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Environmental Provisions in CUSMA: A New Approach

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Key Points

- When the North American Free Trade Agreement (NAFTA) was agreed in 1994, a separate parallel agreement on the environment was negotiated. Now, environmental provisions have been negotiated within the Canada-United States-Mexico Agreement (CUSMA).
- The provisions in CUSMA build on the NAFTA approach, including the basic obligations to have high environmental standards and to effectively enforce environmental laws and regulations.
- CUSMA incorporates new types of obligations and commitments for the parties and also in respect of specific areas, such as fisheries and illegal wildlife trade, while providing for dispute resolution.
- While CUSMA represents progress on addressing a number of issues under trade rules, it fails to address the most pressing environmental concern of our time — climate change.

Introduction

Passage of CUSMA, known in the United States as the United States-Mexico-Canada Agreement, will bring into force — alongside the usual economic and tariff provisions — a detailed environmental chapter that reflects a modified approach to trade and the environment. Commentators have identified both progress and disappointments in the new text.¹ The environmental chapter reflects recent developments in bilateral trade agreements in respect of the environment, as well as addressing numerous recent environmental problems, but falls short on the crucial issue of climate change.

Environmental provisions in trade agreements provide important additional opportunities for environmental protection and offer the promise of better integration of trade and the environment. This brief will canvass the new environmental chapter, mainly with respect to the Canadian experience, in light of the 1994 North American Agreement on Environmental Cooperation between Canada, the United States and Mexico (NAAEC) and other recent environmental provisions parallel to or found within free trade agreements (FTAs), highlighting strengths and weaknesses and leading to some considerations on policy going forward.

1 Noemie Laurens et al, “NAFTA 2.0: The Greenest Trade Agreement Ever?” (2019) 18:4 World Trade Rev 659, online: <www.cambridge.org/core/journals/world-trade-review/article/nafta-20-the-greenest-trade-agreement-ever/00904BBFDD68B29C3B37915E56C19DF2>; Aaron Cosby, “Weighing up the Environmental Cooperation Agreement under the Canada-United States-Mexico Agreement” (2019) International Institute for Sustainable Development Policy Brief, online: <www.iisd.org/sites/default/files/publications/environmental-cooperation-agreement-policy-brief.pdf>.

About the Author

Silvia Maciunas is a senior fellow and previously the deputy director of environmental law at CIGI. Her research considers how climate change protection measures are affected by the international legal framework, including the United Nations Framework Convention on Climate Change, as well as international trade rules and other multilateral environmental agreements. Another area of focus is the relationship between global environmental crises, such as biodiversity and climate, and the linkage to global health and health law. Silvia came to CIGI from Global Affairs Canada, where she served as deputy director within the Oceans and Environmental Law Division. She has held a number of positions within Global Affairs Canada. In addition to her fellowship at CIGI, Silvia is a consultant in international environmental and climate law.

The Precursor: The NAAEC

In 1993, Canada, the United States and Mexico negotiated NAFTA. The pact governing trade relations between the three countries received considerable criticism in the United States and in Canada about possible negative impacts on the environment and labour, in particular about the possibility of a “race to the bottom” for environmental standards. To quell some of these concerns, the NAAEC and the North American Agreement on Labour Cooperation were hastily negotiated and came into force in 1994. This policy brief will focus on the transition from the NAAEC to CUSMA.

Both of these agreements were parallel agreements. That is, they were not linked to the NAFTA text or obligations but were separate international treaties that came into force after NAFTA came into force (and would only come into force after NAFTA came into force). The NAAEC emphasized the effective enforcement of domestic standards and cooperation; however, its scope in Canada was limited to federal laws and the laws of provinces that agreed to be bound by it.

The cornerstone of the agreement was the obligation for each party to have high environmental standards and to strive to improve them and to effectively enforce its own environmental laws and policies. Notably, this obligation was not a requirement to harmonize or meet certain internationally agreed standards. Also, the treaty text recognized the sovereignty of each state to set and modify its own levels of environmental protection. Effective enforcement was anticipated to be achieved through government action, including the option of initiating judicial or administrative proceedings in cases of violations of environmental laws and regulations. The limitation of application of obligations to the federal government and the provinces that agreed to be bound by the agreement substantially reduced its impact in Canada.

In addition, each party had to ensure that appropriate judicial or administrative proceedings were available in case of violations of environmental law for persons with a legally recognized interest in the matter. Such proceedings

were to allow for sanctions or appropriate remedies. Parties also had to ensure provisions that would allow interested persons to request an investigation of alleged violations of environmental laws.

