

INTRODUCTION

Introduction to the Special Issue on Package Treaties

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Globalization generates benefits for nations around the world, but it also creates winners and losers within nations. As former WTO Director-General Pascal Lamy puts it: ‘Globalization works because it is painful, and it is painful because it works’.¹ This is why international economic integration inevitably creates a collective action problem; opposition by losers may thwart policies that would benefit nations overall.

The classical solution puts national governments in charge of establishing mechanisms for sharing the gains and pains among their citizens. Some governments have achieved this successfully but others have not, leading to anti-trade sentiments at heights not seen since the 1930s. Since popular resentment has arisen in some of the leaders of multilateral systems, including in the United States (US), the lack of sharing mechanisms at the national level is threatening the multilateral trading system as a whole.

This special issue brings together leading scholars in the fields of law, international relations, and economics to consider how governments have traditionally addressed the negative effects of trade liberalization. What are the limits of the traditional approach? How has the practice evolved? And what is to be done to further overcome the shortcomings of current trade policy-making? The authors delve into the negative effects, identified by trade experts through impact assessments and ex-post case studies, of trade liberalization on society and the environment. They also reflect upon the risks and opportunities of the emerging solutions of ‘mutually agreed flanking policies’ and ‘package trade agreements’, which consist in tying international trade instruments legally or politically with domestic legislation, public or private standards, or other legal instruments aimed at addressing the negative effects of trade liberalization.

The economics of ‘flanking policies’ face a conceptual challenge: some of the negative effects of trade liberalization suffered by individuals or firms (real income or welfare losses) are necessary for the benefits of trade to materialize, while others serve no economic purpose. The challenge of distinguishing incidental from necessary negative effects of trade liberalization is further exacerbated by a lack of ex-post empirical data and the fact that the negative externalities of trade materializing abroad can simultaneously have domestic economic impacts (e.g. consumer awareness of child labor issues or deforestation). In order to better tailor trade policies to reduce the level of incidental negative effects of trade liberalization for individuals and firms, we need a better understanding of the difference between necessary and incidental negative effects and of the domestic effect of externalities taking place.

Furthermore, on the legal side, the fact that the domestic measures used in the past to address the negative effects of trade liberalization have not delivered the intended results has led to questioning of the traditional silo approach. The latter consists in liberalizing trade through

¹P. Lamy (2015) ‘The New World of Trade: The Third Jan Tumlr Lecture’, Jan Tumlr Policy Essays, ECIPE, 4.

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international agreements, and subsequently addressing domestic fallout and its effects by implementing so-called flanking policies domestically. This conventional approach relies on (1) subsidiarity: liberalization internationally; flanking policies domestically, and (2) silos: no connection between liberalization and flanking. As it turns out, domestic flanking policies have been at a disadvantage in comparison with trade liberalization policies. Traditional flanking policies are temporary, purely domestic, and require renegotiation and reauthorization. Trade liberalization commitments, by contrast, are indefinite, enshrined in international agreements, and implemented by the executive branch. Therefore, in the traditional approach to flanking policies, trade assistance is institutionally disfavored.

Several new policy instruments, aiming at overcoming the disfavoring of trade assistance vis-à-vis trade liberalization, have been emerging recently. Prominent examples include trade preferences for sustainable palm oil in the EFTA–Indonesia Comprehensive Economic Partnership Agreement, the EU’s Carbon Border Adjustment Mechanism, the EU Deforestation Regulation, and the requirement to enable collective bargaining in Mexico as a condition for the US Congress to ratify the US–Mexico–Canada Agreement. These new regulatory instruments come with unclear legal repercussions. Furthermore, it is not always clear to what extent they successfully mitigate the negative effects of trade liberalization. New insights are thus needed to inform future trade policy regarding an effective, meaningful, and WTO-law-compatible balance between trade liberalization and flanking.

Finally, in international relations, we see that the rising public awareness of the negative effects of trade liberalization has made it increasingly difficult for negotiators to conclude international trade agreements and to gather enough domestic political support to get the deals ratified. Negotiators from advanced democracies often face intense pressure from domestic interest groups, including environmental non-governmental organizations and labor unions. As a result, trade deals agreed at the international level typically have a long domestic road ahead before entering into force. In some cases, domestic opposition to a trade agreement or a change in administration can jeopardize international negotiation efforts. For example, the US withdrawal from the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership after the election of Donald Trump put a sudden halt to negotiations. Similarly, the Comprehensive Economic Trade Agreement between Canada and the EU underwent seven years of painful negotiations, widespread criticism from civil society, and is still provisional and therefore only partially in force seven years after its signature. This creates institutional incentives for new forms of international trade cooperation that do not require the active involvement of parliament or civil society, e.g. through coordinated autonomy as pursued by the Indo-Pacific Framework for Prosperity. However, overcoming the stalemate in trade cooperation by relying more heavily on the executive branch of government comes with uncertain implications for the future of trade policy and its democratic legitimacy.

Since the conclusion of the North American Free Trade Agreement in 1992, negotiators have tried to appease the concerns of domestic opponents by including trade and sustainability chapters in trade agreements. However, such chapters do not seem to prevent political backlash anymore. One reason may have to do with the low implementation and enforceability of trade and sustainability chapters. Package treaties could be a solution to this deadlock. Namely, they would require that governments, prior to joining a free trade agreement or right after, develop a set of domestic policies that pre-empt, address, or minimize the environmental and labor disruptions that the treaty is likely to cause. To address critics’ concerns in a meaningful way, the ‘package’ of a trade liberalization agreement combined with the necessary flanking policies would need to be ensured ex-ante and continuously monitored ex-post.

This special issue first provides a conceptual framework for the analysis of traditional and emerging flanking policies. It explains the need for such analysis and outlines why the concepts of ‘trade liberalization packages’ and ‘package treaties’ are of particular interest (Pauwelyn and Sieber-Gasser). By looking at existing ex-ante economic impact assessments, this issue then

provides an overview of the apparent, potential, assumed, and perhaps also hidden negative effects of trade liberalization on the economy, society, and the environment (Baldwin, Donato, and Reverdy). It then turns to the role of domestic law and administrative practice in addressing the negative effects of trade liberalization, with a special focus on the domestic operationalization of package treaties (Claussen). Given that the traditional approach to flanking appears to be replaced by a new form of more extra-territorially oriented policies, the special issue discusses and analyzes the legal repercussions of such emerging practices. Relevant is in particular the apparent shift from production-centered to consumption-centered regulation (Meyer; Shaffer). Finally, the special issue concludes with a historical perspective. It explores why the earlier system of embedded liberalism combined with the design of the post-World War II international trade system did not always function effectively and how the domestic politics of package treaties might differ from the domestic politics of this earlier system (Mosley and Rosendorff).

We believe that this special issue makes a strong case for further research into trade liberalization packages and package treaties: it demonstrates that through this approach, trade liberalization not only mitigates its own negative effects but has the potential to create positive spillovers for labor and the environment in general. However, substantial economic, political, and legal uncertainties remain and research has a key role to play in elevating international trade liberalization to the next, more balanced, stage.