Canadian Union of Public Employees

Submission to the Government of Canada on NAFTA renegotiations

July 2017

www.cupe.ca
1375 St-Laurent Boulevard
Ottawa, Ontario, K1G 0Z7
(613) 237-1590

The Canadian Union of Public Employees (CUPE) is Canada's largest union, representing 650,000 members across Canada. CUPE members work in health care, emergency services, education, early learning and child care, municipalities, social services, libraries, universities, utilities, transportation, airlines and more. We submit these comments to Global Affairs Canada in response to the call for comments on upcoming renegotiations of the North American Free Trade Agreement (NAFTA).

Since the implementation of NAFTA in 1995, trade has become a fault line not only in Canada but across North America. In Canada, many workers, especially those in industries covered by NAFTA, have experienced decades of job loss and wage stagnation. Similarly, American workers have seen a steep decline in their living standards and blame it on NAFTA. Meanwhile, Mexican workers are keenly aware that the central promise of NAFTA for them – that their living standards would reflect that of American and Canadian workers – has not materialized. The major beneficiaries of NAFTA have been transnational corporations that have been able to use the non-tariff related aspects of NAFTA to facilitate the frequent movement of capital, first within different jurisdictions within North America but also, more recently, to China, Vietnam and other even lower-cost countries.

While some believe that the problem lies with the low wages and poor environmental standards in Mexico, the truth is that these conditions are a direct result of an international trade policy that is designed to protect investors and investments even at the cost of wage suppression and environmental degradation. NAFTA, and the many international trade deals that have been signed since then, were not designed to strengthen the North American economy. International trade agreements like NAFTA are designed specifically to reduce "drag" from regulatory control on capital.

Governments at all levels have found themselves unable to maintain the post-war social contract between capital and labour – as NAFTA's impacts intensified in the wake of the global financial crisis of 2008, more and more jurisdictions within Canada and the US and Mexico stagnated economically. As job losses mounted, governments also chose to impose austerity budgets and cut services just at the moment when need for them was rising. As workers and their communities feel abandoned both by government and industry, rising inequality also fuels the anger that is manifesting itself in populist movements that range from Trumpism and the alt-right in the US to the Wildrose Party in Canada. Mexico is facing its own unique challenges, with the escalation of the drug wars, widely-reported human rights abuses and the increasing militarization of police.[1]

The system that NAFTA created is failing millions of workers and their communities across North America. These renegotiations may have been brought about because of the current American administration's understanding that people who voted for them are angry and disillusioned with the status-quo. Corporate trade experts have suggested publicly that the speedy fix to these renegotiations is to insert into NAFTA text that has previously been negotiated for the Trans-Pacific Partnership (TPP).[2] But this would be a mistake: more of the same prescription of trade liberalization will do nothing to address the concerns of millions of angry workers who feel betrayed by NAFTA.

We need a bold new vision of an alternative model of tri-national trade and cooperation that meets the needs of workers and builds solidarity across our shared continent. This can only happen through an open and transparent consultation process in which stakeholders from different groups, including labour, civil society, industry and Indigenous peoples are engaged. Consultations, in order to be truly meaningful, have to be open-ended so that decisions are made with full consent from all of these parties. While we appreciate the opportunity to present our views here to Global Affairs Canada, and will participate in the labour consultations, we do feel that they are inadequate and occur within unhelpful silos.

---

1 http://www.refworld.org/docid/46f146860.html

2 http://www.cbc.ca/news/politics/trump-nafta-renegotiation-explainer-1.3945006

There is an opportunity here for the Canadian government to enter into these negotiations with substantial proposals that address the needs of working people and the environment. It is also critical that Canada commits to ensuring the protection of current public services as well as the preservation of the policy space to provide for other public services in the future. If Canada wants to be part of the solution, we need to go into these negotiations with an intent to actually remake NAFTA so that it is not simply a slightly mitigated bill of corporate rights but instead becomes the blueprint for a more equal and more internationalist project that will build solidarity across our borders. Going into these negotiations requires that Canada does not partake in the frankly racist rhetoric emanating from the United States, that Mexico is somehow the problem.

In what follows, CUPE offers up specific principles that we believe must be followed in drafting language and proposals to bring to the negotiating table.

