Submission from the Canadian Centre for Policy Alternatives to the Standing Committee on International Trade (CIIT) on Canada's Priorities in Bilateral and Trilateral Trade in North America

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The Canadian Centre for Policy Alternatives welcomes this opportunity to present to the committee our priorities for North American trade in light of the current renegotiation of the North American Free Trade Agreement (NAFTA). The CCPA is an independent, non-partisan research institute with over 30 years of experience assessing the impacts of modern free trade and investment agreements like NAFTA. We recently shared our views on the NAFTA renegotiation with Global Affairs Canada. This submission largely repeats those views with some updates to take into account where the negotiations appeared to be heading after the first three rounds.

Background

We will never know the exact degree to which NAFTA hindered or contributed to Canadian job, employment and productivity growth, since it's impossible to accurately compare these measures with a scenario in which NAFTA does not exist. But we

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can — and should — ask whether the agreement is the right model for today's priorities: reducing inequality, eliminating poverty, and putting a stop to climate change.

The CCPA asserts that NAFTA is not the right model, and recommends changes we believe the federal government should insist upon in the current NAFTA renegotiations. In general, these changes are meant to increase Canada's policy options (at the federal, provincial and municipal levels) for promoting more sustainable and equitably shared economic growth — a goal our current federal government claims to share.

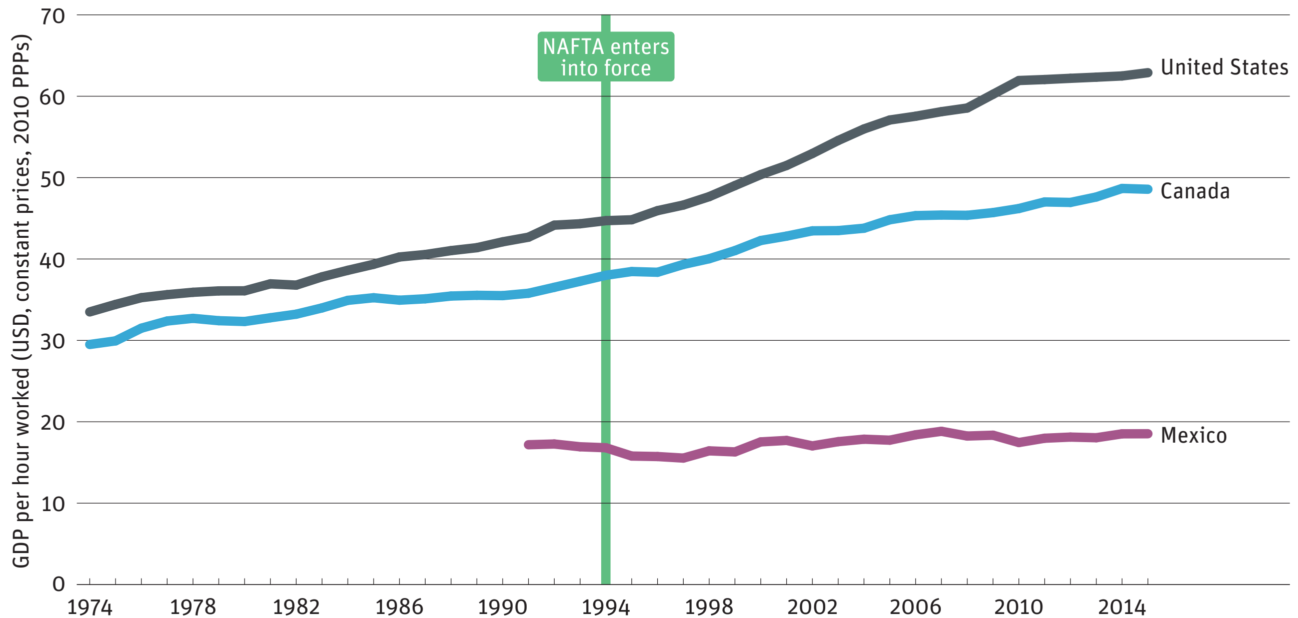
For example, governments will need to take more forceful action more quickly if we are to meet the climate change challenge. Yet, Canada has faced numerous investor–state lawsuits under NAFTA's Chapter 11 that target completely non-discriminatory environmental policies. Furthermore, NAFTA's rather toothless side agreements on the environment and labour should be greatly strengthened and incorporated into the agreement itself, so that violations of North America's international climate and labour rights obligations cannot go unpunished.

Recognizing the desire to upgrade NAFTA for current economic realities (e.g., the rise of e-commerce and prevalence of economic migration), the CCPA also recommends additional language in the agreement strengthening privacy protections related to online activities and the sharing of personal commercial information, and extending equal access to entitlements and rights to all workers, regardless of their status.

Importantly, for NAFTA renegotiation to meaningfully enhance North American integration it would have to directly involve public stakeholders from all three countries, notably long-excluded Indigenous communities, at the outset and throughout. The days when unreachable government negotiators could trade away public policies behind closed doors must come to an end. The government's moves to include non-industry stakeholders on advisory committees is a positive step. However, a truly inclusive trade negotiation would take place entirely in the open so that broad public approval could be built up along the way — for proposals that would benefit everyone, not just multinational corporations and large investors.

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

FIGURE 1 Labour productivity in NAFTA countries



Source OECD (2017), GDP per hour worked (indicator). doi: 10.1787/1439e590-en (Accessed on 14 July 2017).

