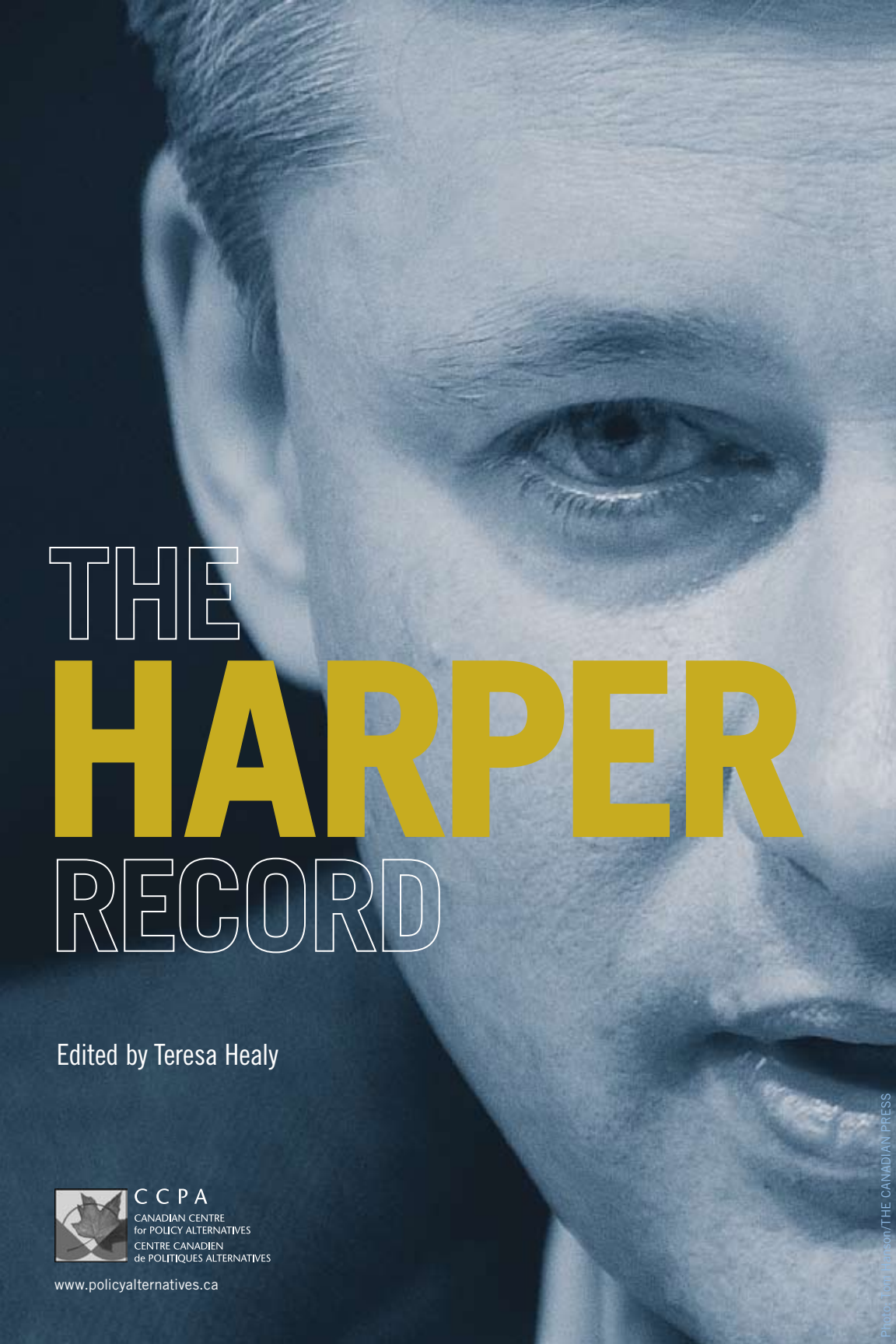

THE HARPER RECORD

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Harper and NAFTA-Plus

Deep integration by stealth

Bruce Campbell

THE NORTH AMERICAN Free Trade Agreement (NAFTA), along with its predecessor, the Canada-U.S. Free Trade Agreement (FTA), has been the primary legislative edifice shaping Canada-U.S. integration since 1989. However, NAFTA was never the end-game for business élites. Rather, it was a vehicle for advancing the broader goal of deepening integration. Rarely articulated, the end-game is a unified continental market with harmonized institutions, policies and regulations, and with the border as an economic impediment fading into insignificance.