The NAAEC also established a Commission for Environmental Cooperation with a council, a secretariat and a Joint Public Advisory Committee (JPAC). The council supervised the secretariat, developed a program of cooperation and established a forum for the discussion of environmental matters as well as overseeing the citizen submission process.

Civil society played a role through the JPAC. In addition, the NAAEC provided for submissions from any non-governmental organization (NGO) or person asserting that a party was failing to effectively enforce its environmental law. Where the submission appeared to warrant it, a factual record could be prepared by the secretariat to investigate the case. This record made no determinations, nor recommendations, and was not binding on the party that was the subject of the complaint.

It is of interest that the NAAEC also provided for consultation and dispute resolution, where there was a “persistent pattern of failure” of a party to effectively enforce its environmental law. The agreement called for consultations to be followed by the establishment of an arbitral panel in the event of the failure of diplomatic consultations. A determination could be made by an arbitral panel that a party was not effectively enforcing its environmental law, in which case the parties are expected to agree to an action plan. If the action plan was not agreed or implemented, a monetary assessment could be made or benefits could be suspended. While theoretically available, the failure to obtain broad-based participation from the provinces limited the use of this process.

However, according to the commission’s 2018 *Annual Report*, the citizen submission process resulted in a high number of submissions: 94 since inception until the end of 2018 and the production of 25 factual records.² At the time of writing, there are five active investigations: four against Mexico and one against Canada.³

2 Commission for Environmental Cooperation, “2018 Annual Report at a Glance” at 11, online: <www.cec.org/sites/default/files/documents/annual_reports/2018-annual-report.pdf>.

3 Commission for Environmental Cooperation, “Registry of Submissions”, online: <www.cec.org/sem-submissions/registry-of-submissions>.

The New Model: An Environmental Chapter

Between 1994 and 2018, both Canada and the United States negotiated a number of bilateral agreements with other states.⁴ Canada continued with its system of a separate parallel agreement until its most recent agreements, the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), where Canada adopted a chapter approach for its environmental and labour provisions. The United States continued with its approach of a chapter within its FTAs after the NAAEC.

NGOs had long advocated for putting the environment on the same footing as trade provisions.⁵ Including environmental provisions in the text was seen to achieve this goal and to make environmental provisions enforceable. In the US agreements, the environmental provisions were subject to the same binding dispute resolution process as the rest of the obligations. But while there was considerable litigation in respect of the broader trade rules, there was a paucity of enforcement action on environmental issues,⁶ although the United States did recently take an enforcement action against Peru in respect of illegal logging. Most Canadian agreements after the NAAEC, including CETA, had a panel process with an outcome limited to an agreed action plan. The CPTPP marked the first pre-CUSMA agreement wherein Canada agreed to binding dispute resolution in respect of environmental provisions.

Another implication of moving to a chapter within a trade agreement was the limitation of scope of the obligations. Whereas most Canadian environmental parallel agreements required high

4 See Jean-Frédéric Morin, Laura Mordelet & Myriam Rochette, “The environment in Canadian trade agreements”, *Policy Options* (1 August 2017), online: <<https://policyoptions.irpp.org/magazines/august-2017/the-environment-in-canadian-trade-agreements/>>.

5 Sierra Club, *Discussion Paper: A New, Climate-Friendly Approach to Trade* (Oakland, CA: Sierra Club, 2016).

6 In 2019, the US Trade Representative did take enforcement action to block illegal timber imports from Peru. See Office of the United States Trade Representative, Press Release, “USTR Announces Enforcement Action to Block Illegal Timber from Peru” (26 July 2019), online: <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/july/ustr-announces-enforcement-action>>.

levels of domestic protection and involved efforts to improve these regulations, the wording in the chapters was changed to an obligation not to fail to effectively enforce its environmental law in a way that affected trade and investment. This link between affecting trade and investment and the failure to effectively enforce essentially raised the bar for litigation. A general obligation to effectively enforce environmental law is different from an obligation that applies only as it affects trade or investment. Also, the requirement for a persistent failure to effectively enforce was made explicit in the wording of the obligation.

