

Getting it Right:

A people's guide to renegotiating NAFTA





Acknowledgements

I am indebted to many individuals and organizations for their good work on this issue. In particular, I wish to thank the brilliant team at the Canadian Centre for Policy Alternatives for its impeccable research, Unifor and the Canadian Labour Congress for their leadership in insisting that the search for justice must be at the heart of a new NAFTA, Brent Patterson, Political Director at the Council of Canadians, for his tenacious documentation of the renegotiation process and the many issues involved, and Council of Canadians' Trade Campaigner Sujata Dey for her steady advice.

Pg 8 photograph by Siyuwj via Wikimedia Commons (modified). CC by-sa 2.0

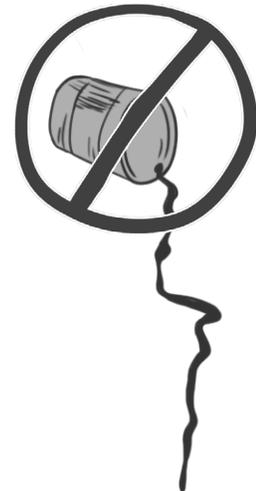


Water for Sale: How Free Trade and Investment Agreements Threaten Environmental Protection of Water and Promote the Commodification of the World's Water is published under the Creative Commons licence Attribution-NonCommercial-ShareAlike 4.0.



Contents

Summary	4
Introduction	5
NAFTA 1.0	6
Modern free trade agreements like NAFTA empower transnational corporations	6
NAFTA delivered a Precariat to Canada	7
Auto sector hit the hardest	8
NAFTA promotes competition and inequality among workers and women	9
NAFTA has impeded environmental protection	9
NAFTA gives American corporations the right to challenge Canadian environmental laws	11
NAFTA's energy provisions hinder our climate commitments	12
NAFTA puts our water at risk	13
NAFTA 2.0	15
What the U.S. wants in a new NAFTA	15
What Canada wants in a new NAFTA	18
What Canada should be asking for in a new NAFTA	20
Conclusion	24
Endnotes	25



Summary

The governments of North America are deep into a process of renegotiating the North American Free Trade Agreement that was signed over 20 years ago. NAFTA has been instrumental, along with other policies, in increasing wealth inequality, job insecurity, wage stagnation and the creation of a precarious work force. It has weakened public services and led to lower regulatory standards in areas such as food, pesticides, and health and safety rules. NAFTA has allowed American corporations to challenge higher Canadian environmental regulations.

The Council of Canadians vigorously opposed NAFTA and its predecessor, the Canada-U.S. Free Trade Agreement, when they were being negotiated and we have monitored these agreements and their fall-out closely since. Our opinion of NAFTA has not changed; quite the opposite, and we document why here.

However, in solidarity with the labour movement and other civil society organizations that are hoping to use these negotiations to insert meaningful chapters and protections for workers, the environment, women and First Nations, we are watching the renegotiation process with a critical eye. We are doubtful that the three parties – Canada, the United States and Mexico – will come to an agreement that rights what is so wrong with NAFTA from when it was written more than 20 years ago. And we are very clear that tinkering with the current NAFTA will not suffice. As the Canadian Union of

Public Employees says, “A bad agreement with a good labour chapter is still a bad agreement.”

The Council of Canadians will only support a new trade agreement for North America if it will:

- * Remove Chapter 11.
- * Put workers and their rights at the heart of a new agreement.
- * Promote and protect public services.
- * Include strong provisions to protect the environment and natural resources.
- * Maintain the right to regulate in the public interest.
- * Remove the energy chapter and cancel the proportional energy sharing provision.
- * Remove all references to water.
- * Maintain and expand the exemption for culture.
- * Protect Canada’s supply management system.
- * Protect and enhance Indigenous rights.



Introduction

Canada, Mexico and the United States are currently in a process of renegotiating the North American Free Trade Agreement (NAFTA). Much has been talked about and written on this subject. The Trudeau government has taken the position – backed by the mainstream media – that NAFTA has been a very good thing for Canada and that it would be a terrible loss if it were to be abrogated.

Foreign Affairs Minister Chrystia Freeland has appeared to consult a broad spectrum of Canadians about NAFTA. The process of public consultation under this Liberal government, while it seemed at first a welcome departure from the secretive Harper years, has been used in other cases to make the government look good while totally ignoring the views it heard. Canadians who appeared before the House of Commons Special Committee on Electoral Reform overwhelmingly supported some form of proportional voting system, but the government rejected these views and completely abandoned its promise of electoral reform. Similarly, the vast majority of those who appeared before the International Trade Committee's hearings on the Trans-Pacific Partnership (TPP), a trade deal between 12 Pacific-based countries, were opposed to it, but the government is moving ahead with these negotiations.

Minister Freeland also set up an advisory council made up of representatives from across the political spectrum, bringing together people with differing points of view with the goal of making the saving of NAFTA a shared national project. She has taken the very strong denunciations of NAFTA from the submissions of many progressive organizations as evidence that a Canadian consensus to seek an improved NAFTA is growing. This plan is working; even the CBC reports that the process is now to “modernize” NAFTA, buying into the narrative that the deal is essential to our economic well-being.

The Trudeau government has also smartly differentiated itself from the narrow and xenophobic nationalism of President Trump's anti-NAFTA stance by equating free trade agreements like NAFTA with being “open to the world,” welcoming refugees and celebrating diversity.

In fact, the government is promising to use this opportunity to make NAFTA the most modern, progressive trade agreement in the world. Minister Freeland has stated she wants to put labour, environmental, gender and Indigenous rights into the body of a renegotiated text.

Progressive voices in Canada that have been highly critical of NAFTA as a tool for corporate interests find ourselves somewhat caught. Labour, environmental, indigenous and social justice groups obviously do not side with the “Make America Great Again” nationalism of the Trump administration. At the same time, we are deeply critical of the pro-free trade policies of the Trudeau government and are highly doubtful that it is going to achieve any meaningful results from the renegotiation process unless NAFTA is profoundly changed.

This report is offered to document how NAFTA has impacted many sectors of Canadian society; what its major flaws have been; what needs to be changed, dropped or added to make it an agreement that would benefit the majority; and how we will know when it is time to walk away from it.

NAFTA 1.0



Modern free trade agreements like NAFTA empower transnational corporations

NAFTA, and its predecessor, the Canada-U.S. Free Trade Agreement, were the first of the “modern” trade agreements that set the template for many others to come, and served as precursors to the creation of the World Trade Organization (WTO).

The purpose of trade agreements has fundamentally changed since the post war Bretton Woods international institutions were established to rebuild a shattered world economy and promote international economic cooperation.

Trade used to be about taking down tariff barriers to the trade in goods and could be a win-win for all. The Auto Pact was a great example of a positive trade agreement. It allowed American car makers to sell their vehicles in Canada duty free if they created jobs here, and a healthy Canadian autoparts industry was born as a result.

But over the decades, most tariffs have come down among industrialized countries and the purpose of trade agreements has fundamentally changed. These changes started in the late 1970s and over the next two decades, domestic corporations and capital went global and left behind their countries of origin.

Transnational corporations wanted four things:

- 1) To move production to low wage countries without censure.
- 2) To remove export controls on resources such as trees, minerals, fish, food, and energy so that they could supply their manufacturing centres in low-wage countries. This meant that governments could no longer require secondary production or manufacturing of raw resources. For a resource-dependent country like Canada, this was a huge issue.
- 3) To challenge government regulations in finance, workers’ rights, environment and health and safety so that they could move

across borders with common (low) standards. Many corporations see laws that protect our common good as bureaucratic red tape that interferes with their profit.

- 4) To gain access to public services that most governments still protect and exempt from trade agreements. Public services are the mother-lode in terms of government spending as they include such big ticket areas as health care, education, water services and child and senior care.

