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ORIGINAL ARTICLE

Operationalizing Package Treaties: A US Case Study

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Abstract

This article studies the incorporation of package treaties in domestic law and administrative practice, including the functions these treaties serve once in force. This sketch of the domestic operationalization offers a window into the institutional design choices that shape how lawmakers craft the regulatory ecosystem in which flanking policies are carried out. The typology for understanding how governments situate package treaties in their domestic regulatory spaces is introduced, arguing that the 'package' of legally binding trade liberalization commitments and mutually agreed flanking policies is shaped by both legislative and regulatory choices that are often underestimated and overlooked. DUS trade agreements are used as a case study, finding that the US government's treatment of each of its trade agreements tends to follow a common pattern: only a small part of the agreement is transposed into domestic law; complex and robust institutions are built around the agreement to embed it deeply into the trade policy work of the executive branch; and, the entrenchment of US trade agreements has a significant enabling effect across a wide range of cross-border regulatory engagements that US agencies think of as 'monitoring' or 'enforcing', among other labels. Finally, the policy choices against the goals laid out by proponents of package treaties are assessed.

Keywords: package treaties; implementation; trade agreements

1. Introduction

Trade liberalization agreements rarely stand alone. On the international side, a free trade agreement may be accompanied by side agreements, exchanges of letters, memoranda of understanding, and other ancillary deals.[1] Internal to the agreement itself, one finds today not just liberalization commitments, but also binding obligations designed to mitigate the concerns or detrimental effects of the liberalization agreement. In the United States, for instance, a comprehensive free trade agreement will not receive congressional approval without robust labor and environmental protection provisions. Mutually agreed flanking provisions, with respect to those two policy spaces, are now canonical principles.[2] But the story does not end there. On the domestic side, these agreements typically require legislation to make the changes agreed in the deal, and sometimes more. In short, trade agreements regularly come in packages.

[1]L. Cernat (2023) 'The Art of the Mini-Deal', ECIPE Policy Brief No. 11/2023, Brussels, 9 October 2023, https://ecipe.org/wp-content/uploads/2023/10/PR-PB-112023.pdf (accessed 10 January 2024); K. Claussen (2022) 'Trade's Mini-Deals', *Virginia Journal of International Law* 315.

[2]J. Pauwelyn and C. Sieber-Gasser (2024) 'Addressing Negative Effects of Trade Liberalization: Unilateral and Mutually Agreed Flanking Policies', *World Trade Review*, this issue (defining flanking policies as 'policies that can mitigate negative effects of trade liberalization, or the concerns of domestic stakeholders regarding said effects, or both, and that are legally or factually linked to such trade liberalization').

This article picks up at that critical juncture. It considers how trade agreements and their flanking policies are brought into domestic law and administration. Much of the scholarly work by international trade lawyers and researchers too often concludes with a treaty's entry into force. However, to a large degree the heavy lifting, and more importantly the regulatory choices that may affect the treaty's success or failure, comes after that moment. This article elaborates upon such package treaties' subsequent administration.[3]

Where a trade deal purports to lower trade barriers and bring tariffs to zero on substantially all the trade between the parties, those liberalization goals are relatively easy to implement. A tariff schedule is updated and instructions go out to border agents to let in the products that previously were not allowed, for instance. The flanking policies are the ones that take most of the work. What happens to the flanking policies and packaged commitments that are mutually agreed after these deals enter into force? How are they administered?

Take the Indo-Pacific Economic Framework (IPEF) Supply Chain Agreement (SCA).[4] Although not a traditional or comprehensive free trade agreement, the IPEF SCA, which entered into force on 24 February 2024, demonstrates the vast architecture trade agreements can construct.[5] The SCA's entry into force triggered the creation of a Supply Chain Council, a Supply Chain Crisis Response Network, and a Labor Rights Advisory Board.[6] Alongside the SCA, the 14 governments launched a Critical Minerals Dialogue.[7] In November 2023, the parties announced the substantial conclusion of three additional related agreements: the IPEF Clean Economy Agreement, the IPEF Fair Economy Agreement, and the IPEF Agreement on the Indo-Pacific Economic Partnership for Prosperity.[8] Funding was allocated for the implementation of these agreements in some countries, and some parties passed laws to put the IPEF changes into effect. What comes next is everything.

This article offers a framework for how we might begin to think about, and ultimately assess, how package treaties are implemented and administered. I take up US agreements as a case study through which to explore such issues. I examine the life of US package treaties to consider how various actors – the US Congress, the US executive branch, private parties, and international partners – engage and then direct how the flanking policies perform. The story of how the US foreign-facing commercial bureaucracies implement agreements has practical, policy, and legal dimensions. It involves the practical operationalization of transnational commitments across the trade administrative state. In carrying out that work, agencies have considerable policy discretion. At the core of that exercise is a determination about the domestic legal force of obligations agreed upon with foreign governments, as well as those accompanying the agreement, and the amount of attention and resources those obligations merit.

