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# Sweetening the liberalization pill: flanking measures to free trade agreements

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## ABSTRACT

Free trade agreement (FTA) negotiators increasingly face pressure from domestic interest groups, including environmental non-governmental organizations (NGOs), civil activists and labor unions. As a result of the growing scrutiny on the content of FTAs, we are now witnessing a proliferation of instruments accompanying FTAs, which we group under the label of flanking measures. In this article, we argue that flanking measures can serve two main non-exclusive purposes: Increasing aggregate social welfare by mitigating the negative spillovers of FTAs on society (the substantive dimension) and helping to build domestic coalitions in support of trade liberalization (the political dimension). Despite the relevance and growing empirical importance of the concept, flanking remains largely overlooked in the International Political Economy (IPE) literature. This essay seeks to fill this gap by discussing the scope, purposes and timing of flanking.

## KEYWORDS

Trade agreements; flanking measures; globalization backlash; labor; environment; politicization

## Introduction

After decades of trade liberalization and ‘hyperglobalization’, the optimism about the perks of free trade and the internationalization of production has faded in many advanced economies. The time of embedded liberalism, which sought to ‘minimize socially disruptive domestic adjustment costs that might accrue from international functional differentiation’ (Ruggie, 1982, p. 399), appears to have vanished. Against the background of populist movements, anti-globalization backlash, and climate catastrophes, policymakers around the world have a hard time selling the benefits of global trade in general, and of free trade agreements (FTAs) in particular, to their domestic audiences.

The increasing public awareness of free trade’s negative spillovers on the environment and labor, combined with the ever-growing scope of FTAs, have made it increasingly difficult to conclude FTA negotiations successfully and to see the deals endorsed at the domestic level, especially in high-income democratic countries. The

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failure of the Transatlantic Trade and Investment Partnership (TTIP) between the United States (US) and the European Union (EU) is just one example. After receiving severe criticism from non-governmental organizations (NGOs) and anti-globalization movements on both sides of the Atlantic, the agreement was finally buried by the Trump Administration. Another example of the increasing difficulty in achieving domestic support for FTAs can be observed in the EU-MERCOSUR negotiations, which face widespread skepticism among the European public regarding its potential negative impact on the environment and climate change. Finally, the Comprehensive Economic Trade Agreement (CETA) between Canada and the EU underwent seven years of painful negotiations, strong public criticism, and a last-minute veto from the Belgian regional government of Wallonia. Yet, although the future of CETA is still uncertain at the time of writing as it is only partially in force and remains to be ratified by a few reluctant EU member states, the deal was concluded.

A closer look reveals that several instruments facilitated the conclusion of the CETA negotiations. First and foremost, the Joint Interpretative Instrument – an additional agreement between the contracting parties specifying the interpretation of certain provisions – addresses the worries of the most resistant signatories, including concerns related to investor-state disputes and governments' regulatory sovereignty. Belgian federated entities also agreed upon an intra-Belgium declaration. Lastly, EU member states adopted 38 unilateral statements and declarations explaining their respective positions on the agreement (Van der Loo, 2016).

Such additional instruments to FTAs, which we refer to as '*flanking measures*', have been growing in number in recent years. Here, we define flanking as the adoption of measures that accompany FTAs to mitigate their potential or proven negative spillovers on society and/or address the concerns of domestic stakeholders regarding the said spillovers. In this context, we refer to negative spillovers of FTAs as unintended negative effects of trade liberalization on non-economic objectives related to the environment, labor, gender equality, human rights and other social goals, including the regulatory sovereignty on these issues.<sup>1</sup> For instance, evidence indicates that under specific circumstances, FTAs and trade liberalization can foster deforestation and environmental degradation (e.g. Abman & Lundberg, 2020; Zhang et al., 2017), worsen working conditions and labor rights (Chan et al., 2013), and reduce long-term employment and wages (Autor et al., 2016).

Spillovers are not necessarily confined to country borders, as concerns over the Amazon rainforest in the case of the EU-MERCOSUR FTA illustrate. Moreover, negative spillovers can be material, such as job losses or environmental degradation, or non-material, such as the loss of policy space, a threat to local cultures, or the erosion of national sovereignty. To cite but a few examples of flanking measures, the protocol of amendment to the United States-Mexico-Canada Agreement (USMCA), side letters to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) on the enforcement of the labor chapter, and the Swiss federal ordinance on the importation of sustainably produced palm oil from Indonesia, fall under our definition.