Given the huge power imbalance among the three countries, "adjustment" by the smaller partners to the more privatized, deregulated U.S. model — a kind of informal political integration — is the desired ultimate outcome.

Especially after September 11, 2001, it became obvious to big business and the policy establishment that NAFTA by itself was no longer adequate. Moreover, at the same time as incremental measures to extend and deepen NAFTA were being implemented, the U.S. preoccupation with homeland security was forcing the project into a defensive mode. Instead of the border fading into insignificance, it was actually thickening, thanks to intensified U.S. security measures and Canadian efforts to comply with them.

At the urging of big business, North American leaders convened the Security and Prosperity Partnership accord (SPP) in March 2005. Political leaders knew that a highly visible, comprehensive NAFTA-plus negotiation would be politically risky, given the level of public controversy it was sure to provoke. The SPP (now in its fourth year) is their Plan B — an executive-level process, out of the eye of the public and parliamentarians, through which they are advancing their deep integration priorities incrementally. NAFTA Leaders and key Ministers meet regularly with business representatives through an SPP advisory body called the North American Competitiveness Council (NACC). Business outlines its priorities, the politicians respond, consensus is reached, and civil servants implement.

The Harper government's initiatives to deepen NAFTA-style integration with the United States appear more like a continuation than a radical departure from the Martin Liberals. This is not surprising since big business (to which both parties have close ties) has been driving the agenda and since the policy establishment is on board with the general direction, if the not the precise shape and speed, of integration.

Modest differences, however, can have large consequences. For the Liberal government, deep integration was more a practical necessity — inevitable if not desirable. The Harper Conservatives are more enthusiastic about deep integration, which they see as part of their long-term goal to remould Canada into a conservative society more in the image of the United States.

Minority status has thus far limited the Harper government's ability to implement its agenda through legislation. But it has made significant progress at the executive/administrative and regulatory levels, largely out of public view. Since the dominant political culture in Canada is progressive, Conservative strategists know they must move carefully, maintaining a moderate image if they are to avoid electoral defeat and eventually achieve a majority government.

This chapter examines several NAFTA-plus initiatives that illustrate the Harper government's efforts to cement even further its alliance with big business, ingratiate itself with the U.S. administration, and use NAFTA to advance its own political agenda. Security and military initiatives — also part of the deep integration agenda — are not covered

here. Finally, it addresses the issue of NAFTA renegotiation in light of a possible U.S. Obama presidency and makes some preliminary suggestions for a progressive response to the renegotiation challenge.

The Softwood Lumber Agreement

In April 2006, several months after the Harper government took office, it signed a preliminary settlement to the long-standing softwood lumber dispute, the latest round of which had dragged on since 2001.

The deal, ratified in the fall of 2006, was a major capitulation to U.S. demands. The Canadian industry had won virtually all of its appeals under NAFTA and the WTO against U.S. countervailing and anti-dumping duties on Canadian exporters. Yet the U.S. government continued to ignore the rulings, using every trick in the book to delay and obstruct. More recently, Canada had taken its case to the U.S. trade court, where it was also winning.

The previous government had balked at the American demands — even as the major exporting provinces (notably British Columbia) unilaterally changed their forest policies to comply with U.S. demands — choosing to let the legal proceedings run their course. But the Harper government was eager to demonstrate that it was better able to "normalize" relations with the U.S., which had become strained in the wake of Canada's opposition to the Iraq war and Missile Defence, and get the softwood issue off the front pages in order to pursue its own deep integration agenda. Moreover, American demands were more in line with the kinds of "free market" changes that the Conservatives favoured.

