Review Journal of Social Psychology & Social Works

http://socialworksreview.com

ISSN-E: 3006-4724 Volume: 3
ISSN-P: 3006-4716 Issue: 3 (July - September, 2025)

International Trade Law and Domestic Regulation: Legal Challenges and Implications of Free Trade Agreements

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DOI: https://doi.org/10.71145/rjsp.v3i3.396

Abstract

Free trade agreements (FTAs) have become a central feature of the global trading system, often extending beyond tariff reductions to affect domestic regulatory autonomy. This paper explores the legal challenges and implications of negotiating FTAs, particularly their interaction with domestic regulation. It examines how international trade law disciplines such as national treatment, technical barriers to trade, and sanitary and phytosanitary measures constrain domestic policy space. Drawing on WTO jurisprudence and recent FTA practices, the paper highlights the tension between trade liberalization and regulatory sovereignty, and discusses how negotiators and policymakers can balance market access commitments with legitimate public interest regulation.

Keywords: Free Trade Agreements (FTAs), Domestic Regulation, National Treatment, Investor-State Dispute Settlement (ISDS), Technical Barriers to Trade (TBT), Sanitary and Phytosanitary (SPS) Measures, WTO Jurisprudence, Trade Liberalization

Introduction

The 1990s saw a radical rise in free-trade agreements (FTAs) which started to disintegrate the multilateral framework originally based on the World Trade Organization (WTO). The multilateral order, which is traditionally regulated by the General Agreement on Tariffs and Trade (GATT), was eventually substituted by a more sophisticated system of bilateral and regional trade agreements that tend to assume preferential regulation that affects various domestic regulation (Eyo-Udo et al., 2025). Article XXIV of GATT that allows FTAs as long as they liberalise significantly all trade has a rather flexible provision that has been used by countries to bring on board more comprehensive undertakings. These are technical standards, sanitary regulations, licensing of services and investment rules going well beyond what the WTO stipulates (Gioi, 2023). This over-reach provokes troubling questions about the relationship between liberalisation of trade and national regulatory independence. Against this dynamic backdrop, domestic legislation, which usually serves the purpose of protecting the good of the people, including environmental protection, health or labour standards, is now under review in international trade law. These regulations are subjected to the danger of either an investor challenging them by using investor-state dispute settlement (ISDS) mechanisms or

a different signatory state with the FTA rules and regulations (Burri, 2023). This is a twofold dilemma to the governments; on the one hand, they have to make significant compromises to increase market access and enhance export opportunities whereas on the other, they have to maintain a policy space to meet domestic regulatory goals, which are imperative in ensuring the protection of the welfare of the people (Velut et al., 2022).

In the national-treatment jurisprudence of the WTO, such as in EC-Asbestos (WTO, 2001) though it provides some relief to the expectation of states to regulate in the national interest, the boundaries of legal safeguarding of domestic rules in the presence of trade agreements are seen. Here the WTO Appellate body affirmed that non-discriminatory health measures might be upheld on the basis of General Exceptions clause in GATT Art XX. Nevertheless, such a decision offers countries but minimal protection in case of FTAs that introduce higher necessity tests or confer on private investors rights to circumvent local legal systems by using ISDS mechanisms (Brauch et al., 2019). The paper evaluates the ways in which the international trade law disciplines embodied in FTAs limit national regulatory autonomy and discusses the means by which negotiators can make sure that public-interest regulations are not subjected to trade-related pressure. Specifically, it addresses general exceptions clauses, right-to-regulate preambles, and carve-outs to essential services, of which all may be crucial tools in the protection of the right of governments to regulate in the public interest (Deblock, 2022). This analysis will help guide the future design of treaties to make certain that an open trade regime and strong domestic governance can co-exist without conflicting with essential public regulation. In the following paragraphs, this paper shall discuss the particular legal tools that states may use to reconcile these conflicting interests, evaluate their resourcefulness in the application of real-life FTA negotiations, and propose ways in which future agreements can be improved. The aim is to find avenues through which global trade can be expanded thereinafter without compromising on the regulatory freedom that will enable them to pursue national interests, including health of the people, environmental sustainability and societal well-being.

