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Canada's Progressive Trade Agenda: NAFTA and Beyond

A failure to achieve strong Progressive Trade Agenda outcomes as part of the NAFTA renegotiation would signal that the move to deeper integration on the North American continent in the sense of harmonization of policy is both unlikely and ill-advised.

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THE STUDY IN BRIEF

Canada is developing a progressive trade agenda (PTA) in response to the global rise of anti-globalization populism.

This *Commentary* reviews the PTA concept, its motivation, the specific elements that comprise it, the likely efficacy of these measures in addressing the factors thought to be driving populism, and the extent to which the PTA can shape Canada's trade agreements in general and the renegotiated NAFTA in particular. It concludes the following:

- The PTA closely parallels the concept of “inclusive trade,” which has received much attention internationally, including in the World Trade Organization (WTO), the G20, and the World Economic Forum. It also closely parallels the concept of “trade sustainability” that has been developed by the European Union. It is, accordingly, part of a mainstream, progressive vision, rather than an idiosyncratic Canadian initiative.
- The PTA responds to a widely accepted view that the gains from globalization have not been fairly shared, that there have been losers as well as winners, and that this reality has been a factor fuelling the populist reaction against globalization. In particular, it responds, along with similar agendas elsewhere, to the declining middle class share of income in industrialized societies.
- While the policy is coherently framed and it goes without saying that trade policy should, indeed, help redress the distributional inequities to which it contributes, the role that trade policy has played in generating the current backlash against globalization was arguably relatively small.
- At the same time, the measures that have been developed to advance the PTA have limited traction in affecting economic structure and income distribution. Expectations concerning the PTA's potential efficacy should be calibrated accordingly.
- The PTA faces modality issues: the norm-setting aspect is most effectively pursued at the multilateral level; in bilateral negotiations, policy coherence issues arise with both new and existing FTA partners, depending on the progressive credentials of partner governments (and changing administrations); and limiting the PTA's substantive content in negotiations with less progressive trade partners may result in Canada facing competitive disadvantages and cause difficulties in mobilizing support for any trade agreement.
- A failure to achieve strong PTA outcomes as part of the NAFTA renegotiation would signal that the move to deeper integration on the North American continent in the sense of harmonization of policy is both unlikely and ill-advised.

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Canada has adopted a progressive trade agenda (PTA), which it is promoting as part of the North American Free Trade Agreement (NAFTA) renegotiations.

However, the Canadian PTA has not yet been given a full and clear articulation in terms of either scope or approach and appears to be evolving as ministers feel their way forward.

Most broadly, the PTA has been pitched as a response to the narrative that links the rise of anti-globalization populism to the concentration of trade gains at the top of the income scale, while leaving many behind. Thus, Freeland (2017) credits NAFTA with increasing incomes by 2.5 percent compared to where the Canadian economy would be without NAFTA,¹ but adds the following comment:

Too many working people feel abandoned by the 21st-century global economy and have voted accordingly, abandoning the modern liberal vision of trade and growth and openness to the world. Too many towns and too many lives across the industrialized world have been blighted by factory closings and precarious work....

If we don't act now, Canadians may lose faith in the open society, in immigration and in free trade – just as many have across the Western industrialized world. This is the single biggest economic and social challenge we face. Addressing this problem is our government's overriding mission.

Prime Minister Justin Trudeau reiterated these points in comments in New York on the margins of the 2017 annual UN General Assembly (Panetta 2017).

For a trade-dependent economy like Canada's, a threat to the trading system represents a threat to its economic strategy and ability to deliver on non-economic policy goals. The PTA is thus positioned as safeguarding not only the open trading system, but also the ability to deliver domestic policy goals. Writes Freeland (2017):

This is the all-important, connecting piece, the tie between free trade and equitable domestic policy: if the second is missing, the first breaks down. And if the first is missing, the second is unaffordable. They need to advance together, in tandem.

By invoking the PTA, the Canadian government indicates it got the memo on the distributional factors behind Brexit and the election of Donald J. Trump and sees the PTA as a countermeasure to make sure a similar backlash, which would jeopardize its economic policy objectives, does not occur in Canada. Importantly, this realization situates the PTA as high policy and not optional window dressing or self-serving virtue signalling. Furthermore, it explains why Canada is giving the

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- 1 This figure appears to be based on impact simulations of the original Canada-US Free Trade Agreement (CUSFTA). Recent estimates of the impact of NAFTA lapsing suggest a much smaller boost to incomes, on the order of about 0.5 percent of GDP (Ciuriak et al. 2017). This is largely a reflection of the fact that the WTO default multilateral regime is much more liberal than was the case at the time of the original CUSFTA. Therefore, the marginal improvement under NAFTA compared to the multilateral regime would be that much less.

PTA a high profile in NAFTA negotiations rather than throwing it under the bus as the first casualty of an attempt to preserve US market access (as anticipated, for example, by Luke and Roarke 2017).

This understanding explains Canadian pressure to elevate the profile of the progressive elements in the Trans-Pacific Partnership (TPP), including the rebranding of the agreement as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. It also helps explain the postponement of trade negotiations with China at the Trudeau-Li summit in December 2017.

Broadly speaking, the framing of the PTA is coherent. For the entire postwar period, the growth of per capita incomes has been associated with the expansion of international commerce. Scholars disagree as to exactly how the link works – trade liberalization or export-oriented strategies supported by industrial policies – but they agree that a high level of participation in the global economy is a prerequisite for high living standards.

