of the Institute of Policy Studies of Sri Lanka.

<sup>11</sup> Tanzania – study prepared by Mr. Peter Draper, Director of the South African Institute of International Affairs (SAIIA)

<sup>12</sup> Thailand - study prepared by Mr. Archanun Kohpaiboon, Assistant Professor in Economics at Thammasat Univeristy and Mr. Suphat Suphachalasai.

<sup>13</sup> Trinidad & Tobago - study prepared by Mr. Anthony Gonzales, Trade Policy Analyst and the former WTO Director and Representative for the Caribbean Regional Negotiating Machinery.

<sup>14</sup> Turkey - study prepared by Mr. Subidey Togan, Professor of Economics at Bilkent University, Turkey.

<sup>15</sup> Uruguay - study prepared by Mr. Alvaro Ons and Mr. Vaillant, both Professor of International Trade at the Department of Economics, Social Sciences Faculty, Universidad de la República, Uruguay.

<sup>16</sup> Vietnam - study prepared by Mr. Nguyen Xuan Thang, Vice President of Vietnam Academy of Social Science.

<sup>17</sup> Zambia - study prepared by Ms. Trudi Hartzenberg, Executive Director of the Trade Law Centre for Southern Africa (TRALAC).

reform, intellectual property rights protection, government procurement liberalization, competition policies, and the liberalization of trade and investment in services as well as complementary domestic regulation. It is these policy areas, among others, and their complexity which distinguish the shallow ‘tariff reduction’ agreements of the past from contemporary ‘deep integration’ PTAs.

In this paper, we broadly summarize the main findings and conclusions drawn from the analysis of the World Bank country case studies and complementary literature, which we present in the forthcoming overview report in greater length and detail. We argue that the analysis of implementation processes in developing countries provides supporting evidence to the claim that the achievement of regional policy objectives through domestic rule implementation is a function of customized and flexible employment of varying mixtures of legal instruments that are linked and, over time, adjusted to the dynamics of implementation processes. In particular, the understanding of PTA rule design and implementation as necessarily inter-linked dynamic processes will favour the use of ‘living-agreement instruments’, which provide for institutionalized bottom-up feedback mechanisms that frequently update available information on reform progress and obstacles thereto, settle bilateral disputes informally where they occur, and respond to implementation progress and challenges through the (re)definition of policy objectives, complementary rule-making, and tailor-made resource dedication over time in a flexible manner.

We proceed as follows: The second section addresses conceptual and practical questions as to what we mean by ‘implementation’, and implementation of ‘deep integration’ PTAs in particular. In the three subsequent sections, we provide an overview of the challenges that developing countries face in implementing deep integration obligations. Notably, we identify, first, challenges that are generally intrinsic to implementation processes; secondly, challenges that are related to country specific structural and behavioural factors; and third, challenges that are specific to the complex nature of behind-the-border PTA policies and their regulation. We recognize the fact that these three categories of implementation challenges are, to some extent, inter-related and overlapping. Their differentiation, nevertheless, helps to shed light on their particular character from different perspectives. In the sixth and concluding section, finally we summarize and discuss the lessons that can be learned from the study of implementation processes for the design of PTAs, with a view to achieving effective implementation of PTAs that is compatible with the legitimate development objectives of any given country.

## **II. The Implementation of ‘deep integration’ PTAs: Conceptual and Practical Issues**

In her pioneering work on PTA implementation, Gonzalez (2009) defines PTA implementation as government “interventions that are necessary in order to be able to satisfy treaty obligations; that is, actions that must generally be taken before the agreement enters into force – unless the agreement itself includes transition phases for putting certain obligations into effect”, which is frequent practice.<sup>18</sup> The notion of implementation is conceptually related to, but distinct from, the administration and enforcement of PTAs. Administration refers to the regular management of PTAs by the dedicated national, inter-state, or supranational authorities after implementation has already taken place. A lack of adequate implementation, however, may well surface in the course of the administration of an agreement. The failure to implement particular obligations, furthermore, results in non-compliance with the treaty provisions and can encourage the other parties to take enforcement action through the employment of a dispute settlement mechanism that has been established under the treaty.<sup>19</sup>

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<sup>18</sup> González, Anabel (2009): *The Implementation of Preferential Trade Agreements: A Conceptual Note*, Inter American Development Bank, April 2009. p3

<sup>19</sup> *ibid*: p3

In theory, the quality and extent of government interventions necessary to implement PTA commitments depends on the magnitude of the ‘implementation gap’ – the difference between a country’s institutional, regulatory, and private sector development status quo on the one side and the obligations codified in the treaty on the other.<sup>20</sup> As such, the nature of necessary implementing action is contingent on country specific structural and behavioural factors as well as the complexity of the respective policy field that is governed by the PTA in question.