Governments may adopt flanking measures due to their dual function. First, they have the potential to increase aggregate social welfare by addressing the material and non-material spillovers of trade liberalization (the substantive rationale). Second, they may help appease FTA opponents and contribute to building winning

coalitions in each partner country (the political rationale). They thus seem to have become a crucial, multi-purpose, tool for policymakers facing domestic opposition. Yet, the International Political Economy (IPE) literature lacks a holistic comprehension of the variety of such measures.

This article starts to fill this gap by discussing the scope, purposes and timing of flanking. It also raises various research questions that IPE scholars could fruitfully embrace. Given the current societal backlash against free trade, there are good reasons to believe that flanking measures will flourish in the coming years. For instance, the European Commission has proposed an additional instrument to accompany the EU-MERCOSUR Trade Agreement.<sup>2</sup> The latter has been in limbo since the European Parliament voted for a resolution declaring that the treaty ‘cannot be ratified as it stands.’<sup>3</sup> This declaration followed French President Emmanuel Macron’s threats to veto the agreement if Brazil failed to act to slow the deforestation of the Amazon (Chrisafis & Stewart, 2019). The additional environmental instrument is precisely ‘aimed at addressing concerns about sustainability and the potential environmental effects of the agreement, notably on deforestation’ (Dombrovskis, 2022). More generally, EU institutions are increasingly aware that ‘EU trade agreements are not standalone tools’ and that trade and sustainable development (TSD) commitments included in FTAs ‘work hand-in-hand with a wider set of policy instruments’ (European Commission, 2022). Similarly, in the context of the new labor-related measures linked to the USMCA, the US government confirmed that these ‘new tools can help [the US] work with allies and trading partners – such as Mexico – to reverse the race to the bottom’ (United States Trade Representative, 2022, p. 2). Against this background, we argue that it is paramount to gain a better understanding of flanking measures.

The remainder of this article proceeds as follows. In the next section, we trace the origins of the concept of ‘flanking measure’ and propose a definition in the context of trade governance. Section two then locates the practice of flanking within a broader set of policy tools to gain political support for trade liberalization. Section three sketches out the substantive and political rationales of flanking measures and reflects on flanking’s timing. Lastly, the conclusion points to interesting avenues for future research.

## Flanking’s contours

Early occurrences of the term ‘flanking’ appear in the context of European border control policies. Specifically, the 1985 Schengen Agreement conditioned the abolition of checks at the common borders between Benelux countries, Germany and France on the adoption of measures ‘to compensate states for the loss of control over internal borders’ (Hailbronner & Thym, 2016, p. 1026). The 1994 Agreement on the European Economic Area similarly referred in its preamble to ‘strengthened and broadened cooperation in flanking and horizontal policies’ to fully realize the free movement of goods, persons, services and capital. A few years later, the 1997 Treaty of Amsterdam required the Council of the EU to adopt ‘flanking measures with respect to external border controls, asylum and immigration’ (art. 73i, a). Flanking (or accompanying) measures then became more popularized with the conclusion of the 1999 Agreement on the free movement of persons between the

EU and Switzerland. Switzerland unilaterally introduced flanking measures to protect Swiss workers ‘against the risk of wage and social undercutting linked to the free movement of persons’ (Mission of Switzerland to the European Union, n.d.). Since then, the literature on border regulation frequently uses the term ‘flanking’ to describe such compensating measures (e.g. Papagianni, 2014).

The term flanking has also been used in connection with trade governance. For instance, in an OECD-edited volume on how to assess the environmental effects of FTAs, Fauchald (2000, p. 290) defines flanking measures as ‘environmental measures aiming at neutralizing negative regulatory effects.’ The European Commission’s Handbook for Trade Sustainability Impact Assessment (SIA), for its part, defines flanking measures as ‘policy measures proposed in the framework of a Trade SIA to mitigate potential negative impacts or enhance positive ones. These measures are not restricted to trade policy but can encompass cooperation, social, environmental or development policies’ (European Commission, 2006, p. 42).

Lastly, critical IPE scholars have described flanking mechanisms as attempts to consolidate neoliberalism. For instance, for Graefe (2006, p. 72), flanking measures such as social economy policies aim to ‘mitigate the anti-social consequences of neoliberal policies by creating or protecting institutions embodying non-neoliberal principles.’ In the same vein, Jessop (2002, p. 470) draws from Polanyi’s (1944) concept of embeddedness to argue that there is a growing concern to ‘identify and pursue flanking measures that would help to re-embed the recently liberated market forces into a well-functioning market society’. Although this critical understanding of flanking is broader than our focus on FTAs, it encompasses the *political* dimension of flanking, which is missing in other definitions. Specifically, we argue that beyond mitigating negative effects, flanking measures also have the potential to make FTAs more palatable to their domestic opponents.