- Any new or renegotiated agreement should not include extraordinary protections for investments and investors that allow them to bypass domestic courts.
- Public services, including but not limited to health care, water and wastewater, and energy, must be fully exempt from any services chapter.
- Policy space for future services should be protected within all chapters.
- Sub-national procurement, including Indigenous government procurement, should be exempt from the procurement chapter.
- Negotiate an end to the energy proportionality clause.
- Reserve public policy space to support hydroelectricity and other renewable sources of energy.
- Exemptions for cultural productions, including requirements for Canadian content and Quebec/French language cultural production.
- US and Mexico should be pressured to ratify and enforce all eight ILO fundamental conventions.
- Labour and environmental legislation that is already on the books in all three countries should be enforced consistently.
- Any renegotiations should be conducted in a manner that is transparent, and consultative with all stakeholders including civil society.
- And the right of Indigenous people to free, prior and informed consent on any measures that impact them should be respected.

In what follows, we offer our reasons and more sustained analysis for the brief principles outlined above.

Investor State Dispute Settlement

NAFTA includes an Investor to State Dispute Settlement (ISDS) system because American and Canadian negotiators thought that they needed to ensure protections from corrupt Mexican courts for foreign investors. As it turned out, they were spectacularly wrong: the extraordinary rights that investors are guaranteed in Chapter 11 have mostly been exercised against Canada, by American investors.

The only principled position to take on investment protections is to omit them from any renegotiated agreement. Domestic courts should be strengthened where necessary to handle any commercial disputes that may arise between investors or between investors and regulators or governments. It is imperative that we do not follow the mistakes made in CETA and the proposals in the TPP that would further entrench the ISDS system.

Analysis compiled by the Canadian Centre for Policy Alternatives (CCPA) demonstrates that Canada has been sued 35 times between 1995 and 2015.[3] Scott Sinclair, Director of the CCPA's Trade and Investment Research Project, notes that these ISDS challenges against Canada make up 45 per cent of the total number of Chapter 11 complaints under NAFTA. In contrast, only 22 claims have been filed against Mexico and 20 cases have been filed against the US.

Canada has been forced to pay out more than $170 million to settle some of these cases. Some of the settlements that Canada has been forced to accept include changing democratically enacted regulations and legislation. It is wholly unacceptable for democratic decisions taken by elected Canadian representatives to be overturned at the behest of unelected, unaccountable trade and investment lawyers who also act as the adjudicators for ISDS panels. The most outrageous of these cases may well be the recent claim by Lone Pine Resources Inc. (a Calgary-based company that is also registered in the US) against the Quebec government's moratorium on fracking.

Canada also spends millions of dollars fighting these cases, in addition to any money that is paid out as penalties. The CCPA estimates that to date, Canada has spent over $65 million dollars defending against ISDS cases. Further, about 63 per cent of the claims against Canada involved challenges to environmental protection and there are currently eight cases against the Canadian government asking for a total of $6 billion in damages. All of them were filed by US companies.

Many of these current challenges involve domestic environmental protections such as the promotion of renewable energies, a moratorium on offshore wind projects on Lake Ontario and Nova Scotia's decision to block a contentious mega-quarry.

It is worth noting here that Mexico has had a similar experience to Canada's with regard to ISDS cases and high-dollar payouts to transnational corporations. At the same time, the United States has won 11 cases and has never lost a NAFTA investor-state case.

Public services

Public services need to be fully protected in any renegotiated agreement. Current protections for public services in NAFTA, as contained in Annex II, are inadequate. They do not cover water and wastewater, for example, or public transit. It is also important to have a carve out a place for future services since it is impossible for us to know at this point what technology may bring forth over the next decades. Carve-outs for the kind of telecommunications technology that we take for granted now, such as internet access, would have been unforeseeable 25 years ago, when NAFTA was being negotiated. In this vein, Canada needs to preserve the policy space to create and protect new and innovative public services.

NAFTA currently includes some protections for Canadian health care. But the growing privatization of health care in Canada is itself a cause for concern since the exemption in NAFTA is based on health care being a public monopoly. As Danielle Martin and Sandro Galea wrote in the *Globe and Mail* recently, "If strong provisions that exclude health care from free trade are not maintained, and in fact strengthened, in any renegotiated trade agreement, American insurance companies and health care delivery organizations could claim the right to a Canadian private health care 'market'."[4] The Canadian government should act during these negotiations to ensure that Canada's public health care will not be opened to foreign private sector health care providers, under any circumstances.

---

[3] https://www.policyalternatives.ca/publications/reports/nafta-chapter-11-investor-state-disputes-january-1-2015

[4] https://www.theglobeandmail.com/opinion/whats-at-risk-for-canada-in-the-america-health-care-war/article34914244/

These protections must also extend to protecting the right of any country to bring services into the public sector. For Canada, it is necessary to ensure that patent protections in NAFTA do not increase the terms of data and patent exclusivity for brand-name pharmaceutical products and for medical devices. Extensive periods of patent and data exclusivity make it prohibitively expensive to add such products to public formularies and to institute public pharmacare programs. It is critical that any new agreement preserves the space for the public provision of health care, broadly defined, including pharmacare.