Transnational corporations largely succeeded in these goals through a number of policies and trends, including the privatization of services, the deregulation of financial institutions, and the lowering of environmental standards. As well, in the guise of “corporate social responsibility,” instead of regulations, the private sector convinced governments to give it the job of upholding voluntary labour and environmental standards.

Modern free trade agreements like NAFTA helped transnational corporations attain these goals by cementing the privatization and deregulation “gains” they had made in an enforceable treaty.

They make it very hard for governments to favour domestic production and services or hire locally as they require governments to open their markets to foreign competitors without discrimination. They limit domestic control of resources by removing export controls. They curtail the right of governments to regulate as government laws must not be more “trade restrictive than necessary” and can be challenged as being protectionist. They allow companies to shift production to countries with lower labour and environmental standards and pit workers against each other. And, starting with NAFTA, they give private investors, including huge transnational corporations, the right to directly challenge governments over policies they believe violate their right to profit.

These corporate-friendly policies and the free trade deals that enshrine them were once sold as the best way to create jobs and prosperity for

all and many international institutions, economic leaders and governments bought that promise. That the deals have benefitted only a select few is now distressingly apparent.

The International Labour Organization reports that the very nature of work is changing in a highly disturbing way, with only one in four eligible workers around the world now holding a stable full time job. The other three-quarters are in what the United Nations calls the “Precariat” – part time, short-term, insecure, informal or illegal jobs often without benefits, vacations, maternity leave, pensions or a future.¹

NAFTA delivered a Precariat to Canada

The elite in Canada are in consensus that NAFTA has created economic growth and jobs. But what kind of jobs have been lost, and what kind created, and what have these corporate-friendly policies done for most Canadian workers and families?

Bruce Campbell, former Executive Director of the Canadian Centre for Policy Alternatives (CCPA), explains that NAFTA has played an important role in the growth of job insecurity and precarious work; in the dramatic increase in wealth inequality; in wage stagnation and the hollowing out of the middle class; and in the weakening of public services and the shrinking of our social safety net. “NAFTA is not solely responsible for these changes,” he writes, “but it was the key strand in a web of mutually reinforcing policies that have facilitated the ‘structural adjustment’ of the Canadian state in line with the demands of the ‘new global reality.’”²

CCPA reports that income inequality in Canada is on the rise, especially in Canada’s largest cities. The wealthiest Canadians make almost \$180,000 more today than they did in 1982 (adjusted for inflation) while the bottom 90 per cent of Canadians saw income gains of only \$1,700.

All indicators point to a steady rise in precarious work in Canada. According to Statistics Canada, across the country, the category of self employed workers increased by almost 45 per cent between 1989 and 2007 and has continued unabated since then. A study by McMaster University and the United Way found that over half the workers in Toronto and Hamilton are now temporary.

Vulnerable workers engaged in precarious work are more likely to be women, racialized persons, immigrants, First Nations or people with disabilities.

There are many reasons for the changing face of work, of course, including the rise of the “gig,” or informal economy, and automation. But because both the Canada-U.S. Free Trade Agreement and NAFTA no longer allowed Canada to require American companies to establish themselves in Canada in order to sell here, many hundreds of head offices closed their Canadian branch plants, devastating the manufacturing sector where the jobs were more secure and well paid.

The loss of jobs in this sector changed the face of the Canadian work force. As a percentage of our gross domestic product, manufacturing in Canada has declined from 26 per cent in the 1960s to under 11 per cent today. Since 2000, Canada has lost 547,000 manufacturing jobs and real hourly wages in manufacturing have grown at a much lower rate than productivity due to downward pressures from low wage countries such as Mexico and China.³

A similar pattern emerged in the U.S. David Autor, an economist with MIT, and Robert Atkinson of the Information Technology and Innovation Foundation, found that between 2000 and 2011, the U.S. lost 35 per cent of its manufacturing jobs, at least half directly due to trade.⁴

NAFTA also contributed to the decline of labour unions and labour rights in Canada. The National Union of Public and General Employees (NUPGE) says that under NAFTA, the capacity of labour unions to organize and represent the interests

of workers has noticeably diminished. “In North America, the overall unionization rate has dropped steadily: in Canada, declining from roughly 40 per cent in the early 1980s to 30 per cent by 2012.” NUPGE says that wage roll-backs, unfavourable working conditions and back-to-work legislation have all been encouraged by NAFTA, which gave license to employers and their allies in government to enact regressive legislation and demand concessions under the threat that they would move jobs to Mexico.

All this happened in spite of the fact that the three governments signed a side agreement on labour that was supposed to prevent such abuses. The North American Agreement on Labour Co-operation committed the countries to “improve working conditions and living standards” and to promote a core set of labour rights set out in an annex. These include the 1998 International Labour Organization Declaration on Fundamental Principles and Rights at Work. The governments also set up a North American Commission for Labour Co-operation to oversee the agreement and handle follow up actions.

But not one of the 36 labour complaints filed with the Commission even got to the stage of arbitration. In fact, there was so little commitment to the process, the secretariat set up to administer the project – first located in Washington, then moved to Dallas, Texas – eventually disappeared.

Auto sector hit the hardest

No manufacturing sector has been harder hit than the auto sector. Aided by the rules of the Auto Pact, for decades the big three American automakers had to create jobs in Canada in order to import their cars without tariffs, and a healthy autoparts industry was created. NAFTA changed all that, allowing manufacturers to move their production without penalty to low wage American states and to Mexico where the wages were even lower.

As Unifor President Jerry Dias explains, the result has been a steady flow of auto plants to Mexico. In just the last five years, nine of 11 new auto factories announced in North America went to Mexico. That country’s 900,000 auto manufacturing jobs represent 45 per cent of the entire North American industry now, compared to just 125,000 jobs in Canada, or six per cent. Since NAFTA was signed, employment in Canada at the big three American automakers has dropped by more than half – from 52,000 to just 23,000 – and Canada’s trade deficit with Mexico tripled to reach \$12 billion.⁵ Overall, reports Canadian economist Jeff Rubin, Canada has lost more than 45,000 jobs in the auto sector since 1999.

Rubin reports that a “massive” shift over the last decade toward low-wage assembly plants in Mexico has left Canada’s largest manufacturing sector badly lagging in the international competition for jobs and production and a “once stable trade surplus in the industry has turned into a large and



growing deficit, primarily as a result of a growing trade imbalance with Mexico.” Rubin adds that output in this sector will continue to decline significantly over the next decade unless the situation is addressed.⁶

The story is repeated for the Canadian-owned autoparts industry. In an attempt to show American politicians how integrated the North American sector now is, Canadian companies boast that they now employ more workers in the U.S. and Mexico than in Canada! Canadian autoparts makers employ about 71,000 people in Canada, but 86,000 south of our border at 150 plants in the U.S. and 120 in Mexico.⁷

Shockingly, the Automotive Manufacturers Association of Canada seems to feel that this shift in jobs away from Canada is an argument in favour of NAFTA and the Trudeau government is furiously lobbying in the U.S. to save the deal armed with these numbers.

NAFTA promotes competition and inequality among workers and women

Unifor is clear that we must not vilify Mexican workers for “stealing” North American jobs as President Trump has done. This story is one of sheer corporate greed with carmakers happy to exploit workers wherever they are allowed to. The average hourly wages for Mexican assembly autoworkers is just \$5.50 USD and \$2.45 USD for autoparts workers, one-eighth the wages paid to American or Canadian autoworkers. At these rates, most Mexican workers can barely put food on the table for their families, far less buy one of the cars they make.

Unifor notes that since NAFTA was signed, Mexican poverty and wages have remained stagnant, purchasing power has declined, human rights abuses have intensified and the dominance of pro-management unions continue to obstruct legitimate organizing activity for Mexican workers.