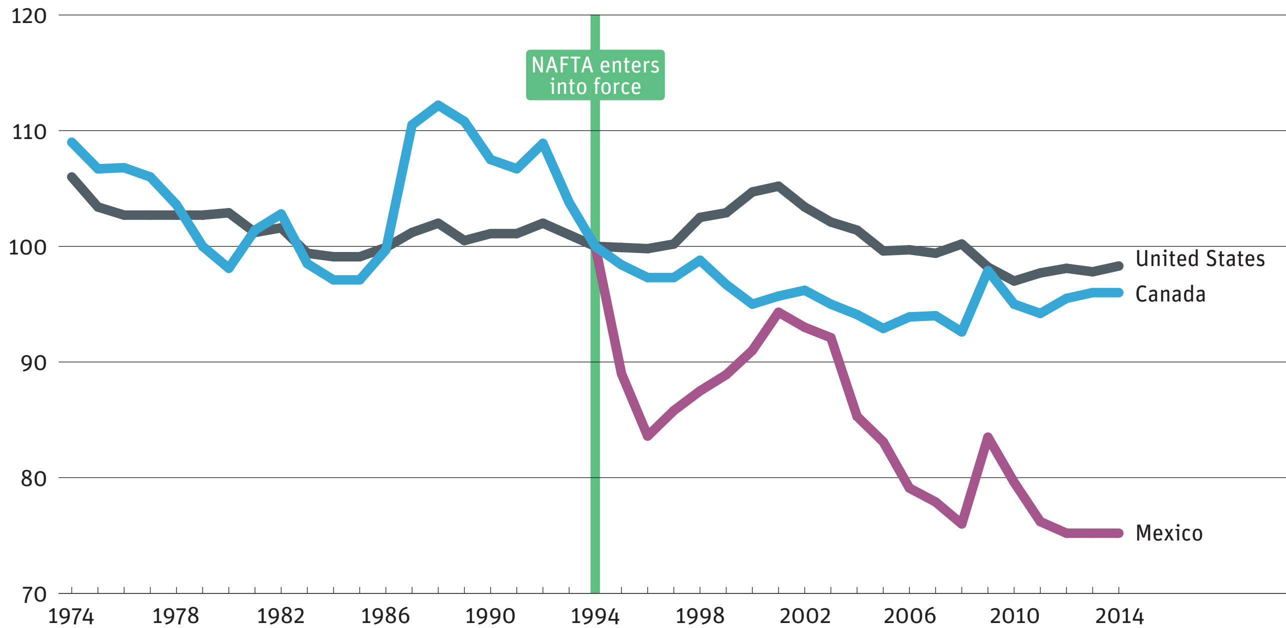
Labour rights and standards

When U.S. President Trump talks about favouring fair trade deals that support American workers, he provides an important opening for Canada to champion a fairer distribution of the benefits of trade for workers in all three NAFTA countries. The CCPA is supportive of a reported Canadian proposal to attempt to use the NAFTA talks to prohibit "right to work" laws in the U.S. states and, potentially, Canadian provinces.

Currently, NAFTA contains no binding provisions protecting labour rights or standards. NAFTA's labour side agreement, negotiated by the Clinton administration to secure congressional approval of the trade deal, has turned out to be toothless and ineffective. Despite widespread violations of labour rights, there has never been a successful labour complaint under the North American Agreement on Labour Cooperation (NAALC), or indeed under any other trade agreement signed by the U.S., Canada or Mexico.

Recognizing the unlikelihood of Trump agreeing to overturn "right to work" laws, Canada should focus on including strong, fully enforceable labour standards in any reformed NAFTA. Mexican workers, whose real wages have stagnated under NAFTA and who are rarely free to join independent unions, would be the primary beneficiaries. But higher wages and improved working conditions in Mexico — and, for that

FIGURE 2 Labour share of income in NAFTA countries (1994=100)



Source "Share of labour compensation in GDP at current national prices" in Penn World Table, version 9.0.[13]

matter, in many U.S. anti-union "right-to-work" states — would also benefit workers in the rest of North America.

It would be easy to improve upon the abysmal NAALC, but that meagre goal sets the bar far too low. Merely including a standard labour chapter, such as one modelled on the Trans-Pacific Partnership (TPP), within the main text of a NAFTA 2.0 would be an abject failure and a missed opportunity. After more than 20 years of failing to adequately protect workers' rights, NAFTA's labour protections must be thoroughly overhauled.

Recommendations

- An effective labour protection chapter must allow workers and unions to directly bring forward complaints regarding labour violations without facing additional hurdles such as demonstrating that a violation is "trade-related" or "recurring."
- A reformed labour chapter must also contain clear non-discretionary deadlines requiring authorities to investigate and adjudicate complaints, while providing for binding enforcement and meaningful penalties for non-compliance.

- A revised NAFTA must include strong, effective labour protection standards, such as requiring all three parties to ratify the eight core conventions of the International Labour Organization (ILO) and adhere to the ILO's Decent Work Agenda as a condition of tariff-free trade.

Government procurement

The Trump administration clearly intends to bolster Buy American purchasing policies, which could sideswipe Canadian suppliers. Buy American conditions are currently applied by the U.S. federal government when funding state and municipal infrastructure projects. Typically, they require 100% use of American steel and 60% domestic content for other types of building materials. Many U.S. states and municipalities also employ their own Buy American purchasing preferences.

Canada's standard response — to seek an exemption or waiver — has fallen short before and the prospects of success are worse today, with the Trump administration apparently asking Canada and Mexico to accept new restrictions on procurement (more and higher American content rules) while completely opening their procurement markets to U.S. bidders. Canada failed to gain any meaningful exemptions from the Buy American provisions in the 2009 Recovery Act. Subsequently, the U.S. also refused to budge on its Buy American rules during the TPP negotiations.