The article proceeds in three sections. Section 1 introduces the conceptual framework for understanding how governments situate package treaties in their domestic regulatory spaces. It argues that the implementation of the 'package' of legally binding trade liberalization commitments and mutually agreed flanking policies is shaped by both legislative and regulatory choices. I set out a typology for understanding these choices. Any analysis of package treaties must consider: first, the nature of the agreement's incorporation into domestic law; second, the agreement's embeddedness in domestic or transnational institutions; and third, the range of activities put in

[3]Ibid. (defining a package treaty as a 'legally binding treaty or other international convention or agreement, that includes legally binding commitments on both trade liberalization and mutually agreed flanking policies').

[4]'Indo-Pacific Economic Framework', Australian Government Department of Foreign Affairs and Trade, www.dfat.gov.au/trade/organisations/wto-g20-oecd-apec/indo-pacific-economic-framework (accessed 10 January 2024).

[5]D. Dupont (2024) 'Commerce: IPEF Supply Chain Agreement will enter into force on Feb. 24', *Inside US Trade*, Washington, 31 January 2024.

[6]'IPEF Supply Chain Agreement Explainer', Australian Government Department of Foreign Affairs and Trade, www.dfat.gov.au/trade/organisations/wto-g20-oecd-apec/indo-pacific-economic-framework/ipef-supply-chain-agreement (accessed 10 January 2024).

[7]Indo-Pacific Economic Framework, supra n. 4.

[8]Ibid.

place that the government – usually the executive – can undertake to further 'enable' the agreement. These three inputs shape the later life of the agreement beyond the original substance and ultimately the success or failure of the flanking policy in question.

Section 2 presents data reflecting these indicators of package treaty implementation. Using US trade agreements as a case study, this research finds that the US government's treatment of each of its trade agreements – all of which reflect some degree of flanking – tends to follow a common pattern: only a small part of the agreement is transposed into domestic law; complex and robust institutions are built around the agreement to embed it deeply into the trade policy work of the US executive branch; and, the entrenchment of US trade agreements has a significant enabling effect across a wide range of cross-border regulatory engagements that US agencies think of as 'monitoring' or 'enforcement', among other labels.

Finally, Section 3 analyzes the significance of this pattern of implementation among US trade agreements and similarly situated package treaties. Here, the article reviews the administration of these flanking policies after their entry into force and assesses these policy choices against the goals of proponents of package treaties. I argue, first, that considerable work is done by implementing legislation; however, the indicator of greatest significance is the degree of discretion afforded to executive branch officials and how they exercise that discretion. Second, the administration of package treaties also turns on the incentive structures built into their administration for the officials that work within their regulatory architecture, and some of those incentive structures may actually work against some of the goals that flanking policies are seeking to achieve.

A note on terminology before proceeding: this article focuses on package treaties as defined by Pauwelyn and Sieber-Gasser – legally binding trade liberalization agreements with mutually agreed flanking policies built into them. Thus, this work does not examine the implementation of the Uruguay Round Agreements or other multilateral agreements, although there are some parallels of relevance (as well as some important distinctions in treatment). I note, however, that package treaties could be viewed more broadly and still meet the needs of Pauwelyn and Sieber-Gasser. Trade agreements come in many packages and do not necessarily require a comprehensive free trade agreement to achieve them; for that reason, I include references to IPEF as a recent example, as well. Likewise, this work concentrates on intergovernmental arrangements, although it mentions, where appropriate and relevant, judicial interventions and private sector functions.

2. Domesticating Package Treaties

Package treaties, like all international agreements, require implementation and accommodation within domestic law and policy. We lack a formal definition of implementation, but it is perhaps commonly understood to refer to the reasonable period of time during which legislators bring the domestic law of a party to the agreement into compliance with the commitments in the agreement if it is not already.[9] Identifying what activities constitute 'implementation', its beginning and end, is challenging.[10] Writing in 1992, John Jackson noted that 'implementation of international commitments has at times appeared to take on almost a religious character'.[11] He

[9]I will put to one side the international law questions about whether those legislative changes ought to be made prior to entry into force. In practice, we know that some governments take longer to make the required changes, and that sometimes an agreement provides that grace period. And we know that some states evaluate others' compliance quickly such that the political grace period may be quite limited.

[10]Case law does not help in this regard. The first case to use the term 'implementation' in reference to an international commitment in US courts was a 1934 case concerning a treaty with Canada. The court quoted Canadian law: 'the treaty "has been implemented or sanctioned by legislation rendering it binding upon the subject," and the statute giving authority to impose tolls for the use of the improvements "must be considered to be a valid enactment until the treaty is implemented by Imperial or Dominion legislation."' *Pigeon River Imp Slide & Boom Co v Charles W Cox Ltd*, 291 US 138 (1934).