Here, we define flanking as *the adoption of measures that accompany trade agreements to mitigate their negative spillovers on society, to address the concerns of domestic stakeholders regarding the said spillovers, or both*. We consider flanking measures as instruments located ‘outside’ an FTA, as opposed to provisions included ‘inside’ the treaty. Flanking measures may accompany FTAs by complementing them with new rules, or by specifying how existing FTA rules should be interpreted. They can be enacted unilaterally without consulting other countries or agreed upon jointly by all the FTA signatories and can have various degrees of bindingness. They also may be linked legally to a specific FTA or address trade liberalization more generally as we illustrate in the next section.

## The evolving practice of sweetening the liberalization pill

The use of flanking measures should be considered within a broad set of strategic options available to governments eager to build domestic coalitions in support of trade liberalization. In order to compensate politically important actors for the removal of traditional forms of protection, such as tariffs, some governments started early on to adopt flanking measures. For instance, in the US, the Trade Adjustment Assistance (TAA) program set up in the 1960s ‘provides aid to workers who lose their jobs or whose hours of work and wages are reduced as a result of increased imports’ (United States Department of

Labor, n.d.). The TAA was explicitly designed as a substitute for the protection provided to labor groups and import-competing industries in the form of high tariffs (Meyer, 2020). In Europe, the European globalization adjustment fund (EGF) for displaced workers was enacted as a ‘special EU instrument to express EU solidarity with European workers or the self-employed that were displaced due to restructuring, and to help them find new jobs’ (European Commission, n.d.). These general flanking measures were also used to address negative spillovers caused by trade liberalization through so-called ‘shallow’ FTAs, which did not include any environmental and labor provisions and were commonplace until the early 1990s.<sup>4</sup>

Since then, the increasing recognition of the detrimental environmental and social effects of FTAs and the growing need to expand the scope of FTAs to beyond-the-border issues have made ‘shallow’ FTAs increasingly rare, at least in advanced democracies. The gradual diffusion of non-trade provisions from one FTA to another (e.g. Peacock et al., 2019) led to the spread of so-called ‘deep’ FTAs (Mattoo et al., 2020). Those agreements include environmental and labor chapters that somehow aim at limiting negative spillovers, theoretically reducing the need to rely on flanking measures. Depth, however, has come with more systematic scrutiny from the public and interest groups (Laursen & Roederer-Rynning, 2017). As a result, governments are facing a choice of how to address the negative spillovers of trade liberalization to gain domestic support for FTAs.

Governments have chosen to address negative spillovers related to labor and the environment either *inside* the trade agreement or *outside* the agreement using joint, agreement-specific, and/or general flanking measures (see Table 1). For instance, in the case of the 2018 EU-Singapore FTA, the partners decided to address labor and environmental issues *inside* the agreement’s TSD chapter. Like most of the recent TSD chapters in EU FTAs, the latter reaffirms both parties’ commitment to effectively implement the International Labor Office (ILO) Conventions and multilateral environmental agreements they have ratified. It also creates a Board on Trade and Sustainable Development comprising senior officials from each Party. To the best

**Table 1.** US and European FTA mitigating measures on labor and environmental protection.

Example FTAs	Inside the agreement	Outside the agreement (flanking)		
	Includes labor and environmental chapters	Joint measures	Agreement-specific domestic measures	General domestic measures
EU-Singapore FTA	✓	∅	∅	✓ (EGF)
NAFTA	✓	✓ (Side agreements on labor and the environment)	✓ (NAFTA-TAA)	✓ (TAA)
EFTA-Indonesia FTA	✓	∅	✓ (Swiss Ordinance on sustainable palm oil)	∅
CETA	✓	✓ (Joint Interpretative Instrument)	∅	✓ (EGF)
USMCA	✓	✓ (Protocol of amendment)	✓ (Mexican labor reform bill)	✓ (TAA)

Source: Authors.

of our knowledge, the FTA was not complemented by treaty-specific flanking measures.

By contrast, in the case of the North American Free Trade Agreement (NAFTA), governments chose to flank the agreement with both joint and unilateral treaty-specific flanking measures. Environmental groups, unions and members of the US Congress feared that Mexico's laxer environmental and labor laws would encourage the relocation of US industries and jobs. Despite the Bush Administration's commitment to a final trade agreement that would address environmental and labor issues, domestic interest groups and the public remained skeptical of an FTA with Mexico. During the 1992 presidential campaign, Bill Clinton then pledged to negotiate additional side agreements on the environment and labor, which were both concluded in August 1993.<sup>5</sup> In addition, to further address NAFTA's effect on American workers, the US government unilaterally established the NAFTA Transitional Adjustment Assistance (NAFTA-TAA) Program within the US Department of Labor. The latter is intended to promote the availability of services and benefits to workers who have been impacted by shifts in production to Mexico or Canada (Runsten et al., 2001).

