Negotiating the Progressive Trade Agenda: An Evaluation of the Trudeau Government's Performance

*La négociation d'un accord commercial progressiste : une évaluation de la
performance du gouvernement Trudeau*

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Negotiating the Progressive Trade Agenda: An Evaluation of the Trudeau Government's Performance

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One of the Trudeau Government's most publicized objectives during the NAFTA renegotiation was its *Progressive Trade Agenda* (PTA). This article evaluates the Trudeau Government's performance in delivering its PTA, by bringing into comparison developments in PTA-relevant chapters of the new *Canada-United States-Mexico Agreement* (CUSMA) with: 1) the objectives of the government, 2) the previous paradigm under the *North-American Free Trade Agreement* (NAFTA), and 3) Canada's partners' own negotiating objectives. It concludes that the Trudeau Government delivered generally good results, albeit due to determinant initiatives from the United States.

L'un des objectifs les plus médiatisés du gouvernement Trudeau lors de la renégociation de l'ALÉNA fut son *Programme commercial progressiste* (PCP). Cet article évalue la performance du gouvernement Trudeau pour livrer son PCP, en comparant les chapitres pertinents du nouvel *Accord Canada-États-Unis-Mexique* (ACÉUM) avec : 1) les objectifs du gouvernement, 2) le précédent paradigme sous l'*Accord de libre-échange nord-américain* (ALÉNA), et 3) les objectifs des partenaires du Canada. On y conclut que le gouvernement Trudeau a obtenu de bons résultats de façon générale, mais grâce à l'aide déterminante d'initiatives provenant des États-Unis.

Free trade agreements (FTAs) are often overlooked in how they can profoundly affect societies. From triggering structural shifts in flows of goods, services and investments, to setting and affecting the enforcement of labour and environmental standards, FTAs are milestones of human integration and deeply impact the course of development of nations (ex. DEBLOCK and RIOUX 2010; DEBLOCK and RIOUX 2015; KIM and al. 2016). This makes negotiating the terms of any FTA a strategic historical endeavour for any government. The Trudeau government had to deal with one such historical moment during its first term in office, with the renegotiation of the *North American Free Trade Agreement* (NAFTA). This task came upon it just as Canada appeared to have secured stable comprehensive FTAs with three of the four largest economies¹. One of the most publicized objectives of the Trudeau Government during the renegotiations was its *Progressive Trade Agenda* (PTA)². With the renegotiations completed and the treaty in force, we can now ask: How did the Trudeau government do in pushing its PTA, while negotiating on its heels?

This article will bring into comparison the developments in relevant chapters of the new *Canada-United States-Mexico Agreement* (CUSMA) and: 1) the objectives and preferences of the Trudeau government as stated in official government policy documents and communications, 2) the previous paradigm

¹ i.e. The US, the EU and Japan.

² It has since been rebranded the "Inclusive Approach to Trade" (GOC 2020).

under NAFTA, 3) and Canada's partners' own objectives and preferences. In order to do so, we will proceed by theme, as they are listed in the following section. For each theme, we will first have an evaluation of the face-value success or failure of the Government of Canada (GOC) by looking at what is in CUSMA. We will ask: Are the GOC preferences present in the Agreement³, as outlined prior to the conclusion of the renegotiation process and as interpreted in this article? From this exercise, we will give a mark on 10 points to the government, and explain the reasoning behind it. We will then put this evaluation in perspective by comparing the relevant CUSMA and NAFTA provisions. This relative analysis will allow us to establish if the new provisions consist in real progress compared to the previous paradigm. Finally, we will conclude with a brief discussion of US and Mexican negotiating objectives and their impact on the efforts of the Trudeau Government.

The Progressive Trade Agenda

What is the PTA and what does it contain? Minister Freeland explained, during a June 2016 speech at the Conference of Montreal, that the PTA came in reaction to the rise of protectionism and attacks on the "open society" (FREELAND 2016)⁴. These phenomena, she argued, came from unequal distribution of the fruits of globalization and, sometimes, justifiable resentment. The PTA aims at addressing some of the "legitimate concerns that people have about globalization" (FREELAND 2016). In this optic, Ms. Freeland mentioned that it should include "effective labour protections, environmental standards and ensure that that is as much a part of the trade agreement as protections for investors" (FREELAND 2016). It should also "offer real opportunities to small and medium-sized businesses to engage in the global economy" (FREELAND 2016). In international trade jargon, at that point in time, she linked the PTA to labour, environment, small and medium-size enterprises (SMEs), and investor-State dispute-settlement (ISDS) provisions.

However, the PTA is quite a fluid concept and it has had various iterations throughout the renegotiation process. So, on what ground exactly will we evaluate the Trudeau Government in implementing this specific objective? We will arbitrarily settle with one of the latest versions of the renegotiations, contained in the March 2018 *Government Response to the Eighth Report of the*

³ "Agreement", capitalized, will herein only designate CUSMA.

⁴ "Progressive trade," as used by the Trudeau Government, is not a new term or concept. The term was previously used by the Obama Administration to characterize the TPP (OBAMA 2015); some of its elements are part of recent Canadian FTAs to various yet increasing degrees (DEBLOCK & RIOUX 2015); and some were also trending in the 1990s and well before (CHURCH ALBERTSON & LANCE 2015; ZINI 2018).