With the Trump administration's strong embrace of a Buy American ethos, it hardly seems an auspicious time for Canada to demand yet again that these laws be made fairer to Canadian suppliers. The government should instead propose reciprocal Buy North American policies for new public infrastructure spending.

This does not mean taking a hands-off, laissez-faire approach to government procurement or disregarding its considerable potential for job creation and economic development. Rather, all NAFTA governments could agree to use their purchasing power to negotiate with all prospective North American suppliers, regardless of nationality, on new infrastructure spending, to ensure that job creation and economic spinoffs are maximized, while achieving best value for taxpayers.

While the soon-to-be-implemented Canada–EU Comprehensive Economic and Trade Agreement (CETA) will seriously limit the ability of Canadian jurisdictions to adopt Buy Canadian policies, there is still some policy flexibility in the area of infrastructure (e.g., most infrastructure spending in Ontario is excluded under CETA). It is also possible for Canada to revise its CETA procurement commitments with the EU so that more provinces, and other levels of government like municipalities, can benefit from proactive purchasing policies.

Any new North American procurement pact should include balancing mechanisms to ensure that suppliers and workers from each jurisdiction receive a fair share of contracts and related investments. These should be allotted in proportion to the committed infrastructure spending of their home governments, whether federal, state or local.

Recommendations

- Canada should propose the creation of an activist Buy North American policy for new infrastructure spending that would create jobs and spur economic development throughout the region.
- If this proposal is rebuffed by the Trump administration, Canada should implement Buy Canadian policies to maximize national economic spin-offs on its own planned public investments, which are worth hundreds of billions of dollars.

Investment protection and ISDS

When NAFTA was signed, little attention was paid to an obscure investor–state dispute settlement (ISDS) provision in the treaty's investment chapter. NAFTA Chapter 11 (Section B) sets up a process through which foreign investors can sue governments for damages via binding private arbitration instead of the domestic courts. The process has since been incorporated into thousands of free trade agreements globally.

Arbitration (ISDS) can be invoked unilaterally by investors from the three NAFTA countries. Investors do not need to seek consent from their home governments and are not obliged to try to resolve a complaint through the domestic court system before launching a NAFTA claim. In effect, NAFTA establishes a private justice system exclusively for foreign investors, including some of the world's largest and most powerful multinational corporations.

The NAFTA investment regime was originally characterized as an exceptional remedy to be used only under extreme circumstances. It was supposedly aimed at situations where the domestic courts, specifically in the Mexican regime of that era, could not be trusted to redress valid investor concerns.

But of the over 80 investor–state claims filed to date under NAFTA only a handful pertain to the administration of justice in the Mexican courts. Instead, foreign investors have targeted a broad range of government measures in North Amer-

ica — especially in the areas of environmental protection and natural resource management — which allegedly adversely affected their investor rights.

Unexpectedly, Canada has been the most sued party under NAFTA, having been targeted in 39 claims. This trend is getting worse: 70% of NAFTA claims since 2005 (28 of 40) have been directed against Canada. Canada has lost or settled eight cases, paying out damages to foreign investors of over $215 million. In nine cases, arbitrators found that Canada did not breach the complainant investor's rights in NAFTA. Canadian governments have incurred tens of millions of dollars in unrecoverable legal costs through this process.

Finally, the threat of an investor–state claim and the influence of negative arbitral rulings, such as in the 2016 Bilcon case (where a tribunal found that a rigorous environmental assessment of a huge quarry in an ecologically sensitive region violated a U.S. investor's NAFTA rights), exert a profoundly chilling effect on legitimate public policy.

Experience has clearly shown that the overly broad powers and protections afforded to foreign investors by NAFTA have been repeatedly invoked to frustrate the legitimate exercise of governmental authority. The NAFTA renegotiation provides an opportunity to eliminate this corrosive feature. In fact, the Trump administration appears ready to allow countries to opt-in to ISDS rather than have it always immediately available as an option for foreign investors. All three governments, and Canada in particular, have compelling reasons to accept this proposal, but more reasonably for getting rid of ISDS altogether.

Recommendations

- NAFTA's investor–state dispute settlement system (Section B of NAFTA Chapter 11) should be eliminated. As a second-best option, Canada should agree to U.S. proposals for ISDS to be opt-in only.
- In addition, NAFTA's clauses on minimum standards of treatment (Article 1105) and indirect expropriation (Article 1110) should be changed to make perfectly clear they do not apply to non-discriminatory laws or regulations taken in good faith to protect the public interest.

Environment and climate change

Despite superficial references to environmental protection and sustainable development in its preamble, the core NAFTA text does not contain meaningful provi-

sions — let alone dedicated chapters — on environmental protection or sustainability. Instead, and only after sustained protest from North American environmental groups, Canada, the U.S. and Mexico negotiated the North American Agreement on Environmental Co-operation (NAAEC) in parallel to NAFTA.

The NAAEC has failed to live up to its limited potential for raising the bar on environmental protection in at least two major respects. First, as a side letter to NAFTA, the NAAEC does not have the same legal weight or institutional support as the main NAFTA text. The Commission for Environmental Co-operation (CEC), which is responsible for upholding the NAAEC, has a modest budget of US$9 million and a limited ability to compel governments to uphold environmental obligations. The NAAEC's dispute settlement process is far weaker than the comparable dispute settlement process (ISDS) for aggrieved investors in NAFTA.