At the same time, there is now widespread acceptance that globalization's gains have not been fairly shared; that there have been losers, as well as winners, even in the long run after the adjustments to trade liberalization have been completed; and that this has been a factor fuelling the populist reaction against globalization – albeit only one of many contributing factors and not necessarily the most important. Nonetheless, since the problems that the PTA seeks to address have the potential to raise trade and investment barriers substantially higher than those routinely addressed in modern trade agreements, the PTA itself becomes part of the core trade and domestic policy agenda. The questions then become: how effective can it be and can it be successfully incorporated in a revised NAFTA agreement in the age of President Trump?

DELINEATING THE PTA

In Prime Minister Trudeau's mandate letter to International Trade Minister François-

Philippe Champagne, the PTA was positioned as contributing to the jobs agenda. Specifically, the minister was required to "[advance] Canada's progressive trade agenda in order to create jobs for the middle class and those working hard to join it" (Office of the Prime Minister 2017).

The PTA was substantially elaborated on in the government's response (Freeland 2017) to the Report of the Standing Committee on International Trade on the Trans-Pacific Partnership (CIIT 2017). It is worth reviewing this statement in detail:

Progressive trade means doing everything we can to ensure that all segments of society can take advantage of the opportunities that flow from trade and investment – with a particular focus on women, Indigenous peoples, youth, and small- and medium-sized enterprises (SMEs). It also means making sure the gains from trade are more sustainably and broadly shared.

For Canada, the progressive trade agenda translates into strong provisions in trade agreements in important areas such as worker's rights, environment protection, gender equality and reinforcing the continued right of governments to regulate in the public interest. Canada pursues, and will continue to pursue, these types of provisions in our bilateral, regional and multilateral trade initiatives.

In addition, the progressive trade agenda means an open and transparent process, and maintaining an ongoing dialogue with a broad range of civil society and other stakeholders, including small and medium-sized businesses, women-owned enterprises, non-governmental organizations, and Indigenous peoples and northern communities.

This includes an appropriate level of transparency for negotiations and related activities. It also means the promotion and communication of the benefits of trade and investment, and helping to create jobs for the middle class.

The key PTA elements may be itemized as follows:

- (a) achieving a fairer sharing of the gains from trade, with a particular emphasis on jobs for the middle class;
- (b) specific focus on women, Indigenous peoples, youth, and small and medium-sized enterprises (SMEs);
- (c) specific reference to labour and the environment;
- (d) safeguarding the government's right to regulate in the public interest;
- (e) procedural reforms to achieve greater transparency and participation of civil society in negotiations; and
- (f) communications to sell the benefits of trade and investment.

However, the PTA is potentially even broader since the specific elements are presented as examples ("areas such as...."), rather than as a definitive list. Accordingly, it is likely to evolve as Canada engages in negotiations with countries in different circumstances. For example, the PTA might encompass such issues as human rights, child labour, anti-corruption, and corporate social responsibility (CSR) in trade negotiations with countries where failure to address these issues would provoke strong opposition in Canada, jeopardizing any such deal.

The PTA closely parallels the concept of inclusive trade, which has received much attention internationally, including in the WTO, G20, and the World Economic Forum. As articulated by Azevado (2016), inclusive trade means "building a system where the benefits are shared more widely [by] entrepreneurs, SMEs, women, and marginalised groups in all economies."

Further insight into the meaning of a PTA can be gleaned from the European Commission's (2017) identification of the progressive nature of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) with sustainable development:

CETA's progressive nature will set a new global standard for sustainability chapters in trade

agreements. This is because, with CETA, the EU and Canada are committed to ensure that economic growth, social development and environmental protection are mutually supportive. ... CETA contains an ambitious and comprehensive chapter on trade and sustainable development, including labour and the environment. These provisions are binding: they create obligations which have the same legal value as any other obligation in the agreement. These provisions are also enforceable, as they are subject to a dedicated dispute settlement mechanism, with a clear, mandatory and timebound procedure for the resolution of any concern on their respect. This brings together governmental engagement, external assessment by an independent panel of experts, civil society involvement and the International Labour Organisation's expertise. The results are public and can be used to pressure the 'offending' party to take action. ... Civil society, including trade unions, is involved at all stages of this dispute settlement process.

The key ideas here appear to be:

- (a) the association of "progressive" with "sustainable;"
- (b) incorporation of the progressive elements in the body of the agreement;
- (c) binding commitments;
- (d) enforceability, including a dedicated dispute settlement mechanism, with a mandatory time-bound process; and
- (e) the involvement of independent experts, civil society, including trade unions, and the International Labour Organization (ILO).

These points are relevant for the NAFTA discussions since Freeland (2017) explicitly referenced CETA as a model when she said, "We will be informed here by the ideas in CETA, the most progressive trade deal in history."

To summarize, the PTA has substantive and procedural elements aimed at the distributional impacts of trade and investment and at safeguarding the ability of governments to regulate in the public interest.

PTA SCOPE AND OBJECTIVES IN THE NAFTA RENEGOTIATION

Scope

Minister Freeland (2017) has spelled out a number of concrete PTA elements that are to be included in the NAFTA negotiations:

In particular, we can make NAFTA more progressive first by bringing strong labour safeguards into the core of the agreement; second by integrating enhanced environmental provisions to ensure no NAFTA country weakens environmental protection to attract investment, for example, and that fully supports efforts to address climate change; third by adding a new chapter on gender rights, in keeping with our commitment to gender equality; fourth, in line with our commitment to improving our relationship with Indigenous peoples, by adding an Indigenous chapter; and finally by reforming the Investor-State Dispute Settlement process, to ensure that governments have an unassailable right to regulate in the public interest.