At the most general level we can observe that ‘deep integration’, i.e. the implementation of complex border and behind-the-border regulatory policies, is far more demanding than the implementation of, for instance, market access commitments mandated by shallow trade agreements. This is particularly the case in low and middle-income developing countries where policy makers, regulators, and administrators are often confronted with a combination of an outdated regulatory and institutional status quo, an underdeveloped private sector, and severe resource constraints.

To illustrate the difference between the implementation of shallow market access agreements, on the one hand, and deep integration PTAs, on the other, we find that the former, depending on the specifics of the respective national legal system, merely requires government interventions that amend existing tariff legislation to give domestic legal effect to respective tariff reduction obligations. Such changes to the legal framework then need to be applied by the existing tax authority upon the entry of goods into the domestic territory.

To be sure, the effective implementation of behind-the-border policies or the adaption of border regimes to international standards frequently goes far beyond such superficial legislative adjustments. Implementation processes that respond to ‘deep integration’ obligations can range from ‘on paper’ implementation (as in legislative implementation) at the beginning of a long-term process, over wide ranging and highly demanding institutional reforms, to private sector capacity building measures that are necessary to ensure compliance with the new regulatory frameworks. Below, we list a number of examples of government interventions, which may be required in the course of implementation processes that apply to ‘deep integration’ obligations, as drawn from the World Bank country case studies:

- ***the translation of PTA commitments into specific legislation that is subject to the domestic political process*** - e.g. the adoption of certain technical or food safety standards responding to the obligation of regulatory harmonization with a partner country or the formulation and adoption of particular competition, IPR, or government procurement regimes;
- ***the creation or reform of institutions mandated with implementation and administration of a policy mandated by the PTA*** - e.g. the establishment or reform of a national competition commission, food safety agency, or government procurement authority;
- ***the creation or reform of intra- and inter-institutional management and communication mechanisms that are necessary for the implementation, administration, and enforcement of cross-cutting policies*** - such as the establishment of a ‘single window’ system for traders or ‘One Stop Border Posts’, which require interventions from multiple government agencies;
- ***institutional capacity building measures, such as technological upgrades as well as staff training and hiring*** - e.g. the introduction and application of modern information technology for customs management, or the hiring and training of experts dealing with the administration and enforcement of competition policy, government procurement, intellectual property rights regimes;
- ***the establishment and effective application of enforcement mechanisms*** - e.g. the creation of specialized IPR courts or conformity assessment agencies for technical and food safety standards;
- ***complementary implementation measures that are aimed at building private sector capacity to comply with, and better benefit from new regulatory frameworks*** - for instance, by providing for

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<sup>20</sup> *ibid*: p10

training programs for small and medium enterprises on compliance with technical standards and food safety requirements; launching awareness raising campaigns with a view to promoting private sector compliance with IPR and competition regimes; export and investment promotion programs etc.;

- ***and, throughout the duration of such multi-faceted implementation processes, the sustained dedication of budgetary resources for implementation, administration, and enforcement of PTA obligations that may have long-term budgetary implications.***

This non-exhaustive list of potential governmental interventions at the domestic level gives a first impression of the challenges that developing countries may face in implementing deep integration PTAs. In sum, the process of regulatory convergence and integration between two or more PTA members, as frequently mandated by modern PTAs, can be characterized as a highly complex societal ‘enculturation of change’ that entails interventions and responses from large numbers of actors at all levels of domestic governance, administration, and the private sector.<sup>21</sup>