Perhaps the most significant modifications in environmental parallel agreements or chapters for Canada in the time period between the NAAEC and CUSMA were found in CETA, which concluded in 2014 and entered into force (albeit provisionally) in 2017, and the CPTPP, which entered into force in 2018. CETA contained some novel aspects for Canada: significantly, the provinces agreed to be bound by it, an innovation not repeated in the CPTPP or CUSMA; a sustainable development chapter was added; the environment chapter contained references to forestry and fisheries; and reaffirmations of commitments to the implementation of multilateral environmental agreements (MEAs) as well as language on the promotion of environmental goods and services were included. By this time, there was also an addition to the standard core obligations that prohibited the weakening of environmental protections to attract trade and investment, known as the non-derogation clause.

The CPTPP, however, contained even more novel aspects than CETA. The CPTPP is a regional agreement involving developing, emerging and developed economies. The United States played a strong role in its negotiations, although the Trump administration chose not to be bound by it. Other parties included Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

The CPTPP contains the standard obligations to have high levels of environmental protection, to effectively enforce its environmental law and the right to modify it, but not to lower standards to encourage trade and investment. In addition, obligations to have appropriate procedural protections and private remedies were maintained. On MEAs, the general reaffirmation of commitment to implement these agreements is

supplemented by references to specific multilateral environmental problems. Thus, in respect of the protection of the ozone layer, parties take on a binding obligation to take measures to control the production and consumption of, and trade in, substances that damage the ozone layer. The text recognizes that measures taken in compliance with the Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol) would be sufficient to meet this obligation.

A similar approach is taken in respect of protection of the marine environment from pollution, where meeting obligations under the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (MARPOL) is considered to meet the requirements. On biodiversity, reference is made to the three objectives of the Convention on Biological Diversity (CBD), but no reference is made to the CBD, given that the United States is not a party to it.

The United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement are not mentioned, nor is there a reference to climate change or greenhouse gases, but commitments for a cooperative approach to transition to a low-emissions economy are included. The article dealing with marine capture fisheries addresses the need to take measures for the conservation and sustainable management of fisheries but, surprisingly, also addresses overfishing and prohibits the use of subsidies where stocks are overfished or subject to illegal, unreported and unregulated (IUU) fishing as well as encouraging other measures to help deter trade in IUU catch. In its article on the conservation of, and trade in, flora and fauna, not only does the text require parties to implement the Convention on International Trade in Endangered Species (CITES) but the parties also agree to combat the illegal take and trade in wild flora and fauna. In addition, parties take on legally binding commitments to protect and conserve wild flora and fauna that are at risk.

Finally, the CPTPP also includes a dispute resolution system that allows for the establishment of a panel under the general dispute resolution process, which could, therefore, give rise to binding decisions.

Perhaps one of the most surprisingly assertive provisions relates to the language on fisheries, where the parties agree to phase out subsidies for overfished stocks and to exclude from trade

products from IUU fishing. Also, in respect of conservation and trade, the language fills a gap in international law on responses to illegal trade in endangered species.

CUSMA

A revised CUSMA was signed by Canada, Mexico and the United States in December 2019 in the midst of much political disruption in the United States and various last-minute changes, largely required by the Democrats, and has now been ratified by all parties. The agreement came into force on July 1, 2020. Observers of the rollback of domestic environmental regulations by the Trump administration could have anticipated a pullback on provisions negotiated in other agreements, but, surprisingly, a comparison of the environmental chapter with the NAAEC and with the CPTPP reveals that the CUSMA text is an amalgamation of the NAAEC and the CPTPP, containing elements of both.

The definition of environmental law remains the same as the NAAEC and the CPTPP, focusing on pollution prevention, the control of toxic substances (including wastes), and the protection or conservation of wild flora and fauna. All three governments have limited its application to the central level of government.

The core obligations are very similar to the NAAEC and subsequent agreements. There is an obligation to have environmental laws with high levels of protection and to effectively enforce these laws, but with an affirmation that each country has the sovereignty to modify these laws. However, when the provisions on the environment were incorporated into the FTAs as a chapter, the wording changed from a positive obligation to effectively enforce the law to an obligation not to fail to enforce these laws through a sustained or recurring course of action in a manner affecting trade or investment between the parties. This limitation to a sustained or recurring course of action would require more than one or two incidents. But the language on a failure to enforce needing to be in a manner affecting trade or investment between the parties could raise additional uncertainty. In some cases, a failure to enforce might only affect domestic industries that are not engaged in trade. This uncertainty is

addressed by a presumption under CUSMA that, for the purposes of dispute settlement, the failure is in a manner affecting trade or investment but allows the responding party to demonstrate otherwise.