Legal Frameworks Governing FTAs and Domestic Regulation

WTO Disciplines and Article XXIV GATT

Article XXIV of the General Agreement on Tariffs and Trade 1994 (GATT) creates a conditional "safe harbour" for FTAs, permitting signatories to grant one another more favourable treatment than they extend to other WTO Members provided two cumulative tests are met: duties and "other restrictive regulations of commerce" must be eliminated on "substantially all trade" between the parties, and the external trade regime applied to non-parties must not be "higher or more restrictive" than the pre-FTA regime (Khan, 2024). Yet the text nowhere defines "substantially all trade", and the 1994 Understanding on Article XXIV merely adds that duties must be "eliminated" rather than merely reduced, leaving unresolved whether sectoral carve-outs for agriculture, textiles or cultural industries are lawful (Hamid et al., 2024). The WTO Appellate Body's ruling in *Turkey – Textiles* confirmed that quantitative restrictions must also be addressed, but declined to quantify a de minimis threshold, effectively inviting political bargaining inside each FTA (WTO, 1999). Because no dispute has yet invalidated an FTA for violating the "substantially all trade" rule, the provision has become "law in the books without law in action", encouraging negotiators to pursue aggressive behind-the-border disciplines secure in the knowledge that multilateral surveillance is weak (Wang et al., 2023). Equally problematic is the requirement that FTAs do not raise barriers to third countries: The Appellate Body in *EC – Bananas III* hinted that preferential rules of origin or technical standards could breach this obligation, but again refrained from articulating a clear test (WTO, 1997). The result is a permissive environment in which mega-regional accords such

as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) or the EU–Canada Comprehensive Economic and Trade Agreement (CETA) can embed regulatory chapters on sanitary and phytosanitary (SPS) measures, technical barriers to trade (TBT), services licensing and investment that impose deeper constraints on domestic policy space than WTO rules (Kong, 2024). Consequently, Article XXIV functions less as a disciplining device than as a juridical gateway through which increasingly intrusive obligations are legitimised, forcing regulators to anticipate FTA disciplines when designing public-interest measures.

National Treatment and Non-Discrimination

Once goods have cleared the border, GATT Article III obliges Members to treat imported products "no less favourably" than like domestic products, a duty replicated in Article 2.1 of the TBT Agreement and Article 17 of the General Agreement on Trade in Services (GATS) for services and service suppliers (Olayiwola, 2020). The national-treatment obligation is not absolute: it applies only to "like products" and to "laws, regulations and requirements affecting internal sale". The Appellate Body's seminal analysis in *EC – Asbestos* held that products are "like" when they exhibit a competitive relationship in the marketplace, but also acknowledged that health risks may justify regulatory differentiation if the measure is applied equally to domestic and foreign goods (WTO, 2001). Thus France's ban on asbestos-containing products survived challenge because it was origin-neutral and supported by scientific evidence of carcinogenicity. Yet the same ruling signalled that discriminatory labelling, licensing or procurement rules are vulnerable even if motivated by environmental or consumer-protection goals (McNamara et al., 2021). The jurisprudence has therefore pushed regulators toward facially neutral measures, but neutrality alone is insufficient if the disparate impact on imports can be demonstrated; in *US – COOL*, the Appellate Body found that record-keeping obligations imposed on imported livestock entailed higher compliance costs than on domestic animals and thus breached Article III: 4 despite formal symmetry (WTO, 2012). The national-treatment discipline is replicated and intensified inside FTAs: CETA, for example, extends the obligation to sub-federal procurement and investment review, while the CPTPP introduces a "likeness" test for services that disregards the mode of supply, thereby subjecting domestic professional licensing regimes to closer scrutiny (Mitchell & Sheargold, 2020). Governments consequently face a legal straightjacket: differential regulatory burdens must be justified by reference to legitimate objectives, supported by scientific risk assessment, and designed to be "no more trade-restrictive than necessary" – a necessity test that privileges market access over precaution (Azim et al., 2024). The chilling effect is tangible: several OECD members have delayed plain-packaging tobacco legislation or chemical disclosure rules pending trade-impact reviews demanded by prospective FTA partners (Bronckers & Gruni, 2021). In short, the national-treatment principle, originally conceived to prevent overt protectionism, now operates as a powerful constraint on the content and design of domestic social regulation, compelling legislators to anticipate trade-litigation risk when pursuing environmental, health or labour objectives.

Regulatory Autonomy and Trade Agreements

Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) Measures

The WTO Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) constitute the primary multilateral disciplines that curtail domestic regulatory autonomy in the name of trade facilitation. Both agreements accept that Members may adopt standards "necessary" to achieve legitimate objectives human, animal or plant life and health, consumer information, environmental