And the burden falls unevenly on women workers. More than one million Mexicans workers – mostly women employed in low-wage “maquiladora” factories along Mexico’s northern border – suffer additional discrimination. Maquiladora employment exploded in the first five years after NAFTA was signed, notes Human Rights Watch. It reported: “Major U.S.-based and other corporations routinely subject prospective female employees to mandatory urine testing, invasive questions about their contraceptive use, menses schedule or sexual habits in order to screen out pregnant women and deny them jobs.”

As Council of Canadians Political Director Brent Patterson points out, their lives are very different than the lives of women who attended the binational Roundtable for North American Women Executives set up by Justin Trudeau and Ivanka Trump, seemingly to promote women’s equality and cross-border business. It is traditional in all these trade agreements to get the buy-in of privileged women by setting up “dialogues” among business women in the partner countries.

NAFTA has impeded environmental protection

When NAFTA was signed, under pressure from environmental groups who were deeply concerned about how the deal could be used by big business to undermine standards in each country, the three governments signed a NAFTA side agreement called the North American Agreement on Environmental Cooperation. In it, they pledged to provide high levels of environmental protection and, to monitor and advise them, they also established the Commission for Environmental Cooperation (CEC). Two measures were set up to give the CEC some teeth: the ability of citizens to seek an investigation into allegations that one of the countries has failed to enforce its environmental laws, and the right of each nation to launch a dispute resolution process that could lead to sanctions.

While the intentions of the commissioners have not been brought into question, there has been a lot of concern expressed about the inability of the CEC to influence governments or prevent them from lowering standards in order to be more competitive. Many point to the fact that the CEC is a side agreement and not included in the body of NAFTA where the real rules are contained. An investigation of a CEC complaint is only undertaken if two of the three member nations approve it and the commission has no enforcement power even if its own findings suggest a violation of a country's environmental laws. And the power it does appear to confer – the state-to-state dispute mechanism – has never been used even though each country has lowered its environmental regulations in a host of areas.

In a report providing a 20-year assessment of NAFTA's environmental impacts, a number of North American organizations, including the Mexican network of social and environmental justice groups the Red Mexicana de Acción Frente al Libre Comercio (a network of social and environmental justice groups), the Institute for Policy Studies in the U.S., and the Canadian and U.S. Sierra Clubs, sounded an alarm. In all three countries, NAFTA facilitated the expansion of large-scale, export-oriented farming that relies heavily on fossil fuels, pesticides and genetically modified organisms (GMOs). Commodity exports from Canada to the U.S. exploded in those years, fuelling the high degree of consolidation in the water-intensive meat and grain sectors. The increase in U.S. GM corn exports added large amounts nitrogen, phosphorus and other chemicals into U.S. waterways as well.

In Mexico, NAFTA contributed to deforestation and higher levels of water pollution and nitrogen runoff. Groundwater levels in some parts of northern Mexico where the free trade zones are so prevalent declined by as much as 50 per cent, and the trade deal spurred a boom in environmentally destructive mining, the groups said.

The evidence documented in the report demonstrates that NAFTA reduced the ability of governments to respond to environmental issues while it empowered transnational corporations to challenge environmental rules. "These are not unfortunate side effects, but the inevitable result of a model of trade that is designed to protect the interests of corporations instead of the interests of communities and the environment," the report noted.⁸

In a 2013 letter to the CEC, the West Coast Environmental Law Association said that the Harper government weakened existing environmental regulations so much that Canada was now in violation of its promise to maintain high standards. Instead, said the group, the government had exposed the environment to undue risk in order to be competitive with the U.S. and Mexico. The environmental watchdog pointed to the gutting of the Kyoto Accord, the Fisheries Act, the Navigable Waters Protection Act, the National Energy Board Act and the Canadian Environmental Assessment Act. It said Canada was clearly violating the environmental side agreement by stripping down its environmental laws to provide a NAFTA advantage to Canadian industries⁹

In fact, using access to information laws, Greenpeace obtained a December 2012 letter to the Harper government from the oil and gas industry through a lobby group called the Energy Framework Initiative that named most of these regulations as impediments to the competitiveness of their industry. Within the year, all of the water-protection laws they named had been gutted and none have been re-instated by the Trudeau government.

More recently, the CEC has demanded that the Trudeau government explain what it is doing to stop tar sands (oilsands) tailings ponds from leaking millions of litres of toxins every day into Alberta waterways. Several North American environmental groups had laid the complaint in June 2017 and the Trudeau government's response is pending. However, it is highly unlikely that the

same government that supports the building of a raft of new oil pipelines that will ensure the expansion of the tar sands will be able to seriously deal with this challenge from this well meaning, but largely impotent commission.

NAFTA gives American corporations the right to challenge Canadian environmental laws

NAFTA was the first of these modern trade agreements to include the right of corporations to sue the government of another country for perceived violations. Before NAFTA, if a company or industry sector in one country had a concern about their treatment in another country, it had to get their own government to lay a complaint, or go to a domestic court of that country.

(In NAFTA, this state-to-state dispute mechanism is Chapter 19 and much hated by the Trump administration as it is through Chapter 19 that the U.S. consistently loses the dispute over softwood lumber.)

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, or interprets current ones – be they environmental, health or human rights – in a way that might cause the foreign investor (often a transnational corporation) to lose money. ISDS gives foreign investors a legal process outside a country's own courts, one that is closed to its domestic companies. So from the start, the process favours foreign investors.

ISDS has become powerful tool to curtail the right of governments around the world to maintain rules and regulations to protect the environment or control their own resources. There are now more than 3,500 bilateral investment agreements between countries that give corporations the right to sue governments and corporations have used them over 800 times to challenge government regulations such as phasing out nuclear power, taking

back control of oil and water resources, or curbing the expansion of a foreign mining company's operations.

The ISDS clause in NAFTA is Chapter 11 and North American companies have invoked it 84 times. When a complaint is laid, instead of it going to a court, it goes to a three-person panel whose members usually consist of highly paid trade lawyers, one chosen by each of the two countries in the dispute, and the third is chosen by the company.

As documented by the Canadian Centre for Policy Alternatives, Canada has been sued 39 times, more than Mexico or the U.S., the latter never having lost a case yet. Canada has paid out more than \$215 million in compensation to American corporations, has spent more than \$65 million defending itself, and is currently facing another \$2.6 billion in challenges. Almost two-thirds of the claims against Canada have targeted our environmental regulations or resource management policies.

These claims include:

- * Canada lost a challenge by Ethyl Corporation when the Canadian government banned the cross border trade in MMT, a gasoline additive made by the company that then Prime Minister Jean Chrétien called a “dangerous neurotoxin.” Canada reversed the ban and paid the company \$13 million in compensation.
- * American giant Bilcon won its recent NAFTA challenge and is now seeking \$300 million in damages after an environmental panel pulled the plug on a quarry it was set to excavate in the delicate ecosystem of Digby Neck, Nova Scotia.
- * AbitibiBowater (now Resolute Forest Products) declared bankruptcy and left its pulp and papermill operation in Newfoundland, abandoning workers and their pensions. It then sued under NAFTA for the “water rights” it left behind and the Harper government paid the company \$131 million in compensation.
- * Canada paid more than \$8 million to U.S. waste disposal company S.D. Myers for our ban on the export of toxic PCB waste.

* Quebec was forced to back off its claim that 2,4-D, a pesticide that harms groundwater, posed an “unacceptable risk to human health” when faced with a \$2 million NAFTA Chapter 11 challenge from American chemical giant Dow AgroScience.

* In 2013, Lone Pine, a Canadian energy company, sued Canada through its American subsidiary for \$250 million because Quebec introduced a temporary moratorium on fracking exploration under the ecologically fragile St Lawrence River.

NAFTA proponents claim these costs are small compared to the large amounts of American investments NAFTA brought to Canada, but there is no evidence that this investment would not have taken place in the absence of this trade deal. Most tariffs were gone by the 1980s and the creation of continental supply chains was underway without one.