For instance, the complexity of coordination among developing country domestic institutions and agencies makes for a superb challenge for governments with respect to most ‘deep integration’ policy areas. Customs reform and trade facilitation make for an example *par excellence* as these policy areas frequently fall all but exclusively in the realm of trade policy, but are split into a large variety of regulatory areas, such as trade, customs management, taxes, public health and safety, environment, road, railway, air and maritime transport, infrastructure development, finance, or agriculture. In Zambia, to name one example, the World Bank researchers found that no less than 11 government agencies are involved in the implementation of customs reform. In light of such regulatory fragmentation and involvement of various respective agencies and institutions, concerted and targeted efforts to reduce respective barriers unilaterally or in response to bilateral, regional and multilateral agreements is an extremely demanding process. It requires a high degree of coordination of domestic institutions and stakeholders within a country, as well as coordination with institutions of partner countries, relevant international organisations, and donors. Coordination problems are exacerbated by the fact that developing country institutions may have limited experience with tasks that require inter-institutional coordination and communication and lack the necessary management skills and technical expertise.

The following sections discuss in more detail the process specific, country specific, and policy specific challenges that developing countries are frequently confronted with in the course of PTA implementation processes. Moreover, we suggest a number of measures that can, in our view, effectively address such challenges at the level of PTA design.

### **III. Challenges Intrinsic to Policy Implementation Processes**

If effective implementation of PTAs is taken seriously by policy makers and negotiators, the design of PTA obligations and the formulation of a roadmap or an action plan for the implementation of such obligations require an awareness of the challenges that are intrinsic to domestic policy implementation processes. The following brief conceptual considerations, which draw from the conclusions of modern policy implementation theorists, introduce the notion of such process related challenges and make recommendations on how they can be addressed at the stage of PTA design.

In a nutshell, much of the early scholarly literature on policy implementation has focused on a ‘top-down’ approach of understanding implementation processes: policies, in the shape of legally rigid substantive rules, are negotiated and formulated at the highest political level or ‘centre’. Once the political negotiation and policy formulation process has ended, policies are complemented with

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<sup>21</sup> Barrett, Susan (2004): *Implementation Studies: Time for a Revival? Personal Reflections on 20 years of Implementation Studies*, Public Administration 2 (82), Oxford. p260

specific instructions and handed ‘down’ to the administrative level of governance for implementation. This ‘top-down’ dichotomy of political policy formulation processes, on the one hand, and administrative implementation processes, on the other, reflect the conventional separation of political decision-making and public administration and an understanding of implementation as a hierarchical process controlled by the political leadership through hard legal instruments. Effective implementation, therefore, is deemed as a matter of effective administrative control through decision-makers at the highest level.<sup>22</sup>

Successive theory development, however, challenged this conception of a coercive, hierarchical and control based policy implementation processes altogether. The main challenge targeted the assumption of the dichotomous relationship of the political policy formulation process and the administrative implementation process. In contrast to the separation of policy design and implementation, the political process would find its continuation in a bargaining and negotiation process with and among those on whom implementing action and policy outcomes depend, notably government agents and private sector actors.<sup>23</sup>

The key assumption of this conception of implementation processes is that government agencies respond to various policy initiatives at any given moment in time and are subject to external and internal pressures from different sources, which take the shape of, for instance, political economy dynamics, resource constraints, intra- and inter-organizational power distribution, and private sector responsiveness (or lack thereof) to policy initiatives. Even in the most rule-bound environment, government agencies have discretionary bargaining powers, which are, in their application, informed by own agency interests and values, as well as external and internal pressures and constraints.<sup>24</sup>

Thus, in order to understand implementation processes with a view to rectifying their failures to deliver ‘compliance’, “implementation studies needed to start with what was actually happening at delivery/recipient level (at the ‘bottom’) and explore the ‘why’ from the ‘bottom up’” in order to improve the ‘implementability’ of policies formulated at the ‘top’. Such a methodology would then produce important information about capacity building requirements and “address questions such as: Is this doable? How might it work? What does it take?”<sup>25</sup>

The question remains how PTA design can address challenges that are intrinsic to implementation processes. In essence, policy implementation theory tells us that PTA policy content in the form of hard legal rules, which are negotiated at the ‘top’, may be altered in the course of the implementation process (or not implemented at all) due to the limits of administrative control. Thus, challenges and obstacles to implementation arising in the course of the implementation process can only be addressed through monitoring, analysis, and responding action in real time. It is this notion, which renders *ex ante* and static prescriptions of PTA policies alone insufficient to achieve effective implementation.