In July 2006, as the deal, which imposed a combination of quotas and a 15% export tax on Canadian producers, was being finalized, a U.S. court issued a preliminary ruling in favour of the Canadian exporters. Also on October 13, 2006, one day after the Softwood Lumber Agreement entered into force, the U.S. Court issued its final ruling: there was no subsidy to Canadian exporters and no injury or threat of injury to U.S. producers.

With the exception of a small group of multinationals, most producers were unhappy with the Softwood Agreement. But most were experiencing severe financial stress, and the Harper government bullied

them into accepting the settlement by threatening to withhold future finance or support.

The deal gave back 80% of the $5.2 billion in duties that the U.S. authorities had collected from the Canadian industry. Contrary to U.S. and international law, the U.S. government kept a 20% cut, half of which it distributed to the U.S. lumber lobby, also contrary to both U.S. and international law. The deal also implicitly accepted the U.S. argument that Canadian governments were in fact subsidizing producers, when in fact all legal rulings found otherwise. Finally, it gave the U.S. government the right to oversee any future changes in Canadian forest policies.

The deal set up a new dispute resolution mechanism, replacing international and national court processes: the London Court of International Arbitration. With the Agreement barely in effect, the U.S. government was back knocking at the Court's door, alleging Canadian breaches of the agreement on the tax and quotas levels and government assistance to producers in Québec and Ontario.

In June 2008, the U.S. Congress, contrary to the Agreement, passed legislation authorizing U.S. border officials to monitor the Agreement and verify that Canadian exporters were complying with the Agreement, and empowering them to conduct audits and issue fines for non-compliance. Thus continues — despite the "settlement" and the loss of sovereignty over forest policy — another round of U.S. harassment and obstruction.

The combined effect of export tax, the dramatic rise of the Canadian dollar, record fuel prices, and the slump in the U.S. housing market have all been catastrophic for Canadian softwood producers. Mills, often in single-industry communities, have shut down, businesses have gone bankrupt, and thousands of workers have been thrown out of work.

Canadian Wheat Board

The U.S. government has long pressured Canada to dismantle the Canadian Wheat Board (CWB), the government farmer-run agency that is the sole marketer of prairie grain. Unsuccessful in the FTA and NAFTA negotiations, the U.S. government brought numerous complaints against the CWB before NAFTA and WTO tribunals, all of them unsuccessful.

At last the U.S. had a powerful ally within Canada to achieve a goal that had so long eluded it. The Conservatives themselves (as well as the Alliance and Reform parties from which they had sprung) have long wanted to get rid of the Wheat Board, and they see NAFTA as a lever to help achieve their goal.

The legality of the Wheat Board under NAFTA and the WTO stems from the fact that it is a monopoly. Once the Harper government succeeds in breaking down its monopoly from within, and once private companies are allowed to compete alongside the Board, then American WTO and NAFTA challenges to the legality of the CWB become much more likely to succeed.

Shortly after the Conservatives assumed power, the Minister of Agriculture convened a task force on the Wheat Board, which the Board itself boycotted. The task force's October 2006 report recommended ending the Wheat Board monopoly in two years. U.S. trade officials publicly praised the Canadian announcement.

The government wasted little time in setting in motion its strategy, as a cabinet document recently released under court order has revealed. Following this blueprint, the government imposed a gag order on the Board to prevent it from defending itself, fired its CEO, Adrian Meisner, held a rigged plebiscite on whether to remove single-desk CWB authority for marketing barley, and announced that, as of August 1, 2007, barley would no longer be under the exclusive marketing control of the CWB, but would have to compete with private companies.

However, a federal court judge ordered the government to halt the removal of barley from the CWB's control, determining that its action was illegal because, among other things, it did not hold the required parliamentary vote. Then, in June 2008, another judge ruled that the government acted illegally in imposing the gag order on the Board.

These setbacks have not weakened Harper's resolve. In the wake of the barley ruling, he said the government would succeed "one way or another." Clearly frustrated after the court's lifting of the gag order on the Board, Harper responded with his own heavy-handed view of democracy: "The bottom line is this, mark my words... Western Canadian farmers want this freedom and they are going to get it, and anybody who stands in their way is going to get walked over."[1]

Several bills currently before Parliament would do just that. Bill C-39 would take away the Canadian Grain Commission's mandate to inspect and regulate grain. Bill C-46 would take away the right of barley producers to a vote on the CWB's role, and Bill C-57 would revamp the voters' list for Director elections taking place in the fall, disenfranchising even more farmers.