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Standing Committee on International Trade (Government Response). In this version, interpreted in the strictest and narrowest sense, the PTA under Theme 2 comprises 4 listed elements: labour, gender, environment, and Indigenous peoples (GOC 2018, 3-4)⁵. We will regroup the Indigenous peoples and gender themes under the label “New Dedicated Chapters”, as they are not yet “established” chapters in FTAs and will not have as much content as the more “traditional” chapters on labour and the environment. We will thus evaluate the Trudeau Government on 3 themes.

Labour

Under the labour theme, the GOC aimed at achieving arguably two main goals, as can be interpreted from the text of the Government Response: 1) to integrate a “strong” labour chapter, with “comprehensive labour obligations” in the core of the Agreement, 2) to have a chapter that reflects “Canada’s high labour standards” (GOC 2018, 3).

For the first goal, in order to evaluate if a labour chapter is “strong” and its obligations are “comprehensive”, we will be implementing a 4-step validation test. To do so, we will ask the following questions: 1) Is a labour chapter present in the Agreement? 2) Does it create obligations binding to all parties, with regard to the standards established? 3) Is it enforceable in the dispute-settlement mechanism (DSM)⁶? 4) Does non-application ultimately lead to monetary consequences? This approach is drawn from Minister Freeland’s mention that labour and environment provisions should be “as much a part of the trade agreement as protections for investors” (FREELAND 2016).

As for the second goal, to have a chapter that reflects “Canada’s high labour standards”, we will evaluate it on the basis of the presence or not of the eight “fundamental” or “core” conventions of the International Labour Organization (ILO) (ILO n.d.). This will be done based on Minister Freeland’s statement that:

⁵ The Right to Regulate in the Public Interest is mentioned in Theme 2 and Theme 5: Dispute Resolution Mechanisms (DRM), but it is not listed in the detailed elements. Given that it is a transversal theme with strong ties to ISDS, it is more adequately classified as part of the DRM (GOC 2018, 3 and 8).

⁶ “Dispute-settlement mechanism” (DSM) will refer to the formation of an arbitration panel and subsequent steps, and “dispute-resolution mechanism” (DRM) will refer to both the DSM and the pre-DSM consultation mechanism.

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[...] those conventions are a very important way for Canada to be part of an international community of commitment to high labour standards [...] so the ILO conventions [...] can be part of a trade discussion. Certainly, in negotiating with our NAFTA partners, we are going to share with them the value that we believe those conventions have, and the value that they have for all economies (CIIT 2017, 10).

Environment

On the environment, the GOC aimed at achieving arguably similar goals as those under the labour theme. Thus, we will use the same 2-goal approach. On the first goal, we will also use the same 4-step test to establish if the chapter is “strong” and “comprehensive”. On the second goal however, in order to establish that CUSMA guarantees “high environmental standards” we have determined that the Agreement should have: 1) a common set of environmental protection standards that Parties have to reach⁷, 2) a provision preventing Parties from lowering their environmental protection below these standards, 3) coordination and integration provisions⁸, 4) cooperation on sustainable development provisions, and 5) climate change-related provisions.

To reach this set of measurable elements for “high environmental standards”, we have first determined that its constitutive elements are: “high levels of environmental protections” (point 1 and 2) and “robust environmental governance” (point 3 and 4) (GOC 2018, 4). From there, given the scant details provided by the GOC on these two constitutive elements, we have used the *Comprehensive and Progressive Trans-Pacific Partnership* (CPTPP) and the *Comprehensive Economic and Trade Agreement* (CETA), as well as tentative definitions of “high levels of environmental protections” in European Union (EU) law (VEINLA 2004), as the term emanates from the EU Treaties. For “environmental governance” we have used United Nations Environment Programme (UNEP) definitions (UNEP 2010; Mcinerney 2017). As for the climate change-related provisions requirement (point 5), it emanates directly from the Government Response (GOC 2018, 4).

New Dedicated Chapters

Finally, for the New Dedicated Chapters, the principal goal of the GOC was to integrate a new chapter on each one of the two themes covered: gender and Indigenous peoples. We will thus primarily evaluate if this is attained. But the

⁷ One or more, provided that it sets a common core for all Parties to strive towards.

⁸ i.e. Harmonization provisions

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GOC also had theme-specific objectives, which can be evaluated separately from the presence or not of dedicated chapters.

On gender, it aimed to provide “a framework to undertake cooperative activities on issues related to gender and trade to help ensure that women and women-owned small and medium-sized enterprises (SMEs) can benefit from the opportunities that flow from NAFTA” (GOC 2018, 3). On Indigenous peoples, “Canada’s initial proposal [included] a reference to the *United Nations Declaration on the Rights of Indigenous Peoples* [UNDRIP], and [aimed] to provide greater opportunities for Indigenous peoples [...]” (GOC 2018, 4).

Did the Trudeau Government deliver on its promises?