A more recent example of a treaty-specific flanking measure is the 2018 Comprehensive Economic Partnership Agreement between Indonesia and the EFTA States. Article 8.10 of this treaty includes a commitment to ensuring that vegetable oils and their derivatives traded between the parties are produced in accordance with various sustainability objectives. In Switzerland, the 'Stop Palm Oil' referendum committee, a coalition of civil society and agricultural groups, collected enough signatures to put the FTA to a nationwide vote (Chandrasekhar, 2021). The Swiss voters approved the deal by 51.7%. As required by the FTA, the international commitments put into the treaty were accompanied by a Swiss ordinance<sup>6</sup> adopted in August 2021. The latter stipulates that anyone who wishes to import palm oil from Indonesia to Switzerland at a preferential rate must prove that the goods have been produced as per the sustainability objectives defined in Article 8.10 of the FTA. This flanking measure likely came as a further signal to the Swiss public that the government's FTA commitments related to sustainable palm oil were more than empty promises.

Some authors consider FTA provisions as flanking measures (e.g. Pauwelyn & Sieber-Gasser, 2024). Our conception of flanking as the adoption of an additional instrument outside of the initiating treaty is driven by the original meaning of the verb 'flank' (i.e. to be at the side of something) as well as the French-language equivalent, 'mesures d'accompagnement' (accompanying measures), originally used in the EU-Switzerland context. However, we acknowledge that flanking measures can take different positions on the inside-outside continuum.<sup>7</sup> For instance, the CETA Joint Interpretative Instrument, while located 'outside' the treaty, deals with the application of 'inside' provisions, which makes it closer to the 'inside' end than general domestic measures, such as the TAA. Moreover, flanking measures' position on the continuum may be dynamic over time. For example, the NAFTA side agreements on the environment and labor have later been incorporated into the main text of subsequent US FTAs.

While a rich literature studies the institutional design of FTAs (e.g. Baccini et al., 2015; Raess & Sari, 2018; Blümer et al., 2020), the literature on agreement-specific outside measures is scarce. Yet, there is a more notable variation



in the types of flanking measures utilized over time and across countries compared to the relatively standardized provisions found in FTAs. Most of the templates underlying different FTAs are, to a high degree, copied and pasted (Allee & Elsig, 2019). As a result, the presence of TSD chapters in FTAs is often independent of the political context and the result of diffusion dynamics of agreement designs (Morin et al., 2017). By contrast, the variation across flanking measures is prompting questions about why some governments decide to tie their hands more tightly with a domestic regulation than what has already been agreed at the international level. Beyond the creation of additional commitments, the passing of domestic legislation may also lead to lengthier parliamentary debates than a sustainability chapter in an FTA. Several hypotheses could be tested in that regard. It may be the case that ‘outside’ instruments make commitments more credible in the eyes of domestic stakeholders and are more visible to the general public than FTA provisions. It seems possible as well that the characteristics of a given country (such as the type of political institutions and the level of public participation in decision-making) influence the perceived necessity of flanking measures in addition to a sustainability chapter. It may also be the case that as FTAs cover a growing variety of issues, specific sustainability commitments are increasingly difficult to negotiate at the international level and the unilateral (outside) road consequently becomes more appealing. The concept of flanking allows us to start exploring these questions in a more systematic and integrated way.

In sum, flanking is not a new practice but is gaining importance in the context of rising public scrutiny and criticism of trade liberalization. Although the trade policy literature has investigated the purposes and determinants of side agreements (e.g. Aggarwal, 2013; Aspinwall, 2014) and, more extensively, trade adjustment policies (e.g. Chandler et al., 2004; Cernat & Mustilli, 2018), it lacks a more holistic understanding of the policy toolbox that governments have used to address the negative spillovers of trade liberalization and how this toolbox has enriched over time. In other words, scholars have tended to investigate isolated columns of Table 1 without considering them within a broader policy choice set. As a consequence, the existing literature disregards the different possible combinations between sustainability chapters inside trade agreements and domestic legislation. It also ignores the cross-country variation in the use of agreement-specific flanking measures. We argue that this variation should be further explored. Moreover, the existing definitions typically disregard one of the two (substantive and political) rationales of flanking. One reason may be that the substantive dimension has received significant attention in the economics and gray literature, whereas International Relations and IPE scholars tend to neglect the concept of flanking in all its dimensions. In the following section, we elaborate on these two rationales and on how they influence the timing of flanking measures’ adoption.