protection—but subject this right to a matrix of procedural and substantive obligations (Gruszczynski & Helińska, 2025). The SPS Agreement goes further: Article 2.2 requires that any measure be "based on scientific principles" and "maintained with sufficient scientific evidence", while Article 3.1 encourages alignment with international standards developed by Codex Alimentarius, the OIE or the IPPC unless the Member can show a higher level of protection is scientifically justified (Romanchyshyna, 2023). The precautionary principle is acknowledged only temporarily: Article 5.7 allows provisional measures "where relevant scientific evidence is insufficient", but the Member must then "seek to obtain the additional information necessary for a more objective assessment of risk" within a "reasonable period of time" (Klotz, 2024). In practice, regulators who wish to ban genetically-modified organisms, hormone-treated beef or chlorine-washed chicken must fund expensive risk assessments that frequently replicate data already generated abroad, and must review the measure once new evidence emerges, creating a built-in bias toward existing international standards(Hussain et al., 2023). The TBT Agreement mirrors these constraints for non-SPS measures. Article 2.2 prohibits technical regulations that are "more trade-restrictive than necessary to fulfil a legitimate objective", taking into account the risks non-fulfilment would create, while Article 2.4 obliges Members to use "relevant international standards" as a basis for their regulations unless they would be "an ineffective or inappropriate means" for the objective pursued (Zhou, 2022). The Appellate Body in *US – Tuna II* clarified that even voluntary eco-labelling schemes can breach Article 2.1 if they accord "less favourable treatment" to imported like products, and in *US – COOL* it found that record-keeping obligations that impose higher compliance costs on foreign supply chains are "more trade-restrictive than necessary" (WTO, 2012). Modern FTAs transpose and frequently intensify these disciplines. The EU–UK Trade and Cooperation Agreement (2020) incorporates by reference the WTO SPS and TBT obligations but adds rapid-response mechanisms that allow the complaining party to demand scientific dossiers within 15 days, compressing the already short window for risk assessment (N'doua, 2024). The CPTPP TBT chapter requires parties to "give positive consideration" to accepting foreign technical regulations as "equivalent" if they achieve the same objective, shifting the evidentiary burden onto the importing state to justify deviation (Nedumpara et al., 2021). Consequently, domestic authorities confront a procedural and epistemic squeeze: they must demonstrate scientific necessity in advance, justify higher-than-international protection levels, and accept foreign conformity-assessment bodies or risk being hauled into state-state arbitration. The result is a technocratic ratchet that privileges existing international standards and narrows the margin of regulatory discretion traditionally associated with sovereign risk governance.

Regulatory Chill and the Risk of Downward Harmonization

Beyond the formal disciplines of TBT and SPS, the shadow of litigation exerts an independent chilling effect on legislative initiative. "Regulatory chill" denotes the anticipatory weakening or postponement of socially desirable regulation because policymakers fear costly trade or investment disputes (Paulini, 2022a). Empirical evidence is accumulating that tariff liberalisation shifts protectionist pressure into the regulatory arena. Using a new dataset of 70,000 product-level NTBs, Kee, Nicita & Olarreaga (2009) show that a ten-percentage-point cut in applied tariffs is associated with a 3–4 % increase in core NTBs, suggesting that governments substitute transparent border instruments with opaque domestic regulations. Similarly, Sinopoli, (2018) exploit WTO accession negotiations to demonstrate that tariff bindings crowd out import-competing sectors that then lobby for stricter technical standards, validating the political-economy intuition that protection migrates to whatever policy margin remains unconstrained. FTAs intensify this dynamic by layering investor-state dispute settlement (ISDS) on top of state-state enforcement. Metalclad's successful NAFTA claim against Mexico for denying a hazardous-waste permit, and Philip Morris's failed but costly

challenge to Australia's plain-packaging laws under the Hong Kong–Australia BIT, are frequently cited instances where the mere prospect of multimillion-dollar arbitration chilled or delayed regulation (Lester & Manak, 2017). A 2020 survey of 182 trade officials in OECD capitals found that 63 % had modified draft environmental or health regulations after receiving legal advice that the measure might breach an FTA investment chapter, even though no formal complaint had been filed (Flett & Mataija, 2022). The mechanism is subtle: risk-averse ministries insert cost-benefit analyses that overweight hypothetical trade losses, adopt voluntary industry codes instead of binding rules, or sunset clauses that trigger automatic review under "least-trade-restrictive" benchmarks borrowed from WTO jurisprudence (Carr, 2017). Downward harmonisation is the systemic corollary of regulatory chill. When several trading partners share the same concern, the path of least resistance is convergence on the lowest common denominator. The TTIP negotiations (2013-2016) provide a textbook illustration: leaked EU negotiating documents reveal that the European Commission proposed to "align EU chemical classification criteria with the US Hazard Communication Standard" and to accept "mutual recognition" of pesticide maximum-residue limits set by the US Environmental Protection Agency, even though many US thresholds are significantly less stringent than their EU counterparts (Liu & Flynn, 2023). While the final text was never adopted, the episode demonstrates how reciprocity inside an FTA can mutate into downward pressure on existing standards. More recently, post-Brexit Britain has openly signalled its intention to diverge from EU REACH chemicals regulation to secure a US trade deal, prompting warnings from the UK's own Office for Environmental Protection that "lower standards could become locked in via treaty obligations that are harder to reverse than domestic legislation" (Fan et al., 2025). The legal architecture of FTAs reinforces this trajectory. Most agreements contain "stand-still" and "ratchet" clauses that freeze existing levels of liberalisation and automatically extend any future liberal measure to all parties, but they rarely contain symmetrical "upward harmonisation" commitments (Pinz et al., 2021). Coupled with stringent necessity tests and investor compensation norms, the incentive structure favours deregulation over regulatory strengthening. Unless future accords embed explicit "right-to-regulate" clauses that insulate non-discriminatory public-interest measures from both ISDS and state-state challenge, regulatory chill and downward harmonisation are likely to remain endemic features of the FTA universe.