[11]J.H. Jackson (1992) 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', *American Journal of International Law* 86, 310, 312.

referred to the 'act of transformation': 'placing a general treaty norm into domestic jurisprudence'.[12] The most familiar mechanism for treaty implementation is what is popularly known as 'implementing legislation'.[13] But to be sure, a government's implementation of any one of its international commitments is not a singular action that happens in a singular moment. Rather, it may require several moves over a long period of time. Depending on the length or interest of one's glimpse at these early moments, diverse visions of agreement life emerge as does a different understanding of the relevant actors in any agreement-precipitated decision-making.[14]

For purposes of this discussion, I will focus on three determinative points or features in the early life of a package treaty that influence the agreement's later operation: first, the nature of the treaty's incorporation into domestic law; second, the treaty's embeddedness in domestic or transnational institutions; and third, the range of activities put in place that the government – usually the executive – can undertake to further 'enable' the treaty. These three inputs shape the later life of the agreement beyond the original substance. With some further investigation, we may be able to set out a short research agenda for each of the three.

The first determinative point in this investigation – the nature of the treaty's incorporation into domestic law – implicates questions of to what extent an agreement's text gets transposed, how much of the treaty that transposition incorporates apart from the text itself, how much the transposition duplicates or reinforces existing domestic law, how the treaty fits into any hierarchy of domestic law, and how much of the treaty is omitted, among other potential questions.[15] Lingering behind each of these questions is a further question of agency.

In some jurisdictions, such as the United States, there may be multiple pathways for legal domestication of international commitments, creating some fuzziness.[16] For example, in the United States, the precise steps taken by an executive branch actor after an agreement enters into force are dictated not by the agreement or by the statute that empowered the executive branch to negotiate it in the first place.[17] Some direction may be provided by implementing legislation passed by the US Congress, but that too may be silent with respect to individual commitments in the treaty. The executive branch may be empowered by other statutes to develop regulations that domesticate an agreement. or it may take informal steps to ensure that the foreign commercial bureaucracy is acting consistently with the agreement. In other instances, no legal steps may be required.

Generally, one would expect a greater degree of incorporation would mean a more reliable solidification of the international norm. It may also mean there is buy-in from at least part of the domestic government. However, a government may already have laws that are required by the agreement such that no incorporation is required. In that instance, the agreement creates an international obligation to maintain the domestic law already on the books.[18] Either way, domestic incorporation is not a panacea for locking in international obligations as future

[12]Ibid.

[13]In the United States, such legislation may also delegate to the executive branch to take regulatory action in the operationalization of the treaty or agreement, 'Treaties and Other International Agreements: The Role of the United States Senate', Congressional Research Service, Prt 106-71 (2001), https://perma.cc/8EU7-2ESQ (accessed 10 January 2024).

[14]J. Galbraith (2017) 'Making Treaty Implementation More Like Statutory Implementation', *Michigan Law Review* 115, 1309.

[15]D.L. Sloss (2016) *The Death of Treaty Supremacy: An Invisible Constitutional Change.* Oxford University Press, 295–318; J. Coyle (2010) 'Incorporative Statutes and the Borrowed Treaty Rule', *Virginia Journal of International Law* 50, 655.

[16]This builds on prior scholars' acknowledgement that no one-size-fits-all for treaty implementation. Galbraith, supra n. 14. There is also literature about subnational implementation – when states and cities implement international legal commitments. C. Ku et al. (2019) 'Even Some International Law is Local', *Virginia Journal of International Law* 60, 101.

[17]In some instances, these delegations to negotiate may cover topic areas already within the regulatory authority of the agency for domestic administration; in others, they may cover new territory. K. Claussen (2022) 'The Improvised Implementation of Executive Agreements', *The University of Chicago Law Review* 89(7), 1655.

[18]I have addressed this practice elsewhere. See K. Claussen (2020) 'Regulating Foreign Commerce through Multiple Pathways', *The Yale Law Journal Forum* 266.

domestic laws could create inconsistencies that must later be resolved. Further, while the international texts may suggest one meaning or interpretation, the domestic texts might suggest another.

The second critical feature – what I refer to as the treaty's 'embeddedness' – can be just as important as the formal incorporation of the agreement into domestic law. This term refers to new and old means of developing support systems for the agreement into domestic and transnational institutions. For instance, the legislature may create a commission to review work carried out in connection with an agreement, or the executive branch may send staff to a foreign state for purposes of ensuring the agreement is fully realized. These are official and unofficial steps that operate alongside the agreement to enhance its effectiveness and extend its reach. Not all agreements will be comparable on this point. The matter may be even more complicated when the legislature's implementing legislation creates additional flanking policies that go beyond the agreement. Do those additional flanking policies rise and fall with the agreement or are they independent of it? These practical and legal questions are growing in importance.