Second, the scope of the NAAEC is relatively narrow. The agreement is principally concerned with assessing and reporting on environmental issues, monitoring and transparency in environmental policy, and upholding existing levels of environmental protection in each country. Although the NAAEC encourages the parties to "strive" to improve their environmental legislation, there is no obligation to do so. Given the multitude of emerging and looming environmental crises — not least the extreme weather events associated with climate change — the status quo for environmental policy is simply not good enough.

Consequently, environmental protection and sustainable development cannot remain subservient to the interests of multinational corporations in trade negotiations. Not only are the environmental challenges facing North America more dire than they were three decades ago, but the policy landscape has also shifted dramatically. Canada's 21st-century environmental commitments, both domestically and internationally, can only be met if environmental sustainability is treated as a central concern of all social and economic policy.

Specifically, Canada's commitments to reduce greenhouse gas emissions and transition to a low-carbon economy under the Pan-Canadian Framework on Clean Growth and Climate Change and the multilateral Paris Agreement cannot be met as long as NAFTA discourages and obstructs efforts to phase out the production and consumption of fossil fuels.

Recommendations

- Remove NAFTA's investor–state dispute settlement process, which has been used repeatedly to challenge non-discriminatory environmental policies in Canada, and which acts as a chill on environmental and sustainable development policies by prioritizing investor interests (see above).

- Incorporate chapters on the environment and sustainable development into the core NAFTA text and make them fully enforceable through dispute settlement (including for third party disputes initiated by civil society groups). Create obligations in these chapters to reinforce Canada's commitments under the multilateral Paris Agreement, starting with provisions for an integrated continental carbon pricing system.
- Create a broad exemption to NAFTA's investment rules (if they are not removed from the agreement) for any government measure intended to reduce greenhouse gas emissions, encourage sustainable development or otherwise promote environmental protection.

Energy and proportional sharing

Having pulled the United States out of the Paris agreement on climate change, President Trump recently declared he would pursue a policy of "energy dominance," which analysts expect to include new oil drilling in the Arctic, an expansion of liquefied natural gas (LNG) exports and the construction of new pipelines to carry U.S. unconventional fossil fuels to market. It will also likely involve locking in U.S. access to North American energy supplies.

According to Natural Resources Canada, 99% of Canadian crude and 95% of refined petroleum products go to the United States, though they represent only 20% and 3% of U.S. consumption in each case. Still, Mexican and Canadian crude combined makes up half of U.S. consumption, up from 34% in 2010. Not surprisingly, U.S. Energy Secretary Rick Perry is talking about using the NAFTA renegotiation to develop a "North American energy strategy."

Canadian energy dependence on the U.S. was engineered through a little-discussed clause in NAFTA's energy chapter on proportional sharing (Article 605). Unique among free trade deals, proportionality requires Canada or the United States to maintain the same proportion of total supply they have been exporting to the other in the event the country wants to cut production or redirect resources elsewhere, even toward a strategic national reserve or to address regional shortages, for example.

Mexico exempted itself from this NAFTA rule for the impact it would have had on the country's sovereign control of energy. On the surface, Article 605 appears to benefit the U.S., since it limits Canada's energy options. However, proportionality is supported mainly by Big Oil, which sees it as a guarantee that the taps will stay on, i.e., that neither country will alter energy trade patterns in a way that lowers profits.

For Canada to meet its climate change commitments we will need to power down and transition away from fossil-fuel dependence, both domestically and in terms of our exports. A renegotiated NAFTA would preferably enhance our ability to do this, not lock us into a poisonous pact with a climate change–denying Trump administration. Removing NAFTA's proportionality clause would allow the federal and provincial governments to take more active climate change measures, including gradually reducing production, without fear of sparking a trade war or ISDS lawsuits from energy multinationals.

Recommendations

- Remove the proportionality clause (Article 605) from NAFTA's energy chapter.
- Refrain from locking Canada into a new fossil fuel energy partnership with the United States and Mexico in a renegotiated NAFTA.
- Shield government measures to reduce fossil fuel production or consumption from ISDS lawsuits (unless the ISDS process is entirely removed from NAFTA, which is preferred).

Intellectual property rights and drug costs

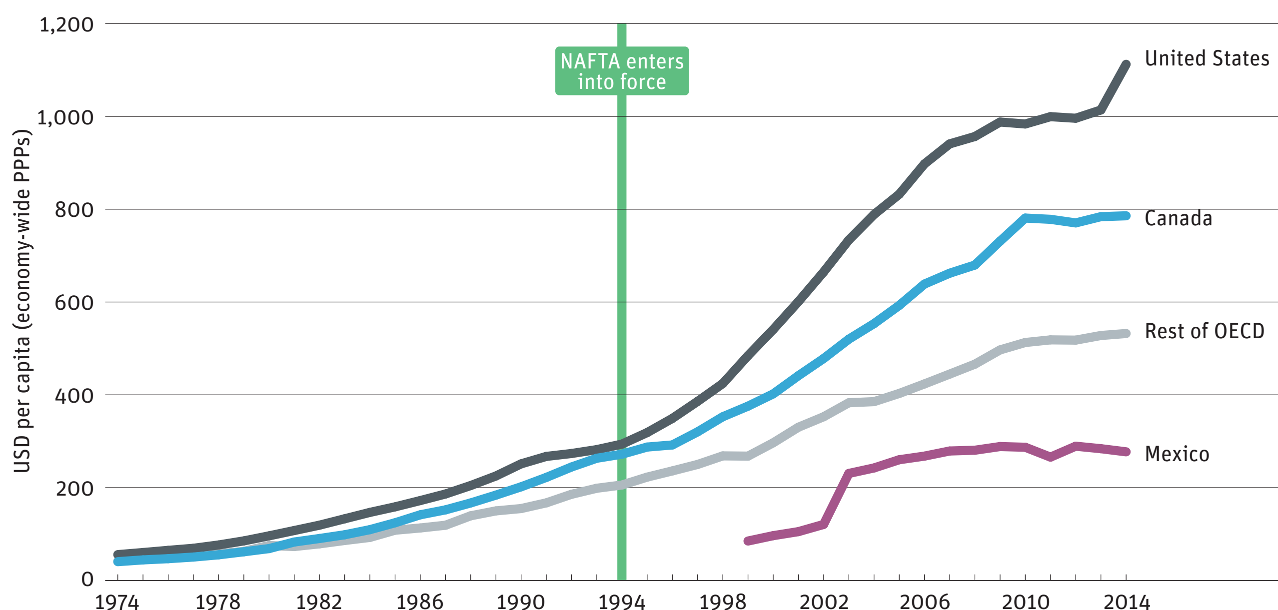
The issue of intellectual property rights (IPR) and their potential impacts on the cost of medicines will be extremely challenging in the coming negotiations. The U.S. brand-name pharmaceutical lobby already has a rash of complaints about Canada in this area. Moreover, key congressional Republicans threatened to block the TPP because they insisted its expanded IPR protections for drugs should be even stronger.