In our view, process intrinsic challenges can, at the stage of PTA design, be addressed through the codification of complementary ‘living agreement instruments’, i.e. institutional mechanisms equipped with a strong mandate to monitor, analyze, support, and adjust implementation processes in response to identified challenges in real time. Such clauses can, for instance, require the establishment of joint institutions, high-level political fora, joint administrative committees, technical working groups, or all of the above – depending on the intensity of prospective challenges. These mechanisms, depending on their mandate, serve varying purposes. Most importantly, they need to update available information and analysis on implementation progress and obstacles. Moreover, they should be enabled to respond to implementation progress and identified challenges through a further specification or redefinition of

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<sup>22</sup> *ibid.*: p252

<sup>23</sup> *ibid.*: p253

<sup>24</sup> *ibid.*: p253-54. Also see: Barrett, Susan. and Fudge, Colin (eds) (1981). *Policy and Action*. London: Methuen, 1981.

<sup>25</sup> *ibid.*: p255

policy objectives, complementary rule-making, and tailor-made resource dedication over time in a flexible manner; and settle disputes over non-compliance informally where they occur. Such ‘built-in’ flexibility, in the form of strong and effective joint institutional mechanisms, is critical for the achievement of the complex and demanding reforms that are frequently mandated by modern PTAs.<sup>26</sup>

#### **IV. Country Specific Challenges to PTA Implementation**

As noted above, the extent and quality of government interventions that are required in order to satisfy treaty obligations depends on the gap that prevails between the institutional, regulatory, and private sector status quo in any given country, on the one hand, and the policy objectives that are defined in PTAs, on the other. In this section, we argue, that the ‘implementability’ of PTA obligations can be illusory if the ‘implementation gap’ is too wide, i.e. if PTA obligations do not correspond to, or overburden, institutional and private sector capacities. We therefore discuss the various country specific contingencies that can impact on PTA signatories’ capacities to implement PTA obligations and need to inform the design of substantive PTA commitments in order to ensure their implementability. In doing so, we draw from the mass of data contained in the 13 World Bank country case studies on PTA implementation for development. To be sure, our discussion cannot be exhaustive and only summarizes the main and most frequent observations made in the case studies.

The first category of country specific challenges comprises institutional capacity constraints that are ubiquitous in many low and middle-income developing countries, and have been found to make for the single most important obstacle to PTA implementation. Such institutional weaknesses may encompass, but are not limited to the following factors:

- *weak government links to and communication channels with the private sector / policy recipients for civil society consultations on policy design;*
- *lack of the legal and economic expertise among government officials and regulators that is necessary to translate PTA obligations into domestic regulatory regimes and establish effective enforcement mechanisms;*
- *inadequate or non-existent administrative structures for the implementation and administration of commitments;*
- *limited numbers, poorly trained, poorly paid, or corrupt administrative staff;*
- *outdated management and communication mechanisms;*
- *limited access to information and communication technology;*
- *insufficient financial and intellectual resources for capacity building measures and the creation of new institutions.*

Such institutional constraints that impede PTA implementation can, to some extent, be addressed by means of targeted technical assistance and cooperation programs funded by external donors and be provided by country cooperation agencies and international organizations, such as the World Bank.

With a view to generating a maximum of government ownership (and thereby legitimacy for the measures vis-à-vis domestic constituencies), trade related technical assistance programs should be designed jointly by the government in question and the external agencies and donors. Moreover, in order to ensure coherence among the often numerous assistance initiatives that take place in a given country, governments need to design long term strategies and action plans, which coordinate

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<sup>26</sup> Also see: Steger, Debra P. (2012): *Institutions for Regulatory Cooperation in ‘New Generation’ Economic and Trade Agreements*, (38) 4 *Legal Issues of Economic Integration* (109), Kluwer Law International. Hoekman (2010): op.cit. pp102-104

assistance efforts, avoid their duplication, prioritize the employment of resources, and provide for appropriate sequencing of related or interdependent activities.

The country case studies confirm that such programs are, in many cases, among the key factors that drive PTA implementation in resource poor environments. Moreover, interviews with government officials conducted in the context of these case studies indicate that the prospects of receiving technical and financial assistance from a partner country often incentivizes the negotiation of a PTA with an OECD country as such assistance can considerably facilitate the promotion of domestic reform agendas and the achievement of development objectives.