To fully measure and assess a package treaty's embeddedness requires a more precise taxonomy of agreement goals, distinguishing between those that are meant to achieve a singular goal as compared to those that create systemic change. Certainly, some may be intended to do the former but end up doing the latter. The data set that Pauwelyn and Sieber-Gasser propose will be useful in this regard, given that the range of embeddedness metrics and options will vary considerably depending on the nature of the agreement.

The third point – what I call the 'enabling' phase – refers to the moments in which government actors apply, invoke, and rely on the package treaty. They may do so to execute their obligations or their privileges, or they may do so to achieve what may be considered ancillary or supplementary goals. By this, I do not mean subsequent practice of the type considered for the interpretation of a treaty.[19] Nor do I refer to state behavior studied to understand how agreements change in meaning over time.[20] Here we are interested here in what functions the agreement may be fulfilling through these practices. Among the possible enabling activities are diplomatic engagements under the auspices of the agreement; voting in commissions or councils created by the agreement; monitoring the activities of the other parties, including through extraterritorial interventions; carrying out in-country missions; or developing shared regulatory frameworks with the agreement parties, to name just a few. These manifestations of the agreement's operations are what some scholars of an early era referred to as 'realization'.[21]

The more 'enabling' work is done, the more successful some stakeholders consider the agreement to be. Through these activities, the agreement is seen as having greater utility than if it were a one-time modification of laws and nothing more. Success turns on precisely how the deal is being used, and this is especially true for package treaties whose flanking policies require ongoing regulatory activities. The fact that it is being used at all is a relevant data point, especially given that agreements vary in the extent to which they create a sustainable foundation for the principles they contain. Some fade from relevance, some shape future conversations, some dissipate in importance, and some are even forgotten.

3. A Case Study: US Package Treaties

This section reviews the 16 US package treaties (comprehensive free trade agreements) that have entered into force in the last 40 years. As will be discussed in this section, the US government's

[19]For a useful study see J. Arato (2010) 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences', *The Law & Practice of International Courts and Tribunals* 9(3), 443, 465.

[20]Y.A. Wang (2019) 'The Dynamism of Treaties', Maryland Law Review 828; J.K. Levit (2005) 'A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments', *Yale Journal of International Law*, 125; K. Alter and K. Raustiala (2018) 'The Rise of International Regime Complexity', *The Annual Review of Law and Social Science,* 329.

[21]P.S. Wild Jr (1932) 'Treaty Sanctions', *American Journal of International Law* 26, 488.

treatment of each of its agreements tends to follow a common pattern with respect to the three features identified above: only a small part of the agreement is transposed into domestic law (low degree of incorporation); complex and robust institutions are built around the agreement to embed it deeply into the trade policy work of the executive branch (high degree of embeddedness); and their entrenchment has a significant enabling effect across a wide range of cross-border regulatory engagements that US agencies think of as 'monitoring' or 'enforcement' among other labels (high degree of enabling qualities).

3.1 Incorporation

With US free trade agreements (FTAs), the so-called fast-track legislative approval process in the United States (now called Trade Promotion Authority) delineates a path from negotiation to statute.[22] After entering into the agreement, the president must submit to both houses a copy of the final legal text of the agreement, together with draft implementing legislation, a statement of administrative action proposed to direct the executive and a statement demonstrating that the agreement furthers the goals of Congress's delegation.[23] The bills 'must contain provisions approving the agreement, the statement of proposed administrative action and provisions amending existing statutes or creating new statutory authorities that are necessary or appropriate to implement the agreement'.[24]

Despite this clearly defined process, many of the commitments in US FTAs are not memorialized in any way in the implementing legislation that accompanies them.[25] Over the last 40 years, Congress has implemented fewer and fewer trade agreement commitments into US law.[26] Running a comparison across the implementation acts of US FTAs reveals that, first, they rarely change as the agreement text rarely changes, and, second, that many of the commitments in US FTAs are not memorialized in the implementing act. The main function of the implementing legislation has been to adjust tariff lines and to lower a limited set of non-tariff barriers. The implementing legislation rarely incorporates elements of the flanking policies of an agreement.

Where implementing legislation speaks to flanking policies, it addresses the embeddedness of those policies, not the legalization of their content, because US law is consistent with the terms of the agreement and no further legislative text is required, or so goes the conventional wisdom. Implementing legislation sometimes provides the executive with authority to enact through regulation, proclamation, or other executive authorities, regulatory changes as required by the agreement.[27] But even then, the executive does not always make good on those mandates.