The biggest concern over Chapter 11 in NAFTA is that it creates a “chill effect” to prevent governments from enacting environmental legislation. If the Trudeau government does, in fact, keep its promise to re-instate the Fisheries Act and the Navigable Waters Protection Act, it could face stiff challenges from the American energy companies that targeted these laws in the first place.

NAFTA's energy provisions hinder our climate commitments

A very contentious issue for Canadians in both the Canada-U.S. Free Trade Agreement and NAFTA was the energy section of the deals where Canada ceded control of its oil and gas. In the 1980s (before the U.S. became energy self sufficient from fracking), there was much talk in U.S. political circles of the need to harness Canada’s oil and gas reserves. A 1985 Congressional report called Canada’s regulatory control over its natural gas, which included a 25-year reserve for Canadian use before allowing exports, a “direct restriction of American rights to Canadian gas.” Edward Ney, then U.S. Ambassador to Canada, said that Canada’s energy reserves were the prime motivation for the Canada-U.S. Free Trade Agreement.

In pre-deal legislative changes, the Mulroney government of the time deregulated oil and gas exports, dismantled most restrictions on American foreign investment in Canada’s energy industry, exempted Canadian government subsidies for oil and gas exploration from trade challenges, stripped the National Energy Board of its “vital-supply safeguard,” abandoned the all-Canadian gas distribution system, banned export taxes and the ability to charge a higher price for energy bound for the U.S.

Most important, the trade agreements imposed a system of “proportional sharing” that obliges Canada to make available to the U.S. the same share of its oil, natural gas and electricity as it has in the previous three years. Currently, this accounts for over 50 per cent of our natural gas output and about 75 per cent of our oil production.



Alberta political economist Gordon Laxer reminds us that Mexico refused to sign a similar clause when it entered NAFTA, and says that no other industrial country has signed away to another country first access to its energy resources. Under NAFTA rules, Canadian exports of oil and natural gas can rise or fall through “market” changes – especially decisions made by the big energy companies – but the Canadian government cannot, as a matter of policy, reduce carbon-energy exports to cut greenhouse gases or redirect domestic oil to displace oil imports to Eastern Canada as it did during the oil-supply shortages of the 1970s.

Laxer says that because Alberta’s tar sands are one of the most costly major sources of oil in the world, oil corporations may abruptly divest from them (as some have already done in the price downturn), leaving energy workers and their communities to fend for themselves. But under NAFTA’s proportionality rule, it is very difficult for the federal or Alberta governments to plan an orderly phase-out of the tar sands to achieve our climate commitments and to phase-in low-carbon alternatives by employing and retraining workers.

While the proportionality clause has not yet had to be invoked to date, Laxer notes that its very existence in NAFTA deters Canadian governments from winding down carbon exports and slowing the growth of the tar sands – the site of the largest amount of greenhouse gas emissions in Canada.¹⁰

NAFTA puts our water at risk

In the annex that names which goods are to be subject to NAFTA, water, “including natural or artificial mineral waters, and aerated water not containing added sugar or other sweetening matter; ice and snow” is listed as a tradable good. Water is also listed as a tradable good in all subsequent trade agreements. Because NAFTA says that, “No party may adopt or maintain any prohibition or restriction on the exportation or sale for export of any good destined for the territory of another party,” and the fact that water is defined as a tradable good, means that Canada’s water is subject, like other listed “goods,” to the NAFTA ban on prohibiting exports.

Including water in NAFTA and the Canada-U.S. Free Trade Agreement that preceded it was the subject of huge controversy at the time. NAFTA proponents accused opponents of fear-mongering, saying that nothing in the agreement could force Canada to start exporting its water since water in its “natural state” – in rivers and lakes – is not a good. This is true. Nothing in NAFTA can force Canada to start exporting water, but NAFTA did dramatically curtail the ability of the federal government to stop a province from allowing the commercial export of water. In such a case, water would indeed be considered a tradable good subject to all the rules limiting government interference in this “commercial exchange.”



After a number of attempts to export Canadian water to the U.S. were shut down by vociferous public opposition, in 2014, the Harper government adopted the Transboundary Waters Protection Act that amended an earlier legislative attempt to curtail water exports by preventing water situated inside a province or territory from being diverted to a transboundary waterway for export.

While some experts are satisfied that this law would allow the federal government to veto a provincial water export project, others disagree, saying that because of the constitutional division of authority over water, both the federal and provincial governments can lay claim to such decisions and a province might very well go ahead and sell its water to the thirsty neighbour to the south. If this happens, the full authority of NAFTA kicks in. If a province were to open the door to commercial water exports, under NAFTA, the U.S. could challenge a federal ban. As well, a similar proportionality clause to the one that now exists for energy would apply to our water. Once the tap is turned on, it would be very hard to turn it off.

It is hard to know who is right on this question, but the one way to be sure is to remove all references to water as a tradable good in NAFTA and every other trade agreement.

Water is also included as a “service” in NAFTA, putting public water services in jeopardy. As with water exports, NAFTA cannot force a municipality to privatize its water services as public services were exempt from the deal. However, if a municipality decides to go with a private company for its water delivery or water treatment services, it cannot easily go back to a public system under NAFTA. Like other trade agreements, NAFTA contains a “standstill” provision that basically locks in privatization once tried. And if the private water utility that obtained the contract is located, or has a subsidiary in another NAFTA country, it can sue Canada for financial compensation if the municipality adopts a policy in favour of public water services.

Water is also an “investment” in NAFTA and as such is subject to the ISDS provisions of the deal. A number of the investment challenges noted earlier in this report had to do with attempts to protect water. The AbitibiBowater example is particularly disturbing because it allowed a foreign-based company to claim actual ownership of the water it was using in its operations. This “right” to claim ownership of Canada’s water resources could arguably be extended to any American company – energy, agriculture, mining or pulp and paper – that needs to use water in its Canadian operations.

As well, if any level of government moves to ban or restrict groundwater takings, it could run afoul of NAFTA. The Wynne government has been under pressure to curtail the Nestlé bottled water operations in Elora, Ontario. In 2016, then Ontario Minister Glen Murray gave an interview to the CBC in which he admitted that trade agreements such as NAFTA limit what his government can do to deal with the situation. “One of the things that shocked me in the last several months since the premier directed me and my ministry to take this challenge on was exactly how much international trade rules – NAFTA and WTO rules – apply to this. So there are real restrictions. Some of them, I have to say, are somewhat concerning over what a province and what a national government can do on water.”



NAFTA 2.0



What the U.S. wants in a new NAFTA

U.S. President Donald Trump makes no bones about his unhappiness with NAFTA and his belief that the U.S. got the short end of the stick in the deal. In particular, he cites his country's trade deficit with both Mexico and Canada and the hollowing out of large parts of America's manufacturing sector and the consequent loss of jobs as proof that NAFTA is no friend of the U.S. True to his election promises, President Trump re-opened talks on the deal. In the months leading up to the first round of talks, his administration clearly stated its major beefs. The following are the major areas that affect Canada:

- * **The elimination of Chapter 19**, the state-to-state dispute settlement provision. While each of the three countries retained the right to impose countervailing duties and anti-dumping measures, Chapter 19 allowed a country to have the penalties reviewed by a panel composed of members from the two countries involved in the dispute, rather than go to a court in their own country. The U.S. lumber lobby argues that Chapter 19 has robbed it of its right to an impartial judicial hearing in the U.S. in its ongoing dispute with Canada's lumber industry. In recent documents, the U.S. has suggested it might accept a "voluntary" state-to-state dispute system.
- * **A sunset clause** in which the countries would have to reapprove the deal every five years. This clause would make the deal, which is superior to our own democratic parliaments, more accountable to them. National director Ken Neumann said the threat of termination would 'add some accountability' for politicians making the kinds of promises the original NAFTA has not fulfilled.
- * **An end to non-tariff barriers in agriculture.** As Andy Blatchford of Canadian Press explains, Canada's supply management system limits the amount of dairy that can be imported into Canada before tariffs are imposed and this



has long been a trade irritant. But the U.S. has already targeted Canada's pricing policies on newly invented milk protein ingredients, called diafiltered milk. This ultrafiltered milk used to make cheese, yogurt and other dairy products, is not covered by tariffs. In essence, the U.S. found a way to bypass the supply management system by bringing in this new product tariff-free. It then dumped diafiltered milk in Canada. As a result, Canadians lowered the price of their own diafiltered milk. The U.S. is contesting that pricing decision.¹¹