If Harper were to achieve his coveted goal of majority government, the major stumbling block to the Conservatives' efforts would be removed. The impact on farmers, grain handlers, and grain-dependent communities would be devastating. (See Forsey elsewhere in this volume.)

Intellectual property

At about the same time as the Harper government was caving in on softwood, it was amending Canada's drug patent regulations on data exclusivity, effectively extending the period during which the drug multinationals have exclusive monopoly rights — something the U.S. had been demanding for years. Generic drug companies now have to wait six years after a brand name drug has entered the market to *apply* for approval to market a generic equivalent, and another two years to actually obtain market approval. Until then, the government could *approve* a generic drug during the first five years after the brand name drug received market approval, using the brand name company's test data.

This change makes it even more difficult to bring cheaper generic drugs to market, and hence tilts the balance even further toward protecting patent holders and away from the law's mandate to balance patent protection with affordably priced medicines.

The other issue, currently before Parliament, is Canadian copyright law. The U.S. has been pushing hard for Canada to adopt its copyright infringement laws. USTR officials have for several years put Canada on its annual intellectual property Priority Watch list.[2]

U.S. Ambassador David Wilkins has made it a priority, publicly calling on Canada to toughen its copyright law and alleging that Canada's copyright law was "the weakest in the G-7," then following it up with a letter to Stephen Harper urging greater enforcement.[3]

The U.S. administration also made intellectual property a top priority at the SPP table, as did the big business council's (NACC) February 2007 report to SPP ministers. One of the four priority deliverables announced at the Montebello summit was an Intellectual Property Action Plan to combat piracy and counterfeiting. Though not reported, sources told University of Ottawa Internet expert Michael Geist that U.S. officials told their counterparts that any progress on Canadian concerns such as "the thickening border" would be contingent on "progress" on Canadian copyright changes.[4]

The government introduced its amendments to the copyright act in June 2008 (Bill C-61). According to Geist, priority No. 1 for the Harper government was to meet U.S. demands, and Bill C-61 delivered. The bill has been dubbed by its critics the *Canadian Digital Millennium Copyright Act* because of its close resemblance to the U.S. legislation of the same name. Geist said the bill skews the balance between creator and user rights, eviscerating the latter, erects new barriers for teachers and students, and makes it impossible to protect privacy against invasion by digital media companies.

Regulatory harmonization: Food, drugs and chemicals

Continental regulatory harmonization is central to the deep integration, or NAFTA-plus, agenda. Many of the SPP initiatives are regulatory in nature. One of the few announced "deliverables" of the Montebello Summit was a regulatory harmonization framework agreement and a sub-agreement on chemicals regulation, and one of the five action priorities identified by the leaders coming out of the 2007 Montebello summit was "safe food and products." This was reinforced by the 2008 leaders' joint statement at the New Orleans summit, which directed officials to "collaborate to promote the compatibility of our related regulatory and inspection regimes" in the area of food and product safety.

It is extremely difficult, given the lack of transparency, to trace the line from the SPP to Canadian policy outcomes, but from the fragmentary information that has leaked out, the direction is toward relaxing rather than tightening existing regulations. For example, we've learned the following:

- An SPP working group has been negotiating the raising of limits of pesticide residues for produce entering Canada.
- The Montebello agreement on chemicals has shifted the Canadian chemicals regulation regime, which was till then positioned somewhere between the more stringent safety-first regime of the European Union's REACH program and the business-friendly American approach, into the U.S. regulatory camp.
- The American chemicals industry is using the SPP agreement in its global lobbying campaign to dilute and diminish the global impact of the European program, which they say puts too great a burden on the industry. The three NAFTA governments are pushing the Montebello accord as a counterweight to REACH in international forums.[5]
- In December 2007, the government announced its new policy on food and product safety. While giving the government new powers of product recall and enforcement, it also allowed the government to put new drugs on the market faster without the current level of safety testing. This business demand for relaxing drug-testing requirements was made by the NACC in its report to SPP Ministers.
- A leaked November 2007 Treasury Board memo revealed that the government was mandating the Canadian Food Inspection Agency to move toward the U.S. model of handing over key parts of food inspection to the industry, and downgrading the agency to performing an oversight role. According to an "anonymous leading Canadian academic expert on food risk management" interviewed by CanWest News, there is almost unanimous agreement among public health experts that the greatest risks of new infectious disease are related to animal products and food, and that "reducing food safety controls could be disastrous if there is an outbreak of a new food-borne disease..."[6] Moreover, these changes, along with the elimination of the payments to producers to test cattle for BSE, will increase the risk of another outbreak and U.S. closure of the border. (As this book goes to press, in the