So, what happens to those commitments as a matter of domestic or international law? What happens if parts of the FTA are unaccounted for in the domestic legal process? What happens if the executive does not carry out the administrative activities expected by Congress or carries out different activities that are contrary to what appears in the agreement? The answers to these

[22]Trade Priorities and Accountability Act of 2015 (TPA 2015), Pub L No. 114-26 (2015).

[23]North American Free Trade Agreement Statement of Administrative Action, reprinted in HR Doc No. 159, 103d Cong, 1st Sess 450, 461 (1993).

[24]TPA 2015, s 102. The process is imperfect, however, even if those imperfections are rarely noticed or explored.

[25]We can generalize here because there is considerable consistency across those acts (just like the agreements themselves).

[26]This approach is one among other factors that has contributed to the perception that Congress does not need to approve agreements that appear not to change US law. Importantly, Congress maintained in the 1974 Trade Act an expectation of approval, even where changes to US law were not required. The Act defines 'implementing bill' as 'a bill of either House of Congress which is introduced with respect to a trade agreement and which contains: (A) a provision approving such trade agreement or agreements, (B) a provision approving the statement of administrative action (if any) proposed to implement such trade agreement or agreements, and (C) *if changes in existing laws or new statutory authority is required to implement such trade agreement or agreements, provisions*, necessary or appropriate to implement such trade agreement or agreements', Section 151 (b)(1) (emphasis added).

[27]North American Free Trade Agreement Implementation Act, Pub L No. 103-182, 107 Stat 2057 (1993).

questions remain unclear. This lack of clarity has created some challenges in congressional oversight of US trade agreements.

A recent example is the implementation of the United States–Mexico–Canada Agreement (USMCA). The USMCA implementing legislation does little to codify the commitments made in the agreement itself and this silence produced difficulties for members of Congress that sought to exert control over the USMCA's objectives. After the USMCA entered into force in July 2020, certain members asked the Office of the US Trade Representative (USTR) why progress was not made on matters that had been key congressional priorities in the vote on the USMCA implementing legislation several months earlier.[28] Some members criticized the lack of executive action in fulfilling commitments made during the legislative deliberations in which the USTR and other agencies made commitments – written and unwritten – to administer and make rules in certain ways.[29] The legislative bargain now behind them, it appeared the executive branch would not hold up its word. Had those informal interbranch commitments appeared in the legislation, Congress may have had more recourse than was actually the case by November 2020 when little administrative progress had been made.[30] The agreement may have lost some of its promise as a result.

3.2 Embeddedness

US trade agreements sometimes demand the creation of administrative institutions, and their implementing legislation often supplement and create additional infrastructure apart from what is set out in the agreement. Increasingly over the years both Congress and the executive have built set of side features that go beyond the terms of FTAs to extend their reach, entrench their relationships, and enhance their transnational regulatory work.[31] Some of these commissions, committees, working groups, and other staff arrangements are found in the implementing acts for the agreements. The USMCA Implementation Act, for example, creates an Independent Mexico Labor Expert Board that is tasked with reviewing labor issues in Mexico and the actions of the Mexican government as required by the USMCA. The USMCA Implementation Act also required the executive branch to set up two new oversight committees – one on the enforcement of environmental obligations and the other on trade in automotive goods.[32] Other pieces of infrastructure grow out of executive action. What is noteworthy, however, is that very few of these are part of the agreement itself. Most are add-ons developed by US government actors or the parties to the FTA.

These supplements take on many forms. In the case of some US FTAs, there are no fewer than a half dozen reports and commissions that demand cross-border investigation and engagement. For instance, in most US FTA labor chapters, a provision creates a Labor Affairs Subcommittee or similar commission 'to discuss matters related to the operation of the [labor] Chapter.'[33] In other recent trade-related agreements, the US Trade Representative has also created 'partnerships' for monitoring and additional negotiations. These institutions are, like many trade statutes, modular and complementary to other statutes and agreement. And, like other parts of trade law, they do not include judicial review or oversight. Rather, they are means of outsourcing review beyond the ordinary agencies and committees. On the one hand, they may be enhancing the agreement's

[28]I. Icso (2020) 'House Democrats' "Report Card" Gives Poor Grades for USMCA Implementation', *Inside US Trade*, Washington, 3 November 2020.

[29]Ibid.

[30]Ibid.

[31]I noted some with respect to a recent US trade agreement (IPEF, not an FTA) in the Introduction.

[32]I. Icso (2020) 'White House Creates Environment, Auto Panels to Help Steer USMCA's Implementation', *Inside US Trade*, Washington, 2 March 2020.

[33]See, e.g., Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, Art. 16.4, 19 January 2006.

legitimacy through this external assessment; on the other hand, they may be undermining the agreement's credibility when the executive takes these institutional opportunities too far.