Canada and Mexico will face intense pressure to align their intellectual property provisions with the more industry-friendly U.S. standards. The U.S. brand-name industry has already set out its NAFTA 2.0 priorities, which include the following:

Patent term extensions: Under CETA and in the TPP, Canada agreed to extend patent terms for up to two years to compensate for alleged regulatory delays. The U.S. industry is seeking up to five years of patent term restoration, as is already the case in the U.S., EU and Japan.

Data protection: The U.S. has the longest periods of data protection in the world, providing a term of 12 years for biologic (non-chemical-based) drugs. This contrasts with Canada's eight-year term, which is already excessive by global standards. Entrenching a 12-year term for data protection for biologics in NAFTA is Big Pharma's highest priority.

FIGURE 3 Pharmaceutical spending in NAFTA countries



Source OECD (2017), Pharmaceutical spending (indicator). doi: 10.1787/998febf6-en (Accessed on 14 July 2017).

Patent linkage: Under CETA, both generic drug manufacturers and brand-name patent holders are able to appeal the outcome of a challenge to a generic manufacturer's application for marketing approval of a patented drug. But the brand-name industry is unhappy with how the Canadian government intends to implement this CETA commitment, and will use the NAFTA talks to press for changes.

The "promise doctrine": The U.S. brand-name drug lobby has already been handed a victory by the recent Supreme Court of Canada decision invalidating the "promise doctrine," which stipulates that to be eligible for patent protection, drugs and other inventions must perform as promised. This issue was also the subject of a NAFTA investor–state challenge by Eli Lilly, which Canada won. U.S. negotiators will probably now seek to lock in a ban on the "promise doctrine" in a revised NAFTA.

Canadians already pay among the highest per capita drug costs in the developed world (see *Figure 3*), in good measure because of our brand-friendly system of patent protection. U.S. brand-name drug firms will already benefit from impending patent term extensions and other changes in the Canada–EU trade deal.

Fully aligning our system of patent protection for medicines with the U.S. model would be extremely expensive for Canadian consumers and our health care sys-

tem. In fact, these changes could add up to billions of dollars annually in higher costs, and easily swamp any marginal gains to consumers from preferential tariffs.

Finally, incorporating TRIPS-plus provisions (i.e., IPR standards that are more restrictive than the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, or that reduce the flexibilities affirmed in the 2001 Doha Declaration on TRIPS and Public Health) into NAFTA would seriously impede access to affordable medicines in Mexico, a developing country with many citizens who are simply unable to bear these extra costs.

Recommendations

- Canada should strongly resist U.S. and drug industry pressure to adopt IPR provisions that will impede access to affordable medicines.
- Canadian governments should advance alternative strategies to encourage and reward innovation, including compulsory and humanitarian licensing and publicly funded research premised on ensuring affordable access to new medicines.

Temporary entry

Canada first negotiated a chapter on temporary entry for business persons in the Canada–U.S. Free Trade Agreement. The chapter allowed "genuine business travellers" to enter Canada without going through the usual immigration process. A similar chapter was included in NAFTA and many of Canada's subsequent free trade agreements.

Temporary entry chapters in FTAs are problematic for several reasons. First, the types of workers covered by these temporary entry provisions are not always the "genuine business travellers" claimed by negotiators. There are examples of employers moving construction workers and bank tellers across borders as intra-corporate transferees, demonstrating the wide scope of these provisions.

Second, by prohibiting economic needs tests and quotas, NAFTA allows employers to hire migrant workers even in areas where local workers are available and/or unemployment is high. These provisions disincentivize employers from investing in training for local workers.

Third, the temporary entry provisions in NAFTA are, in practice, a right of employers to move employees across borders, not a right of workers to access new opportunities in other countries. Workers using these provisions receive no protection against deportation if an employer chooses to cancel their contract or otherwise terminate their work permit.

Finally, the temporary entry provisions in NAFTA cannot be changed through domestic legislation. As a result, the agreement inhibits democratic control over immigration policy.

The U.S. Congress eventually acknowledged the severity of these issues in NAFTA and prohibited its trade negotiators from making any temporary entry commitments in subsequent agreements. In the TPP negotiations, for example, the U.S. was the only country not to offer tangible access to its labour market.