The specific PTA objectives in the NAFTA negotiations thus parse out as follows:

- (a) encompass two well-established areas for the “trade and ...” agenda already incorporated in the overall NAFTA framework, namely environment and labour;
- (b) introduce two new areas: gender and Indigenous peoples;
- (c) include reforms to the investor-state dispute settlement (ISDS) mechanism; and
- (d) support action on climate change (an issue that the TPP, the go-to model for NAFTA, referred to only obliquely).

Potential Implementation Modalities

To the extent that trade agreements venture into the areas addressed by the PTA, they generally do so by reference to conventions and rules developed in specialized international fora, such as:

- (a) requirements to ratify international agreements in the relevant area, including meeting internationally agreed minimum standards;
- (b) requirements to develop and pass domestic legislation on the specific issues; and
- (c) requirements to enforce the rules and regulations promulgated pursuant to such legislation.

An exception to this approach is the treatment of investor-state disputes, where trade agreements have developed their own mechanisms (e.g., the Investor Court System developed for CETA).

The level of commitment to PTA principles in respect of non-trade issues can be varied by the drafting of the text in the following dimensions:

- (a) the language used to describe the commitment: mandatory (“shall”), aspirational (“shall endeavour”), or permissive (“may”);
- (b) the coverage required: limitations on scope or on the level of government subject to the commitments (for example, sub-national governments are often exempt from trade agreement rules); and
- (c) position in the agreement: inclusion in the main body of the text (i.e., an entire chapter) or only as a side agreement (such as the TPP side agreements between the United States, before a newly-elected President Trump withdrew from the arrangement, and Vietnam, Malaysia, and Brunei on labour, which were much tougher than what is included in the NAFTA).

As well, the level of administrative commitment can vary. This can be inferred from the following trade agreement language:

- (a) whether a commitment is subject to the dispute settlement chapter;
- (b) the transparency requirements attached to the item;
- (c) whether a committee must be established (with differing levels of detail concerning agenda, frequency of meetings, and level of bureaucratic representation); and
- (d) whether there are any subtle so-called get-out-of-jail-free cards attached, such as the requirement

to hear complaints, but no requirement to do anything about them; or to follow national laws but without any minimum internationally recognized standards (such as the existing NAFTA measures on labour).

Finally, the right to use such remedial measures is usually circumscribed by making them contingent on the following:

- (a) the requirement to establish a connection between any instrument derogating from free trade and the policy goal in question;
- (b) the requirement to choose instruments that minimize impact on trade (the measure must not constitute a “means of arbitrary or unjustifiable discrimination” or a “disguised restriction on international trade,” to use General Agreement on Trade and Tariffs, GATT, Article XX language); or
- (c) the requirements to show good faith by exploring cooperative agreements to resolve the issue.

As this itemization illustrates, there is considerable latitude for negotiators in how to implement PTA elements. The trade-off is also clear: the stronger the PTA measures, the more they serve as a countermeasure to the forces driving anti-globalization reactions; the weaker they are, the greater the risk of anti-globalization pressures bubbling over and disrupting trade and investment to an even greater extent.

At the same time, even soft measures can have long-term value in terms of norm setting. Accordingly, even if they have no direct immediate effect, they cannot be dismissed out of hand as irrelevant.

Substantive PTA Elements

Labour

For Freeland (2017), the motivation for a PTA is linked to ensuring “fair trade,” under which Canadian workers are not put at an unfair disadvantage because of high regulatory standards, and, thus, is also linked to promoting win-win outcomes that help “workers both at home

and abroad to enjoy higher wages and better conditions.”

This is consistent with current mainstream thinking on trade’s impact on wages and inequality, including the role that trade and capital mobility have played in undermining labour’s bargaining power. The OECD has recently acknowledged this link:

... globalisation has weakened the bargaining power of labour in advanced economies, invoking the threat of cheap import competition from low wage countries as well as that of moving investment and production there. Weaker trade unions and weaker labour bargaining power in turn explain why real wage growth has been staying behind productivity dynamics and why the share of labour in national income has been going down in most economies over recent decades. As capital income is more unequally distributed than labour income, the falling labour share then pushes up overall inequality. (Janssen 2017)

Both the CETA and the TPP incorporate labour chapters in the body of the agreement, signalling a greater commitment to and/or force of the measures. The TPP, in particular, serves as a potential role model for the NAFTA since it was already agreed to by all three NAFTA parties before Trump withdrew.

The TPP has a mandatory requirement (“shall”) to “adopt and maintain in its statutes and regulations, and practices thereunder,” in respect of labour’s rights to the following:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour;
- (d) the elimination of discrimination in respect of employment and occupation; and
- (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

The following observations may be made concerning the strength of the TPP measures:

- (a) The core provisions are enforceable under the TPP's dispute settlement mechanism and subject to trade sanctions if violated, which provides some muscle to the measures.
 - (b) The TPP does not, however, make "acceptable conditions of work" subject to international standards or to its no-derogation requirement in respect of promoting trade and investment, except in the case of special economic zones. Moreover, enforcement of treaty rights is limited to violations that "affect trade or investment between the Parties." This latter measure is supplemented by an exhortation to "discourage, through initiatives it considers appropriate, the importation of goods from other sources produced in whole or in part by forced or compulsory labour, including forced or compulsory child labour."
 - (c) The TPP stipulates that parties "shall endeavour to encourage enterprises to adopt corporate social responsibility initiatives on labour issues that have been endorsed or are supported by that Party." However, there are no mandatory requirements or minimum standards in these regards.
 - (d) The TPP includes measures to promote awareness of labour laws and, more significantly, contains a well-articulated set of measures requiring procedural safeguards to ensure that "persons with a recognised interest under ... [a party's] law in a particular matter have appropriate access to impartial and independent tribunals for the enforcement of the Party's labour laws." This would, however, not improve upon NAFTA, as equivalent language already exists in the NAFTA Labour side agreement (Articles 4(1) and 5(4) cover the relevant commitments).
 - (e) Otherwise, the progressive commitments in the TPP, including the ILO's "Decent Work" agenda, gender equality, and the protection of migrant workers' rights are listed only as possible areas of cooperation.
- CETA Article 23.3(4) only *urges* the parties to "make continued and sustained efforts to ratify the fundamental ILO Conventions, if they have not yet done so."
 - Furthermore, CETA does not require adoption of the following:
 - the ILO's Convention concerning Occupational Safety and Health and the Working Environment;
 - the ILO priority governance conventions, including those on labour inspections, employment policy and international consultations; or
 - the ILO conventions on labour mobility and the protection of migrant workers.