Protections for public services must be written in such a manner as to ensure that policy related to public services cannot be challenged as trade or investment barriers. Governments at all level are responsible for the provision of services to their constituents; but as it currently stands, decisions they make to ensure universal or accessible service provision can be challenged by investors as barriers to investment or trade. This is especially true when governments consider reversing privatization. These concerns have to be addressed during these renegotiations.

Here again, relying on text and language that was negotiated for the TPP and for the CETA is not a solution. CETA already concedes far too much on intellectual property to European corporations. And the language in the TPP mirrors the language in CETA. Any renegotiations of NAFTA have to produce transparent and clear language that protect Canada's ability to strengthen and expand public services as well to defend current services.

Procurement

NAFTA's procurement commitments only apply to federal governments. In Canada, approximately $20 billion worth of goods and services procurement is open to US and Mexican suppliers. The procurement rules in NAFTA essentially require that the federal government cannot prioritize Canadian suppliers or include considerations like local economic development in the tendering process for goods and services, including construction services. The levels at which these commitments kick-in are also very low: they range from $25,000 for goods for US suppliers to about $56,000 for Mexican suppliers. Services and construction thresholds are higher but these thresholds all fall well below the thresholds for the World Trade Organization (WTO)'s multilateral Agreement on Government Procurement thresholds, for instance.

The only positive here is that NAFTA's procurement commitment do not extend to governments or governmental entities at the provincial, territorial or municipal levels. Our understanding is also that they do not apply to Indigenous governments.

The US has always been interested in gaining access to subnational procurement in Canada with absolutely no interest is reciprocating with access to procurement at state and municipal levels. Access to the subnational procurement market in the US will not result in huge benefits to Canadian companies. Even ardent proponents of free trade like the Canadian Manufacturers and Exporters Association admits that few Canadian businesses are in a position to take advantage of the opening up of the European market in terms of CETA; the same would be true of NAFTA.[5] Free trade agreements are often negotiated on the basis of market potential but given the vastly different capacity between Canadian and US capital, access to potential markets does not make for an even playing field. The most likely scenario, were Canada to negotiate any form of reciprocal subnational procurement, is that American corporations would be in far better positions to bid for Canadian contracts than Canadian companies would be to bid for US contracts.

[5] http://business.financialpost.com/news/most-small-canadian-companies-not-ready-to-take-advantage-of-ceta-say-experts/wcm/3f90b7df-fc33-4525-b7f7-950a23a57815

It is far more important to preserve the ability of subnational entities in Canada to be able to use some discretion in awarding contracts.

Subnational procurement in Canada is worth approximately $18 billion annually and is likely to rise exponentially as the federal government rolls out promised infrastructure funds. This infrastructure funding could be leveraged by local communities to create employment, diversify their economies and extend training opportunities to under-represented groups of workers in Canada. It is a once-in-a-generation opportunity.

Culture

It is difficult to overstate the importance of the need for Canadian cultural productions to be protected, given how Canadian identity is formed in the context of a globalized popular culture that emanates from the United States. For Canada to maintain a sense of self as distinct from Americans, it is critical to have ourselves – in all of our diversity – be reflected back to us through our cultural productions. Indigenous culture, especially indigenous languages, are at risk, and it is doubly important to make sure that First Nations, Metis and Inuit peoples are appropriately consulted on the issue of the protections that they may want for Indigenous cultural production.

Canada must maintain NAFTA's current general exemption for culture which allows for provinces and the federal government to promote Canadian artists and local production, while also ensuring that governments have the flexibility to protect cultural diversity and Canadian content. Cultural production is also an important driver of employment. This is particularly true in Québec, where culture represents 4 per cent of GDP and where francophone content must compete with the endless barrage of content from the US that is mostly in English.

If we use the TPP negotiations as a barometer, we can assume that the US will attempt to weaken the exemption for culture so as to curtail the federal government's ability to regulate online content. Canada did try to negotiate a similar general exemption in the TPP, but ended the process by accepting two exceptions to the general exemption: (1) not to impose a levy for the Canadian Media Fund on web-based broadcasters and (2) not impose any measures that could limit access to online audio-visual content. With the exponential rise of web-based services like Netflix, and Hulu, it is essential to avoid including any such exceptions to the current general exemption to ensure the survival of our homegrown industries and producers.