### **Why, how and when to flank?**

How can we explain why, how and when governments resort to flanking measures? Building on the literature on the political economy of trade liberalization, we assume that the political goal of governments is both to maximize aggregate social welfare and to gain support from politically influential actors (Grossman &



Helpman, 1994). First, governments seek to increase aggregate social welfare (the substantive rationale of flanking), which can include material objectives such as mitigating job losses and environmental degradation but also non-material objectives such as preserving policy space, national sovereignty, social justice, local identities and cultures. Across countries and over time, different governments have put different weights on these two types of substantive objectives. Especially in Europe, given the relatively high levels of social protection and safety nets, non-material objectives have increasingly gained importance for governments in the context of trade liberalization.

Second, governments seek to maximize the political support of influential domestic groups (the political rationale of flanking). While traditionally, these influential domestic groups mainly consisted of industry associations and labor unions, today, NGOs, civil society groups and environmental movements have gained influence in the trade policy arena. Moreover, due to a higher politicization of trade issues in recent years, governments must increasingly respond to mass attitudes. As various studies have demonstrated, mass attitudes on trade policy are not only driven by material self-interest but also by a range of psychological, ideational and sociotropic factors (Mansfield & Mutz, 2009; Rho & Tomz, 2017).

The distinction between the substantive and political rationales for flanking should not be overstated. For one thing, whether governments adopt a given flanking measure to aggregate social welfare or for purely political reasons is hard to tell in practice. For another thing, the substantive and political rationales are not mutually exclusive, and the absence of any political motive is, admittedly, unlikely. Further, it is not always evident whose political interests are served. For instance, although the EU motivates the deployment of an additional instrument to the EU-MERCOSUR FTA with the need to include stricter environmental standards to protect the Amazon rainforest, strategic political interests are also at stake. The European Parliament's critical stance on the FTA is supported by 'a broad alliance of agricultural lobbyists, anti-globalization groups, and environmentalist groups' (Nolte & Ribeiro Neto, 2021). Since the beginning of the negotiations in 1999, the French government has been opposed to liberalizing its agricultural sector, partly due to French farmers' pressure (Konold, 2010). During an official visit to Argentina, French President Emmanuel Macron declared about the EU-MERCOSUR deal that he 'cannot ask French farmers and workers to change their production habits to lead the ecological transition, then to sign trade agreements with countries that do not do the same' (Schipani, 2018). Such discourse unveils both protectionist and environmental motives, leaving it unclear whether one type dominates the other. Such mixed political and substantive motives in trade policy also have been shown to play a role in the context of WTO environmental exceptions (Meyer, 2022).

However, the distinction between both rationales should not be disregarded either. In fact, one can expect that flanking measures are only effective policy choices if they are driven by both substantive and political rationales. On the one hand, a measure solely driven by political motives without substantive potential is likely to be regarded as pure greenwashing or window dressing by core political groups. For instance, one reason why the additional instrument to the EU-MERCOSUR FTA has so far not been successful in obtaining the desired political support for the agreement might be that it is considered inadequate by many environmental NGOs, which denounce the instrument as being 'cosmetic,

aspirational and unenforceable' (Friends of the Earth, 2023). On the other hand, substantive rationales alone might not be enough to obtain the needed political support in a trade policy arena that is increasingly characterized by heterogeneous interests. Hence, one might expect flanking to be particularly salient if it effectively builds broad coalitions by serving the substantive and political interests of several groups of stakeholders. Against this background, the conceptual distinction between the substantive and political rationales seems useful in explaining why some flanking measures appear to be more successful than others in obtaining support for trade liberalization. Yet, while there is growing scholarship evaluating the effectiveness of provisions within FTAs, for instance showing that environmental provisions can be effective in limiting the increase in deforestation linked to FTAs (Abman et al., 2021), the effectiveness of flanking measures is largely unknown. Emerging research on the TAA program indicates that while the program is effective politically in that it can suppress demand for trade protection, its effectiveness on the substantive dimension has considerably decreased since the 1990s (e.g. Kim & Pelc, 2020). Similar work needs to be performed regarding agreement-specific flanking measures.