Instead, CETA's compliance mechanism relies on non-binding cooperation, dialogue, and recommendations to address labour rights violations. This is not to gainsay the worth of including norm setting in trade agreements. Canada, for example, ratified the fundamental ILO conventions, which came into force on 1 January 2018, even if the CETA did not formally require that.

Moreover, there is evidence that inclusion of labour clauses in trade agreements does lead developing countries to improve their labour market policies, if complemented with incentives and active monitoring of factories (Polaski 2004; ILO 2017). Labour provisions have rarely been used to try to force compliance and, to date, there is not one case in which this has been achieved through a legal process. For example, in a recent case in which US and Guatemalan labour unions accused the Guatemalan government of not upholding international labour standards under the Dominican Republic-Central America-United States Free Trade Agreement, an arbitral panel found in favour of the Guatemalan government on grounds that there was no evidence that the labour violations were affecting trade (ICTSD 2017).

For a PTA to have meaningful impact on labour-market outcomes, it would have to require changes

It is also worthwhile observing that the CETA, described as Canada's most progressive trade deal, does not require changes in Canada's labour market policies. As noted by Pfister and Dessewffy (2016):

in Canada's own labour market policies or attenuate race-to-the-bottom competitive pressures.² In the NAFTA context, neither of these is likely.

As regards labour market policies, Canada's are broadly aligned with the OECD model, which promotes labour-market flexibility and thus shifts risk from capital to labour. Freeland (2013) commented on this "darker side" of labour market flexibility prior to entering politics, so this connection is understood. Canada is generally seen as having preserved protection for labour to a greater degree than the United States; however, the Bank of Canada points out that by one indicator of labour market flexibility – namely the degree of regional dispersion of unemployment rates – Canada has converged to the US norm (Amirault and Rai 2016), which is unlikely to be impacted by any new NAFTA measures. By the same token, NAFTA will not drive change in Canada to strengthen labour market protections.

From the PTA perspective, the lack of impact on US labour market practices is problematic given that US laws and regulations feature several troubling features, including: "right-to-work" legislation in many states; the Supreme Court's Hobby Lobby decision permitting discrimination in respect of sexual orientation on religious belief grounds; and exemptions from US labour laws for prison labour, such as the waiver of the requirement to contribute to unemployment benefit schemes. As well, right-to-work legislation is being advanced at the US federal level (Higgins 2017). Given that Canada has pointed to the US right-to-work policies as a trade competition measure (Weissman 2017) and that these policies have been found to have competitiveness implications for Canada (Lau 2017), it is difficult to see how Canada could sign

onto a NAFTA labour chapter while maintaining that this represents a progressive element for Canada's workers.

Environment

A PTA should prevent reduction or weakened enforcement of environmental standards from creating a competitive advantage in particular industries, thereby distorting trade. Indeed, Freeland (2017) promised "to ensure no NAFTA country weakens environmental protection to attract investment."

The TPP text provides useful examples of such measures:

No Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.

... a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties.

These measures are enforceable under the TPP's dispute settlement mechanism and subject to trade sanctions if violated.

A not insignificant problem in transposing such measures into the NAFTA is the Trump Administration's overt hostility to the US Environmental Protection Agency (EPA) and its past policies. While the administration has been constrained by Congress in implementing radical cuts to the EPA budget (Meyer 2017), it would be an open sham to sign onto NAFTA measures that

2 Cimino-Isaacs (2016), writing for the Washington-based Peterson Institute, states that the TPP labour chapter "aims to protect the rights of workers to organize and improve their working conditions in countries not particularly known for high labor standards," with the further goal to "[make] it difficult for producers in other countries to undercut and outcompete the United States through poor standards."

purport to prevent use of weak or non-enforced environmental standards for trade advantage while the Trump Administration tables budget proposals that would have just that effect.

A second important PTA environmental role is to promote the achievement of environmental goals and sustainable development. Again, this can be seen in the TPP, which includes statements to this effect in its “Objectives” preamble. As demonstrated by the successful role of trade sanctions in the 1987 Montreal Protocol, a global agreement to protect the ozone layer, trade deals can, indeed, play a powerful role in advancing environmental goals.

However, while the TPP was given good marks by environmentalists for some of its interventions (e.g., strong text supporting multilateral environmental agreements regarding ozone, marine pollution, and trade in endangered species), it makes only oblique and ineffectual references to the most important issues of the day – climate change, ocean acidification, and deforestation (Ciuriak and Ciuriak 2015). Accordingly, it is not to be expected – especially under the Trump Administrations – that a new NAFTA would make progress in areas where the TPP could not.