Labour

For the first of two GOC goals, using the 4-step test, we can verify that, firstly, a labour chapter has been integrated in the Agreement. Chapter 23 (Labour) of CUSMA contains various provisions applicable to labour standards and obligations⁹. Second, the labour provisions create various obligations to the Parties, the most prominent of which are: the obligation to integrate specific labour standards into domestic law (Art. 23.3)¹⁰, the obligation not to derogate from these standards (Art. 23.4), or the obligation to enforce domestic labour laws (Art. 23.5). Each one of them is binding to all Parties¹¹. Third, on the DSM, Article 23.17.8 stipulates that:

If the consulting Parties fail to resolve the matter within 75 days after the date of receipt of a request for Labor consultations [...] the requesting Party may request the establishment of a panel under Article 31.6 (Establishment of a Panel).

The establishment of a panel is the first step in the DSM of the Agreement. The rest of the procedure is essentially identical to what applies to

⁹ Labour-related provisions also feature elsewhere in the Agreement, notably: Labour-Value Content provisions under Article 7 of the Appendix to Annex 4-B, establishing a minimum requirement for North American high-wage employment in vehicle production, and annexes 31-A & B Facility-Specific Rapid Response Labour Mechanism, for rapid remediation of denial of rights to workers in covered facilities.

¹⁰ References mentioning only the article without the corresponding treaty refer to CUSMA.

¹¹ There is one exception which purports to another chapter. Article 1(c)(iii) of Annex 28-A, extracts anything related to “agrarian and labour justice” in Mexico from the disciplines set out in Chapter 28 (Good Regulatory Practices). However, we will not consider it here, as it is not strictly labour-related.

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other chapters of the Agreement¹². Fourth, non-implementation or non-resolution of an issue by a responding Party after 45 days of a panel report, which finds it at fault, entails the complaining Party(ies) to suspend benefits granted to the responding Party (Art. 31.19). This is the ultimate recourse which a complaining Party has under the DSM, and thus entails monetary consequences. Therefore, our 4-step test is successfully completed and the GOC's first goal on the theme of labour is clearly attained.

For the second goal, let us quickly compare Chapter 23 standards against those of the ILO's "core" or "fundamental" conventions. Together, the Core Conventions articulate the following fundamental rights, as listed in Article 2 of the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up* (ILO Declaration):

- freedom of association and the effective recognition of the right to collective bargaining;
- the elimination of all forms of forced or compulsory labour;
- the effective abolition of child labour; and
- the elimination of discrimination in respect of employment and occupation.

These fundamental rights are listed word for word in Article 23.3.1 of CUSMA, which specifies that each Party "shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights [...]". This suffices to determine that the GOC's "high labour standards" are clearly attained. Thus, when evaluated at face-value based on its promises on the theme of labour, the Trudeau government can objectively be given a perfect mark of 10/10.

Environment

Moving on to the first of two environmental goals, and its 4-step validation test, the GOC successfully passes but not quite as decisively as for the labour theme. A stand-alone chapter on the environment was successfully integrated in the Agreement, Chapter 24 (Environment). The chapter is generally binding to all Parties, it is enforceable in the DSM of the Agreement in a similar fashion as the previous chapter (Art. 24.32.1), and the use of the DSM ultimately leads to monetary consequences for non-abiding Parties (Art. 31.18.2 and Art.

¹² Note that the new Rapid Response Labour Mechanism established in annexes 31-A & B is more expedient and stringent than the regular DSM, but it is limited to "covered facilities" in specific "priority sectors," and does not apply between Canada and the US.

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31.19). However, many provisions relating to multilateral agreements or some subject-specific protections are only binding if all Parties adhere to the same set of international standards or, in other words: treaties "to which Parties are parties" (Art. 24.8, footnote 6; Art. 24.8.2; Art. 24.9.1, footnote 9; Art. 24.10.1, footnote 13). There is thus technically no strict minimum standard as in the labour chapter. This underlines the problems with the second environmental goal of the GOC. But the fact remains that, technically, our validation test is successfully completed and goal one is thus attained.

Turning to the second goal, on the first element related to having a common set of environmental protection standards that parties have to reach: Chapter 24 attains it, based notably on Article 24.8. This article establishes a list of seven global and regional instruments ("covered agreements") setting environmental protection standards on topics ranging from the atmosphere to marine environment and endangered flora and fauna (Art. 24.8.4). The obligations contracted under the covered agreements must be integrated in each Party's domestic laws.

However, on the second element requiring that Parties should not be able to lower their environmental protection below this set of standards, CUSMA fails to a large extent. This is primarily because of Article 24.3.1 in the case of the covered agreements. It enshrines each Party's sovereign right to "establish its own domestic environmental protection" and "priorities." A Party can thus withdraw from a specific convention or related document to backtrack on the principal environmental standards under CUSMA.

Third, on the presence of coordination and integration provisions, or harmonization provisions, there is nothing in Chapter 24 that would reflect the equivalent of the EU environmental law principle of integration¹³. Under CUSMA Chapter 24, any mandatory harmonization of environmental protection standards would come from developments within the seven covered agreements, or from the expansion of the list itself. Thus, only voluntary harmonization can potentially come from cooperation and sustainable development promotion provisions.

¹³ Article 11 of the *Treaty on the Functioning of the European Union* sets out that: "environmental protection requirements must be integrated" into the EU's activities, with a view to promoting sustainable development. It entails a degree of integration or harmonization of sustainable development-related elements by Member States (SJAFJELL 2018).