One way to decipher the motivations behind flanking measures is to analyze their timing. For instance, the European Commission (2006) and the United Nations (Baker, 2018) typically conceive flanking measures to FTAs as *ex-post* measures adopted after some kind of impact assessment has been performed. When this is the case, timing likely points to a substantive mitigation purpose. However, flanking measures can also be, and sometimes are, adopted before the FTA enters into force and is implemented, which makes the identification of motives trickier. For example, the ratification of the USMCA by the US Congress was made conditional on Mexico enacting domestic legislation regarding worker representation in collective bargaining (USMCA, Annex 23-A; Rodriguez, 2019). On 1 May 2019, Mexican President Andrés Manuel López Obrador enacted a labor reform bill<sup>8</sup> that gives workers the legal right to bargain collectively through independent labor unions (Fernández Campbell, 2019). Although the US motivations for requiring flanking measures could be the protection of both US and Mexican workers during the implementation of the USMCA, the political motives of Mexico are apparent here. The labor reform bill was adopted 'after several years of domestic debate and constitutional reforms in 2017' (Congressional Research Service, 2023). Therefore, it seems safe to assume that the Mexican government's objective was *not* to mitigate the negative effects of the USMCA on workers' rights but rather to get the deal ratified by a crucial trade partner.

We also expect the FTA's degree of public salience to be a good predictor of the presence and timing of flanking. While trade policy in general, and FTAs in particular, were traditionally regarded as rather technical policy areas crafted and implemented in the absence of public scrutiny (Zürn, 2004), there has been an increasing degree of politicization of trade in recent years (Laursen & Roederer-Rynning, 2017; De Bièvre & Poletti, 2020). Events such as the 'Battle of Seattle' during the 1999 WTO Ministerial Meeting as well as the tragic suicide of a Korean farmer during the protests at the 2003 WTO Meeting in Cancun have shown the mobilization potential of trade issues. Yet, the degree of public salience and politicization of FTAs varies greatly over time and context (Meunier & Czesana, 2019). For instance, while CETA and the TTIP negotiations quickly became highly

salient, many other FTAs negotiated by the EU have not been the subject of much scholarly, media, or public attention (De Bièvre & Poletti, 2020). Explanations for this variation range from the changing nature of trade liberalization toward deep integration challenging entrenched domestic norms (Laursen & Roederer-Rynning, 2017), growing resentment with globalization as such (Meunier & Czesana, 2019), to the role of interest groups and civil society organizations as agents of politicization (De Bièvre & Poletti, 2020). Regardless of its drivers, the politicization of FTAs makes it harder for negotiators to reach an agreement and for legislators to ratify it. Hence, we expect flanking to be more likely when the FTA reaches a certain threshold of public salience.

Anecdotal evidence makes this claim plausible. For instance, CETA was highly scrutinized and criticized by environmental NGOs and labor unions, which raised public awareness about the deal and led to important protests (Nienaber, 2016). This may explain why flanking measures such as the Joint Interpretative Instrument were necessary for the FTA to provisionally enter into force, albeit partially. Similarly, while they did not trigger a comparable public backlash, the renegotiation of NAFTA did not go unnoticed. Environmentalists and labor unions were highly critical of the original deal and vocally called for adjustments (Behsudi, 2018; Watkins, 2019). Consequently, flanking NAFTA's successor with a protocol addressing labor and environmental issues<sup>9</sup> came to be a prerequisite soon after the Democrats, led by Nancy Pelosi, won control of the US House of Representatives in late 2018 (Rodriguez, 2018).

Another politically salient FTA is the Trans-Pacific Partnership Agreement (TPP), which was renamed the CPTPP after the US withdrawal. Like CETA, the negotiations of the TPP gave rise to protests, particularly in New Zealand (Theunissen & Fuatai, 2014). Beyond criticisms against the lack of transparency of the negotiations and concerns about the protection of the rights of Māori, opposition to the TPP in New Zealand mainly coalesced around the possibility for foreign investors to sue the government through private international arbitration, and the resulting threat to sovereignty (Kelsey, 2018). The provisions on investor-state dispute settlement (ISDS) reached high salience following the numerous 'NAFTA Chapter 11' disputes (Government of Canada, 2019). They then became one of the most controversial aspects of the TTIP and CETA (Hübner et al., 2017), and a hot topic during the USMCA negotiations (Laurens et al., 2019). ISDS provisions have been widely blamed for threatening domestic environmental and labor policies by discouraging policymakers from implementing strict standards for fear of costly litigation (Nolan, 2015; Tienhaara, 2018). In the CPTPP case, the newly elected Labor New Zealand Government managed to exclude the ISDS mechanism from its relations with Australia, Brunei, Malaysia, Peru and Vietnam by flanking bilateral side letters to the FTA, which met protesters' demands to some extent.