A third area where the PTA and the environment come into play is ISDS. The current NAFTA ISDS regime has been linked to regulatory chill in environmental policy (Ciuriak 2016a), a concern which the relevant TPP provisions do not address at all. Accordingly, if US concern about dispute settlement compromising sovereignty results in ISDS being dropped from the NAFTA altogether (see discussion below), despite Canada’s counterproposal regarding strengthened recognition of the “right to regulate” following the CETA approach (see VanDuvzer 2016), this would actually represent a positive step from the PTA environmental perspective, in the minds of many.

Finally, given Canada’s push to implement a national carbon tax, it would be important for the PTA that the NAFTA have language commensurate with GATT Article XX (which is incorporated into the current NAFTA by

reference). That article safeguards legitimate measures to address environment and climate change, as can be seen from the following excerpts:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

... (b) necessary to protect human, animal or plant life or health;

... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . .

An obviously interesting question is whether such language could be coupled with specific carve-out for carbon border offsets (border taxes that compensate for lack of similar taxes abroad), which would, of course, be preferable to relying on the interpretation of the qualifier “legitimate” in the GATT to safeguard policy space for carbon taxes.

Gender

Canada’s PTA component on trade and gender was introduced as a separate chapter in the modernized Canada-Chile FTA. The new trade and gender chapter does the following (with key operational language highlighted in quotes):

- acknowledges the importance of incorporating a gender perspective into the promotion of inclusive economic growth and that gender-responsive policies can help achieve socioeconomic development;
- references Goal 5 in the UN 2030 Agenda for Sustainable Development, which is to achieve gender equality and empower all women and girls;
- affirms existing commitments to adopt, maintain, and implement effectively gender-equality laws, regulations, policies, and best practices;

- requires (“shall”) each party to domestically promote public knowledge of its gender-equality laws, regulations, policies, and practices;
- reaffirms the importance of promoting the elimination of all forms of discrimination against women, including the obligations in the parallel Agreement on Labour Cooperation relating to gender equality and the elimination of gender discrimination;
- reaffirms commitments made in Article G-14 bis on CSR as they relate to gender, including the parties’ commitments to the OECD Guidelines for Multinational Enterprises, and the requirement under those guidelines to establish a National Contact Point;
- reaffirms commitments to effectively implement the obligations under the UN Convention on the Elimination of all Forms of Discrimination Against Women, as well as obligations under other international agreements addressing gender equality or women’s rights to which the party is a signatory;
- requires (“shall”) the parties to engage in cooperation activities designed to improve the capacity and conditions for women to access and fully benefit from the opportunities created by the agreement and provides an extensive list of cooperation activities that the parties “may” engage in, with priorities for cooperation activities to be decided by the parties based on their interests and available resources;
- establishes a Trade and Gender Committee of representatives from each party’s government institutions responsible for trade and gender (rank not specified), which is to meet at least annually (“shall”) and has at least one mandatory task (“shall”), namely to review the implementation of the chapter after two years;
- the ISDS mechanism does not apply with respect to any matter arising under the gender chapter; and
- Article G-14 bis: CSR reaffirms commitments to internationally recognized standards, guidelines and principles of CSR that have been endorsed or are supported by the parties, including the OECD Guidelines for Multinational

Enterprises, and includes the hortatory statement that each party should encourage its enterprises to voluntarily incorporate these standards, guidelines, and principles that address gender equality into their business practices and internal policies.

However, as can be seen, the chapter has few mandatory elements, and none of the mandatory elements require a change in laws or regulations. Furthermore, dispute resolution cannot be used to enforce commitments. Its influence then lies in terms of norm-setting and in the outcomes from the mandatory cooperation exercise and the work of the mandatory committee. In this regard, it improves upon the TPP, which only mentions gender equality as part of the cooperation agenda and which only uses permissive language (“may”).

Given that the TPP does in fact mention gender equality, a renegotiated NAFTA with an upgrading commensurate with the Canada-Chile FTA would not seem to be beyond reach. Could the Canada-Chile gender provisions be usefully strengthened in the NAFTA? Indeed, they could: for example, there could be a provision that ensures that the NAFTA ISDS provisions do not constrain or undermine governments’ capacity (and resources) to act in support of the progressive realization of women’s rights. Indeed, Fontana (2016) argues that “without appropriate public resources and government’s commitment, services liberalisation and privatisation may lead to the replacement of state-based entitlements by market-based individualized entitlements for those who can afford them, and poverty and overwork for those who cannot.”

Should trade agreements include flanking measures to address gender disparities? In principle, yes. In 2016, the European Parliament’s Committee on Women’s Rights and Gender Equality published a study on gender equality in trade agreements and found that “goods trade liberalisation does not automatically provide increased employment opportunities for women, as this is highly

dependent on the sectors that expand or contract in each country” (Fontana 2016). It further found that the increased competition of more market access resulting from FTAs does not reduce the discrimination women face at the hands of employers.

Women are also less likely than men to be self-employed in businesses capable of trading, as they face greater resistance in access to infrastructure and productive assets, relegating their businesses to small, local. Fontana (2016) further finds that women featured prominently among the workers most disadvantaged by the original NAFTA, primarily US unskilled workers and small agricultural producers in Mexico. The new NAFTA could therefore strengthen transparency requirements to research and publish gender-disaggregated statistics to promote awareness and stimulate policy remedies.

Is promoting gender equality sound economics? Fundamentally, yes. Entrenching norms for equality of women in the workplace (including pay) helps expand female labour force participation. This is beneficial on three counts:

- Enabling labour force participation expands choice and society should allow women to vote with their feet as to whether to exercise that option.
- Labour force participation creates efficiency, as household production (which is otherwise performed overwhelmingly by women) is transferred to the market, allowing for productivity gains from specialization. A large part of the economic growth realized in the 20th Century came from this source.
- Jobs provide social context and status that is welfare enhancing for the individual, even if this source of welfare gain from the market economy is not measured. This perk has been historically enjoyed disproportionately less by women.