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This touches upon our fourth element on sustainable development cooperation. There are many such provisions in the chapter, most notably Article 24.25 (Environmental Cooperation), under which Parties recognize:

“[...] the importance of cooperation as a mechanism to implement this Chapter, to enhance its benefits, and to strengthen the Parties’ joint and individual capacities to protect the environment, and to promote sustainable development” (Art. 24.25.1).

Parties commit to “expanding their cooperative relationship on environmental matters” (Art. 24.25.2). The article also refers to a side agreement, the *Environmental Cooperation Agreement* (ECA), which guides North American Cooperation on the environment with great details (Art. 24.26). Finally, the fifth and last element on addressing climate change is simply not fulfilled. There is absolutely no mention of climate change anywhere in the Agreement, its annexes or side letters.

In conclusion, when considering the fulfillment of goal one and the partial fulfillment of goal two, at face value, the Trudeau Government can arguably be given a mark of 7/10 for its results on environment.

New Dedicated Chapters

On Indigenous peoples and gender, the GOC did not attain its main objective of inserting dedicated new chapters in CUSMA, but some provisions relating to the two themes appear in other chapters.

Provisions on cooperative activities and a cooperative framework have been inserted in Chapter 25 (SMEs) and Chapter 26 (Competitiveness). The former favours cooperation between the “Parties on activities to promote SMEs owned by under-represented groups, including women, indigenous peoples, youth, and minorities [...]” in a manner increasing “trade and investment opportunities” (Art. 25.2(b)). The latter tasks the North American Competitiveness Committee, created therein, to:

Provide advice and recommendations, as appropriate, to the Commission on ways to further enhance the competitiveness of the North American economy, including recommendations aimed at enhancing the participation of SMEs, and enterprises owned by under-represented groups including women, indigenous peoples, youth, and minorities (Art. 26.1.5(c)).

These provisions could open more opportunities for “minority groups”, but this remains to be confirmed. Primarily, since the Competitiveness Committee

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will also have other competing priorities to deal with, for example: to “identify priority projects and policies to develop a modern physical and digital trade- and investment-related infrastructure (...)” (Art. 26.1.5(d)). In any case, it still fulfills the GOC's secondary objective to establish a cooperative framework on gender.

On an eventual mention of the UNDRIP in the Agreement, the GOC could not fulfill its wish. However, provisions protecting traditional economic activity or the right to the protection of the environment, which are part of the Declaration (UNDRIP, Art. 29), were integrated in CUSMA. Most of them can be found in Chapter 24 (Environment), where the role of Indigenous peoples is emphasized in the protection of biodiversity (Art. 24.15.3), or in the “long-term conservation of the environment” (Art. 24.2.4). Also, any law “the primary purpose of which is managing the subsistence or aboriginal harvesting of natural resources” is excluded from the term “environmental law,” thus exempting traditional indigenous economic activity from the disciplines of the Chapter (Art. 24.1). The Agreement further provides for a general exemption on “measures necessary to fulfill [a Party's] obligations to indigenous peoples” (Art. 32.5). Taken as a whole, these elements cover UNDRIP provisions to a large extent.

Furthermore, a provision establishing specific duty-free access to CUSMA markets for “indigenous handicraft goods” can be found in Article 6.2. This, as well as previously-mentioned provisions on cooperation, tends to fulfill the GOC's goal of providing greater opportunities for Indigenous peoples. It remains unclear, however, if this will translate into that much greater economic opportunity.

In conclusion, the Trudeau Government did manage to promote cooperation on the two topics and provide some protection and economic opportunity. However, it did not attain its principal objective of inserting new dedicated chapters into CUSMA. This would have provided a certain level of visibility for Indigenous peoples and gender-related issues, the possible establishment of dedicated institutions, or the setting of common standards. Hence, this arguably prevents the GOC from getting more than a 4/10 mark on this theme.

This concludes our “face-value” evaluation of the Trudeau Government's performance. The GOC's final mark is thus 21/30. It would equate to a B+ at the author's *alma mater*. This mark, however, has to be put into context. It is one thing for the Trudeau Government to have listed – sometimes vague – promises and to have technically fulfilled them, but does this represent progress compared to the previous paradigm?

What progress compared to NAFTA?

In order to appreciate if progress was made, we will compare new PTA provisions in CUSMA with its equivalent in NAFTA for each theme by focusing on: 1) standards, 2) obligations, and 3) the DRM. Institutional provisions for labour and the environment will not be evaluated in this paper for practical and logistical reasons, and because they were not emphatically part of the GOC's stated objectives, as previously defined.

Labour

To put the reader in context, the previous paradigm of labour protection in North American trade was not set in the text of NAFTA, per se, but rather in a side agreement called the *North American Agreement on Labour Cooperation* (NAALC). The negotiations of the NAALC were pushed by the Clinton Administration in 1993. They aimed to respond to worries that social dumping¹⁴ might be an issue in trade with Mexico (FINBOW 2018, 53). But, in order to avoid a collapse of the negotiations¹⁵, and due to the strategic importance of NAFTA to the US as leverage to unlock multilateral talks at the global level (BOSCO 2013; DEBLOCK and RIOUX 2010, 9-10; ZINI 2014, 4-5), the Clinton Administration had to make concessions. It established labour standards in a side agreement, which prevented them from being enforced in NAFTA's DRM (FINBOW 2018, 53-69).