3.3 Enabling

Unlike the incorporation and embeddedness of FTAs, *how* executive branch agencies carry out their ordinary agreement-related work is not clear from the legislative package or any executive pronouncements. Understanding the activities of the relevant actors requires considerable investigation into the everyday agendas of the foreign relations bureaucracy.

Under the umbrella of the FTA, several agencies in the US government monitor, report on, speak with, educate, advocate, and enforce trade agreement commitments with our trading partners. This is true for both the liberalization commitments as well as for flanking policies. For example, for many years, the Department of Labor has worked with the government of Honduras to develop and work through an action plan under the auspices of the Central America–Dominican Republic–United States FTA for improving labor conditions, labor standards, and labor inspectorate. US government employees regularly travel to Honduras for these capacity building and dialogue opportunities.[34] The agreement provides a vehicle for this development work – at risk of enforcement through the agreement's dispute settlement chapter. In this example, like countless others we might identify not only in the labor and environment context but also beyond them the FTA is enabling US government actors to achieve goals only lightly identified by the original agreement. The agreement is a platform for greater diplomatic exchange and norm creation.

4. From Text to Practice

As shown above, regardless of the style of package treaty, the subsequent domestication of the treaty through the work of the US bureaucracy may be more indicative of outcomes than the content of the treaty itself. Those bureaucrats are either empowered or constrained by the degree of incorporation, the nature of the embeddedness, and the scope of enabling features that legislators and trading partners afford them.

This section examines in greater detail the discretion of the executive branch in the United States in executing the commitments of package treaties. In their introduction to this special issue, Pauwelyn and Sieber-Gasser highlight the importance of *ex post* monitoring that may be written into package treaties. There is much more to unpack from this idea: what kind of monitoring is demanded, by whom, and with what checks or balances? I argue that, first, the work of our bureaucrats across treaty partners is highly variable and that this can be both an asset to treaty operationalization but also a liability. Second, a closer look at the institutional ecosystem in which package treaties operate yields further lessons about unexpected areas of misalignment and imbalance in the way the executive carries out those duties. I maintain that divergence in the administration of inward- and outward-looking commitments risks exacerbating the negative externalities that flanking policies and package treaties seek to ameliorate.

4.1 Administering Package Treaties

Across the economies of the world, considerable volumes of trade law are made in largely unseen ways, through the work of the executive branch alone. Administrative agencies engage in the exercise of trade law and in its further development in their quotidian interactions with foreign trading partners. In the United States, some of that activity is directed by statutes, but not all. In fact, the US Congress is often not aware of those activities such as the conclusion by agencies of trade

[34]'ILAB in Honduras', US Bureau of International Labor Affairs, www.dol.gov/agencies/ilab/country/ilab-honduras (accessed 10 January 2024).

executive agreements, negotiated agreements with trading partners organized and implemented by the executive branch without congressional review or approval. These exercises – particularly the meetings of many commissions and committees, the further negotiations of side letters, and the training of trade personnel, to name but a few – are left out of trade textbooks and appear unorganized or even happenstance. In the absence of readily available public information about these activities, they remain obscured from discussion about trade law generally, except perhaps among experts in the issue areas that they individually implicate.

Studying package treaties 'in action' requires a closer examination of this work and the place of trade bureaucrats. The success or failure of the flanking policies turns on the choices made by executive branch officials in the operationalization of these policies, and any oversight by other bodies. In the United States, Congress has largely ceded its *ex post* role. Rather, it asks the executive branch for receipts, often in the form of reports. Congress is engaged in the post-negotiations space in its limited legislative and funding capacities.[35] Most often, the executive branch has significant discretion in the administration of the programs and policies envisaged by these package treaties.

This notion is not limited to the US experience. Among other governments, the executive branch often may undertake nearly any strategy it chooses to rely upon or otherwise use the agreement and to implement its related policies. Bureaucrats select the 'how': the mechanics of the articulated and unarticulated parts of the bargain manifest in the text. Sometimes they do so with an opportunity for participation in determining the details and sometimes they do not. How do bureaucracies embrace (or not) their trade agreement commitments and ensure that the flanking policies have their intended effect? Operationalizing flanking policies requires more than a change in a tariff line or a change in instruction to port authorities. An administration particularly committed to flanking policies may ensure that they are maximized, while one that is less committed or opposed may never see those policies through. Accordingly, it is among the flanking policies that the package treaties may be most vulnerable.

Let us take an example. Under the USMCA, the United States and Mexico have agreed to several provisions regarding labor rights. What is perhaps obvious is that it is up to the executive branch in both the United States and Mexico to carry out the monitoring and to activate the enforcement tools within the agreement where one government finds that the other is acting inconsistently with those flanking provisions. While the commitments obligate certain behaviors, it is only the opposing government's officials that can act on an evaluation as to a derogation. Even where a derogation is identified, the government may choose not to act. They may choose to slow-walk or handicap the system, and different administrations have done so strategically.[36]

Executive branch officials select who, what, where, when, and how to operationalize these commitments at least vis-à-vis one another. They require resources to do so, and different administrations may choose different priorities where human capital and other resources are limited. This is where the degree of embeddedness and enabling features of a package treaty are most meaningful.