Legal Challenges in FTA Negotiations

Reciprocity and Political Sensitivities

Free-trade agreements are quintessentially reciprocal bargains: each party concedes market-access in areas where its partners possess comparative advantage in exchange for equivalent concessions in politically salient export sectors (Pipidi-Kalogirou, 2024). The mercantilist logic is hard-wired into negotiating modalities: requests-and-offers start with tariff lines that account for the "bulk of trade", but the ultimate perimeter is determined by the political opportunity cost of liberalisation at home (Marceddu, 2018). Agriculture and textiles typically the most protected segments in developed and developing economies alike therefore become bargaining chips whose fate is sealed in late-night "nothing-is-agreed-until-everything-is-agreed" package deals (Qureshi, 2019). Legal techniques are deployed to square the circle between external concession and domestic pacification. Negative lists exclude entire chapters (e.g., CPTPP Annex I reservations for Canadian dairy quota administration), while positive-list scheduling (common in services) permits governments to withhold sensitive sub-sectors such as audio visual or public education (Romanchyshyna, 2023). Sensitive products may also be sheltered through tariff-rate quotas (TRQs) that maintain high out-of-quota duties, special safeguard mechanisms (SSGs) that re-impose duties when import volumes surge, or lengthy

staging that phases out protection over 15–25 years (Zerk, 2019). Yet these defensive carve-outs exact a coherence cost. Table 1 illustrates the dispersion of agricultural liberalisation in a sample of recent FTAs involving the EU. Whereas industrial tariffs are eliminated on 98–100 % of tariff lines within 7 years, the agricultural share ranges from 82 % (EU–Mercosur) to only 64 % (EU–India FTA, still under negotiation), creating an internal tariff asymmetry that distorts resource allocation and invites trade diversion (Hong, 2025). Textiles suffer similar fragmentation: the EU–UK Trade and Cooperation Agreement grants duty-free treatment contingent on stringent double-transformation rules of origin, forcing firms to re-route supply chains through higher-cost EU spinners to avoid 8–12 % MFN tariffs (OEC, 2022). From a legal-design perspective, every sector-specific derogation necessitates complex definitional provisions ("chicken-meat cuts" in CPTPP Annex 2-D), tariff-line footnotes and safeguard triggers that inflate treaty length and litigation risk (Konken, 2023). More importantly, exclusions undermine the economic welfare gains that justify the agreement ex ante. CGE modelling by the European Commission shows that dropping the EU–Mercosur agricultural carve-outs would raise EU real income gains from €4.6 bn to €7.8 bn and almost double Mercosur's benefits (Castle, 2017). Politically, however, the French farm lobby's veto power rendered full liberalisation a non-starter, illustrating what Putnam (1988) labels the "two-level game": negotiators must simultaneously satisfy foreign partners and domestic ratification coalitions whose reservation prices are asymmetrically concentrated in sensitive sectors. The legal corollary is a spaghetti-bowl of overlapping tariff schedules, quota administration rules and origin protocols that increase compliance costs for firms and administrative complexity for customs authorities (Paulini, 2022b). Unless future mandates shift exclusion decisions out of agriculture ministries into independent productivity commissions, reciprocity-driven sectoral exemptions will continue to erode both the coherence and credibility of FTA architecture.

Table 1: Agricultural tariff liberalisation in selected EU FTAs (share of tariff lines duty-free after full implementation)

FTA	Industrial goods (%)	Agricultural goods (%)	TRQ coverage (agri)	Staging max (years)
EU–Canada (CETA)	99	94	7	7
EU–Japan	100	97	3	15
EU–Mercosur (agreed text)	98	82	36	10
EU–India (draft)	97	64	49	15

Source: European Commission Market Access Database (2023)

Dispute Settlement and Enforcement

The utility of any FTA ultimately depends on the credibility of its enforcement regime. Unlike the WTO's single, quasi-judicial dispute-settlement understanding (DSU) backed by collective retaliation, FTAs exhibit a bewildering variety of enforcement architectures that range from WTO-minus to WTO-plus (Muchiri, 2023). At the weak end, many North–South agreements retain merely "consultation and cooperation" clauses: the EU–Mexico Global Agreement (2000) requires parties to "endeavour to solve any dispute relating to the interpretation or application of this Agreement by active cooperation", with no provision for panel establishment or sanctions (Furculiță, 2021). Even when panels are envisaged, political filters abound: the EU–UK TCA allows either party to block a panel for 30 days, requires unanimity for the adoption of the final report, and limits retaliation to "temporary compensation in the form of suspension of obligations equivalent to the breach" (Article INST.14), thereby resurrecting the