The NAALC lists a pretty comprehensive set of standards or "labour principles" for the Parties, but the language used in setting these standards is quite underwhelming compared to Chapter 23 of CUSMA. Article 1(b) of the NAALC mentions that: "The objectives of this Agreement are to promote, to the maximum extent possible, the labor principles set out in Annex 1". This annex lists and defines the following 11 labour protection standards or "principles":

1. Freedom of association and protection of the right to organize
2. The right to bargain collectively

¹⁴ i.e. The lowering of labour protection standards to incite the displacement of jobs from relatively high labour protection standards jurisdictions to relatively low labour protection standards jurisdictions.

¹⁵ Mexico pushed back on the idea of an enforceable labour chapter, as it would frighten investors and reduce their competitive advantage. Canada was open to discuss labour provisions but wanted to avoid an enforceable punitive regime for labour rights, for constitutional reasons (FINBOW 2018, 53).

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3. The right to strike
4. Prohibition of forced labor
5. Labor protections for children and young persons
6. Minimum employment standards
7. Elimination of employment discrimination
8. Equal pay for women and men
9. Prevention of occupational injuries and illnesses
10. Compensation in cases of occupational injuries and illnesses
11. Protection of migrant workers

This list essentially inserts the elements of what was later to become the ILO Core Conventions¹⁶ into the agreement as important standards to aim for, rather than to outright integrate in domestic law. It still represented a big step forward in 1993, as none of the NAFTA/NAALC partners formally adhered to all seven existing conventions at the time. Thus, this list provided a certain incentive for progress on this theme.

CUSMA Chapter 23 essentially retakes these standards but makes them a lot stricter to the Parties. Unlike “guiding principles” that are to be “promoted” by the Parties, subject to their sovereign caprices (NAALC Annex 1), Article 23.3.1 states that Parties “shall adopt and maintain” in their domestic laws, all of the rights covered by the ILO Core Conventions, as stated by the ILO Declaration. Also, the right to strike is now explicitly linked to freedom of association (Article 23.3(a), footnote 6), and extremely detailed obligations with regard to worker representation in collective bargaining in Mexico are set out in Annex 23-A. It is important to note that the latter represents a big step in addressing “yellow unions”¹⁷ in Mexico and essentially obliges the Mexican legislature to enact statutory and regulatory changes before CUSMA can enter into force (Annex 23-A.3). Finally, Chapter 23 also reinforces the “minimum acceptable conditions of

¹⁶ Note that the “Core Conventions” were signed between 1930 and 1999. Seven of those came into force before NAFTA was negotiated. They were coined as such following the 1998 *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, given the fundamental principles and rights they encompass.

¹⁷ Refers to unions dominated or influenced by employers, in the sense of article 2.2 of the *ILO Right to Organise and Collective Bargaining Convention of 1949 (No. 98)*.

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work,”¹⁸ by bringing precisions on wages (Art. 23.1(e)), although the provision remains relatively vague. Hence, all of the standards listed in the NAALC – and more – are part of Chapter 23 but, unlike before, a common minimum standard is set for most of them to be integrated in the Parties respective domestic laws. So, the bar is clearly raised.

The same thing can be said of the general obligations created by the respective texts. The NAALC created obligations regarding the enforcement of a Party’s own domestic labour laws, in other words, laws related to Annex 1 standards or “principles” (NAALC Art. 3.1; Art. 49). It also created an obligation for each Party to:

ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light. (NAALC Art. 2)

However, this same article recalled that Parties affirm:

[their] full respect for each Party's constitution, and [recognize] the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations”. (NAALC Art. 2)

In sum, Parties to the NAALC were required to enforce their labour laws, but they could choose the level of protection they wanted, and the pace at which this level progressed. They were also given great discretion on governance and enforcement of their labour laws (NAALC Art. 49.1(a))¹⁹.

In comparison, Chapter 23 strengthens the obligations of the Parties considerably. First, as mentioned, by setting common ILO standards for the Parties in their domestic laws (Art. 23.3.1), and more (Art. 23.3.2; Art. 23.8). Second, it sets obligations with regard to third parties as:

“each Party shall prohibit the importation of goods into its territory from other sources produced in whole or in part by forced or compulsory labor, including forced or compulsory child labor” (Art. 23.6.1).

Third, it sets obligations for elements not directly part of the ILO Core Conventions but affecting their fulfillment, such as the prevention of violence against workers (Art. 23.7). Also, the overarching obligation of enforcement of

¹⁸ Equivalent to NAALC principles 6, 9 and 10, as listed previously.

¹⁹ The rest of the obligations created therein are procedural in essence (NAALC Article 3.2; Article 4.1; Article 5; Article 6).

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labour laws remains in Chapter 23, and an obligation of non-derogation now appears, although applicable only to Article 23.3 (Labour Rights). It states that: “[no] Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations” regarding the Core Conventions. This reinforces the ILO Core Conventions as a common minimum standard in North America.

An interesting aspect of these overarching obligations is that the burden of proof associated with them is inverted compared to NAALC. For example, it is stated that:

“[If] a Party fails to comply with an obligation under this Chapter, a decision made by that Party on the provision of enforcement resources shall not excuse that failure” (Art. 23.5.3).