While exception (1) provides a fiscal advantage to web-based or foreign-based broadcasters and content producers, exception (2) eliminates all possibility of establishing a fair, cross-sector, taxation system for culture which would even the playing field between local broadcasters and web-based broadcasters, as the latter pay no sales taxes or income taxes. This is not only an unfair advantage for web-based services, but also shrinks the tax base required to fund the public services that Canadians depend on. Canada needs to stay vigilant to ensure that this sector, as well as the many workers in it, are protected.

Energy

Discussions around energy and NAFTA seem to invariably lead to debates about pipelines and the energy proportionality clause that Canada agreed to with the US. There has been heated debate in Canada about whether Chapter 6 (Article 605) of NAFTA is an affront to Canadian sovereignty. From the very beginning, part of the robust opposition to NAFTA was driven by the sense people had that Canada was giving up the ability to govern itself in its best long-term interests to make short term gains in the form of access to American markets. As Gordon Laxer writes "Thirty years ago, it was believed that the world had plenty of easy oil. Few had heard of the impending climate-change disasters.

Most Canadians felt they had boundless energy resources that could be tapped at will without major environmental costs. It made sense too many to give the United States unrestricted access to our vast energy resources."[6]

But given the changes to our own energy security needs, technology and our understanding of climate change, this is not the case any longer. Canada's oil is no longer considered an energy resource that can be tapped without causing major – and global – climate damage.

These renegotiations offer Canada a chance to negotiate an exemption from this energy proportionality clause. Mexico negotiated an exemption to this clause in 1995. Mexico's relationship with its energy sector is different from Canada's, given the historical connection between the nationalization of the sector and the formation of modern Mexico.[7] Though there has been significant privatization of the sector since NAFTA was signed, Mexico is no more likely to sign onto the energy proportionality clause in 2017 than they were in 1995 so this is an issue that is solely to be negotiated between Canada and the United States. Canada's position should be that the concept and the specific text around energy proportionality be removed from NAFTA in its entirety.

Specifically, CUPE recommends that Canada consider production and export of hydroelectricity as important for maintaining our national energy security and meeting our green energy production goals. While Canada exports nine per cent of our hydroelectric generation to the United States, it is important for Canada to be able to balance its energy production as it reduces dependence on carbon intensive energy and increase in domestic electricity demand.

For Canada to meet its commitments under the Paris Treaty and maintain its economy, it must have flexibility to negotiate, develop and support a just transition in the sector.

Public ownership, investment, and procurement must be a cornerstone of Canada's guiding principle on energy going into these renegotiations. Current NAFTA language undermines a holistic economic and social view of just transition in the sector. Canada needs to negotiate an end to the energy proportionality clause and preserve our public policy space to support hydroelectricity and other renewable sources of energy.

Labour and Environmental Protections

NAFTA's most significant impact has been to facilitate the flow of capital to such an extent that states and provinces and even municipalities within Canada, the US and Mexico are competing between themselves for investment. Far from creating a more equal continent that can then trade with other regional groupings like the European Union, NAFTA has dragged down wages and environmental standards within North America. In "NAFTA at 20: State of the North American Worker," economist Jeff Faux notes that the agreement has "depressed wages, weakened unions, and set the terms of the neoliberal global economy."[8] Right to Work legislation is now in place in 29 states in the US, often brought in by legislators who claim that they are trying to compete with other, cheaper jurisdictions.[9]

The skew in NAFTA is obvious: investments and the rights of investors are offered extraordinary protections through the ISDS process. But violations of workers' rights – endemic in Mexico, but also common in the US – have no such protections. On the environmental front, the effects of climate change are becoming ever more severe.

---

6 https://www.theglobeandmail.com/report-on-business/rob-commentary/if-were-renegotiating-nafta-lets-be-ready-to-walk-away/article31609876/

7 https://nacla.org/article/selling-public-sector-latin-america-reacts-mexico-lights-out-electric-company-sale

8 http://fpif.org/nafta-20-state-north-american-worker/

9 http://www.cnbc.com/2015/05/29/the-right-to-work-battle-has-reached-a-tipping-point.html

At the same time, NAFTA has meant, as Cameron Parsons writes, that "environmental damage has grown and continues to grow along the US/Mexican border at the expense of both the economic benefits of liberalized trade and the health of populations on both sides of the *frontera*."[10] There are no mechanisms to hold investors who exploit workers or those who cause environmental degradation accountable.

The Canadian government needs to take the opportunity presented by these renegotiations to ensure that any new agreement protects the interests of working people and the environment.