Given U.S. concerns, the renegotiation of NAFTA provides Canada with an excellent opportunity to eliminate the temporary entry chapter in NAFTA. In its place, Canada should focus on developing a robust immigration system that better meets the needs of workers from around the world, and their families, who want to make Canada their home.

Recommendation

- Eliminate the temporary entry chapter in NAFTA, and instead create and expand domestic immigration programs for facilitating the entry of migrant workers, and their families, into Canada.

E-commerce and privacy

Electronic commerce (e-commerce) accounts for a large and growing share of the Canadian economy. Retail transactions are increasingly moving online while digital-only services (including advertising, banking and media distribution) are rapidly expanding and, in many cases, displacing their traditional competitors.

The corresponding growth of cross-border digital trade over the past two decades has raised issues that are not covered in NAFTA. For example, Canada does not have clear agreements with Mexico and the U.S. regarding customs duties for goods purchased online, protection of internet users' personal information, processing of digital payments, and other concerns unique to the digital economy. In other areas, such as the application of traditional trade agreements to digital trade, legal uncertainty remains.

But there are risks to addressing these issues in the NAFTA renegotiations rather than in other international venues. Canada is likely to face pressure from U.S. negotiators to adopt extremely one-sided e-commerce provisions like those found in the TPP and Trade in Services Agreement (TiSA). In both those cases, U.S. negotiators pushed aggressively for international e-commerce standards that would benefit

large U.S. internet corporations (such as Google, Amazon and eBay) at the expense of internet users and smaller companies.

For example, the TPP would prohibit data localization requirements that some governments, including several Canadian provinces, use to protect the personal information of internet users. In repeated negotiations with the U.S., Canadian negotiators have been forced onto the defensive to protect Canadians and Canada's digital industries against the interests of U.S. internet giants.

If a renegotiated NAFTA must include an e-commerce chapter, its provisions should be limited to technical and legal issues, such as the tax and customs treatment of online goods, and those provisions should be balanced with strong protections for consumers and smaller domestic firms.

Recommendations

- Limit the scope of any new e-commerce provisions to addressing technical issues raised by the digital economy, while striking a balance between the needs of internet users, consumers and firms of all sizes in all three NAFTA countries.
- Create new obligations in NAFTA to enhance the privacy of internet users and to exempt from NAFTA's investment rules (if they are not removed from the agreement) any government measures designed to protect their citizen's personal information.

Supply management

Canada must not give in to President Trump's scapegoating of Canadian dairy farmers. Without supply management, our dairy farmers would simply be put in the same predicament as their U.S. counterparts, who suffer from the effects of overproduction and farm-gate prices that fall below production costs.

Losing or even seriously weakening supply management would be a tragedy for famers and rural communities. It would also potentially create a political backlash from Canadians. Supply management is a good system for Canadian farmers and consumers, drawing support from key provincial governments and the public, both rural and urban.

Unfortunately, supply management is reviled by conservative economists, right-wing pundits and big business lobby groups. It will certainly be under attack from the U.S., and from critics and agri-food interests (large food processors, fast food restau-

rants and major retailers) within Canada. There will be pressure for the concessions the Harper government offered under TPP to be the starting point in these NAFTA talks.

But even these concerns are unlikely to satisfy the Trump administration or the U.S dairy industry, which is also upset with Canadian proposals to limit the use of imported protein solids and other fluid milk substitutes in Canadian dairy products.

Recommendation

- Canada should defend its supply-managed agricultural sectors, ensuring they are entirely exempted from further trade liberalization in a renegotiated NAFTA. A strong defence of supply management will help ensure that Canadians continue to have access to high-quality, locally produced food, while supporting small family farms and rural communities.

Copyright and internet freedom

In recent international trade negotiations, U.S. negotiators have pushed aggressively for intellectual property rights and internet provisions favourable to major U.S. movie studios, record labels and other media corporations, such as expanded copyright terms and more stringent enforcement for alleged copyright infringement.

For example, in the TPP negotiations the U.S. demanded Canada extend copyright terms by 20 years. Incorporating TPP-style intellectual property provisions into NAFTA risks undermining innovation and internet freedom and would likely lead to a net economic loss for Canada, which is a net importer of intellectual property.

In the TPP, the U.S. also demanded that Canada abandon its "notice-and-notice" system of copyright enforcement in favour of a draconian "notice-and-takedown" system. Although Canada alone was able to secure an exemption to that provision in the TPP, the U.S. will surely use the renegotiation of NAFTA as another opportunity to push its pro-corporate internet agenda.

The U.S. copyright agenda is especially problematic because Canada already has a well-developed internet policy, which includes recently updated copyright legislation and a governance framework for the neutrality of internet infrastructure. This body of policy is the result of a decade of consultations and compromises between internet users, copyright holders, regulators and other stakeholders in Canada. The renegotiation of NAFTA should not be used to undo or unbalance these hard-fought compromises.

If new intellectual property provisions are incorporated into NAFTA they should reflect Canada's existing domestic policy and/or international standards, such as the Berne Convention, not the demands of U.S. industry.

Recommendations

- Reject any provisions in NAFTA that would require changes to Canada's 2012 Copyright Modernization Act, including changes to copyright terms, fair dealing exceptions and Canada's "notice-and-notice" system for alleged copyright infringement.
- Reject any provisions that would undermine the principle of net neutrality as set out in the Canadian Radio-television and Telecommunications Commission's net neutrality governance framework.