- * **Duty free cross-border shopping.** The U.S. wants to be able to export more goods to Canada duty free. Canada's limit is currently anything over \$20, and was set before the influx of on-line shopping. The U.S. wants Canada to match its threshold of \$800, but Canadian retailers and many politicians argue that this would encourage Canadians to do all their shopping on line from American retailers, ending in job and industry losses here.
- * **Reversal of the U.S. trade deficit, particularly in autos.** The U.S. has said it may seek a border adjustment tax on foreign imports from Canada and Mexico, increased duties on imports such as cars unless they contain a higher level of U.S. content, and the right to implement "Buy American" policies, all in the name of reducing the trade deficit, returning jobs to the U.S. and favouring American-made products.

American demands that automotive rules of origin must be renegotiated to benefit the US are likely a deal breaker to the Trump administration. At the time of writing, the U.S. proposed North American content raised from 62.5 per cent to 85 per cent, and created a new requirement of 50 per cent American content. But as Unifor president Jerry

Dias says, insisting on more American content in North American cars while continuing to allow an open door policy for auto imports from Asia and Europe will not solve the American trade deficit problem. “Strengthened rules of origin without any reason to meet them will be simply side-stepped, only encouraging more imports. It’s like patching a hole in the tub, but leaving the drain open.” As well, since tariffs are low, Dias noted that companies would be better off ignoring the 50 per cent American content rules and paying the 2.5 per cent tariff.

On July 17, 2017, the Office of the U.S. Trade Representative (USTR) published its first official statement of objectives, which gave a more detailed picture of American demands. Canadians should be worried about what it contains. While underlining the above objectives, the statement goes far beyond them.¹²

“The new NAFTA must continue to break down barriers to American exports,” it states. “This includes the elimination of unfair subsidies, market-distorting practices by state-owned enterprises, and burdensome restrictions on intellectual property.” The U.S. wants to reduce or eliminate barriers to U.S. investments in “all sectors,” which could include those formerly exempted. It declares its intention to challenge “non-tariff barriers to trade” and “reduce burdens associated with unnecessary differences in regulation.” This is trade-speak for challenging higher government standards and regulations.

The USTR wants NAFTA countries to move toward regulatory cooperation by setting up a public consultation process, allowing “other stakeholders in other countries” (i.e., American corporations), to provide comment and require authorities to address “significant issues” on what are called technical barriers to trade – measures countries use to regulate markets and protect their citizens and natural resources. Any new regulation in Canada would have to be vetted and approved by the American industry that might be affected.

The U.S. is very clear that it wants to open up trade in services. It wants: “Secure commitments from NAFTA countries to provide fair and open conditions for services trade, including rules that apply to all services sectors.” It would prohibit: discrimination against foreign services suppliers in Canada; restrictions on the number of services suppliers that can compete here; and the requirement that cross-border services suppliers first establish a local presence in Canada.

Disturbingly, the USTR calls for the “narrowest possible exceptions with the least possible impact on U.S. firms” in the trade in services.

In particular, the U.S. targets telecommunications, financial services, the digital trade in goods and services and cross-border data flows, which would affect Canadian privacy laws and our policies regarding banks and financial institutions. Canadian state-owned and controlled enterprises, including Crown corporations, must not cause harm to the domestic interests of the American industry in question, says the USTR. American firms must also have new opportunities to sell American products into Canada and Mexico through new access to the procurement contracts.

Importantly, U.S. services proposals resemble those in both the Trans-Pacific Partnership (TPP) and the Trade in Services Agreement promoted by the big global services companies in health care, education, finance and water.

The Canadian Centre for Policy Alternatives says that the USTR statement of objectives proves that rather than abandoning the hated TPP, President Trump is actually picking out his favourite parts of it to be included in NAFTA 2.0. One American criticism of the TPP was that it did not go far enough to protect American intellectual property rights in the areas of biologics (drugs made from biological, not chemical sources) and cross-border data flows – these issues are being raised in the NAFTA renegotiations.

In fact, the Canadian Press has reported that the U.S. is proposing a 12-year-patent protec-

tion for cutting edge biologics medicines. This is significantly higher than the current protections in Canada and would drive up prices. Canadian and American health care professors Steve Morgan and Ruth Lopert warn: “In its efforts to repeal Obamacare, the current U.S. administration is willing to drive up health care costs while allowing tens of millions of Americans to lose their health insurance. If it’s willing to do that to its own citizens, the administration will likely also attempt to coerce Canada to do the same to Canadians by way of NAFTA provisions that would prevent implementation of an equitable and sustainable universal pharmacare system.”¹³

As well, while wanting to beef up its “Buy American” policies, the U.S. is seeking increased access to Mexican and Canadian procurement markets, especially for construction and infrastructure projects, often now used to create jobs at home. However it is proposing to cut access to its own markets so that the total value of contracts that Canadian and Mexicans could access would not exceed the total value that U.S. firms could win in Canada and Mexico. This would essentially eliminate the procurement advantage to American contracts that NAFTA gave to Canada and Mexico. The Globe and Mail quoted one Canadian insider as describing the U.S. demands as the “worst proposal in any trade agreement ever presented.”

On the contentious issue of Chapter 11, which administers the ISDS rules, the USTR statement is silent, except to say that while it wants to secure rights consistent with U.S. legal principles and practices for U.S. investors in Canada and Mexico, the U.S. wants to ensure that “NAFTA country investors in the United States are not accorded greater substantive rights than domestic investors.” This once again displays special treatment for American companies. About one month after this USTR statement was published, Fox Business News reported that U.S. trade officials were putting together a proposal to let the U.S. withdraw from Chapter 11 and replace the current system with an “opt-in” system, allowing the U.S. to use its own courts in a dispute when it chooses. Presi-

dent Trump is under huge pressure from his own business community not to weaken Chapter 11.

On energy, the USTR wants to strengthen investment and market access benefiting “North American energy security” while promoting “energy market-opening reforms.” The Trump administration, like the Canadian and Mexican governments, appears to be in favour of having Mexico cement its recent liberalization and privatization measures in its energy sector by signing a proportionality clause in NAFTA 2.0 similar to what Canada signed the first time around and that Mexico did not.

This suits the North American energy industry very well. As the Trump government eases up environmental laws and opens up drilling in national parks, Bloomberg News reports that oil industry leaders are “desperate” to preserve a deal that drove a North American oil and gas renaissance. They want to lock Mexico’s energy deregulation “reforms” into NAFTA and they see the deal as a way to harmonize regulatory standards across the continent and establish more “predictability” surrounding the approval of pipelines. They are also aggressively lobbying to keep – and even strengthen – Chapter 11 as it gives them added clout in challenging what they see as unfair government restrictions on their business.¹⁴

The statement also contains a section on labour and environmental rights similar to ones that have been added to other recent trade agreements such as the TPP.

On labour, the USTR proposes that NAFTA countries would adopt and maintain in their laws and practices the internationally recognized core labour standards of the International Labour Organization. They would have laws governing acceptable conditions of work with respect to minimum wage, hours of work and occupational health and safety. They would not be able to break their own labour laws in order to be competitive, and they would set a means for stakeholder participation

and provide access to fair, equitable and transparent administrative and judicial proceedings.