wake of a deadly listeria outbreak at a Toronto meat processing plant, media reports reveal that the CFIA had already begun implementing [in March 2008] these food inspection deregulation measures outlined in the Treasury Board document.)

Foreign investment

The heart of NAFTA was the extensive deregulation of foreign investment controls, new limitations on the activities of public corporations, and new powers and freedoms for multinational corporations.

The NAFTA investor-state dispute mechanism is one of the most insidious provisions in NAFTA. It allows corporations to challenge (before an arbitration panel of judges) governments whom they claim have implemented laws or regulations that impede their profit opportunities. It has led to some 50 claims (18 against Canada), almost half of which involve challenges to policies or laws on environmental protection or resource management.[7]

Successful complaints have led to the reversal of some measures, but, more significantly, it has created an atmosphere of regulatory chill, discouraging governments from bringing in measures to protect the public. Moreover, because of its almost unlimited scope, it has extended NAFTA's reach into areas that were supposedly excluded from the Agreement, including water exports, log export controls, public postal services, agricultural supply management systems, cultural policy, etc.

The investor-state dispute provision allows corporate interests to trump the public good. Even FTA negotiator Gordon Ritchie called it "an ill-conceived construct." It should be scrapped. The Harper government has not called for changes to investor-state. Rather, it has stated emphatically that NAFTA should not be reopened. Given the Harper government's track record, it is almost certainly supportive of NAFTA's investor-state clause.

Foreign ownership limits in key sectors such as banking and telecommunications were maintained. Government could still screen foreign investment, but its scope and enforcement capacity were weakened. Until May 2008, when Industry Minister Jim Prentice denied the takeover of Canadian space company MacDonald Dettwiler by U.S. arms-

maker Alliant Techsystems, Investment Canada had a "perfect" record of approving all 1,500 foreign takeovers since its inception in 1985. (See Watkins elsewhere in this volume.)

The MDA decision went against the Conservative image of opposing interference in corporate decision-making. This case was unique, however, and is unlikely to be repeated. On the contrary, it is more likely that the Conservative government will deregulate foreign investment beyond NAFTA.

Following a massive wave of foreign takeovers, Harper's handpicked panel of businessmen on foreign investment and competition policy, like the Manley panel before it, delivered the desired result. The June 2008 Panel report's recommendations included: tripling of the threshold that would trigger a review; shifting of the onus of proof from companies having to show "net benefit to Canada," to the government having to show that a proposed takeover is not in the "national interest;" and lifting of restrictions on foreign investment in banking, telecommunications and broadcast, airlines, uranium and cultural sectors.[8]

Deep integration extremists have been advocating these NAFTA-plus measures for years. They could well be part of a Harper majority government agenda.

Oil and gas

Arguably the biggest single concession Canadian negotiators made in NAFTA was to surrender control over our energy resources. With the U.S. share of Canadian production now guaranteed, soaring demand has boosted its share of Canadian gas to over 60%, and its share of oil to two-thirds and growing quickly. U.S. and Canadian corporations — with the blessing of the Alberta and federal governments — have been investing massively in the vast (and now commercially viable) Athabasca tar sands.