Regulatory co-operation/Good regulatory practices

For some time, Canada and the United States have closely co-operated on regulatory issues with the aim of minimizing differences in rules, procedures and standards between the two countries, in particular in sectors more engaged in trade or where there is significant cross-border integration (e.g., agriculture, auto production). While this may sound innocuous, co-operation can become a hindrance to good public interest regulation if it prioritizes trade and industry needs over precaution, public health or environmental protection.[1]

Following the coming into force of NAFTA, about 30 technical working groups and committees were established to oversee the agreement, including several related to regulations (on pesticides, chemicals, and how to determine rules of origin, for example).[2] As post-NAFTA consolidation deepened North American supply chain integration, subsequent Canadian governments put more effort into aligning rules and regulations, always with input from industry lobby groups, and increasingly with a view, first and foremost, to facilitating trade and commerce.[3]

By cabinet directive, Canadian regulators are required to consider how trading partners might react to new rules, whether the partner's rules should be simply adopted outright (or accepted as equivalent to Canadian rules), or whether non-regulatory (e.g., voluntary and/or industry-backed) alternatives exist. One result of this regulatory transformation in the NAFTA era has been the adoption of more industry-friendly self-regulation in sensitive areas such as food preparation, oil and gas production, and transportation, with sometimes deadly results.

For example, the acceptance in Canada of a U.S. norm (supported by the rail industry) allowing a single operator to handle rail shipments of hazardous goods played a role in the 2013 Lac-Mégantic explosion that killed 47 people.[4] Regulation of genetically modified foods in Canada is opaque and slanted toward industry preferences, as in the U.S.[5] Regulatory co-operation with the U.S. in the area of chemicals has also had the effect of stalling federal action on the suspected risks of neonicitinoid pesticides on bee populations.[6]

Canada and the European Union included a regulatory co-operation chapter in CETA, a first for an international trade agreement. Canada has also already agreed to a chapter on regulatory coherence in the stalled TPP. Both chapters establish multinational committees, led by trade officials, aimed at harmonizing regulations in ways that ultimately test the necessity or legitimacy of new regulations by how they will affect trade and commerce.

Recommendations

- Co-operation should lead to the adoption of the highest possible standards across North America, and leave room for regulators in any country to exceed North American norms if it is in the public interest to do so (e.g., it is more protective of public health or the environment).

- Formalized consultations on regulatory co-operation should include non-industry voices from all three countries (where appropriate) at the outset and throughout the process rather than merely at the very end (once co-operation or harmonization priorities have already been set).

- The impact on trade of new rules should be one, but not the primary, consideration when regulating. Unilateral measures for protecting the environment or public health that do not discriminate between Canadian, Mexican or U.S. firms should be immune from investor–state dispute settlement.

- Under no circumstances should Canada propose or agree to apply a dispute settlement process to regulatory provisions, and co-operation procedures, in a renegotiated NAFTA. It is the inherent responsibility of states to establish appropriate regulatory practices with the goal of protecting the public. The threat of new trade disputes related to the regulatory process can only lead to shortcuts in the regulatory process and downward pressure on regulations.

Dispute settlement (Chapter 19)

Despite the market certainty ostensibly provided by NAFTA, Canada remains vulnerable to arbitrary U.S. trade actions, since the agreement left each party's trade remedy laws (countervailing duties and anti-dumping measures) largely intact. Under NAFTA, U.S. trade remedy laws continue to apply fully to Canadian exports. The U.S. can amend its trade laws without Canadian consent. If a new U.S. trade law or amendment specifies Canada, then the new rules will apply to Canadian products.

When the Mulroney government negotiated the 1988 Canada–U.S. Free Trade Agreement, its chief goal was to achieve secure market access by getting an exemption from U.S. trade remedy laws. These had been used repeatedly against Canadian products, including softwood lumber. Canada failed in this effort. Instead of an exemption, it got a binational review of U.S. trade remedy rulings, a feature that was carried over into NAFTA.

NAFTA Chapter 19 allows an exporter to go to an independent binational panel to review final anti-dumping and countervailing duty rulings, as an alternative to judicial review by the importing country's domestic courts. The binational panel's mandate is strictly to determine whether the importing country's trade remedy laws have been applied properly. If it agrees that they have not been, it can remand the determination to the relevant trade authorities to bring the decision in line with their domestic law.

Canadian exporters have had some successes using the NAFTA Chapter 19 process. But the Trump administration, certain U.S. industries and many members of Congress are unhappy with it. These interests want to eliminate or seriously weaken the process in a revamped NAFTA.

NAFTA's Chapter 19 binational review process is a long way from the exemption from U.S. trade remedies sought by Canada in the original FTA with the U.S. But it is unlikely that Canada would have signed the FTA if it had not been included. Today, with U.S. industries and the administration pursuing a long list of trade remedy challenges against Canadian industries (lumber, aircraft, steel and aluminum), Canada must not give in to U.S. demands to weaken or eliminate this process.

Instead, the process needs to be strengthened. A 2005 House of Commons report identified major problems with the Chapter 19 process.[7] In particular, U.S. trade authorities have repeatedly delayed the process beyond agreed timelines, and have been reluctant to comply with panel rulings. Canada should seek to fix these problems in a revised NAFTA.

Recommendations

- Canada should reject any attempt by the U.S. to eliminate or weaken the Chapter 19 dispute settlement mechanism.
- Canada should seek instead to strengthen adherence to agreed timelines and ensure that trade authorities promptly comply with binational panel rulings.