On the environment, the USTR would stop member countries from bending their own environmental rules in order to be competitive, establish rules to ensure they “do not fail” to enforce their own environmental laws, and guarantee a means for other stakeholder participation, including access to judicial proceedings for enforcement of environmental laws. It calls for the protection of fisheries and marine species and the conservation of flora and fauna and ecosystems.

The USTR calls for ensuring these core environmental and labour rights by setting up the “same” dispute settlement mechanism that applies to other enforceable obligations of the agreement. It is supposedly referring to the state-to-state rules of Chapter 19 and the investor-to-state rules of Chapter 11.



What Canada wants in a new NAFTA

That is perhaps a misleading title as the Trudeau government never wanted to re-open the deal in the first place. As such, Canada has been playing a defensive game, trying to figure out how serious President Trump’s threats are to tear NAFTA up entirely.

Minister Freeland has promoted a new chapter on labour standards that would bring the International Labour Organization’s (ILO) core labour rights into the body of the agreement. She has also put the issue of American “right-to-work” laws on the table, much to the unhappiness of

American negotiators. At the urging of Canadian unions such as Unifor, Canada wants the U.S. to pass a federal law stopping state governments from enacting right-to-work laws that have been used to gut unions in a number of states. Canada believes that lower labour standards in the U.S. and Mexico have given those countries an unfair trade advantage.

Minister Freeland is promoting a similar chapter on environmental standards to stop any of the countries from weakening their regulations in order to be competitive. Her call for such measures were undermined, however, by the announcement of the membership of a new NAFTA advisory council that was set up in early September to advise Environment Minister Catherine McKenna on how to protect the environment in these talks. While there are no labour or environmental organizations represented on the council, it is full of private sector interests. These include a former president of Shell Canada, a former president of logging giant Weyerhaeuser Canada, a former president of an insurance company, and a number of pro-energy and pro-privatization politicians and lawyers. The National Union of Public and General Employees (NUPGE) has written a formal complaint to the minister stating its concern that there appears to be a clear ideological bias in favour of the resource sector and privatization on this important advisory council.¹⁵

It is likely that the references to labour and environmental standards will resemble those already laid out by the USTR as both countries had previously adopted them in the TPP.

While at first blush these provisions appear to be a vast improvement over the side deals of NAFTA 1.0, analysts are giving a strong note of caution. In a 2016 report for the Canadian Centre for Policy Alternatives, political scientist Laura Macdonald and Canadian Labour Congress economist Angela MacEwen note that pressure from the labour movement around the world has forced governments to include labour rights inside the bodies of most trade deals since NAFTA. The la-

bour provisions being promoted by the American government in the NAFTA negotiations are based on those agreed to in the TPP and are flawed.

While it is no doubt better to have the core labour and environmental rights written into the body of the text, such provisions have not yet worked in other trade agreements where they have been included. “Like the NAFTA side accord,” write the authors, “these agreements remain largely ineffective for addressing labour rights violations and they fail to counteract the negative impacts on working people of other, stronger provisions in contemporary trade agreements. As the ILO pointed out recently, ‘no complaint has given rise to a decision of a dispute settlement body or even led to sanctions.’” The burden of proof of a labour wrongdoing is very high; a petitioner needs to prove that the labour violation had an impact on the trade between the two nations – something that is almost impossible to verify.

Macdonald and MacEwen cite many other problems with these seemingly progressive provisions, but point out that their inconsistency with other aspects of trade agreements such as the TPP and NAFTA is the big sticking point. The clauses on market liberalization and protection of corporate investors alone put workers at risk. They point out that similar worker-protection provisions in the Canada-Colombia trade agreement have not had any impact on the widespread violations of labour rights, or the large number of murders of activists in Colombia.¹⁶

At the risk of sounding cynical, there is perhaps another less altruistic reason for Canada and the U.S. to be including stronger labour and environmental standards in NAFTA 2.0. Because the issue of American job loss was so front and centre in President Trump’s decision to start this renegotiation process in the first place, it doesn’t take a lot of imagination to think that promoting higher labour standards and rising wages for Mexican workers would benefit the American (and Canadian) auto industry by bringing some of the auto plants back to the U.S. and Canada. Mexico has

strong labour standards written into its Constitution; these new rules could be used to challenge the way in which Mexico regularly allows its own laws to be broken.

As well, it is hard to think that Donald Trump, who put a climate denier in charge of the Environmental Protection Agency and has slashed funding to Great Lakes restoration, would be sincere in placing strong environmental safeguards into the renegotiated deal. Mexico has quite strong environmental laws but regularly allows foreign corporations to violate them. The chapter on the environment could be used to hold Mexico to account for this discrepancy, thereby weakening its “competitive” advantage of allowing its environmental rules to be broken.

Minster Freeland has also said she wants a chapter on gender rights, which will likely be modelled on the one Canada signed in its free trade agreement with Chile. In that pact, the countries agreed that working to include women and girls is key to improving long term economic development, but it is aspirational and non-binding.

She is also attempting to include a chapter on Indigenous rights that was drafted by a pro-trade group called the International Inter-Tribal Trade and Investment Organization. The group wants NAFTA to support Indigenous economic development and allow for free passage and duty-free trade across borders for Indigenous peoples for purposes of trade and commerce. This chapter is likely to cause some conflict between those First Nations who have been victims of big, extractive corporations asserting their rights through NAFTA and other trade agreements, and those who believe that putting a chapter on Indigenous rights in NAFTA will improve their economic opportunities.

Canada also wants to expand procurement protections in order to counter ongoing “Buy American” practices in many U.S. states, especially for construction projects at the local level. But Canada should be wary of this demand. Not only is President Trump not likely to ever give up his

“America First” practices, no matter what a trade agreement says, Canada may, in return, have to open up its own provincial and local procurement practices to American corporate competition.

Canada has promised to protect the cultural exemption that exists in the Canada-U.S. Free Trade Agreement and in NAFTA 1.0, but it is likely a bargaining chip. The U.S. has identified this exemption as an irritant in its annual report on international barriers to free trade. As ACTRA advisor and culture policy expert Garry Neil explains, the exemption has served Canada well over the past 30 years. However, Canada weakened its position on culture in the TPP, exchanging an “exemption” for a less effective “reservation.” This really served only as a declaration of intent rather than an agreement between the parties. If the U.S. uses the TPP as the model for the culture chapter in the NAFTA negotiation as it has in other areas, there is great cause to be concerned. Neil says that all sectors of culture, including audiovisual services, broadcasting, publishing, music and visual and performing arts are at risk.

Minister Freeland has similarly vowed to protect Canada’s supply management system for the dairy and poultry industries that President Trump has called “another typical one-sided deal against the United States.” The National Farmers Union has said that NAFTA was detrimental to Canadian farmers. Farm costs have gone up, commodity prices have dropped, the share of our domestic market is shrinking, and one in five family farms have disappeared. It says that dismantling the supply management system that is left would only put Canadian dairy and poultry farmers in the same situation as their American counterparts, who suffer from over-production and corporate control of their industry.¹⁷

On energy, the Trudeau government is disappointingly supportive of maintaining the proportional sharing provision of the energy chapter. Environmental groups hoped that the government would use the renegotiation process as an opportunity to right this wrong and regain sovereign control of

this vital resource. Further, the Canadian Chamber of Commerce and the Canadian Association of Petroleum Producers are joining energy-friendly Republicans in attempting to remove the presidential permitting process for cross-border pipelines and hydroelectric transmission lines, taking the authority out of the hands of the State Department and giving it to the pro-energy industry Federal Energy Regulatory Commission. The Canadian groups want to change the rules of origin in the NAFTA talks so that any form of energy carried by train, pipeline or truck within North America is considered to be NAFTA in origin and not subject to national rules.¹⁸

The Trudeau government is adamant it will keep Chapter 19, the state-to-state dispute system that regulates anti-dumping and countervailing issues that President Trump wants to kill. Minister Freeland says this is a deal-breaker, but that may be posturing. Losing Chapter 19 would put Canada at the mercy of a protectionist Trump White House and an aggressive U.S. industry lobby in many sectors.

