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NAFTA 2.0: The Environment Chapter

In the last blog, we discussed the fact that trade has been an anomaly in the current Administration, and that the labor chapter included some new and positive provisions. The environment chapter is in a similar posture. While the Administration has not positioned itself as a friend of environmental groups, nevertheless the USTR has enforced environmental provisions in the U.S.-Peru trade agreement. In that context, the positive provisions are not as surprising as they might otherwise be, although as with the labor chapter, there are deficiencies as well.

Notably, the United States had a high level of ambition for environmental provisions in the TPP negotiations, reflected in this public Green Paper. TPP ended up significantly watered down, as other trading partners refused to accept the kind of binding obligations that the United States sought. While, as discussed below, NAFTA 2.0 is in some respects an improvement on TPP, it mostly seems like a missed opportunity to alter more fundamentally the way trade agreements handle environmental issues involving the global commons. (This blog does not cover new provisions that contain language that is merely hortatory, as such language is not enforceable.)

While the Canadians have made much of their "progressive" trade agenda, there is little here to suggest they are meaningfully more progressive than they were under the right-wing Harper government. Indeed, outgoing speaker Paul Ryan has consistently backed the May 10th agreement, which strengthened environmental provisions and made them fully enforceable. In that regard, he is more progressive than his Canadian and European counterparts, who only seem inclined to include them when Americans are at the negotiating table.

A Brief History of Environment Provisions in Trade Agreements

House Ways and Means Democratic staff wrote this paper that provides an overview of the evolution of environmental trade provisions. (For those who have read the labor blog, the evolution is similar.)

Environmental provisions were included in May 10th and are generally as follows:

- The parties agree to adopt, maintain, and implement measures to implement seven multilateral environmental agreements. These seven were chosen because the parties to the pending agreements in 2007 were all signatories to those particular agreements:
    - CITES
    - Montreal Protocol
    - Convention on Marine Pollution
    - Inter-American Tuna Convention

- Antarctic Convention
- RAMSAR (wetlands)
- Whaling

More information on the relevant obligations in these seven agreements can be found in this Ways and Means Democratic staff paper.

- The parties agree not to roll back or waive environmental laws and regulations for the purpose of attracting trade or investment (non-derogation).

- Parties are obliged to enforce their laws.

- The provisions are enforceable using the same dispute settlement mechanism as other chapters. However, there is the same problem in the environment provisions as there in the labor provisions: to be enforceable, the breach must be in a manner affecting trade or investment between the parties, a condition not applicable to other chapters.

As with labor, the United States is the country that pushes for enforceable environmental provisions, even with environmentally-conscious trading partners like the European Union and Canada.

May 10th

It is difficult to evaluate the chapter against May 10th. This is largely because the chapter is based on the TPP chapter, and the TPP chapter did not adopt the May 10th structure of requiring parties to adopt, maintain, and implement measures to implement seven multilateral environmental agreements. This Ways and Means Democratic staff paper goes into more detail. Some of the issues with the May 10th MEAs will be discussed below.

The other aspects of May 10th (non-derogation and enforcement) are included (Article 24.4).[1]

[1] There is a change to the non-derogation language from May 10: it specifies that the laws must not weaken the protections afforded in their laws "to encourage trade or investment between the Parties." Strictly speaking, May 10 does not require a demonstration that the laws are being weakened for purposes of encouraging trade or investment between the Parties, but that is the intention, and the change in language is consistent with that intention. This change is also in TPP.

What's Good

- *Fisheries subsidies (Article 24.20).* This is a provision in TPP and addresses an important contributor to the problem of overfishing: subsidies. The provision prohibits certain subsidies. There have been efforts for years at the WTO to rein in these subsidies, and those efforts have failed. Having these provisions become standard in regional agreements is an important step forward.

- *Marine litter (Article 24.12)*. This is a new provision, relating to a problem of growing significance, especially as it relates to plastics (including microplastics). The provision requires parties to take measures to prevent and reduce marine litter. (Unlike so many environmental provisions, which "recognize" problems and encourage "cooperation," the marine litter provision actually *requires* parties to take measures. Ideally, the text would be more specific about what the measures must do, but nevertheless, the provision is new, and it is enforceable.)

- *Illegal, Unreported, and Unregulated (IUU) Fishing (Article 24.21)*. This is a provision in TPP and requires parties to take certain steps to address IUU fishing, which is also an important contributor to overfishing.

- *Whaling (Article 24.19.2).* One aspect of May 10th that was missing from TPP was the Whaling Convention (or any comparable prohibition on whaling). Considering Japan is a party to TPP, and has been found in violation of the Whaling Convention, this was a major omission. The NAFTA 2.0 environment chapter does include a prohibition on killing great whales, with exceptions as permitted by multilateral environmental agreements.

What's Not Good

- *Climate change*. Having withdrawn from the Paris Convention, this Administration was never going to include provisions on climate change in NAFTA 2.0. There's also a problem in the Senate:

Nevertheless, it cannot be seen as anything but an omission to have an environment chapter in a trade agreement that does not address climate change.