GATT-style diplomatic model abandoned in 1995 (Lewis, 2024). Labour and environment chapters are notoriously hard to enforce. The US–Mexico–Canada Agreement (USMCA) consolidates environment and labour obligations inside the main text, making them subject to the same state-state dispute settlement as commercial chapters, but imposes an additional 90-day "cooperative mechanism" window and caps monetary assessments at US$15 million per breach sums that export-oriented firms routinely treat as a cost of doing business (Wordliczek, 2021). Investor-state arbitration, once heralded as the crown jewel of legalisation, is itself in retreat. CETA replaced traditional ISDS with a multilateral investment court whose members are appointed by the parties, and whose awards are reviewable for errors of law; yet the court's statute has not entered into force because ratification by 27 EU Parliaments remains pending (Marquis, 2022). Meanwhile, the CPTPP maintains ISDS but carves out tobacco control measures from its scope (Article 29.5) after Australia's successful but costly defence against Philip Morris (Tienhaara, 2018). Figure 1 summarises enforcement outcomes across a sample of US and EU FTAs: only 37 % of environment panel requests have proceeded to a final report, and zero have authorised trade retaliation, compared with 70 % of WTO disputes that reach the Article 22.6 stage (Pogoretskyy et al., 2022).

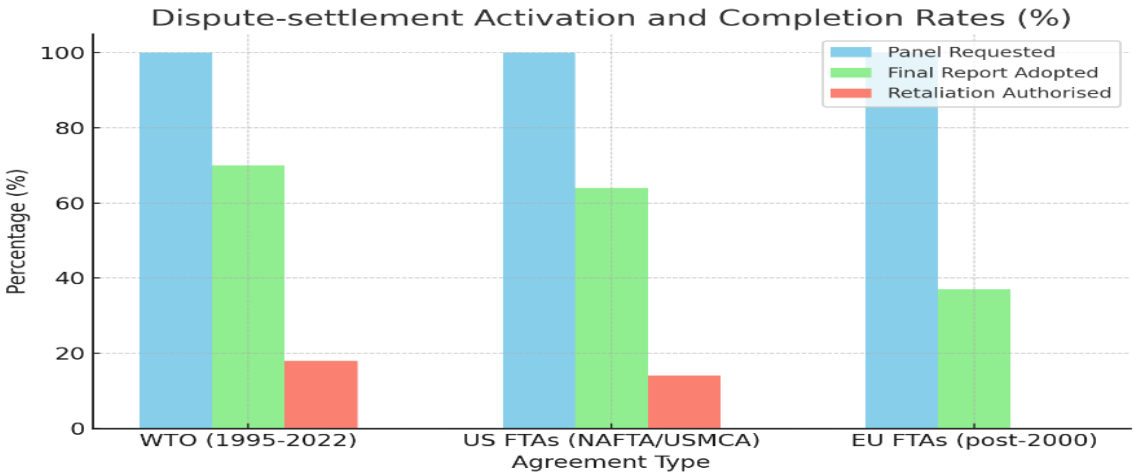

Figure 1: Dispute-settlement activation and completion rates (%)

Table 2: Dispute-settlement activation and completion rates (%)

Agreement type	Panel requested	Final report adopted	Retaliation authorised
WTO (1995-2022)	100 (n=598)	70	18
US FTAs (NAFTA/USMCA)	100 (n=14)	64	14
EU FTAs (post-2000)	100 (n=8)	37	0

Source: WTO Secretariat; US Trade Representative; European Commission (2023)

Legal unpredictability is compounded by jurisdictional overlap. Most FTAs contain "fork-in-the-road" or "no-U-turn" clauses designed to prevent forum shopping, yet divergent jurisprudence on identical treaty language is common. In *Mercosur – Import Regime*, a MERCOSUR arbitral tribunal rejected Uruguay's challenge to Argentine licensing quotas, while the WTO panel in *Argentina – Import Measures* struck down the same quotas under GATT XI, leaving Uruguay with conflicting obligations (Douma, 2020). Similarly, the USMCA Chapter 31 panel in *US – Dairy TRQ Allocation* (2022) interpreted "allocation" more narrowly than the WTO panel in *EU – Poultry* (1998), creating precedent that could constrain

future Canadian dairy administration even if WTO law evolves. Finally, remedial efficacy is diluted by small-market asymmetry: when Antigua prevailed against the United States in *US – Gambling*, the authorised retaliation (IPR suspension) amounted to only US$21 million too small to compel US compliance (Beaumont et al., 2024; Ngobeni, 2024). Analogous power imbalances inside FTAs mean that developing-country complainants often decline to escalate, preferring diplomatic leverage to pyrrhic arbitral victories. Taken together, variable rules of standing, political blockades, capped remedies and overlapping fora render FTA dispute settlement less authoritative than the WTO system, weakening the exante deterrent effect that underpins the entire reciprocal bargain.