Public services

Public services strive to meet social needs through affordable, accessible and universal programs. They purposely restrict commercial activity and profit-making. By hiving off significant sectors of the economy (e.g., health insurance) from commercial exploitation, by either domestic or foreign firms, public services potentially run afoul of trade and investment agreements.

NAFTA was the first modern trade agreement to take a "negative listing" approach to investment and cross-border trade in services. The starting assumption is that everything is covered; governments must then expressly exempt any sectors or measures they want shielded from NAFTA's investment and services obligations.

This top-down approach to covering services under NAFTA creates serious challenges for public services, which then need to be protected from the commercializing pressures of trade agreements through country-specific exceptions, called reservations. Annex I reservations protect existing non-conforming measures, but if the excluded policy measures are weakened or eliminated they cannot later be restored. Annex II reservations provide for future policy flexibility in certain key sectors, such as health care and public education.

In general, Canada's NAFTA reservations are better at protecting existing public services than protecting the right of governments to expand public services into new areas, or to return previously privatized public services to the public sector. Even the strongest Annex II reservations are limited in scope; for example, they do not apply against NAFTA's rules on expropriation (Article 1110) and minimum standards of treatment (Article 1105). There is also uncertainty about the meaning of key terms used in NAFTA, such as Canada's Annex II-C-9 reservation for key "social services established or maintained for a public purpose."

Unfortunately, as NAFTA is currently written, when governments expand public services into areas where foreign investors are already established they are exposed to compensatory lawsuits under the agreement's investor–state dispute settlement process (Chapter 11). Critical decisions about whether any financial compensation was appropriate for private commercial interests adversely affected by the expan-

sion of public services, and the amount of any monetary damages, would be made by NAFTA investment tribunals, not by the domestic courts.

NAFTA's existing rules on services do not prevent governments, at any level, from delivering services through monopolies or exclusive service supplier arrangements. But the market access provisions in more recent FTAs, including CETA and the TPP, do prohibit such requirements for public service delivery (where no reservations have been taken), even when such government policies and regulations do not discriminate between foreign and domestic investors and service suppliers. "Modernizing" NAFTA to include such intrusive provisions would further constrain and restrict public services.

Vibrant public services are a hallmark of advanced societies and an important goal of economic and social development. The expansion of public services (e.g., into dental care, child care and long-term care) would also create thousands of well-paying permanent jobs, with the economic gains this entails. A truly fair, forward-looking trade and investment agreement must fully protect public services and, indeed, facilitate their future development and growth.

Recommendations

- Public services should be *fully* excluded from the investment and service chapters of NAFTA, as well as any other provisions affecting public monopoles or state enterprises. As proposed by European public services advocates, such a general carve-out could read: "This agreement (this chapter) does not apply to public services and to measures regulating, providing or financing public services. Public services are activities which are subject to special regulatory regimes or special obligations imposed on services or service suppliers by the competent national, regional or local authority in the general interest."[8]

Notes

1 Over the past 30 years, Canada has swapped a precautionary approach to regulating for what it calls a risk- or science-based approach, frequently but not always in league with regulatory preferences in the United States. Under the precautionary principle, industry is required to prove its products are safe before they can be put on the market. Risk-management logic says regulators should have to prove, without doubt, that a product is unsafe before they can prohibit its sale or use. See Stuart Trew, "From NAFTA to CETA: Corporate lobbying through the back door," co-published by the CCPA, Forum Umwelt und Entwicklung, LobbyControl (Germany) and the Corporate Europe Observatory (CEO), February 2017: https://www.policyalternatives.ca/publications/reports/nafta-ceta-corporate-lobbying-through-back-door

2 Stephen Clarkson, Sarah Davidson Ladly and Carlton Thorne, "De-Institutionalizing North America: NAFTA's Committees and Working Groups," paper for the Third EnviReform Conference, November 8, 2002: http://www.envireform.utoronto.ca/conference/nov2002/clarkson-paper2.pdf

3 Examples include the 2002 Canada-U.S. Smart Border Declaration, the 2004 "smart regulation" review, the 2005 Security and Prosperity Partnership regulatory working grous, the 2007 Cabinet Directive on Streamlining Regulation, a 2012 Cabinet Directive on Regulatory Management, and the establishment, in 2011, of a Canada-U.S. Regulatory Cooperation Council under the auspices of the Harper-Obama "Beyond the Border" agreement.

4 Bruce Campbell, "Little progress on rail safety in wake of Lac Mégantic," Toronto Star, April 14, 2016: https://www.thestar.com/opinion/commentary/2016/04/14/little-progress-on-rail-safety-in-wake-of-lac-mgantic.html

5 "GMO Inquiry: Are GM Crops and Foods Well Regulated?," Canadian Biotechnology Action Network: https://cban.ca/are-gm-crops-and-foods-well-regulated/

6 Chloe Cornish, "Study links insecticides to bee breeding problems," Financial Times, June 29, 2017. https://www.ft.com/content/1643b4a2-5cd2-11e7-9bc8-8055f264aa8b.

7 Standing Committee on Foreign Affairs and International Trade, "Dispute Settlement in the NAFTA: Fixing An Agreement Under Siege," May 2005. http://www.ourcommons.ca/DocumentViewer/en/38-1/FAAE/report-9.

8 Markus Krajewski, "Model Clauses for the Exclusion of Public Services from Trade and Investment Agreements," Study commissioned by the Chamber of Labour Vienna and the European Federation of Public Service Unions. February 2016. http://www.epsu.org/sites/default/files/article/files/Study%20M%20Krajewski_Model%20clauses%20for%20the%20exclusion%20of%20public%20services_2016.pdf.

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