The main purpose of the SPP energy working group is to help reduce environmental and other regulatory barriers that stand in the way of tar sands development and construction of the pipeline infrastructure necessary to transport oil to U.S. markets. Bilateral pipeline agreements have been signed; and understandings have been reached on regulatory

approvals, environmental assessments, etc. Little is known about these accords. However, the National Energy Board has recently approved several massive pipelines to carry raw bitumen from the tar sands to U.S. refineries. The capacity of the two most recent approvals exceeds the total volume of Alberta's 2006 oil exports.[9]

NAFTA renegotiation

The issue of NAFTA renegotiation came to the fore during the U.S. Democratic party primaries in the winter of 2008. Front runners Barack Obama and Hillary Clinton both pledged to reopen NAFTA, and, if Canada and Mexico refused, to scrap it altogether. Obama said NAFTA was a mistake and told *Meet the Press*: "I will make sure that we renegotiate NAFTA." He said he would use the threat of opting-out as the hammer to get improvements in NAFTA.[10]

Obama's stated renegotiation priorities are three-fold:

> We must add binding obligations to the NAFTA agreement to protect the right to collective bargaining and other core labour standards recognized by the International Labour Organization. Similarly, we must add binding environmental standards so that companies from one country cannot gain economic advantage by destroying the environment. And we should amend NAFTA to make clear that fair laws and regulations written to protect citizens in any of the three countries cannot be overridden simply at the request of foreign investors.[11]

Obama also said he would continue having annual meetings with the other NAFTA leaders, but that they would, unlike the SPP, be transparent and that big business would no longer have exclusive access. He would seek "active and open involvement of citizens, labour, the private sector and non-governmental organizations in setting the agenda and making progress."[12]

In March 2008, Obama's senior economic advisor, Austin Goolsbee, told Canadian consular officials not to worry about NAFTA renegotiation, that it was merely campaign posturing. Their notes from the meeting that were leaked to the press provoked a mini-incident in the Democratic campaign; and a louder scandal in Canada over the source

of the leak (ostensibly from the Prime Minister's Office) and whether Stephen Harper was trying to influence the American presidential race.

Canadian politicians, business leaders, media pundits and peddlers of free trade conventional wisdom responded with predictable bluster. Then Trade Minister David Emerson warned: "If you open it [NAFTA] for one or two issues, you cannot avoid reopening it across a range of issues." He added that Americans' privileged access to Canada's massive oil and gas reserves could be disrupted.[13]

NAFTA leaders and business representatives assembled for the fourth SPP summit in New Orleans also warned against reopening the agreement. At the leaders' press conference, Harper stated that "we" need to "deepen NAFTA even more." He then repeated the oil threat: "Canada is the United States' No. 1 supplier of energy. We are a secure, stable supplier. That is of critical importance to the future of the United States... If we had to look at this kind of an option, I'd say quite frankly we'd be in a stronger position now than we were 20 years ago, and we'll be in a stronger position in the future."[14]

Obama, now confirmed as the Democratic presidential candidate, has softened his tone. In a June 2008 interview with *Fortune* magazine, he conceded that the campaign rhetoric got a little overheated. Obama said he believed in "opening up a dialogue" with trading partners Canada and Mexico, "and figuring out how we can make this work for all people." His opponents have characterized this as a flip-flop, dismissing the likelihood of a real NAFTA renegotiation. However, this "don't worry" approach may be premature. Though his tone may have changed, there is no indication at this point that his original intent with regard to labour and environmental standards and foreign investor rights has altered.

What the people think…

In the U.S., a May 1, 2008 Pew Research Centre poll found that 48% of Americans think free trade agreements such as NAFTA are bad, compared to 35% who think they are good; 61% think that they have destroyed jobs, 9% think they have created jobs, and 56% think they depress wages. A June 20, 2008 Rasmussen Reports national poll found

that 56% of Americans want NAFTA renegotiated, including 49% of Republican voters.

In Canada, a March 10, 2008 Angus Reid poll found that 45% of Canadians think the federal government should "do whatever is necessary" to renegotiate NAFTA; 24% think NAFTA should continue under its current terms, and 8% think Canada should do what it can to leave NAFTA altogether.

Finally, a June 2008 Strategic Council Globe-CTV poll comparing Canadian and American opinions found that 44% of Canadians think free trade has been bad for Canada; 43% think it has been good. This compares with 36% of Americans who think it's been bad for the U.S. and 46% who think it's been good for their country.