CUSMA also includes a derogation clause, which is a legally binding commitment not to derogate from its laws or waive them, in a manner weakening protection under these laws to encourage trade or investment between the parties. This version of the language makes it clear that the obligation is limited to trade between the parties. The NAAEC did not contain the non-derogation clause, but it was subsequently added in various side agreements and environmental chapters for both Canada and the United States.

Beyond this, the new environmental chapter starts to look more like the CPTPP in terms of adding more specific types of obligations. There is a general affirmation of the commitment to implement the MEAs to which Canada, the United States and Mexico are parties. But on seven specific MEAs listed (CITES, the Montreal Protocol, MARPOL, the Convention on Wetlands of International Importance especially as Waterfowl Habitat [Ramsar Convention], the Convention on the Conservation of Antarctic Marine Living Resources, the International Convention for the Regulation of Whaling, and the Convention on the Establishment of an Inter-American Tropical Tuna Commission), the obligation is to adopt, maintain and implement laws, regulations and all other necessary measures to uphold these conventions. Canada is party to four of them (CITES, the Montreal Protocol, MARPOL and the Ramsar Convention) and is not required to ratify the other three.

In addition, the text then outlines a series of key environmental issues, calling for parties to implement necessary measures of protection. These include provisions for protecting the ozone layer, protecting the marine environment from ship pollution, reducing marine litter, improving air quality, enhancing biodiversity, controlling invasive alien species, managing marine wild fisheries, conserving wild flora and fauna, and managing forests sustainably. Not surprisingly, given the position of the United States on climate change, there is no mention of climate change in the text.

On the subject of marine wild capture fisheries and conservation of wild flora and fauna, the text is, like the text of the CPTPP, surprisingly detailed and expansive. While acknowledging

the problems of overfishing and unsustainable use of fisheries resources, the text encourages the establishment of sustainable fisheries management. The text specifically prohibits the use of poisons and explosives and requires the use of science as a basis for fisheries management. One article is dedicated to the reduction of fisheries subsidies that are specific under the Agreement on Subsidies and Countervailing Measures (SCM Agreement). These, in any case, are unlikely to conform with the SCM Agreement, but the incorporation of this obligation into CUSMA adds some weight to these obligations and establishes an additional obligation to notify regarding subsidy programs. In addition, information on fuel subsidies related to fisheries is required. Finally, the agreement includes very strong language on IUU fishing, with a view to deterring such products from being traded: parties are to implement the Agreement on Port State Measures, support monitoring measures and act, *inter alia*, consistently with the conservation measures of regional fisheries management organizations.

On the conservation of, and trade in, wild flora and fauna, the emphasis is on combatting illegal taking and trading, which is separate from legal trade in endangered species that is allowed under CITES. CUSMA establishes a legal obligation for parties to take measures to combat illegal trade. Similarly, parties commit to take measures to protect and conserve wild flora and fauna that may be at risk. What is interesting is that the trade agreement establishes obligations that go beyond existing obligations in MEAs in respect of the protection and conservation of wild flora and fauna and combatting illegal trade in wild flora and fauna, but which may be found in the domestic laws of the parties. The parties also commit to sustainable forest management, including combatting illegal logging and associated trade.

CUSMA includes a process requiring information to be available to the public and providing for a system to have questions from persons in that party answered and made public. The Q&A provisions are found in many Canadian environmental chapters and side agreements. These provisions are a departure from the NAAEC model but made sense where there was no citizen submission process. CUSMA now has both approaches. Similarly, the obligations to provide for private remedies and have appropriate judicial and administrative procedures

included in the NAAEC and all subsequent agreements and chapters are included in CUSMA.

Perhaps surprisingly, given that a detailed environmental chapter is incorporated in CUSMA, the NAAEC, including the Commission on Environmental Cooperation and the citizen submission process of the NAAEC, survived the negotiations. CUSMA contains the provisions detailing how to file a citizen submission and its progression to a factual record. One innovation is allowing the environment committee to make recommendations to the council on whether the matter could benefit from cooperation activities. A separate agreement (the Agreement on Environmental Cooperation among the Governments of Canada, the United States of America and the United Mexican States [Cooperation Agreement]) addresses the specific details on the continuation of the commission and establishes a work plan that includes areas of cooperation such as strengthening environmental governance; reducing pollution; supporting strong, resilient, low-emissions economies; conserving and protecting biodiversity and habitats; promoting the sustainable management and use of natural resources; and supporting green growth and sustainable development.