To be sure, anecdotal evidence is not necessarily representative of the whole population of FTAs. Furthermore, while flanking may be one type of governmental reaction to FTA politicization – along with contestation or dodging, for instance (Dür et al., 2023) – flanking measures may also be an anticipatory tool to pre-empt politicization. Lastly, the direction of causality between flanking and politicization is not straightforward, since lobbying for the adoption of flanking measures by domestic interest groups may be the reason for the high political salience of an FTA (Dür & Mateo, 2024, p. 11). Nevertheless, if the rationale for flanking is

mostly political, we expect the adoption of a flanking measure to complement a relatively uncontested FTA to be unlikely.

Another key variable to consider beyond FTA politicization is the duration of flanking measures. Although most FTA flanking measures mentioned in this essay do not include any specific time span, and hence are theoretically indefinite, others are limited in time. Finite flanking measures likely provide evidence for political motives to temporarily address stakeholders' concerns and 'sweeten' the transition. For example, Meyer (2020) notes that there is a significant mismatch in US trade policy between permanent trade liberalization commitments entrenched in international agreements and trade adjustment instruments, such as the TAA, which are temporary and whose budgets undergo constant renegotiation and reauthorization in Congress. The effectiveness of such de-coupled instruments is questionable, which may explain part of the discontent among the American working class with trade liberalization. In this context, flanking measures which, by design, have the same life duration as the corresponding FTA might not be solely motivated by a will to appease political opposition at home and may prove more effective in tackling the negative spillovers of trade liberalization over time.

Yet another key variable to consider is the degree of power asymmetry between FTA partners and the respective levels of social and environmental protection. When at least two parties have strong bargaining power but large differences in protection levels, they may be less inclined to make concessions on the content of the FTA's labor and environmental chapters (Lechner, 2016). In such a case, it may prove difficult to reach a consensual solution, and necessary to choose the 'outside' route through the adoption of a unilateral flanking measure. Conversely, when power asymmetry is high, it may be easier for the most powerful partner to conditionally impose the sustainability provisions of its choice to its less powerful partners, thereby avoiding the need to flank the FTA (Jinnah & Lindsay, 2016).

Last, the effect of political salience and power asymmetry, among other variables, on the adoption of flanking measures may become less pronounced over time with the well-documented 'boilerplate' effect in trade governance (Allee & Elsig, 2019; Peacock et al., 2019). Similar to labor and environmental provisions included inside FTAs, one could imagine that some flanking measures gradually become standard and are replicated from one FTA to the next. However, while this path dependency effect could help explain the adoption of joint flanking measures, we do not expect it to be as prominent for domestic (agreement-specific or general) flanking measures because of the idiosyncratic characteristics of each country.

## Discussion and conclusion

This essay has introduced the concept of flanking, which IPE scholars have largely overlooked. We refer to flanking as the adoption of measures accompanying trade agreements to address their negative spillovers on labor, the environment and other societal concerns, including policy space on these issues. Uncovering the concept of flanking opens up several promising research avenues. While this essay has not aimed at completeness either in the list of research questions or in the list of attempted answers, it has started investigating the 'why' (i.e. the purposes), the 'how' (i.e. the different types of measures) and the 'when' (i.e. the timing) questions

of flanking. Answering these questions more thoroughly will require substantial data collection efforts and conducting in-depth case studies.

There are a number of other interesting areas of research that could further help researchers disentangle the two rationales for flanking. First, it will be insightful to explore whether the adoption of flanking measures accelerates the signature and entry into force of FTAs and whether negotiators expect such an accelerating effect, thereby pointing to the political rationale. The length of FTA negotiations is an important dimension to consider, as lengthy negotiations not only entail substantial bargaining costs, but can also undermine trade growth (Tarlea, 2018). Existing research has shown that ambitious FTAs with new issue items tend to protract the negotiation process (Lechner & Wüthrich, 2018). Flanking measures may accelerate negotiations by covering unprecedented or controversial topics outside the agreement's text and by addressing the concerns of domestic audiences in a targeted manner.

Second, it will be interesting to see whether the political rationale of addressing the general public's concerns toward FTAs is matched by a change in public opinion following the adoption of flanking measures. While there is ample research analyzing the determinants of public opinion about trade policy in general (Mayda & Rodrik, 2005; Hainmueller & Hiscox, 2006), there is no consensus in the literature on the factors that shape public opinion regarding specific FTAs. Besides the factors outlined above that might increase the politicization of particular FTAs, studies have found biased public support for like-minded trade partners (Landriault & Minard, 2018; Carnegie & Gaikwad, 2022) and a mixed effect of compensation policies on support for free trade (Ehrlich & Hearn, 2014). It remains to be seen whether flanking measures can address the concerns and biases of the public and key stakeholders when it comes to FTAs.