At the same time, we should not assume that other countries are actively using trade agreements to address this problem. Leaders like French President Emmanuel Macron are in no position to – credibly, at least – declare that U.S. participation in the Paris Convention is a precondition for trade negotiations when, as this blog has noted many times, the Europeans don't bother to include enforceable environmental obligations in their trade agreements to begin with.

- *Unnecessarily weak language on illegal trafficking in wildlife and flora (Article 24.22)*. TPP contained new language obliging parties to "combat" illegal take and trade. This should be considered a step forward, and it is. But it is more of a missed opportunity.

  Illegal take and trade is depleting flora and fauna all over the world, which is reason enough to address it; ***but the proceeds are also used to fund terrorists***. This is not hyperbole: it's a concern for Interpol, which considers it a national – a global -- security issue.

  The United States already prohibits illegal take and trade; it is other countries that weaken U.S. proposals.

  This is another example of the United States showing leadership on environmental provisions in trade agreements, and other parties watering down the obligations.

- *Watered down May 10th MEAs*. The only MEA that is embodied in the chapter as provided in May 10th is CITES.

In other cases, the subject matter of the MEAs is reflected in the agreement, but the obligation is written differently from May 10th. That isn't necessarily a problem *if* the provisions are equally strong. That is true of the marine pollution agreement, for example.

But it isn't true of the Montreal Protocol or the two fisheries management conventions. The Montreal Protocol implementation obligations are limited to ozone-depleting substances (see footnote 5), as opposed to any substances included in the Protocol either now, or in the future. Those are the obligations under both May 10th (see, e.g. footnote 2 of the Peru trade agreement) and under the language as crafted in TPP (footnote 3).

The fisheries management conventions impose catch limits. The fisheries management provisions in NAFTA 2.0 merely require parties to "seek" to operate such managements systems according to certain principles. This weak language is a holdover from TPP.

- "*In a manner affecting trade or investment between the parties*." This language was discussed in the context of the labor chapter, and the same analysis applies here. As noted there:

> May 10th is understood as having put labor and environment provisions on the same footing as the other chapters in these agreements. That, however, is not accurate. Provisions in other chapters are enforceable *per se*; to bring a dispute, there is no need to prove that the breach occurred in a manner affecting trade or investment between the parties.
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> The response to that argument is typically that labor and environment are "local" issues and thus they are only appropriately included in a trade agreement if they actually involve trade or investment.
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> This argument fails, however. Take the intellectual property chapter. It requires the parties to establish civil remedies for intellectual property rights violations, for the rightholder to be compensated for the breach. (Article 20.J.4). It even requires parties to have a *criminal* penalty regime for certain IP beaches. (Article 20.J.7) These regimes apply *even if there is no cross-border transaction whatsoever*. For example, if a Mexican national who has never left Mexico violates the copyright of a Mexican author who has also never left Mexico, NAFTA 2.0 nevertheless requires Mexico to have a law providing for civil penalties – and criminal penalties if it is done on a commercial scale. (In fact, some of the criminal penalty provisions in the chapter don't require the violations to be done a commercial scale. (For example, Article 20.H.11 (Technological Protection Measures.))
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> It is reasonable to ask why the architects of May 10 agreed to this conditional language, given that the goal was to put labor and environment on equal footing with other

chapters. Pragmatism is the likely answer. May 10 was a significant step forward in addressing race-to-the-bottom issues that have been endemic in the debate over globalization. The language was probably a Republican ask, and it may have seemed easy to meet the requirement that it simply occur in a manner affecting trade or investment – not a particularly stringent standard.

Except it turns out it is. As previously discussed, a panel had to interpret similar language in a labor dispute involving Guatemala, and the panel found that it not met the burden of proof.

As long as this language remains in the labor and environment chapter, and does not apply to other provisions that are equally "local issues," it cannot be said that trade agreements treat these issues the same.

Labor and environmental issues are also often dismissed as "social issues." They are not "social issues." They go to the very heart of competitiveness. If low wages are the comparative advantage that allows certain countries to attract investment, then those countries have every incentive to make sure those wages remain suppressed in order retain the advantage. That then creates a false comparative advantage. This is precisely the race-to-the-bottom incentive structure in trade that aggravates income inequality, trade skepticism, and trade anxiety.

For those who think Econ 101 actually has anything to do with trade in the real world (it doesn't), recognize that one of the premises is that lower-wage countries will experience wage growth as a result of trade, and thus the parties will reach equilibrium. When governments interfere with wage growth, they prevent equilibrium from being reached – and not only unnaturally siphon off jobs from higher-wage countries, but suppress wages in those higher-wage countries as well.

- *Questions about enforcement*. As noted above, the Trump Administration did enforce a provision in the Peru trade agreement that allowed the United States to block imports of lumber without going through dispute settlement. However, there have been no disputes brought under these agreements, despite concerns that Peru in particular has violated the non-derogation obligations of the agreement and that it as yet has not fulfilled its obligation to audit producers and exporters of lumber products every five years (footnote 6).