A dispute resolution process is provided, which encourages consultation between officials and ministers. In the event of failure, a panel under the FTA may be established and any outcome under that panel would be binding. But the provision for arbitration that was contained in the original NAAEC was not replicated.

Overview

The new environmental chapter in CUSMA is an improvement over the previous NAAEC. The core provisions regarding the obligation to have high levels of environmental protection, to not fail to effectively enforce environmental laws and to not derogate from them to attract trade and investment have been maintained. As noted in detail above, the text refers to many global environmental issues. There is a legally binding obligation to implement obligations under specified MEAs to which each party is party and, in other areas, softer obligations to cooperate and promote desirable trade have been included. In addition, disputes will be subject

to the same adjudication process as disputes under the general trade agreement. In the areas of sustainable fisheries and conservation and trade, the text has gone further than other agreements by, *inter alia*, seeking to end fisheries subsidies, combatting IUU fishing and helping to deter trade in IUU products. Similarly, in the section on trade and conservation, there are obligations not only to implement CITES but also to combat illegal take and trade of wild flora and to protect and conserve wild flora and fauna at risk within each territory. Despite the stronger language, however, there is no reference to climate change, one of the most compelling environmental and economic challenges for society at the present time. The commission continues, with its structure intact and a role for cooperation in areas of common interest under the work plan. Indeed, much of the value of the commission under the NAAEC derived from its cooperative research and programming.

While environmental problems are unlikely to be resolved primarily by trade agreements, environmental chapters in trade agreements are a useful addition to making trade and the environment mutually supportive. The environmental chapter of CUSMA is a good model; if it is adopted by more jurisdictions, it will have a wider reach and more impact. Movement on sustainable fisheries and illegal trade in wild flora and fauna is sorely needed globally, and this language might reinforce progress, in particular if it is replicated. Also, the inclusion of language-affirming obligations under MEAs will likely be helpful in interpreting the intentions of the parties, should disputes on environmental measures that are justified under MEAs be taken to adjudication. The biggest deficiency in the chapter is the failure to include language on climate change. Overall, the CUSMA environmental chapter represents progress.

But despite the broadening of CUSMA's scope, it remains to be demonstrated whether the environmental chapter will have much impact. The US administration has rolled back more than 100 measures in the environmental field since the election of Donald Trump.⁷ Regulation in the environmental field has been a particular target,

and individuals with strong links to industry now control many of the regulatory agencies in Washington. There is no lack of examples of failure to have high standards, but the lack of enforcement of regulatory standards has not been challenged. Many of these rollbacks may have been domestic, without links to trade, but the political will to bring an environmental challenge under the trade agreement may be difficult to garner, given the uncertainty of trade rules more generally at this time.

Policy Recommendations

The language in the CUSMA environmental chapter is important in emphasizing the need to implement MEAs, but it is limited to three parties. This approach to MEAs should be a template for new trade agreements for each of the parties, but future agreements should also address climate change and seek stronger language on environmental issues not covered by the seven listed MEAs.

The language in the CUSMA environmental chapter goes beyond the content of MEAs in respect to fisheries management and illegal trade in wild flora and fauna. As trade agreements are unlikely to be the key means to address these issues, Canada should consider how to advance these issues in related fora as well and, in particular, with its CUSMA partners to the extent possible.

Canada should use the Cooperation Agreement to develop a robust program of work, including work on low-emissions economies and green growth within the Commission on Environmental Cooperation.

⁷ Sabin Center for Climate Change Law, Columbia Law School, online: <climate.law.columbia.edu>; Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, "The Trump Administration Is Reversing 100 Environmental Rules. Here's the Full List", *The New York Times* (20 May 2020).

Acronyms and Abbreviations

CBD	Convention on Biological Diversity
CETA	Canada-European Union Comprehensive Economic and Trade Agreement
CITES	Convention on International Trade in Endangered Species
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CUSMA	Canada-United States- Mexico Agreement
FTAs	free trade agreements
IUU	illegal, unreported and unregulated
MARPOL	International Convention for the Prevention of Pollution from Ships
MEA	multilateral environmental agreements
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	North American Free Trade Agreement
NGO	non-governmental organization
JPAC	Joint Public Advisory Committee
SCM Agreement	Agreement on Subsidies and Countervailing Measures
UNFCCC	United Nations Framework Convention on Climate Change

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