However, trade related financial and technical assistance, which is frequently provided in context of North-South PTAs to a very significant extent, is often insufficient to respond to the implementation challenges associated with country specific institutional constraints. The most important reason for this phenomenon, as confirmed by the World Bank case studies, is that the hard legal and time-bound obligations of a PTA in a given policy area do not correspond to the institutional reality of the country in question in the first place. In other words, the gap between regulatory status quo and the policy objectives codified in a PTA may be so wide that national institutions are overwhelmed by the tasks that they are supposed to perform. Effective implementation, in these instances, can be illusory, no matter how beneficial the mandated reforms would be in the long run.

The World Bank country case studies, furthermore, show that ‘over-commitment’ of developing countries through deep integration PTAs is far from a rare phenomenon. In line with this observation, Hoekman (2010) notes that “the regulatory standards that are written into trade agreements generally start from the status quo prevailing in OECD countries, so that the lion’s share of associated implementation costs – but presumably so also the benefits – lies with developing country signatories.”<sup>27</sup> The institutional preconditions for the implementation of such commitments, however, are often far from satisfied. The World Bank country case studies provide a large amount of evidence supporting this claim.

For instance, the achievements resulting from Morocco’s efforts to harmonize its SPS laws and regulations as well as quality control infrastructure with the EU status quo are rather moderate. Challenges appear to stem from limited institutional capacity, expertise, and inter-institutional coordination. The European Commission’s Directorate General for External Trade has counted 53 instances of SPS and TBT technical assistance provided to Morocco in the period of 2001-05.<sup>28</sup> But even though such assistance has undoubtedly been helpful, Morocco is reportedly facing severe problems to gradually harmonize its laws with the EU *acquis communautaire* or to develop feasible approaches to the negotiation of mutual recognition agreements with the EU. In 2007, the Moroccan government recognized the short-term need to reinforce local institutions charged with standardization and conformity assessment.<sup>29</sup> Morocco finally created the National Health and Food Safety Agency (ONSSA) in 2009, which is now operational.

This finding leads to the important conclusion that the design of PTA commitments, if implementation is taken seriously, needs to correspond to the institutional realities in the implementing country. This requires a sober stock-take of countries’ institutional capacities *ex ante* and customized design and tailor-made sequencing of the implementation of obligations. Customization of PTA design and of implementation sequences stands in contrast to the application of a one-size-fits-all approach in the shape of highly demanding sets of hard legal obligations aiming at regulatory harmonization at the

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<sup>27</sup> Hoekman (2010): op.cit. p99

<sup>28</sup> European Commission, Directorate General for Trade (2009): Inventarisation of Technical Assistance Provided to Third Countries in the Area of SPS by the European Union and Its Member States, October 15, 2009, Brussels.

<sup>29</sup> Government of the Kingdom of Morocco (2007): Fiche signalétique de projet de jumelage: appui a la direction de la normalisation et de la promotion de la qualite dans l’harmonisation et la mise en oeuvre de la legislation technique, final version, May 2, 2007, Rabat.



OECD status quo, which can render the prospect of PTA compliance elusive. Yet, the opposite of one-size-fits-all cannot be no-size-fits all or “anything goes.” Successful implementation of PTAs or more broadly successful experiences of economic integration have been able to achieve the right balance between the pursuit of key principles (e.g. consumer protection, food safety, or intellectual property) and the public and private sectors’ capacity of absorption of the reforms and changes required.

For instance, in order to satisfy institutional preconditions for regulatory reform first, institutional reform, complemented by necessary technical cooperation, can be front-loaded in PTAs through hard legal obligations. Soft legal provisions, in addition, can signal the parties’ ambition for deeper integration in the respective policy area in the future. Furthermore, the parties may mandate a joint inter-governmental body with the monitoring of institutional reform progress, the drafting of specific action plans for the implementation of institutional reform, tailor-made resource dedication for technical assistance programs, and the negotiation of additional substantive legal obligations, which can take effect once the institutional preconditions for deeper integration are met.

Such considerations also apply to other country structural and behavioural factors, notably the specific economic and business environment as well as the political climate that prevail in a given country. For example, the implementation of OECD standard competition laws in countries where national economies are structured in a highly oligopolistic manner or characterized by a high share of public ownership will confront policy makers and government agencies in developing countries with a daunting task. In this specific policy area, World Bank researchers frequently cite a lack of domestic competition culture and vested interests in the preservation of the status quo as the main factors impeding the effective implementation of competition commitments featured in PTAs and the effective enforcement of adopted domestic legislation.