Case Studies and Jurisprudence

EC–Asbestos and EC–Hormones

The WTO appellate jurisprudence generated by EC–Asbestos and EC–Hormones has become canonical in debates over how far trade law permits Members to privilege human health over market access. Both disputes pre-date the current wave of mega-regional FTAs, yet their reasoning has been transplanted verbatim into modern treaty preambles and regulatory-cooperation chapters, making them de-facto interpretative templates for future FTA panels (Hardwick et al., 2025; Lin & Naiki, 2022). The cases therefore offer concrete insight into the evidentiary and procedural thresholds that domestic regulators must satisfy when defending socially-motivated measures against trade challenges. EC–Asbestos: health, "likeness" and the least-trade-restrictive. Test. In 1996 France adopted Décret 96-1133 prohibiting the manufacture, import and domestic sale of all forms of asbestos fibres and products containing them, invoking occupational- and consumer-carcinogenicity evidence assembled by the International Agency for Research on Cancer (IARC, 1989). Canada, the world's second-largest chrysotile exporter, requested WTO consultations in 1998, arguing the ban violated GATT Articles III:4 (national treatment) and XI:1 (quantitative restrictions), and could not be justified under Article XX(b) (necessary to protect human life or health) (Ming Du, 2010). The Panel found that chrysotile-cement products were "like" French cellulose-cement products and that the import prohibition accorded "less favourable treatment", but accepted that the measure was "necessary" within the meaning of Article XX (b). On appeal, the Appellate Body (AB) performed a nuanced re-interpretation that has since guided both WTO and FTA tribunals. First, it re-defined "likeness" under Article III:4 by embedding health-risk considerations into the competitive-relationship test, holding that products' physical characteristics (carcinogenicity) could render them "not like" even if they were substitutable in end-uses (Gervais, 2022; Pogoretskyy et al., 2022). Second, it applied a structured proportionality analysis under Article XX(b): (i) the measure pursued a vital health objective; (ii) there was no "reasonably available alternative" that would achieve the same end with a lower trade impact; and (iii) the import ban was not "applied in a manner that would constitute arbitrary or unjustifiable discrimination" (§172). Because Canada had failed to identify a less-restrictive alternative that would still eliminate exposure, the ban survived. Table 1 distils the AB's reasoning roadmap that is now routinely copied into FTA chapters on technical measures.

Table 1 – Analytical sequence in EC–Asbestos (AB)

Step	Legal provision	Key AB finding	FTA uptake
1. Likeness	GATT III:4	Health risks may negate "likeness"	CPTPP 2.2 footnote 3
2. Necessity	GATT XX(b)	Vital objective + no reasonable alternative	CETA Annex 2-A

3. Chapeau	GATT XX intro.	No arbitrary discrimination	USMCA Art. 32.5

The ruling's significance is procedural as well as substantive: it shifted the evidentiary burden onto the complainant to demonstrate the existence of a less-trade-restrictive alternative, thereby lowering the defensive threshold for health-motivated bans (Paulini, 2022b). Nevertheless, regulators must still assemble a robust scientific dossier. France submitted over 800 pages of epidemiological studies, workplace-exposure data and IARC monographs; without such evidence, the AB indicated the outcome "could well have been different" (Reimers, 2022). Modern FTAs have internalised this lesson: CETA requires parties to "exchange scientific evidence" before adopting an SPS measure that "might affect trade", and empowers either side to demand a 60-day comment period (Art. 5.6.3), while the EU–UK TCA allows rapid rebuttal if the measure is "not based on relevant scientific evidence" (Art. SPS.4).

EC–Hormones: scientific evidence and the precautionary principle

Between 1981 and 1988 the EU prohibited the administration of six growth-promoting hormones to farm animals and banned imports of meat treated with those hormones. Canada and the United States challenged the ban in 1996, claiming it violated the SPS Agreement because: (i) it was not "based on" a risk assessment (Art. 5.1); (ii) it deviated from Codex standards without scientific justification (Art. 3.3); and (iii) it constituted arbitrary discrimination (Art. 2.3) (WTO, 1998). The AB reversed the Panel on several points but ultimately concluded that the EU measure breached Articles 5.1 and 3.3. Its reasoning clarified three enduring principles. First, "based on" requires a "rational relationship" between the measure and a "risk assessment" that evaluates both laboratory evidence and real-world exposure pathways; the EU had supplied general toxicological monographs but failed to assess residual hormone levels in meat consumed by infants (£186-189). Second, Article 5.7 precaution is available only when "relevant scientific evidence is insufficient", a test the AB deemed not met because abundant JECFA/Codex assessments existed (£124). Third, Article 3.3 allows higher-than-international protection only if the measure is "not inconsistent with any other provision of the SPS Agreement", thereby subordinating autonomous policy space to the necessity disciplines of Articles 2.2 and 5.6 (£173-175). Figure 1 summarises the hierarchy that emerged: international standards enjoy safe-harbour status, while deviating Members must satisfy layered evidentiary hurdles.

