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Submission to Global Affairs Canada on NAFTA Renegotiation

EXECUTIVE SUMMARY AND RECOMMENDATIONS

By The Council of Canadians

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The Council of Canadians welcomes the opportunity to provide comments on renegotiation of the North America Free Trade Agreement (NAFTA).

Founded in 1985, the Council of Canadians is Canada's leading social action organization, mobilizing a network of more than 50 chapters and close to 100,000 supporters across the country. Through our campaigns, the Council of Canadians advocates for clean water, fair trade, green energy, public health care, and a vibrant democracy. The Council of Canadians is a registered non-profit organization and does not accept money from corporations or governments. Our work is sustained by the volunteer energy and generous donations of our supporters.

The Council of Canadians was founded as an organization that believes trade should be fair and should benefit people and the planet. Instead, many trade deals – including NAFTA – have favoured corporate interests and given corporations unfair advantages and rights. The information provided in this brief shows how NAFTA has helped corporations while putting our water, environment and energy security at risk.

As a social justice organization, the Council of Canadians was deeply involved in the debate around the U.S.-Canada Free Trade Agreement, which later evolved into NAFTA. Over the last two decades, our organization has been a vocal opponent of NAFTA and warned that it would significantly harmonize our social safety net downwards and benefit corporations at the expense of people and the environment. Twenty-three years after NAFTA's implementation, with rising inequality, manufacturing job losses,

stressed health and social programs, and provisions that have put our water and climate at risk, it is clear that NAFTA has not delivered its promised benefits to Canadians.

The Council of Canadians calls on the Canadian government to stand up for an alternate vision – NAFTA renegotiations present an opportunity for a better, fairer NAFTA that will improve things for people and the planet. In order to achieve a strong negotiating mandate, we also call on the Canadian government to properly consult Canadian citizens, Indigenous peoples and civil society representatives.

On behalf of our supporters, the Council of Canadians is calling for three specific changes in NAFTA renegotiation:

1. Eliminate Chapter 11, the investor-state dispute settlement (ISDS) process, from NAFTA. ISDS provisions allow corporations to sue governments for policies or regulations that restrict corporate profits. Corporations have used these provisions to challenge laws that protect people’s health and the environment.

2. Remove all references from NAFTA to water as a good, service or investment. Canada is vulnerable to bulk water exports and increased privatization under the deal. President Trump could see Canadian water as a way to hydrate drought-ridden U.S. states.

3. Eliminate NAFTA’s energy proportionality rule. This rule requires Canada to export a locked-in percentage of our energy production to the U.S. This forces continued production in the tar sands, which will stop us from meeting our climate commitments.

NAFTA renegotiation must eliminate Chapter 11 investor-state dispute settlement provisions

Investor-State Dispute Settlement (ISDS) provisions grant private investors from one country the right to sue the government of another country if it introduces new laws, regulations or practices – be they environmental, health or human rights – that infringe on profits.

These corporate lawsuits:

- Protect foreign investors, but no one else. Domestic corporations, civil society, unions or governments do not have the same rights to challenge government decisions.
- Cost \$4 million on average to defend a case. Chapter 11 cases are heard by three arbitrators, an elite group of investment lawyers who only look at investment issues, behind closed doors.

- Create a public “chill” that may dissuade governments from enacting policy. A study by Gus Van Harten, a scholar at the Osgoode Hall Law School in Toronto, showed that policymakers will delay or shelve decisions because of the threat of potential ISDS lawsuits.

Canada has faced 38 Chapter 11 ISDS lawsuits – the most amongst the three NAFTA countries. At the moment, Canada faces ISDS lawsuits claiming \$2.6 billion in damages. Canada is the most sued country in the developed world because of NAFTA. According to the Canadian Centre for Policy Alternatives, two-thirds of the ISDS lawsuits against Canada are over environmental policies.

But more and more, countries around the world are pulling out or revising their ISDS treaties. Recently, Ecuador declared it would scrap its ISDS agreements, including one with Canada. Brazil, India, Australia, South Africa, and Indonesia have all made trade agreements without ISDS provisions. According to the World Trade Organization, these countries are among the top 30 trading nations in the world.

In 2005, a trade agreement between Australia and the U.S. came into force without ISDS provisions. Both countries said that ISDS was unnecessary because each has a “robust” legal system for resolving disputes.

Recommendation:

The Canadian government must work to eliminate Chapter 11 ISDS provisions in NAFTA renegotiation. These ISDS provisions have provided no benefit to Canadians, but have led to weaker environmental policies and regulations and have cost taxpayers millions of dollars to date, with billions sought in pending ISDS claims.

NAFTA renegotiation must remove all references from NAFTA to water as a good, service or investment.

Water, which was once thought to exist in abundance, is now facing pressure from misuse, over-extraction and relentless pollution. The world’s water sources are finite and world-wide demands are increasing. We are facing a global water crisis of unprecedented proportions. The UN reports that the demand for water will increase by 55 per cent over the next 15 years. By that time, global water resources will meet only 60 per cent of the world’s demand. The water crisis could affect as many as 7 billion people by 2075.

NAFTA – and other trade agreements like it – put water at even more risk by defining it as a commodity that can be bought and sold.