As for the highly contentious Chapter 11, the Trudeau government has taken what the Washington Examiner calls a “hard no” to any attempt by the Trump administration to make it voluntary. A source in the Canadian government is quoted as saying that weakening ISDS provisions is something Canada will not accept, and any such proposal would nullify the entire dispute resolution system. The fact that the government supports Chapter 11 after Canada has been so glaringly on the receiving end of so many terrible challenges is evidence that Prime Minister Trudeau and Minister Freeland are listening to the lobbying of big business in Canada and not to the voices of the many labour, justice and environmental groups who strongly oppose the measure.

A final note of caution on this issue. If the U.S. opts out of Chapter 11, but Canada and Mexico stay in, the two countries will be at the mercy of American corporations and a protectionist White House with no reciprocating rights.

What Canada should be asking for in a new NAFTA

It is very difficult for most Canadians to judge the merits of the various proposals being put forward for the NAFTA renegotiation, especially since so much of the talks are taking place behind closed doors. We can, however, start by recognizing that the current NAFTA has not been good for workers, for people and families, or the environment. It has increased the wealth and power of a privileged few and of many large corporations and it has endangered the natural world of all three countries. As such, is not the right model of trade going forward.

Canadians must make the following demands of its government:

1 Remove Chapter 11.

Chapter 11 has been used as a corporate charter of rights and has no place in a future North American trade agreement. Minister Freeland has stated her wish to “improve” the ISDS provision of NAFTA by mirroring the one contained in the Canada-European Comprehensive Economic and Trade Agreement (CETA) which set up an investment court system to hear investor disputes. However, a report by European and Canadian research institutes found that most of the controversial ISDS challenges launched under NAFTA would have been allowed to proceed in the CETA system.¹⁹ In any case, setting up a more formal court that gives foreign investors rights not accorded to domestic companies is undemocratic and dangerous.

On the other hand, Canada should reject any attempt to kill Chapter 19 and seek instead to gain agreement on clear timelines for decisions and enforcement.

2 Put workers and their rights at the heart of the new agreement.

It appears that the countries may be getting ready to bring core labour rights into the body

of the agreement and this is good. However, if it is just targeted to Mexican violations and does not deal with bad practices in the U.S. and Canada such as right-to-work laws and allowing corporations to get concessions by threatening to move their production away, the laws will not lift the rights of all. As well, and as NUPGE points out, the burden of proof and scope of the proposal to allow human and workers’ rights groups to launch disputes in the USTR proposal are too limited and undermine enforceability as labour complaints would never get past their requirements that a violation must be trade related and recurring. The Canadian Labour Congress adds that an effective labour chapter must contain clear deadlines requiring authorities to investigate and adjudicate complaints, while providing for binding enforcement and meaningful penalties for non-compliance.

It must be clear, however, that even if the language on labour rights is greatly improved, unless other provisions of NAFTA that give corporate investors their current powers are drastically curtailed, this chapter will not be enough to protect workers in the long run. As Canadian Union of Public Employees President Mark Hancock wrote in a September 2017 letter to Prime Minister Trudeau, “A bad agreement with good labour rights is still a bad agreement.”²⁰

3 Promote and protect public services

Vibrant public services are very important to Canadians and must be fully protected in any new trade agreement. Since the signing of the first NAFTA, which included exemptions for a number of public services such as health care and education, there have been a raft of agreements such as the TPP and the Trade in Services Agreement targeting public services. Not only must the exemption to these services be crystal clear in the new text, it must be spelled out that governments have the right to introduce new public services such as child-

care and pharmacare, without penalty from either other governments or corporations. Canada must resist the American push for longer patent rights for biologic drugs to keep these drugs affordable to Canadians.

There must also be strong language to ensure that governments can direct public procurement funds to local enterprises. Unifor's Jerry Dias says that procurement rules are the "lifeblood" for thousands of workers and their communities and public funds must be used to support jobs at home. Governments at all levels must retain the right to control procurement funds to social ends.

4 Include strong provisions to protect the environment and natural resources.

Friends of the Earth U.S. and Canada call the current USTR proposals to protect the environment unenforceable and weak. A new NAFTA must explicitly include a chapter that is comprehensive and enforceable through dispute resolution. It must include an obligation for the three countries to enforce their domestic laws, including agriculture, food, chemicals, and biotechnology. It must also include an enforceable obligation to adhere to a comprehensive list of multilateral agreements, including the Paris Climate Accord. As with the chapter on labour rights, there must be an enforceable mechanism through dispute settlement, including those started by civil society and environmental groups.

5 Maintain the right to regulate in the public interest.

The Canadian government is promoting stronger "regulatory cooperation" provisions in a new NAFTA similar to those found in CETA and the TPP. Promoted by right wing groups like the U.S.-based Cato Institute, regulatory cooperation is meant to harmonize regulations in areas as diverse as GMOs, resource extraction projects, water protection rules, regulating toxic mining waste, pesticide residue levels in

food, and drug approvals. This is a dangerous development for Canada given its American partner is set on a deregulation crusade. Regulatory cooperation gives the major corporate lobbies of the countries an "in" to challenge non tariff barriers such as higher food, health and environmental standards. As shown in a 2016 Council of Canadians report, Canada's informal process of regulatory cooperation in the first NAFTA led to increased market size and concentration in the chemical industry, and the concentration of American food conglomerates in Canada.²¹ If a chapter on regulatory cooperation is indeed included, it must lead to the adoption of the highest possible standards and include non-industry groups from all countries.

6 Remove the energy chapter and cancel the energy proportional sharing provision.

A coalition of North American climate groups reminds us that the climate crisis requires that governments have a full range of policy and regulatory options to reduce climate pollution as quickly as possible. The NAFTA proportionality sharing clause limits Canada's ability to

restrict climate-polluting fossil fuels, including tar sands crude. NAFTA's national treatment rules threaten policy options such as renewable portfolio standards, low carbon fuel standards and other climate-friendly energy regulations perceived as impeding business for foreign fossil fuel firms. NAFTA's procurement rules limit governments' ability to use "green purchasing" requirements that ensure government contracts support renewable energy, energy efficiency and sustainable goods. Instead of protecting corporate interests in ongoing fossil fuel exploitation, trade agreements should shield public interest policies to ensure compliance with domestic environmental laws and important international environmental agreements.²²

7 Remove all references to water.

Water in all its forms should be removed from the annex that lists the tradable goods named in the current NAFTA. This would end the debate on whether the current federal ban is sufficient to protect Canada should one of its provinces start the commercial export of water as it would remove any potential for a NAFTA challenge. Removing water as a service would help protect water as an essential public service. Removing it as an investment and cancelling Chapter 11 would make it much harder for foreign corporations to fight domestic or international rules that protect water sources.