Building an institutional frame around the flanking policies conditions its success. Creating incentive structures for the executive branch to operationalize package treaties in particular ways and for those to stand the test of time ought to be on the mind of policymakers. In this respect, a package treaty may only be as good as a foreign-facing commercial bureaucracy wants it to be, or allows it to be. Our study of package treaties must acknowledge this distinction between policy-setting and policy-executing.

[35]North American Free Trade Agreement Implementation Act, Pub L No 103-182, 107 Stat 2057 (1993).

[36]In the United States–Mexico relationship, this slow-walking and discretionary policymaking is most easily seen in the two governments execution of the Rapid Response Labor Mechanism in the USMCA. Both governments have elected to engage with one another regarding denials of labor rights at Mexican workplaces based on their analytical and political considerations.

4.2 Misaligned Packages

As noted above, package treaties instill foreign commercial bureaucrats with authority to operationalize and administer the programs and policies that they set out. As other contributions to this special issue highlight, however, many of those programs and policies are outward-facing. Almost no programs address inward-looking flanking policies – those that target domestic negative effects of trade liberalization. Meyer has written about this issue at length as well.[37]

Consider Figure 1 in the Introduction to this special issue. There, the authors identify a matrix of domestic and international negative effects of trade liberalization in relation to unilateral and mutually agreed flanking measures. None of those that qualify as mutually agreed includes inward-looking flanking policies. Our trade bureaucrats are not engaged in that work. They are empowered only with respect to outward-looking flanking policies. As a result, the outward-looking flanking policies become associated with trade agreements and their programs, at least among major economies.

To the extent legislatures have developed packages that do include inward-looking flanking policies, those are often administered by different bureaucrats and agencies, and in the case of the EU perhaps different nationalities than those that have been mutually agreed. Whether a flanking policy is mutually agreed becomes a critical touchpoint as to whether it counts as part of the trade bargain or of trade policymaking at all.

The primacy of outward-facing flanking policies in the trade agenda of the major economies of the world risks exacerbating some of the inequities that the flanking policies arguably seek to confront. This is one of several misalignments that remain unaddressed in our conceptual framework. The flanking policies that are mutually agreed are the ones that trade bureaucrats carry out and that become the yardstick for measuring the scope, breadth, and, to some degree, the success of those treaties, even where the very incorporation of those policies may be considered to be a tool for counterbalancing negative domestic effects.[38]

Relatedly, when commentators speak of flanking policies as mitigating concerns about liberalization, they may actually be at odds with the flanking policies that mitigate the effects of liberalization, depending on their perspective. The final agreement and implementation of the USMCA was delayed while a new round of negotiations, instigated by Democrats in the House of Representatives, could occur to develop new outward-facing flanking policies on international labor issues. Those conversations were nevertheless kept at arm's length from discussions about domestic labor-related flanking policies.[39] Put differently, flanking policies addressing domestic labor concerns were disaggregated from the package treaty while those dealing with international labor came in and were strengthened. The nature of these labor commitments is to harmonize domestic labor standards, but since domestic labor issues had been decoupled from the package treaty, international labor and domestic labor issues remain imbalanced.

A second misalignment within and among package treaties is the diversity of actors in the administrative state. Trade bureaucrats are responsible for those outward-looking commitments: they are tasked with ensuring that trading partners implement their end of the bargain. Different bureaucrats, if any, are tasked with the inward-looking commitments. This bureaucratic misalignment makes it difficult for trade policymakers to regulate and legislate across them as part of 'trade'.

[37]T. Meyer (2020) 'Misaligned Lawmaking', *Vanderbilt Law Review* 73, 151.

[38]There remains also a duality of commentary on whether the purpose of these provisions is to 'level the playing field' or to improve worker rights as a matter of principle.

[39]B. Baltzan and J. Kucik (2020) 'NAFTA's Replacement Gives Labor Some Shelter from Globalization's Storms', *Foreign Policy*, 16 January 2020, https://foreignpolicy.com/2020/01/16/usmca-mexico-canada-trump-workers-democrats-naftas-replacement-gives-labor-some-shelter-from-globalizations-storms/ (accessed 10 January 2024).

As a result of this need for omnibus packages that work across the government, package treaties and their flanking policies contribute to the increased modularity of 'trade' law.[40] Cross-policy political compromises may make passage easier, but they are also vulnerable to criticism that lawmakers are straying from their designated 'lane'.[41] This sort of misalignment may inhibit policymakers from ensuring that flanking policies achieve their greatest potential. That some flanking policies have become mutually agreed and others remain unilateral has exacerbated this misalignment.