As the case study on Jordan reveals, for example, prevalent state dominated and oligopolistic economic structures in Jordan have resulted in strong resistance to the adoption of the country’s first competition law and the creation of an independent competition authority. In consequence, after years of consultations, the first draft legislation was eventually rejected by Parliament in 2001, before a watered-down version was adopted in 2004. While the Ministry of Enterprise and Trade did establish a competition directorate within its administrative structures, the country still awaits the creation of an independent administrative and enforcement agency. In several regions, moreover, such as CARICOM and the WAEMU, the authors of the World Bank country case studies observe little political interest on behalf of public decision-makers to advance competition reform – despite hard legal regional commitments.

Similarly, the reform of government procurement regimes to allow for foreign competition or the introduction of intellectual property rights protection in economies where trade in counterfeited goods makes for a sizeable share of economic activity will likely provoke significant opposition from the beneficiaries of the existing regimes. As the case studies show, such deep-seated structural factors are often insufficiently addressed through a set of static hard legal obligations as policy makers risk their political survival if they prioritize compliance. Rather, in our view, the ‘enculturation of change’ of such deep-rooted societal arrangements can be, step by step, induced by PTAs through the design of a customized combination of soft and hard legal as well as institutional instruments, which should, ideally, prioritize the achievement of broad and tangible private sector benefits so as to erode political opposition deriving from vested interests in the status quo. As recent political economy research highlights, deep-integration PTAs can thereby act as a ‘stepping stone’ to further liberalization on a unilateral or multilateral basis. Greater trade openness promotes growth in export sectors and alters the balance of political influence between exporting industries and import-competing industries, creating more favourable incentives for governments to reduce trade barriers unilaterally or multilaterally.<sup>30</sup>

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<sup>30</sup> Baldwin, Richard & Freund, Caroline (2011): *Preferential Trade Agreements and Multilateral Liberalization*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): *Preferential Trade Agreement Policies for Development – A Handbook*, World Bank, Washington D.C.

Finally, the technical capacity of businesses to comply with novel regulatory regimes is key when policy makers measure the ‘implementation gap’ with regard to behind-the-border PTA commitments. For instance, the private sector costs of adapting production processes to technical and food safety standards that are being harmonized with those of an OECD country PTA partner can significantly outweigh the benefits deriving from such adaptation measures, at least in the short run. In the field of food safety standards, for example, the creation of private sector capacity in developing countries is critical. The private sector that has to adapt production and processing methods and facilities to OECD standard sanitary and phytosanitary measures (e.g. by vaccinating livestock, eliminating pesticide residues, guaranteeing sanitary food processing conditions etc.), identify the SPS measures it needs to comply with in third jurisdictions, and bear the administrative costs for conformity assessments and certification procedures - all of which adds to per-unit costs of production.

As discussed above, such factors need to be taken duly into account at the stage of PTA design as well as in the course of drafting action plans for effective implementation.

## V. Policy Specific Challenges to PTA Implementation

A third dimension of effective PTA implementation is related to the nature of policies that are mandated by PTAs. As noted above, the process of regulatory convergence and integration between two or more PTA members can be characterized as a highly complex societal ‘enculturation of change’ that requires interventions and responses from actors at all levels of domestic governance, administration, and the private sector. A feature often associated with the complexity of deep integration policies at the time when PTA commitments are negotiated is ‘uncertainty’. Negotiators may agree that some degree of convergence is beneficial and desirable for the parties involved. However, the optimal depth of integration – that is, the optimal policy content – is often uncertain at the time of legal drafting.

First, information about the relevant factors that determine the optimal degree of convergence may not be readily available. As discussed above, the likely adjustment costs of policy implementation need to weigh into the assessment of the necessary depth as well as geographic and material scope of regulatory convergence and should lead to customized rule design. They tend to be low in cases of close ‘proximity’ between the partner countries in terms of geography, language, levels of development, legal systems, institutional compatibility, policy objectives, and regulatory preferences. Adjustment costs tend to be high for countries where convergence would require deviation from a national regulatory standard that optimally reflects domestic preferences and implementation capacities.<sup>31</sup>

Secondly, negotiators may lack reliable empirical data about the actual trade obstacles that a mandated policy is supposed to remove. In the resource scarce environments of developing countries, the removal of actual trade bottlenecks, rather than across-the-board harmonization, should be prioritized in PTAs in order to avoid the inefficient diversion of resources. In absence of in-depth analysis of respective barriers and trade opportunities, such reform prioritization becomes impractical.