For these and other reasons, mainstreaming gender equality has been part of social policy in all advanced countries for decades, including in trade policy.

Indigenous Peoples

Provisions creating special treatment for Indigenous peoples are not new to trade agreements. For example, Canada’s NAFTA reservations include “the right to adopt or maintain any measure denying investors of another Party and their investments, or service providers of another Party, any rights or preferences provided to aboriginal peoples” (NAFTA, Annex II, Schedule of Canada, Aboriginal Affairs). Similar reservations are maintained by New Zealand in the TPP, ensuring that it retains flexibility to implement domestic policies that favour Maori without being obliged to offer equivalent treatment to overseas entities. Similarly, the Canada-China Foreign Investment Protection Agreement (FIPA) provides specific exemptions for Aboriginal rights and privileges (Article 8), as well as a general exemption from environmental measures (Article 33(2)). Such exemptions preserve policy flexibility for existing or future measures that do not conform to the treaty obligations (Richardson 2017).

However, Indigenous peoples in Canada and elsewhere have argued that such reservations fall short of what is required to respect domestic and international commitments to Indigenous peoples. The UN Special Rapporteur on the rights of Indigenous peoples supports this position, saying, “Investment clauses of free trade agreements and bilateral and multilateral investment treaties, as they are currently conceptualized and implemented, have actual and potential negative impacts on indigenous peoples’ rights, in particular on their rights to self-determination; lands, territories and resources; participation; and free, prior and informed consent” (UN Rapporteur 2015).

A requirement to formally consult with Indigenous peoples on trade agreements during the negotiation/ratification phase would address one of their main concerns. The Supreme Court of Canada has established that the Government of

Canada has a duty to consult and, if appropriate, to accommodate when the Crown considers an action or decision that could adversely affect Aboriginal rights, even if the adverse effect is not yet proven (Tucker 2013). More specifically in the current context, it is not unrealistic to suppose that such a duty to consult would be triggered by a trade negotiation. As Schwartz (2017) writes:

Hupacasath First Nation v. Minister of Foreign Affairs Canada is the first case in Canada where a court was asked to determine whether there was a constitutional obligation to consult prior to ratification of an international agreement. The Federal Court, and later the Federal Court of Appeal, determined that there was no duty on the government to consult the Hupacasath First Nation prior to ratification, as the potential adverse impacts of the international investment agreement on Aboriginal rights were found to be non-appreciable and speculative. However, the court did leave the door open that a future international agreement could trigger constitutional consultation requirements.

Moreover, as Tucker (2013) persuasively argues, the court decisions in the Hupacasath legal case, which sided with the Crown, seem far from unassailable. Whether or not the legal obligation would be found to exist in any particular FTA/FIPA negotiation, Canada could settle matters as regards ex ante consultations by acknowledging the duty to consult on one of several possible grounds: that it is covered by its own guidelines;³ that it is implicit in the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*; and/or that trade and investment agreements fall under the rubric of "strategic, higher level decisions that may have an impact on Aboriginal claims and rights," which the Supreme Court of Canada has stated

would trigger the duty to consult.⁴ A concrete step in this direction would be to include members of the three Indigenous peoples recognized in the *Constitution Act* on Canada's negotiating teams (IITIO 2017).

It is an open question what more could be practically achieved in an FTA chapter dedicated to Indigenous peoples' issues over and above the type of specific and general carve-outs from treaty obligations described above and formal consultations with First Nations on an ex ante basis.

A modest step would be to include reaffirmation of international instruments that the parties have already signed. Thus, an Indigenous chapter could include a reaffirmation of the UN Declaration on the Rights of Indigenous Peoples and the American Declaration on the Rights of Indigenous Peoples. All three NAFTA parties are signatories to these declarations so this should not be contentious in the NAFTA context.

Notwithstanding the large differences in the circumstances of Indigenous peoples in the three NAFTA countries and the differing extent to which each country has progressed toward reconciliation, a chapter could also commit to the following proposed measures suggested by the International Inter-tribal Trade and Investment Organization (IITIO 2017):

- cooperation activities designed to improve the capacity and conditions for Indigenous peoples to engage successfully in cross-border trade;
- reservations to the agreement, to ensure effective protection of Aboriginal rights, treaty rights and Aboriginal title interests in land, following language included by New Zealand in Article 29(6) of the TPP, which provides that:
 - nothing in the treaty precludes the adoption of measures deemed necessary to accord

3 See Minister of the Department of Aboriginal Affairs and Northern Development Canada, 2011: at 23.

4 *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 SCR 511.

more favourable treatment to Indigenous people in respect of matters covered by the Agreement, including in fulfilment of treaty obligations (in Canada's case under Section 35 of the Constitution Act); and

- Indigenous-related measures are excluded from dispute settlement enforcement; and
- exhortations to institute protection for Indigenous cultural property and traditional knowledge and sharing of the benefits when they are used commercially, taking into account, for example, obligations under the Convention for Biological Diversity and the Nagoya Protocol (Morin and Gauquelin 2016).

NAFTA renegotiation would also seem to provide an outstanding opportunity to address the problem of arbitrary borders (e.g., the 49th parallel or the Yukon/Alaska vertical). These were imposed upon Indigenous communities by foreign imperial powers, with no conceivable democratic legitimacy from the perspective of the Indigenous people, and they continue to generate daily frictional border costs for Indigenous communities as they go about their daily business. A Schengen border for Indigenous territories even in the absence of a customs union and free flow of goods within North America? Perhaps a bridge too far at the present moment, but something to think about for the future.