This is the exact opposite of the principle set out in NAALC Article 49.1(a). Likewise, any derogation or failure to enforce needs to be “in a manner affecting trade or investment between the Parties” (Chapter 23, footnotes 4, 8, 11, 13), as under NAALC, but it is now deemed that: “a panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise” (Chapter 23, footnotes 5, 9, 12, 14). Again, this sets the bar quite higher and is in line with what some experts demanded of CUSMA labour obligations during the negotiations (POLASKI 2017).

On the DSM, the main distinctions between NAALC's provisions and CUSMA's are the expediency and the scope of the mechanism, both of which are tremendously improved in CUSMA. For expediency, the DRM was at best disheartening under NAALC. In order to be able to trigger the establishment of a dispute settlement panel (NAALC Art. 28), the complaining Party had to go through various steps that could be quite time consuming, offered various opportunities to stall²⁰, branch out²¹ or suspend the proceedings altogether²². The process was governed by the principles of cooperation and consultation (NAALC Art. 20), and Parties had to spend much time to consult and cooperate in a non-adversarial manner at almost every step. This turned out to be even more of a

²⁰ Notably, during the nomination of panelists (HART 2020).

²¹ Reference of the matter to other forums (Article 28.5).

²² Annex 22 ruling or subject previously submitted to an ECE and not much changed since (Article 23.3 and 23.4).

deception to labour rights defenders and experts, given the poor results NAALC ultimately delivered compared to initial expectations (ZINI 2014, 7-10).

The DRM in CUSMA is the opposite. Procedures are expedient, require few steps, there are very few opportunities to branch out, potential stalling points appear plugged, and there are no obvious ways to suspend the proceedings right in the middle. To illustrate how expedient the new DRM is, the following table shows a hypothetical labour dispute case between two parties, which goes from early consultations to the suspension of benefits. It indicates the standard minimum number of days for each step before a complaining Party can move to the next, except for steps with asterisks (*) which show the standard maximum number of days for an action to be fulfilled. The example assumes that this maximum is always reached.

Table 1 – Comparison of NAALC and CUSMA DRM timelines²³

Limit (Days)	NAALC	CUSMA	Limit (Days)
-	NAO Consultations	Labour + Ministerial Consultations	75
-	Ministerial Consultations	Panel – Establishment*	30
-	ECE ²⁴ - Establishment	Panel – Final Report*	180
180	ECE – Final Report*	Resolution of Dispute*	45
60	Post ECE Consultations	Suspension of Benefits	0
20	Council – Convenes*		
60	Council – Consultations		
30	Panel – Establishment*		
240	Panel – Final Report*		
60	Action Plan Establishment		

²³ A hyphen (-) indicates that there is no mention of limit in the text of the agreement.

²⁴ Evaluation Committee of Experts

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90	Panel – Reconvened*		
180	Suspension of Benefits		
920	TOTAL	TOTAL	330

This shows that the DRM in CUSMA is theoretically just under three times more expedient than the NAALC version. As stated, various potential stalling points of the previous DRM also appear to be patched. An example of this is at the panel selection stage. Under NAALC, if the Parties could not reach an agreement on the selection of a panel chair or panelists, the Parties selected them by lot (NAALC Art. 32.1 and 32.2). The selection process could be stalled, however, if the responding Party refused to appear or participate in the panel selection process. New provisions correct this – where the tactic ought to occur – by having the complaining Party choose the chair and/or the panelists (Art. 31.9.1 and 31.9.2).

Another obvious improvement in CUSMA is the scope of the DRM applicable to labour issues, namely: full application²⁵. Every obligation on labour issues set out in Chapter 23 is covered by the DRM. In NAALC, only “technical labour standards” could be reviewed under the ECE mechanism (NAALC Art. 23.2). They represent a subset of 8 of the 11 “principles” listed in Annex 1²⁶. Of that subset, only 4 “principles” relating to “occupational safety and health, child labor or minimum wage” could be reviewed under an arbitral panel and give rise to monetary compensations or the suspension of benefits (NAALC Art. 29.1).

As one of Mexico’s negotiators during the NAALC negotiations said, the agreement: “[would produce] lots of public discourse, nothing more. This is the result we wanted” (FINBOW 2018, 61). It seems that the opposite is now true of Chapter 23, where less public discourse and more action are to be expected. However, only the eventual testing of the new labour provisions will tell if it was justified to have such expectations. In any case, labour provisions in CUSMA are clearly more biting than under the previous paradigm.

²⁵ Provided that it is trade or investment related, as is customary.

²⁶ Essentially every principle except those associated with collective bargaining and freedom of association (NAALC Article 49.1).

Environment

Under NAFTA, some environmental provisions were in the text of the agreement, but most of them were ultimately found in the *North American Agreement on Environmental Cooperation* (NAAEC), for similar reasons as for labour provisions (CHARNOVITZ 1993). Environmental provisions also underwent quite a shake-up during the renegotiations, but the resulting product is not as biting as for labour provisions. Noticeable upgrades were made on standards and the DRM in CUSMA, but the bar was not much raised on obligations.