8 Maintain and expand the exemption for culture.

It is crucial not to give in to U.S. demands to exchange the protections Canada had in NAFTA for the weakened ones of the TPP. For instance, Canada fully conceded a U.S. demand in the TPP that prevented online broadcasters, such as Netflix, from ever being subject to Canadian content rules. Canada must not only maintain its current cultural exemption, but strengthen it by updating the definition of cultural industries. This, says ACTRA, can best be done by putting a focus on the artist and the creative work that provides the cultural content produced and distributed by the cultural industries, rather than on the medium used. It would also allow the coverage of new forms of culture not envisaged when NAFTA was first signed. ACTRA also wants to remove the “notwithstanding” clause of NAFTA that allowed retaliation measures if the U.S. is unhappy with our use of a cultural exemption.²³

9 Protect Canada’s supply management system.

The government must keep its promise to retain the protection for dairy and poultry farmers in order to ensure that Canadians have access to high quality locally-produced food while supporting small family farms and rural communi-

ties. “The U.S. cannot solve its dairy crisis by taking over the Canadian dairy market,” says Jan Slomp, President of the National Farmers Union. “We need Canada to stand firm against any temptation to negotiate away supply management. Our system ensures farmers are paid the cost of production, processing plants are able to run at full capacity and consumers have a reliable, wholesome and affordable supply of dairy, poultry and eggs – all without any government subsidies.”²⁴

10 Protect and enhance Indigenous rights.

Lost in most analysis of NAFTA is the impact it has had on Indigenous peoples in Canada. More has been studied and written about the massive displacement of Indigenous people, small farmers and peasants in Mexico who lost their land rights in the agreement’s aftermath. While perhaps difficult to pinpoint what impacts NAFTA itself has had on First Nations in Canada, they have undoubtedly taken the brunt of the fall-out from large hydroelectric and extractive energy, fracking and mining projects, all of which have been spurred by the open and unregulated markets of which NAFTA has been a centrepiece. A new agreement must contain a chapter clearly defining First Nations’ rights based on their now accepted right to free, prior and informed consent contained in the United Nations Declaration on the Rights of Indigenous Peoples.

Conclusion

There is a great deal at stake in these talks and Canada should be prepared to walk away if a new agreement does not protect the rights of Canadians and the environment. A study by the Canadian Centre for Policy Alternatives found that if NAFTA is terminated and Canadian exporters were forced to revert to the World Trade Organization rules and tariff rates, the impact would be “disruptive, but by no means catastrophic.” Written by CCPA senior researcher Scott Sinclair and labour economist Pierre Laliberté, the report finds that for 96 per cent of total Canadian exports – the effective cost of losing the “NAFTA advantage» – would amount to only 1.5 per cent of the value of Canadian exports.²⁵

A September 2017 EKOS Research poll commissioned by the Council of Canadians found that most Canadians say the government should walk away from NAFTA if it’s a “bad deal.” Eighty per cent agreed that water should not be treated as a commodity under NAFTA as it is now; 70 per cent said measures requiring Canada to maintain energy export quotas to the U.S. should be removed; and 63 per cent agreed that Chapter 11 should be removed from the deal.²⁶

Whether it is called NAFTA or something else, a new North American trade agreement must empower the governments, individually and collectively, to enhance the rights of workers, promote the sustainable use of our shared resources, and introduce the measures needed to fight climate change and stop the destruction of water, forests, fisheries, wetlands and soils.

As the CCPA asserts, “If NAFTA renegotiation is to have any chance of improving the welfare of all North Americans, it must be inclusive, transformative and forward-looking – focused on today’s real challenges, including climate change, the changing nature of work, stagnant welfare gains and unacceptable levels of inequality in all three North American countries. NAFTA should be re-

gotiated so that it helps us achieve the sustainable and equitable economy we want, not to uphold an uninspiring and untenable status quo.”²⁷

Around the world, people and their governments are reassessing the purposes and goals of trade agreements in light of the deep inequality they have helped engender. The backlash against the right of foreign corporations to sue governments for policies they don’t like is growing, and many countries, including Bolivia, Brazil, South Africa, Australia, India and Malaysia, have either rejected ISDS altogether, or expressed serious reservations about it.

There has never been a better time for a debate about the nature of trade agreements like NAFTA. There has never been a better time to reign in the power of transnational capital and transnational corporations and recognize the sacred democratic authority of people, communities and their elected governments to protect human and workers’ rights and the environment upon which we all depend for life.

Let’s get it right.

Endnotes

1. *World Employment and Social Outlook 2015; the Changing Nature of Jobs*. Publication. International Labour Organization, 16 May 2015.
2. Campbell, Bruce. "Trump Launches NAFTA Renegotiations." *The Monitor*, 1 July 2017.
3. Jackson, Andrew. "Canada-China Trade Agreement No Deal for Middle Class, Blue Collar Canadians." *Globe and Mail*, 9 May 2017.
4. *Submission to Global Affairs Canada on NAFTA Renegotiations*. Publication. National Union of Public and General Employees, 21 July 2017.
5. Dias, Jerry. "NAFTA Took Good Canadian Jobs and Made Them Bad Ones in Mexico." *Huffpost*, 30 Aug. 2017.
6. Rubin, Jeff. *How Has Canadian Manufacturing Fared under NAFTA? A Look at the Auto Assembly and Parts Industry*. Publication. Centre for International Governance Innovation, 8 Aug. 2017.
7. Keenan, Greg. "Auto-parts industry touts integration ahead of trade talks." *Globe and Mail*, 2 Apr. 2017.
8. *NAFTA, 20 Years of Costs to Communities and the Environment*. Publication. Sierra Club and Others, Mar. 2014.
9. Hume, Mark. "Canada accused of ignoring NAFTA obligations by environmental law association." *Globe and Mail*, 14 Aug. 2013.
10. Laxer, Gordon. *After the Sands: Energy and Ecological Security for Canadians*. Douglas & McIntyre, 2015.
11. Blatchford, Andy. "Five key NAFTA issues bound to spark friction between Canada, US." *Toronto Star*, 21 Jul. 2017.
12. *Summary of Objectives for the NAFTA Renegotiation*. Publication. Office of the United States Trade Representative, 17 July 2017.
13. Morgan, Steve and Ruth Lopert. "NAFTA talks may threaten Canada's steps toward universal pharmaceutical." *Toronto Star*, 4 Aug. 2017.
14. "Oil firms that cheered regulatory cuts are quaking on NAFTA talks." *Gulf Times*, 3 Sept. 2017.
15. "New NAFTA Advisory Council on the Environment: serving the interests of industry?" National Union of Public and General Employees, 11 Sept. 2017.
16. MacEwen, Angella and Laura Macdonald. *Does the TPP work for workers? Analyzing the labour chapter of the TPP*. Publication. Canadian Centre for Policy Alternatives, 21 July 2016.
17. "Canada says 'hard no' on Trump change to NAFTA dispute resolution." *Washington Examiner*, 29 Aug. 2017.
18. Patterson, Brent. "NAFTA 2.0 Could Include Provision Removing US Presidential Permitting Process for Cross-border Tar Sands Pipelines." Blog post. Council of Canadians, 12 Sept. 2017.
19. *Investment Court System put to the test*. Publication. Canadian Centre for Policy Alternatives and Others, 19 Apr. 2016.
20. "Tougher send on labour rights an important first step in fixing NAFTA." Canadian Union of Public Employees, 22 Sept. 2017.
21. *Food Safety, Agriculture and Regulatory Cooperation in the Canada-EU Comprehensive Economic and Trade Agreement (CETA)*. Publication. Council of Canadians and Others, Aug. 2016.
22. "Can Canada Halt NAFTA's Climate Denial." Climate Action Network Canada, US Climate Action Network, Climate Action Network Latinoamerica, September 2017.
23. *Renegotiating The North American Free Trade Agreement - A Cultural Perspective*. Publication. Alliance of Canadian Cinema Television and Radio Artists, 18 July 2017.
24. "Family farm groups from three countries slam NAFTA reboot based on TPP." National Farmers Union, 15 Aug. 2017.
25. Laliberté, Pierre, and Scott Sinclair. *What Is the NAFTA Advantage? Putting the Tariff Impacts of a Trump Termination in Perspective*. Publication. Canadian Centre for Policy Alternatives, 29 June 2017.
26. "Poll: if NAFTA results in bad deal for Canadians and the environment, 76% say walk away." Council of Canadians, 20 Sept. 2017.
27. Sinclair, Scott, Stuart Trew, and Hadrian Mertins-Kirkwood. *Renegotiating NAFTA: CCPA Submission to Global Affairs Canada on the Renegotiation and Modernization of the North American Free Trade Agreement*. Publication. Canadian Centre for Policy Alternatives, 19 July 2017.