A third misalignment has to do with the timelines of these arrangements. Pauwelyn and Sieber-Gasser make note of time, but in a different fashion. They write:

> Linkages between trade liberalization and flanking policies in trade liberalization packages or package treaties may be established prior, during, or after the negotiation and implementation of the trade liberalization package or package treaty. Most prominently, trade-related international treaties may be tied with an international trade agreement by either requiring their ratification and/or implementation prior to the ratification of the international trade agreement, or their ratification and/or implementation after the ratification of the international trade agreement. A trade liberalization package or package treaty may also be conditional upon certain ex-ante changes to domestic law, without which the treaty would not enter into force, or include flanking commitments with reference to domestic laws to be implemented or enforced ex post, once the treaty has entered into force.[42]

While these questions are no doubt important in package treaty design, I submit that it matters less when the flanking policies are instituted, which is the temporal dimension used by Pauwelyn and Sieber-Gasser for classification purposes, and it matters more the timelines along which they operate. Put differently, it is less about the beginning and more about the end.

There are multiple competing timelines for complementary areas of trade policy that obfuscate lawmaking. By way of one example, in the United States, decoupling of trade adjustment assistance from trade liberalization agreements beginning in 1962 subjected each policy to different renewal timelines to the detriment of the former.[43] Meyer describes how this temporal distinction created uncertainty in the continuity of the trade adjustment assistance program and its financial security.[44] This decoupling shifts the timing of the trade adjustment assistance legislation out of step with trade liberalization, which then alters the nature of the legislative bargain surrounding its renewal. As this example demonstrates, temporal discrepancies in flanking policies and among package treaties may prove to be counterproductive.

Similarly, package treaties rarely expire or are subject to renewal but the funding to support them is. Future legislatures may choose to support or hinder the work that those treaties seek to create. In the United States, once trade agreements are approved by Congress, they are subject to execution and implementation by the executive branch with little to no temporal oversight. Likewise, there are not typically time limits on the bodies that are designed to do the work of operationalizing trade agreements which may entice those institutions to develop practices that entrench those programs – programs that may have only had weak political support in the

[40]I. Icso (2020) 'USMCA Corrections in Final Omnibus Package; GSP, MTB left out' *Inside US Trade*, Washington, 21 December 2020.

[41]H. Andrew Shwartz et al. (2004) 'Nippon Steel, TTC, and Digital Trade', CSIS, 2 February 2004, www.csis.org/podcasts/trade-guys/nippon-steel-ttc-and-digital-trade (accessed 10 January 2024). Whole of government policy programs are no doubt demanding, even if they may create space for greater political leverage than siloed programs. They may be especially difficult in an area such as this which is both foreign and domestic. In some government systems, straddling those two spaces can create constitutional challenges.

[42]Pauwelyn and Sieber-Gasser, supra n. 2, s 3.4.3.

[43]Meyer, supra n. 38, 157–158.

[44]Ibid., 158.

first place. Such entrenchment might alleviate any concern about misalignment. But because most agencies administer multiple programs, they could choose to treat misaligned programs in disparate ways with uneven outcomes for program beneficiaries. By disconnecting renewal of an agency from its program, executive or administrative motivation has the potential to influence the latter's continuation.

Some aspects of trade law appear highly path dependent or even static, while others are in a constant state of question and flux.[45] These divergent timelines suggest that some programs and principles of trade law have been locked in without need for additional consideration, while others left unfixed must be regularly reconsidered. The difference between those categories is reasonably haphazard and arbitrary.[46] More attention is needed to understand how package treaties diverge with respect to their temporal elements.

5. Conclusion

There is some degree of dynamism in the design and operationalization of package treaties with potential for redesign and reconsideration. For instance, some flanking policies begin as unilateral policies and make their way into mutually agreed spaces. When they do so, elements change: the calculations of the actors on how they deploy these policies may shift, just as the reasons for the policies and the reasons those policies are activated may change. Reviewing the incorporation, embeddedness, and enabling features of these policies helps us better understand the flexibility and opportunity in the way policymakers think about negative effects of trade liberalization at home and abroad.

This Article has set out and studied three points in the operationalization of package treaties as a means of testing out their importance. It has sought to identify critical junctures that could be further evaluated as hallmarks for the effectiveness of flanking policies beyond the conventional metrics. Undoubtedly, more work is needed here, but this research confirms that policy content and text is only a small part of addressing the negative effects of trade liberalization. How these treaties are implemented and administered may be the most significant determinant in this policy exercise.

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[45]K. Claussen (2022) 'Our Trade Law System', *Vanderbilt Law Review En Banc* 73, 195.
[46]Ibid.

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