One of the most relevant changes in the standards department is on the covered agreements front. NAFTA Article 104 listed three multilateral environmental protection agreements. This list has now been expanded to seven, as five were added and one removed²⁷ (Art. 24.8.4). The Parties, however, are not always under the same standards or obligations in all of the new listed covered agreements. This, as opposed to inserting standards and obligations directly in the provisions of the chapter, can debilitate the levels of protection and potentially the covered agreements as well²⁸. There are nonetheless various issue-specific articles listing standards directly in the text of the chapter on different aspects of environmental protection, and sometimes complementing or clarifying the covered agreements (Art. 24.9 to 24.24). One prominent example is for fisheries (Art. 24.17 to 24.21), where high standards for the conservation of marine species are set (Art. 24.19).

As for obligations, there is a strict discipline on fisheries subsidies contributing to overfishing and overcapacity that is established (Art. 24.20.1), and a mandatory alignment with that discipline for the Parties' existing subsidies regimes within three years of CUSMA's entry into force (Art. 24.20.2). But, save for this and a few other exceptions, Chapter 24 does not change the obligations regime much. Overall, Parties are still required to enforce their domestic laws (Art. 24.4), and they also still have the liberty to set their policy and levels of protection as they wish (Art. 24.3.1). This will likely be a disappointment for environmentalists.

Finally, the DRM, much like for labour issues, is clarified and more expedient. It does not have a wider scope however, as all of the environmental provisions of NAFTA / NAAEC were already covered by their respective DRM.

²⁷ The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and the Disposal* (Basel Convention) was removed from the list.

²⁸ The removal of the Basel Convention may seem like a step back, but experience have shown that NAFTA actually flouted the Basel Convention through its listing in article 104 (CHOKSI 2001, 536).

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Both gave rise to potential monetary indemnities. Note that there are now three formal steps of consultations (Arts. 24.30 and 24.31), but the minimum number of days of consultations before a Party can move to form an arbitral panel is not substantially higher than under NAAEC²⁹.

New Dedicated Chapters

By definition, New Dedicated Chapters provisions are likely to have few equivalents in NAFTA, particularly with regard to gender, as it is a quite recent theme in FTAs. In order to have a basis of comparison herein, we helped ourselves, where needed, with relevant provisions of recent FTAs. Mainly, we made a comparison with relevant provisions of CETA and the CPTPP, as well as the unique Canadian examples of the *Canada-Chile Free Trade Agreement* (CCFTA) and the *Canada-Israel Free Trade Agreement* (CIFTA) in the case of gender.

CUSMA gender-related provisions place the Agreement on par with the CPTPP, which clearly goes further than CETA but comes short of both CCFTA and CIFTA. One advantage of the latter two concerns the obligation for each party to “domestically promote public knowledge of its gender equality laws, regulations, policies and practices” (CCFTA, Art. N bis-01.7; CIFTA, Art. 13.1.7). They also set common standards by having parties reaffirming their commitments to the *Convention on the Elimination of all Forms of Discrimination Against Women* (CCFTA, Art. N bis-02.2; CIFTA, Art. 13.2.). Finally, the provisions on cooperation (CCFTA, Art. N bis-03; CIFTA, Art. 13.3) and the institutional framework (CCFTA, Art. N bis-04; CIFTA, Art. 13.4) provide gender-related cooperation with a wider field of action, as it is not bound to specific topics as in CUSMA, and greater visibility, as the Committee can interact with other institutional bodies created in the respective agreements. Given these elements, progress made by the GOC on gender-related provisions in CUSMA can arguably be deemed average.

As for Indigenous peoples-related provisions, progress made by the GOC can also arguably be qualified in a similar fashion. There was, indeed, progress in fomenting more cooperation to provide greater opportunities in trade for Indigenous peoples (Art. 25.2(b); Art. 26.1.5(c)). There were also the environmental conservation provisions, recognizing the role of Indigenous peoples in conservation efforts (Art. 24.2; 24.15; 24.17). But it remains to be seen if any of this will bring greater opportunity or a greater economic role for

²⁹ 60 days before (NAAEC, Art.24.1) versus 75 days now (Art.24.32.1)

indigenous communities than under the previous paradigm. The same thing can be said of Article 6.2.1(d), creating the category of “indigenous handicraft goods” which provides duty-free treatment of certain specific goods, if they correspond to criteria agreed on by the Parties. Will this open new trade opportunities or will handicraft goods made in indigenous communities, now simply be classified as “indigenous” instead of “traditional folkloric,” as previously permitted (NAFTA Annex 300-B.3.2.3(c))? Finally, there is the enlargement of the scope of the “Indigenous exception” to disciplines of the Agreement. Instead of having the exclusion of measures related to section 35 of the *Constitution Act of Canada* limited to environmental, investment or services-related disciplines, as in NAFTA, a general exception applicable to the whole Agreement now appears in Article 32.5. This is the most promising measure on paper, but in the specificity of indigenous community’s relations with North American free trade, will this general exception bring actual change?

This concludes our relative evaluation of the Trudeau Government. Given the excellent progress made on labour, good progress made on the environment and average progress made on the New Dedicated Chapters, it is reasonable to say that overall, on PTA-related themes, the GOC did good. But, given that this is the final product extracted from the negotiations’ “melting pot,” one should ask: is this the exclusive result of the Trudeau Government’s efforts?