This does not simply mean that labour rights and environmental rights should also be subjected to parallel arbitral systems like the Investor to State Dispute Settlement (ISDS) system. The solution to the unenforceable, and purely aspirational commitments made to labour and environmental protections in the NAFTA is not to set up more extra-judicial systems that purport to be more independent than our domestic courts.

Instead, Canada must propose measures that will lead to more robust protections for workers and the environment, and have these safeguards be enforced by domestic courts. We should never be in a position where hard won domestic standards of labour rights and environmental protections can be subject to ISDS challenges but we also do not want to be in a situation where jurisdictions within North American are undercutting each other to attract investment.

The minimum standard that Canada should insist upon for workers' rights should be that all three countries need to sign onto and agree to enforce the ILO (International Labour Organization)'s eight Fundamental conventions. Since Canada has just signed onto Convention 98 (the Right to Organize and Collective Bargaining Convention, which will enter into force in June 2018), we are finally signed onto all eight fundamental conventions. It is in our interest to make sure that the US and Mexico sign onto and enforce all these conventions too. The US has only signed onto two of the fundamental conventions. In the case of Mexico, which has ratified seven of the eight conventions, the key is enforcement. It is best for all of North America to be bound to the same transparent and reportable international standards set by the ILO.[11]

Further, given the high-level of concern that exists about the low standards of environmental and labour rights in Mexico, Canada must also do its utmost to ensure that Mexico is actually in a position to enforce its already existing legislation on labour standards and on the environment. This might involve offering support to Mexican governments and agencies as well as putting in place mechanisms to ensure that investors from Canada do not pressure local authorities to not enforce legislation, regulations or standards. There is ample evidence to show that while a good deal of excellent legislation in on the books in Mexico, pressure from investors in the US and Canada tempers enforcement.[12]

Conclusions

In the 23 years since the North American Free Trade Agreement (NAFTA) was signed, Canada has lost hundreds of thousands of manufacturing jobs, and our communities have suffered from these losses. In the sectors and pockets of the US and Mexico that have been hardest hit by NAFTA, there is growing public anger toward globalization and international trade deals that range from NAFTA to the TPP and CETA.

---

[10] https://library.brown.edu/create/modernlatinamerica/chapters/chapter-12-strategies-for-economic-developmen/nafta-free-trade-and-the-environment-in-mexico/

[11] http://www.ilo.org/global/standards/lang--en/index.htm

[12] See *Continental Crucible: Big Business, Workers and Unions in the Transformation of North America*. Fernwood Publishing, 2013.

Globally, the anger against this model of international trade was most visible recently in the demonstrations in Hamburg, during the G20 meetings. Much of this anger also comes from the fact that ordinary working people do not feel that they are adequately consulted or represented in the secretive processes through which international trade agreements are negotiated.

The promise of free trade was that it would create millions of new jobs, lower consumer prices and raise living standards across North America. To state the obvious, that has not happened, though a small number of individuals and some corporations have seen immense profits. But many people, including the US President, seem to believe that well-paying, middle class manufacturing jobs in the US and Canada have "been stolen" by Mexico. The hard truth, however, is that Mexico has not benefited greatly from NAFTA either: wages there are still a fraction of the wages in Canada and the US, and unemployment levels remain high. In fact, Laura Carlsen, Director of the Americas Program at the Center for International Policy, argues in the *New York Times* that "NAFTA has cut a path of destruction through Mexico."[13]

It is also important that Canada ensure that there is a process for full consultation with First Nations, Inuit and Metis communities regarding NAFTA renegotiations and any implications this may have for them. Article 19 of The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) requires that "States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." Given how far-reaching NAFTA has been to date, it is important that Indigenous stakeholders are at the table for all these discussions.

CUPE opposed the negotiation and implementation of NAFTA in the 1990s because we believed that it would jeopardize the standard of living for Canadian workers, without doing much to enhance the standard of living for Mexican workers. Regrettably, our analysis was accurate for many workers in all three NAFTA countries.[14] But we recognize that this current renegotiation process is an opportunity for the Canadian government to fundamentally remake NAFTA. It is still possible to create a new model of alternative trade and cooperation that works for all of North America, that does not encourage investors to sue governments, that protects public services, that respects human and labour rights, and that raises living conditions in all three countries.

We hope that the Canadian government will ensure that any renegotiated agreement meets these standards.

:cope491

[13] https://www.nytimes.com/roomfordebate/2013/11/24/what-weve-learned-from-nafta/under-nafta-mexico-suffered-and-the-united-states-felt-its-pain

[14] http://policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/lessons_from_nafta.pdf