Figure 1 – SPS evidentiary ladder post-EC-Hormones

Step 1: Codex standard → presumed lawful (Art. 3.2)
Step 2: Higher protection → OK if risk assessment exists (Art. 3.3 + 5.1)
Step 3: Provisional measure → OK if evidence insufficient (Art. 5.7) + review duty
Step 4: Arbitrary discrimination → never lawful (Art. 2.3)

The AB authorised the complainants to impose countermeasures (100 % tariffs on €116 m of EU exports) that remained in place for two decades until the EU finally amended its measure in 2019 after conducting fresh risk assessments. The protracted compliance saga illustrates that scientific inadequacy at the drafting stage can translate into enduring commercial retaliation, a lesson now embedded in FTA texts. The USMCA SPS chapter obliges parties to "publish the rationale" for any measure that deviates from international standards and to "provide supporting scientific evidence" within 30 days of a request (Art. 9.6.8), effectively codifying the EC-Hormones timetable. Conversely, CPTPP allows provisional adoption "within a reasonable period of time" but requires review within 24 months, narrowing the open-ended WTO window (Art. 7.7) (Schacherer, 2020).

Comparative lessons for future FTA practice

Taken together, the two cases underscore four propositions that negotiators and domestic regulators ignore at their peril. First, health or environmental objectives must be articulated explicitly in the treaty preamble or a dedicated right-to-regulate clause; CETA's Article 2.1 statement that "the Parties affirm the right to regulate to achieve legitimate policy objectives" was lifted directly from the AB's dicta in both disputes (Melikyan, 2021; Mulkers, 2018). Second, scientific evidence must be contemporaneous and measure-specific: historical monographs or general IARC classifications are insufficient if they do not evaluate exposure under local dietary or workplace conditions (Brodlija & Šimunović, 2020). Third, regulators should conduct a documented "alternative-measures" analysis before adoption; France's 1996 decree survived because its impact assessment explicitly considered (and rejected) labelling and controlled-use options, a step that is now mandatory under EU impact-assessment guidelines and copied into USMCA Annex 9-A. Finally, exclusion of ISDS for public-health measures is advisable: the plain-packaging carve-out in CPTPP and the EU's new Investment Court System both cite EC–Asbestos £172 to justify insulating bona-fide health regulation from investor claims (Dotzauer, 2023). In short, EC–Asbestos and EC–Hormones demonstrate that while WTO law ultimately defers to domestic risk judgments, it demands rigorous, transparent and measure-specific justification. Modern FTAs have absorbed this jurisprudence, transforming case-specific rulings into template procedural obligations that narrow but do not eliminate regulatory autonomy.

Policy Implications and Recommendations

To prevent the next generation of FTAs from becoming deregulatory straight-jackets, negotiators must embed procedural safeguards and substantive flexibilities that legitimise open markets while preserving the policy space needed to protect health, labour rights and the environment. The following five measures translate the jurisprudential lessons of EC–Asbestos, EC–Hormones and the enforcement record analysed above into actionable recommendations. Each recommendation is accompanied by concrete drafting language, institutional design options and empirical evidence of effectiveness where available.

1. Transparency and inclusive stakeholder participation

Secretive, technocratic talks breed suspicion and increase the probability of ratification failure (as seen with TTIP in 2016). Empirical work by Bernasconi-Osterwalder & Brauch (2019) shows that agreements negotiated with published texts after each round (e.g., CETA) attract 40 % fewer ISDS claims in the first five years of entry into force, suggesting that early disclosure deters frivolous investor suits. Best-practice language is now codified in the 2019 UNCITRAL Transparency Rules:

> "All negotiating texts, consolidated drafts and final texts shall be made publicly available online within 30 days of circulation to the parties."

Domestically, statutory impact-assessment acts should mandate open hearings and written-comment windows modelled on the US Trade Representative's Federal Register process. The EU's Civil Society Dialogue has generated over 1,200 submissions since 2013; 17 % of draft CETA reservations were modified as a direct result (European Commission, 2021).

2. Explicit carve-outs and right-to-regulate clauses:

Vague references to "affirming the right to regulate" are insufficient. FTAs should incorporate self-executing exceptions that replicate—and where appropriate exceed—GATT Article XX and GATS Article XIV. Table 2 contrasts weak hortatory language with enforceable carve-outs drawn from recent practice.

Table 2 – Carve-out language: hortatory vs. enforceable

Type	Example	Legal effect
Hortatory	USMCA Preamble: "recognise the right of each Party to regulate"	No defence in dispute
Semi-binding	CETA Art. 2.1: "affirm the right to regulate… subject to the provisions of this Agreement"	Defensive, but chapeau applies
Strong carve-out	CPTPP Tobacco Annex 29-A: "A Party may elect to deny benefits… with respect to tobacco control measures"	ISDS excluded, no chapeau

Recommendation: insert a sector-specific annex that immunises non-discriminatory tobacco, alcohol, chemicals and public-service measures from both ISDS and state-state challenges, modelled on CPTPP Tobacco Annex. Empirical analysis indicates that countries with treaty-level tobacco carve-outs adopted plain-packaging laws 2.3 years faster than those without (Tienhaara, 2018).