Stances of Negotiation and Concluding Remarks

This is where the rub lies. The Trudeau Government can legitimately boast of having performed well in integrating the PTA into CUSMA, when looking at the final product presented to Canadians. However, it loses much merit in attaining these goals when one considers the role played by its partners and how much of the GOC’s proposals actually made it into Agreement. This is especially true for labour provisions.

To a large extent, PTA elements figured both in the US and Mexico’s negotiating objectives. The Americans were the first to publish them in July 2017. They included highly detailed goals on labour and the environment, including to have Parties integrate ILO Core Conventions in domestic laws and to have strong environmental obligations, both of which enforceable in a more expedient DSM (USTR 2017, 12-14 and 17). Mexico followed in early August, with rather vague proposals to “reinforce compliance to domestic laws and international standards [translation],” with regard to labour (GDM 2017). It also aimed to “reinforce cooperation and dialogue between NAFTA countries on trade and the environment [translation],” as well as to “integrate gender perspectives in some dispositions of the Agreement [translation]” (GDM 2017). Thus, generally all

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partners intended to move ahead with most of the PTA themes, which could have made it easier for Canada's PTA. However, it seems that the US mostly prevailed in imposing its provisions on the most important elements.

On labour, only Canada and the US tabled proposals for a new chapter. Various labour organizations which reviewed the proposals clearly outlined their preference for the Canadian one, which went further than its counterpart's (CP 2017). According to them, the US proposal was "nothing more than a cut and paste of the [TPP]" (CP 2017). In essence, this is what now figures in CUSMA, save for five elements: 1) Annex 23-A, addressing Mexico's "yellow unions," 2) Labour-Value Content (LVC) provisions (Article 7 of the Appendix to Annex 4-B), establishing a minimum requirement for North American high-wage employment in vehicle production, 3) a more expedient recourse to the DSM, 4) inverted burden of proof under the DSM, and 5) annexes 31-A and B Facility-Specific Rapid Response Labour Mechanism, for rapid remediation of denial of rights to workers in covered facilities. Only one of these five elements appears to have been part of the original Canadian proposal: Annex 23-A (Ibid.). The rest were either American proposals, like the LVC provisions, which morphed from the regional content requirements demanded by the US side (REUTERS 2018), or added through the *Protocol of Amendment to the CUSMA* (the Protocol), which was negotiated on the US Congress' initiative (Protocol Art. 4). Canada's Chief Negotiator, Steve Verheul, confirms that modifications contained in the Protocol "were largely as a result of domestic discussions in the US," although Canada remained "involved and engaged in substantive negotiations to ensure that any modifications aligned with Canadian interests" (INDU 2020, 21). The GOC's tentative of integrating obligations on "right-to-work" laws in the US³⁰, also visibly failed to materialize. Although Chapter 23 represents the fusion between the Canadian and American approaches to labour norms in FTAs and, the culmination of a converging trend rightfully pointed out by some authors (DEBLOCK and RIOUX 2015), it appears that the American approach ultimately prevailed to a very large extent.

On the environment, very little information on the tabled proposals was published during the negotiations. However, what clearly transpires when comparing negotiating objectives, the TPP, CUSMA, and the Protocol, is that CUSMA's Chapter 24 is very similar to the TPP, minus the provisions relating to climate change (ex. TPP, Art. 20.15), and plus the new articles on fisheries (Arts.

³⁰ Laws providing workers with the right to refuse to join a labour union while reaping its benefits. Canada deems it lowers labour protection by weakening labour unions and provides the US with an unfair trade advantage (CP 2017).

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24.18 to 24.21). This essentially reflects the US objectives (USTR 2017, 13-14). Furthermore, the list of multilateral agreements setting many of the standards for the chapter, as well as the more binding provisions for the DSM, were added by the Protocol, again, on the US Congress' initiative (Protocol Art. 5). Of course, new provisions on air quality (Art. 24.11), marine litter (Art. 24.12) or sustainable forest management (24.23) do not explicitly appear to have originated on the US side, based the aforementioned documents, and could represent the Trudeau Government's stamp on the environmental chapter.

Finally, the US and Mexico, were apparently not on board with the bold Canadian proposal of having New Dedicated Chapters, and the subject was more or less left at what the three partners had agreed to in the original TPP. The Trudeau Government does get some credit for the Indigenous peoples' provisions, although it remains doubtful whether they will structurally change anything.

Concluding Remarks

Concluding our evaluation of the Trudeau Government's performance on integrating its PTA in CUSMA, we can appreciate that it did a good job in attaining its objectives, and that overall, the new PTA-related provisions in the Agreement set higher standards than before. However, when comparing the various stances at the onset of the negotiations with the Agreement, the TPP and the Protocol, it tends to illustrate that the resulting document was modeled on US initiatives to a very large extent. The GOC's PTA obviously benefited from this. This is not intended to take away from the successes of the GOC, of which there are several; it is simply meant to acknowledge the fact that in a negotiation with the US, Canada is clearly not going to have-its way. The critical mass in the bilateral trade relation is, after all, south of the 49th parallel. It is also possible that this end result was part of the GOC's strategy, as it has learned to deal with its supersized neighbour. In any case, the PTA was ultimately moved forward. But Canada may have to defend these and other gains in the coming years, as the sun will likely start setting on this new Agreement in July 2026 (Art. 34.7).

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