There is, accordingly, a basis for a suite of initiatives that would flesh out the PTA in respect of Indigenous peoples in a constructive manner based on measures that are not foreign to trade and investment agreements and that might fall within a feasible space for the three NAFTA parties. This would be a step in the right direction and establish a core on which to build.

Investor State Dispute Settlement

The fifth element of the Canadian PTA is to retain investor-state arbitration, but to replace the current NAFTA ISDS mechanism with a permanent investment tribunal with language that enshrines the right of governments to regulate in the public

interest, including when regulations affect a foreign investment.

The Trump Administration is cool on the idea of ISDS, as it involves an intrusion on sovereignty. Accordingly, the outcome on this issue is uncertain. That being said, US business interests insist on some such mechanism being retained (Donnan 2017).

The Canadian interest is complicated by offsetting considerations. On the one hand, the Canadian federal and provincial governments have faced ISDS cases related to, inter alia, fracking bans, toxic waste, and water conservation. Canada is the most sued NAFTA party, with 25 claims registered against it (39 in total if notices of intent are taken into account, as per Sinclair et al. 2017), of which Canada has lost 6, and 4 are still ongoing. Minister Freeland (2017) argues that "reforming the Investor-State Dispute Settlement process, to ensure that governments have an unassailable right to regulate in the public interest" is key to the renegotiating process. From this perspective, dropping ISDS altogether, as many analysts have urged, would not be a problematic PTA outcome.

On the other hand, from a purely economic perspective, ISDS (as well as NAFTA's current Chapter 19, which provides for binational review of anti-dumping and countervailing duty decisions) have some potential value in promoting US investment in Canada and in safeguarding Canadian investments in the US (although not all of these investments are likely to be perceived as progressive by supporters of a PTA – see, for example, TransCanada's ISDS claim in respect of the since-reversed US decision to cancel the Keystone XL Pipeline).

There are several ways forward:

- (a) a Permanent Investment Tribunal that introduces procedural reforms addressing a number of perceived abuses of the current arbitration system;
- (b) circumscribing (or dropping altogether) the "fair and equitable treatment" provision, which is seen by analysts as the key problem, because it has received expansive readings by arbitrators

(e.g., Howse 2017). This would address both the sovereignty concern (as it restricts action to discrimination) and the issue of regulatory chill;

- (c) introduce language based on the *Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States*⁵ on the ambit of investor protection developed for the CETA, which would also address point (b); or
- (d) drop ISDS altogether – this would be preferable to an optional system (the latter being an idea floated by the United States) since an optional system provides no certainty for firms, the main gain from ISDS from a public policy perspective.

In the long run, if there is a perceived need to retain an ISDS system, stronger economic foundations for arbitration could be realized by recognizing that regulations address negative externalities (e.g., the risks to human health from chemicals used in fracking contaminating drinking water). While arbitrators have at times taken this into account in making awards, a systematic treatment of this in the ISDS mechanism would help address the regulatory chill concern (Ciuriak 2016a).

Transparency and Stakeholder Involvement

Canada's NAFTA consultations are being conducted within the established framework for stakeholder involvement: briefs are solicited from all interested persons, meetings with different interest groups are held, and our negotiators provide de-briefs following each negotiating round. To date, there does not appear to be any specific innovation in the approach, however, that could be attributed to the PTA.

Are there such steps that could be taken? Arguably, yes. The European Commission, for example, in a comparable renegotiation of an

existing FTA (in this case the EU-Chile Economic Partnership Agreement), has already published proposed texts for 15 areas after the first substantive round. Given that modern trade and investment agreements are mainly about behind-the-border measures, a more open NAFTA approach is warranted.

Moreover, the EU practice of commissioning and publishing independent trade sustainability studies for each negotiation is something else that Canada could emulate (full disclosure: the author is engaged in conducting such studies).

DISCUSSION

General Considerations

In concept, Canada's PTA is aligned with, and can be considered an elaboration of, the inclusive trade agenda in the WTO's and the EU's trade sustainability initiatives. Many of our PTA elements (e.g., regarding social and environmental standards and the right to regulate) respond to longstanding concerns that have generated an extensive literature that can guide negotiators in crafting practical measures. The profile given to gender equality and the introduction of Indigenous peoples' issues is valuable in terms of international norm-setting and may provide the basis for proactive flanking measures, both through international cooperation and domestic policy. For the most part, the PTA sails in charted waters.

In terms of motivation, the PTA is couched as a response to the discontent arising from the uneven impact of trade liberalization on different segments of society, which has seen some lose even as others win. Its main aim is to prevent trade liberalization from undermining domestic labour's position by exposing it to unfair competition from countries

5 See Official Journal of the European Union, L 11/3, 14 January 2017.

with lower labour market standards. In this regard, it has the same main aim and, indeed, many of the features of the pre-Trump Administration US trade agenda, as seen, for example, in the US-led TPP Agreement of 2016. The inclusion of gender equality and Indigenous peoples' interests represents a generalization of this distributional agenda rather than a new departure.

While the PTA is coherently framed at this high level, and it goes without saying that trade policy should indeed play its part in redressing distributional inequities to which it contributes, the role that trade policy has played in generating the current backlash against globalization is arguably relatively small – and of comparatively minor consequence going forward compared to the challenges to income distribution and labour market outcomes posed by technological change, including the anticipated rapid spread of artificial intelligence in the coming years. At the same time, the power of the measures that have been developed to advance the issues addressed in the PTA is also comparatively weak. Expectations concerning the potential efficacy of the PTA should, therefore, be calibrated accordingly.