In NAFTA, water is defined as a “tradeable good.” It is also referenced as a “service” or “investment.” As Council of Canadians Honorary Chairperson Maude Barlow points out in her book *Boiling Point*, “included in the annex [of NAFTA] that lists all the goods to be covered by the agreements are ‘waters, including natural or artificial mineral waters, and aerated waters not containing added sugar or other sweetening matter nor flavouring; ice and snow.’”

NAFTA dramatically limits the federal government’s ability to stop provinces from selling water. If a provincial government decides to sell water to parched U.S. states, the federal government would be powerless to turn off the tap. And NAFTA’s proportionality clause would mean the province couldn’t cut back on the amount of water it was sending to the U.S. even in times of drought.

Removing all references to water as a good from NAFTA would end the debate on whether the federal and provincial bans on water exports are sufficient, as it would remove any potential for a NAFTA challenge. At the same time, NAFTA’s ISDS provisions, which allow corporations to sue governments over new laws or regulations that might restrict their profits, must also be removed.

Water as a service

Removing water as a “service” would help protect water as an essential public service. When services are provided by private corporations, NAFTA provisions limit the involvement of the public sector. NAFTA’s negative list approach means that unless a service is specifically exempted, it must be opened up to the private sector. Examples around the world have shown the impacts privatization has on water services, including increased rates, less accessibility and poorer quality.

Water isn’t just exported in its raw form. Water services, through water delivery and waste treatment are also important services. In Canada, these services are made more accessible when they are provided through the public sector.

Water as an investment

Removing water as an “investment” and excluding NAFTA’s ISDS provisions would make it much harder for foreign corporations to use trade treaties to fight domestic or international rules that protect water. Canada has already been sued for laws protecting water including:

- American water giant Sunbelt Inc. challenged British Columbia's water protection legislation, along with its moratorium on bulk water exports from the province, demanding \$50 million.
- V.G. Gallo, a Canadian company that planned to dump Toronto's municipal waste in an artificial lake in northern Ontario sued the Canadian government for \$105 million when the Ontario government passed legislation blocking the project.
- The American corporation Bilcon proposed to build a massive quarry and marine terminal on the Digby Neck peninsula in southwestern Nova Scotia. When a joint panel said no to the application, Bilcon sued under NAFTA's ISDS provisions for more than \$100 million.

Many corporations see water as a marketable good. The global annual market for water will be worth just under \$300 billion by 2020, making it very profitable for companies to buy and sell water. Canada must protect its water interests by ensuring it is not open to corporate interests through trade agreements.

Recommendation:

The Canadian government must remove all references from NAFTA to water as a good, service or investment in NAFTA. Canada's water cannot remain vulnerable to bulk water exports and increased privatization. The Canadian government must implement the human right to water and ensure water is protected for future generations.

NAFTA renegotiation must eliminate NAFTA's energy proportionality rule

As Maude Barlow explains in her recent report, *Water For Sale*, Canada gave up control of its energy sector in NAFTA. The "proportionality clause" of NAFTA obligates us to maintain a fixed share of energy exports to the U.S. The more we export, the more we are obliged to export. This NAFTA rule has led to a dramatic increase in energy exports to the U.S., accelerating the depletion of Canada's conventional oil. It has meant exponential growth in the water-destructive tar sands and has facilitated the trade in environmentally dangerous fossil fuels. NAFTA's energy proportionality requirements have compromised Canada's energy security by restricting our legal capacity to regulate the extraction and trade in tar sands oil. It has also made it harder for us to protect water.

If there was ever an energy shortage, or environmental concerns that meant we wanted to cut back on energy production, under NAFTA we can't eliminate or scale back our exports to the U.S. even to meet our own domestic needs.

This energy-sharing clause will also make it very difficult – if not impossible – for Canada to meet its climate commitments. Although Prime Minister Justin Trudeau has tried to position Canada as a climate leader, NAFTA rules force us to keep producing tar sands oil and fracked natural gas, both of which produce greenhouse gas emissions. The tar sands are Canada’s fastest growing source of climate pollution and continue to contribute significantly to climate change.

NAFTA also doesn’t allow us to change the mix of energy. If Canada ever tried to transition from oil and natural gas to renewable energies such as wind and solar – which cannot be exported – we would violate NAFTA’s energy sharing rules. This is problematic as conventional sources of oil become less available.

Recommendation

The Canadian government must eliminate NAFTA’s energy proportionality rule. Canada must take control of its energy sector and be able to say no, if needed, to the U.S.’s energy demands.

Other areas of concern

There are many other issues that must be raised in NAFTA renegotiation. The Council of Canadians supports calls from other civil society groups and Labour Unions and urges that the renegotiation also includes:

- Protection for Canada’s supply management system.
- Provisions to address the growing income inequalities in all three countries.
- Protection for public services.
- Changes to address the loss of manufacturing jobs in Canada.
- More good jobs with fair wages and standard labour rules in all three countries.
- Protection for Canadian farmers, particularly small family farms that have been negatively impacted by the rise of large-scale farms.
- Limits for patent extensions on prescription drugs.

Conclusion

Trade across North American borders is a good thing and essential to our economy, but the rules outlined in NAFTA have made it so the benefits of the deal are reaped almost entirely by multinational corporations and investors.

NAFTA renegotiation presents an opportunity to tip the balance of power in this unfair trade agreement back to people and the planet. The Council of Canadians calls on the Canadian government to make NAFTA fairer by protecting and expanding Canadians jobs, safeguarding water and the environment, and strengthening our economy.