A third avenue worth exploring regards the relationship between specific political systems and flanking. The rich literature on the effects of the political system and institutional environment on countries' choice of trade policies (McGillivray, 1997; Hiscox, 1999; Alden & Aran, 2016) could usefully be extended to flanking measures. In other words, it will be interesting to examine whether the electoral system, the type of government, the relative power of the legislative vis-a-vis the executive branch, the number of access points of organized domestic interest groups, or the structure of the bureaucracy have an influence on the adoption of flanking measures.

Fourth, it seems promising to look into the interrelation between the 'depth' of FTAs and the deployment of flanking measures. The scholarship on institutional design has shown that trade agreements are becoming ever deeper as they attempt to tackle behind-the-border obstacles such as technical standards or competition rules (Baccini et al., 2015). However, by doing so, deep FTAs are also increasingly interfering with societal norms and constraining policy space, causing friction and discontent. Thus, it can be expected that the need to address these potential conflicts through flanking measures increases.

Lastly, it will be interesting to investigate whether the adoption of flanking policies is influenced by election cycles. While there is an overall consensus in the literature that the main drivers behind trade policy are organized interest groups (Grossman & Helpman, 1994; Manger, 2009; Kim, 2017), voters can still play an important role in shaping trade policy (Verdier, 1995). Politicians facing elections tend to be more receptive to voters' trade preferences, particularly protectionist

demands (Conconi et al., 2014). In some cases, trade policy may even become a dominating issue in electoral campaigns, as illustrated by the 2016 US presidential election (Pew Research Centre, 2016). Therefore, we might expect to observe a rise in flanking measures adoption in countries where elections are approaching. Such a phenomenon would call into question the substantive rationale for flanking.

To conclude, trade liberalization has always created winners and losers. Yet, with the right compensational and adjustment policies, the negative effects of free trade can be minimized. This embedded approach to trade was one of the fundamental principles of the post-world war period (Ruggie, 1982). However, decades of neo-liberal ideology have eroded this normative framework and left too many people vulnerable to the negative spillovers of trade. In an era of strong economic interdependence, deep trade agreements, and globalization backlash, flanking measures could allow decision-makers to re-embed FTAs into society. This is unless concerned stakeholders perceive flanking measures as yet another window-dressing strategy, which would make the liberalization pill even more bitter.

## Notes

1. While restricting the regulatory sovereignty of governments has long been seen as a feature rather than a bug of trade and investment agreements, the negative experience of many governments with investor-state dispute settlement mechanisms, in combination with fierce public opposition toward such measures, have led to a more critical view on provisions limiting policy space. For example, the mass protests against CETA and TTIP in Europe can largely be explained by concerns about regulatory sovereignty (Young, 2016).
2. EU proposal for a joint instrument, 6 March 2023. Available at: <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/da997440-4edb-437d-aa4a-3cb9a5e77930/details?download=true>.
3. European Parliament resolution of 20 October 2021 on a farm to fork strategy for a fair, healthy and environmentally-friendly food system, 2020/2260(INI). Available at: [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0425\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0425_EN.html).
4. More recently, the EU has started to adopt general flanking measures to minimize the effects of trade liberalization on climate change. The 2023 regulation on deforestation-free products and the Carbon Border Adjustment Mechanism now accompany all EU FTAs by regulating trade flows of carbon- and forest-intensive products.
5. For a more detailed history of the negotiations of the environmental side agreement, see Moreno et al. (1999) and Gallagher (2004). On the labor side agreement, see Griffin (1997).
6. Ordonnance sur l'importation au taux préférentiel d'huile de palme de production durable en provenance d'Indonésie, August 18, 2021. Available at: <https://www.newsd.admin.ch/newsd/message/attachments/67849.pdf>.
7. We thank an anonymous reviewer for making this point.
8. Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley Federal de los Trabajadores al Servicio del Estado, Reglamentaria del apartado B) del Artículo 123 Constitucional, May 1, 2019. Available at: [https://dof.gob.mx/nota\\_detalle.php?codigo=5559131&fecha=01/05/2019#gsc.tab=0](https://dof.gob.mx/nota_detalle.php?codigo=5559131&fecha=01/05/2019#gsc.tab=0).
9. Protocol of Amendment to the United States-Mexico-Canada Agreement, December 10, 2019. Available at: <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Protocol-of-Amendments-to-the-United-States-Mexico-Canada-Agreement.pdf>.

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## Disclosure statement

The authors declare no conflict of interest.

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