The modalities – multilateral, regional/bilateral, or unilateral – through which the PTA is pursued raise another set of issues. The PTA's norm-setting aspect would have its widest impact at the multilateral level. The trade-off for broadening the sphere of influence is that what can be achieved multilaterally in terms of agreed texts, even for non-binding hortatory measures, is usually less than what can be achieved between like-minded parties in a narrower negotiation.

However, attempting to implement in regional/bilateral negotiations a PTA based on a country's own sensibilities and circumstances runs into problems since that potentially limits the roster of eligible new FTA partners at any given time and/or raises policy coherence issues with existing FTA partners, depending on the progressive credentials of changing governments. The regional solution can be

one of variable geometry – side letters with particular parties where specific PTA elements are relevant. This is the approach used in the TPP, where the US pursued its labour market levelling objectives with developing countries through side letters.

Limiting the substantive content of the PTA to carve-outs for Canada's own progressive initiatives allows some elements to be achieved even with less progressive trade partners. However, it may result in Canada facing competitive disadvantage vis-à-vis those subscribing to less progressive rules, as well as a difficult time mobilizing support for the agreement with Canadian domestic constituencies.

These considerations suggest that the PTA may have to be pursued flexibly, with the minimum essential elements in any agreement being the carve-outs required for Canada's own policies and, at least, symbolic nods to the other elements.

The PTA and the NAFTA Renegotiation

In the NAFTA negotiation, Canada's PTA faces what can only be described as hurricane-level headwinds. Raising the status of the existing NAFTA side agreements on labour and the environment by including them in the main text of a revised NAFTA and making them enforceable through trade sanctions would be consistent with what the NAFTA parties agreed to in the original TPP. However, these measures would have little, if any, practical impact on Canada in terms of addressing the distributional and labour market concerns that motivate the PTA, as they would not affect either Canadian or American laws or regulations, nor materially change wage differentials between Canada and Mexico. Moreover, it would be problematic for Canada to sign an agreement purporting to be progressive in these areas with an American administration that does not obviously identify with these views.

As regards gender and Indigenous peoples' issues, anything that would be included in NAFTA would likely be limited to hortatory and/or permissive

statements that would not be enforceable through trade sanctions. If chapters on gender and Indigenous peoples cannot be achieved in the current NAFTA negotiations, a realistic target would be to include these issues as part of the non-binding cooperation chapter, which is the treatment given to gender equality in the TPP.

The PTA components that go beyond inclusiveness – climate change and ISDS reform – appear to face insuperable problems. As regards climate change, the Trump Administration, which has walked away from the Paris Agreement and has removed all references to climate change in domestic government operations, can hardly be expected to sign onto any text even mentioning the subject and might not even be prepared to include the TPP's oblique references to a transition toward a low-emissions economy.

As regards ISDS, while both Canada and the US want to reform the current NAFTA mechanism, there is no evident landing zone since the Canadian approach which involves a move to an investment court system that implies greater intrusion on sovereignty than even the NAFTA Chapter 19 panels. Not surprisingly, the Trump Administration rejects this outright.

Moreover, US issues go beyond the positions taken by the administration, given the divisions within American society. While the deindustrialized heartland is primarily concerned about losing jobs to cheap labour abroad, these are conservative regions where the majority does not embrace progressive views on environmental, gender, or Indigenous concerns. For example, on climate change, the interests of the coal mining regions are at odds with US environmentalists. On ISDS, the antipathy comes both from the right, where the concern is sovereignty, and the left, where the concern is regulatory chill. Forging a workable compromise on trade is proving difficult; forging one on progressive trade might be impossible.

This raises two inter-related questions:

- (a) Does failure to advance the PTA signal future problems from trade-related distributional impacts?
- (b) Should there be any PTA red lines for Canada in the NAFTA renegotiation?

While the PTA is assigned an important role by the Canadian government in the NAFTA context, the failure to meaningfully advance it is unlikely to drive populist reaction against trade openness in Canada.

First, as Rodrik (2017) points out, the breakout in the present decade of populism from fringe status was driven by many factors, including changes in technology, rise of winner-take-all markets, erosion of labour-market protections (i.e., the rise in labour market flexibility), and the decline of norms restricting pay differentials. To this list can be added the differential in international mobility of labour and capital, which resulted in tax burdens shifting to the less mobile factor of production (labour, of course); the increased ability of the wealthy to avoid taxes; the role of monetary policy in depressing income earned in traditional household savings vehicles like bank accounts, while fueling asset value growth in equity markets; and the general distortion to factor markets from setting the risk-free interest rate to zero or even negative in nominal (let alone real) terms, which undercut labour's competitiveness (Ciuriak 2016b).

All of these factors worked to redistribute income shares from the lower and middle-income to the top percentiles.

In short, there is a long list of policy and economic factors contributing to the worsening labour market experience (as realized in less job security, fewer benefits, poorer pensions, less wage growth, etc.), which in turn fuels populism. The increase in global trade and international competitive pressures on domestic economies is just one factor and probably not the most important, notwithstanding its high profile.

There are, nonetheless, important considerations for Canada if the PTA cannot be meaningfully implemented in the NAFTA. First, as the European experience with deep integration and now de-integration demonstrates, deep integration requires far more intrusive disciplines than contemplated by a PTA. Second, given the potential need for labour market training and income support to respond to technological change, greater flexibility is likely to be required for national

policies without the threat of triggering some form of retaliation under NAFTA. These considerations suggest that deeper integration, in the sense of more harmonized policies, is not only unlikely in a North American context, but would in fact be ill-advised.

In the NAFTA negotiations, less might truly be more from the PTA perspective and Canada should paint its red lines accordingly. When all is said and done, NAFTA might actually turn out to be just a free trade agreement after all.

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