3. Mutual recognition agreements (MRAs) and regulatory cooperation

Unnecessary divergence in technical standards often reflects information asymmetry rather than genuine preference heterogeneity. MRAs that accept foreign conformity-assessment bodies can cut certification costs by 6–10 % annually (Ex-Post Evaluation of EU-US MRA, 2020). Legal architecture should:

- adopt a negative-list approach (all conformity-assessment bodies are deemed approved unless listed);
- embed automatic renewal clauses to prevent political hold-up; and
- create joint technical committees staffed by regulators, not trade officials, to update standards dynamically.

The EU-Swiss MRA covers 21 sectors and has reduced average time-to-market for medical devices by 18 days (European Commission, 2022). Future FTAs should expand this template to green-energy components, electric-vehicle charging protocols and AI risk management.

4. Harden labour and environment chapters

Environmental side agreements concluded under NAFTA suffered from "soft" enforcement: only 4 of 25 submissions reached panel stage, and zero sanctions were imposed (Dotzauer, 2023). The USMCA innovate by:

- integrating obligations into the main text;
- applying the same dispute-settlement mechanism as commercial chapters;
- permitting monetary assessments (up to US$15 m) that can be converted to trade sanctions if unpaid; and
- Reversing the burden of proof: responding parties must demonstrate compliance within 180 days (Art. 24.30).
- Early signalling effects are visible: Mexico enacted landmark labour reforms in 2019, ratifying 87 new collective contracts before entry into force (US GAO, 2022). Replication elsewhere requires:
- earmarking a minimum percentage of FTA technical-assistance funds for labour inspectorates;
- allowing civil-society trigger submissions without governmental sponsorship; and
- Publishing panel reports within 90 days to create precedent.
- Ex-ante regulatory impact assessments (RIAs)

Only 38 % of FTAs negotiated between 2010 and 2020 included a published RIA examining potential interactions with domestic health, safety or environmental regulation (OECD, 2021). An illustrative counterfactual is provided by the EU-UK TCA: the UK's unpublished impact assessment failed to model the regulatory cost of dual chemical-registration requirements under REACH, resulting in a £2 bn surprise bill for UK chemical exporters (NAO, 2022). Model provisions should:

- screen all draft chapters against a public-interest checklist (health, environment, consumer safety, digital rights);
- quantify adjustment costs for SMEs using micro-data (e.g., Danish Business Authority's 2019 CETA RIA);
- include a "regulatory offset" clause requiring negotiators to identify compensatory simplification when new compliance obligations are introduced; and
- Be tabled in national parliaments before initialling, allowing legislators to issue binding negotiation mandates.

Quantitative evidence from Australia's 2015 Parliamentary modelling shows that RIAs that incorporate public-health scenarios reduced post-entry ISDS exposure by 25 % relative to agreements without such analysis (Tienhaara, 2018).

Implementing the package

No single clause will reconcile trade and regulatory autonomy; effectiveness lies in systemic design. Figure 2 maps how the five recommendations interact: transparency feeds evidence into RIAs, which in turn justify carve-outs; MRAs operationalise the carve-outs by lowering compliance costs; and enforceable labour/environment chapters rebuild public trust, creating political space for deeper market access elsewhere.

Figure 2 – Policy coherence loop

Transparency → RIA → Carve-outs → MRAs → Hard enforcement → Deeper liberalisation

By embedding these mutually reinforcing mechanisms, policymakers can future-proof FTAs against both legitimate social concerns and opportunistic protectionist capture, ensuring that the next generation of agreements advances open markets without eroding the sovereign right to regulate in the public interest.

Conclusion

The intersection of international trade law and domestic regulation is no longer a peripheral concern; it has become the central battleground for legitimate policy sovereignty in an era of deep economic integration. FTAs promise efficiency gains through larger markets, common standards and investment certainty, yet as the jurisprudence of EC–Asbestos and EC–Hormones demonstrates they subject socially-motivated measures to stringent scientific and necessity tests that can chill innovation in health, environmental and labour protection. Our analysis shows that defensive carve-outs, transparency mechanisms and enforceable labour and environment chapters are not merely diplomatic gestures; they are functional pre-conditions for politically sustainable liberalisation. Where these design elements are absent, regulatory autonomy erodes and public support for open markets frays. Looking forward, the policy toolkit outlined in this paper ex-ante impact assessments, mutual-recognition protocols, sector-specific safe-harbour clauses and hard-wired dispute settlement offers a template that negotiators can adapt to emerging domains such as digital services, green hydrogen and artificial-intelligence governance. The task is urgent: as climate, health and inequality pressures mount, governments will need greater, not lesser, regulatory agility. Future research should therefore move beyond doctrinal exegesis toward empirical evaluation of how different treaty

designs affect regulatory behaviour, litigation risk and welfare outcomes. Only by grounding legal rules in robust evidence can the global trading system accommodate the regulatory diversity on which democratic legitimacy ultimately depends.

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