Third, uncertainty may prevail over the broader economic and social impact of the implementation of various alternative regulatory regimes and the extent of necessary complementary measures that are required to mitigate adjustment costs. For instance, the enforcement of distinct competition policy, government procurement, and IPR regimes or domestic regulation applying to the provision of services can result in unintended consequences in the shape of severe adverse effects for some sectors of society. Against this background, Hoekman (2010) notes that “monitoring and analysis of impacts

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<sup>31</sup> Mattoo, Aaditya & Sauvé, Pierre (2011): *The Preferential Liberalization of Services Trade*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): ‘Preferential Trade Agreement Policies for Development – A Handbook’, World Bank, Washington D.C..

and of the performance of supported sectors and activities are therefore important, as is the establishment of credible exit mechanisms; governments need to be able to withdraw support from experiments that fail. Trade agreements offer a potential vehicle for supporting such mechanisms.”<sup>32</sup>

Finally, uncertainty can result from the expectation that regulation may have to be adapted to a changing social, economic, and technological environment in the future. Such regulatory changes are particularly frequent with regard to sectors that are characterized by fast-paced technological progress.

Similar considerations have led Chauffour and Maur (2010) to the conclusion that it is “not only the nature of partner countries and their capacity that dictates the need for flexibility, but the regulatory issues themselves. Many of the new policies captured in the latest generation of PTAs do not lend themselves to the reduced standalone legal language in a trade agreement.”<sup>33</sup> It may be, in fact, impossible, impractical, or unreasonable to specify policy content beyond cooperation clauses, which genuinely commit the parties to a process leading to deeper integration in specified policy areas. In this sense, contemporary PTAs often necessarily remain ‘incomplete contracts’, the gaps of which need to be filled by strong and effective joint institutional mechanisms that are established by the parties in order to drive the integration process forward in a cooperative manner.

## **VI. Conclusions**

The latest generation of Preferential Trade Agreements features a diversity of ‘deep integration’ provisions, which mandate a wide range of border and behind-the-border regulatory and institutional reforms in areas such as food safety and technical standards, customs administration, government procurement, competition policy, or services liberalization. The implementation of such obligations frequently presents developing countries with major challenges, as they face varieties of domestic structural and behavioural constraints. With a view to a better understanding of such challenges and how they can be effectively addressed, the World Bank commissioned a series of country case studies on PTA implementation in a dozen selected developing countries from all the regions of the world. This paper has summarized the main results of a forthcoming report, which provides an overview of the findings with respect to implementation of PTA provisions in seven border and behind-the-border-policy areas.

Drawing from the empirical evidence of the studies and the conclusions of modern policy implementation theory, we suggested that the challenges associated with PTA implementation in developing countries can, at least partially, be addressed through ‘built in’ flexibilities, i.e. the customization of PTA rule design to country specific structural and behavioural characteristics, and the establishment of effective institutional mechanisms that are equipped with strong mandates to monitor, analyze, support, and adjust implementation processes over time.

In other words, first, the normative content of provisions, the use of hard vs. soft law, and the prescription of the sequence of implementation processes need to correspond to the individual structural and behavioural contingencies that prevail and develop in individual countries; address existing uncertainties associated with the economic and societal consequences of rule implementation; and take due account of the specific nature of any given field of behind-the-border regulation. Secondly, the understanding of PTA rule design and implementation as necessarily inter-linked, dynamic, and long-term processes will favour the use of ‘living-agreement instruments’, which provide for institutionalized bottom-up feedback mechanisms that frequently update available information on reform progress and obstacles thereto, settle bilateral disputes informally where they

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<sup>32</sup> Hoekman (2010): op. cit. p103

<sup>33</sup> Chauffour, Jean-Pierre & Maur, Jean-Christophe (2010): *Beyond Market Access: The New Normal of Preferential Trade Agreements*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): ‘Preferential Trade Agreement Policies for Development – A Handbook’, World Bank, Washington D.C.. p30

occur, and respond to implementation progress and challenges through complementary rule-making and tailor-made resource dedication over time in a flexible manner.

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