The Strategic Counsel expressed surprise at the Canadian results:

> Given the prominence of the issue in the U.S. in recent years, and especially in the presidential primaries, it's not surprising that opposition is high in that country. In Canada, with broad cross-party support for free trade and the almost universal buy-in from our media, government and business élites, the high level of opposition will surprise many. This is a sleeper issue among Canadians.[15]

The degree of Canadian public discontent with NAFTA, despite the relentless pounding of the NAFTA propaganda machine for the last 20 years, is truly remarkable. Imagine how much more widespread the discontent would be if inconvenient truths about NAFTA impacts or the actual contents of the Agreement were given a fair voice in the mainstream media.

Conclusion

Clearly, the Harper government and the Canadian business community do not want to renegotiate NAFTA. They especially don't want environment, labour, or investor issues on the table since it could mean a serious recasting of the NAFTA model. They want to advance their NAFTA-plus agenda defensively to reverse the thickening of the border, and offensively to push ahead with military and security integration, harmon-

ized regulations, laws and policies, a customs union, a North American dispute tribunal, etc.

A majority of Canadians, on the other hand, want to renegotiate or scrap NAFTA. As with many other public policy issues, the gap between élite opinion and that of the general public is wide, indeed.

Although not currently high on the list of Canadians' priorities, it could become a proxy for discontent, for example, around economic issues such as the loss of manufacturing jobs. The NDP is the only major national party calling for renegotiation. The Liberals might, if this occurs, jump on the renegotiation bandwagon, but the Chrétien flip-flop over NAFTA during the 1993 election could present credibility problems.

The items Obama put on the table — environmental and labour protections and investor rights — could benefit people in all three countries if they succeed in rebalancing power relations between corporations and citizens, between private interests and the public good.

However, they will meet with powerful resistance from entrenched corporate interests in all three countries. Obama may not have the will or determination to follow through and make a truly significant reform. In the face of other more pressing issues, NAFTA may take a back seat and changes may be disappointing. Nevertheless, progressive forces in Canada should embrace the renegotiation challenge.

Integral to building the case for renegotiation, as the 15th anniversary of NAFTA and the 20th anniversary of the FTA approaches, progressives should step up their efforts to educate Canadians about the failure of NAFTA within the broader frame of the failed neoliberal experiment: how it depresses wages, displaces jobs, exacerbates patterns of inequality, heightens insecurity, constrains the ability of governments to act in the public interest, and limits the scope of public services.

Progressives in all three countries should outline what a set of labour and environmental provisions should look like in a revised NAFTA. (Perhaps it should be renamed the North American Trade and Development Accord to signal a change in the model.) They should jointly call for the scrapping of the investor-state dispute mechanism, and they should call for the replacement of the SPP initiative with a dif-

ferent mandate: transparent, and with full participation of parliaments and civil society.

They should explore other common proposals for reshaping the terms of North American integration to curb the power of the corporations. These could include joint or complementary industrial policy initiatives to curb corporate offshoring of production and jobs, and measures to limit tax avoidance by corporations and the wealthy. They could include provisions that place a floor, preventing downward harmonization of environmental, labour, and social standards and social dumping, while providing incentives to jurisdictions to implement higher standards and protections.

Progressives in each country will also want put forward issues specific to their national reality. For Canada, the priority list would include:

- an end to proportional sharing of energy;
- exclusion of water from NAFTA;
- restoration of active industrial policy measures; and
- strengthening of government powers to protect and enhance public programs and services.

Progressives in all three countries should pursue, wherever possible, common or complementary strategies and policies. However, processes of continental integration (benign or otherwise) very quickly spill over into to the political realm, raising questions of nationalism, diversity, democracy, culture and values, especially for the smaller partners. How to achieve the right balance between national policy flexibility, autonomy consistent with democracy and international cooperation, and the strategic pooling of sovereignty is an ongoing challenge of our time. In the case of North America, the concept of pooling sovereignty, where one partner vastly outstrips the others in size and power and is congenitally averse to the idea, is challenging in the extreme.