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RE: Consultations on the Renegotiation of the North American free trade agreement (NAFTA)

What should be the goals of free trade?

NAFTA, despite being a deeply flawed agreement, has become a template for free trade and bilateral agreements around the world. As the number of agreements have multiplied, so too have the problems arising from the form and structure of NAFTA. It is time we rethink how we structure free trade. Trade isn't just about the export and import of goods and services. Trade agreements also impact human rights, labour standards, cultural diversity, environmental laws, and even constitutional rights. Hewers of wood, drawers of water - Canada's longtime international reputation - was to be reformed under NAFTA. Now, many Canadians and public policy think-tanks admit that the trilateral integration has not lived up to its promises of widely-shared income benefits and increased productivity.

As our Prime Minister acknowledges: "What we're facing right now – in terms of the rise of populism and divisive and fearful narratives around the world – it's based around the fact that globalisation doesn't seem to be working for the middle class, for ordinary people."



Where I think we disagree, and has been apparent from the Prime Minister's recent decisions to sign and implement the Canada-European Union Comprehensive and Economic Trade Agreement (CETA) and push for the Trans-Pacific Partnership (TPP), is that the Prime Minister believes the problem is in style, not substance. He believes the positive impacts of globalization are not being effectively communicated to the middle class. The Green Party, on the other hand, believes that there are simply not as many positive outcomes of free trade, as currently structured, as there are drawbacks. Free trade can't simply be seen to work better for Canadians - it has to actually work better.

Current Problems with NAFTA

Chapter 11: Investor-State Dispute Settlements

Chapter 11 of the agreement has been interpreted so broadly as to be nearly unrecognizable in its enforcement in comparison to its original intent. Let's not forget that foreign investment protection agreements (FIPAs), as they are now commonly referred, were devised as a mechanism to protect Canadian and American investors from the Mexican justice system, which at the time was seen as susceptible to corruption and political interference. The Mexican justice system has since undergone substantial reforms. We now deal routinely with large agreements, as in the case of CETA and the TPP, that involve industrialized countries bound by the rule of law, with no reasonable prospect of expropriation of property. Canada need no longer act as prime protector of Canadian investment abroad.

The reality of the arbitration system as currently structured is that the Canadian government is the most sued under Chapter 11 provisions, the majority of which are not for violations of article 1110 (direct or indirect expropriation) but rather the use of other articles to challenge environmental protection, resource management and health care. As of 2015, nine active Investor-State Dispute Settlement (ISDS) claims places Canada liable for over \$6 billion in alleged damages. And Canadians should be concerned about losing these cases - Canada is notoriously unsuccessful in tribunals, with claimants being successful in 46% of claims against Canada.

Yet proponents of ISDS continue to make erroneous assurances that, as the Parliamentary Secretary of Trade, David Lametti, recently said of CETA, "Nothing .. prevents governments from regulating in the public interest to protect or promote public health, social services, public education or the environment. This principle, which is well recognized in international law, is clearly set out in the CETA text."

The reality is that ISDS mechanisms lead to regulatory chill. As Professor Gus Van Harten explains succinctly : "Corporate giants and the super-rich, alongside the ISDS legal industry,



have been the main beneficiaries of ISDS by far, at significant expense and opportunity cost to countries and to those who would have benefited from laws and regulations that were deterred by ISDS."

Removal / Clarification of Chapter 11

There are those who claim that recent jurisprudence suggests a limiting of the interpretation and scope of the NAFTA tribunals. In fact, the opposite is true. While the recent decision in the long-awaited Eli Lilly Case went in Canada's favour, the implication was that had Lily's claims not been as baseless as they were, the tribunal could have ruled in their favour. As the tribunal pointed out in its conclusion, it could not find allegations of arbitrariness or discrimination because there was no "fundamental or dramatic change in Canadian patent law." As Michael Geist, professor of Law at the University of Ottawa, puts it: "While Eli Lilly failed in its efforts to use the dispute settlement system to extract hundreds of millions from Canadian taxpayers, the dangers of the system remain a reality ... as new trade deals are negotiated or renegotiated, should rethink the need for investor-state dispute settlement provisions in agreements with countries with respected court systems that offer investors sufficient protections and reliable legal recourse."

The ISDS provisions in NAFTA are deeply flawed. Any renegotiation of the agreement must have at its fundamental core the goal of limiting the potential of ISDS tribunals to intercede on Canadian sovereignty by deterring or chilling the exercise of lawmaking power. The Green Party advocates for wholesale removal of Chapter 11 from the agreement, or at the very minimum, a limiting of investor protections. Investors should be protected from threats of expropriation, but it is unreasonable and over broad to protect their profit-loss at the expense of taxpayers.

Water

Of the threats to Canadian sovereignty posed by NAFTA, the agreement's stipulations with regards to water are of chief concern. NAFTA threatens Canada's control over our water - classifying Canadian freshwater as a good or service capable of being exported for a price.

This characterization was summed up by then Assistant Deputy Attorney General Mr. Konrad Von Finkenstein, who testified to the House of Commons Legislative Committee on the NAFTA implementation bill in 1993: "... if you trade water in its natural state you put in tanks, or bottles, or something and sell me freshwater that you've taken out of a well or something like that, then you are indeed trading in water and it's then a good and is covered by the GATT, by the FTA, or by the NAFTA ... Water is no different from any other resource." We disagree. As stewards of 9% of the world's renewable water, we cannot simply treat it like any other resource.



The issue of freshwater will only become more vital as we face the effects of climate change and the accompanying scarcity of water resources. We must act to enshrine, enforce and strategically implement the 1987 Federal Water Policy to meet the requirements of sustainable water management - equity, efficiency and ecological integrity. We must remove all mentions of water as a good from NAFTA, in addition to passing federal legislation to prohibit bulk water exports, building on the current law banning exports from trans boundary basins. Canada can also work to ensure the removal of similar language from CETA, and other trade deals based on the NAFTA template.

Resources

Raw Logs

Donald Trump may be the loudest sabre rattler on NAFTA, but it was under Barack Obama that Canada failed to reach an amicable settlement to the long lingering softwood lumber dispute. Thousands of jobs and dozens of mills are under threat without an agreement. Canada's forest heritage - 300 million hectares or 10% of all the world's forests - is on the line.

Canada has the power to defend our forestry industry. We must cease the practice of exporting raw logs, and focus on keeping value-added jobs in Canada by implementing a substantial whole log export tax. And throughout the process of renegotiation, Canada must work toward a management strategy for our forests with long-term, environmental sustainability as a priority.

Energy

While energy lobbyists and others have advocated that the NAFTA provisions touching the energy sector shouldn't be altered, the Green Party believes it must be a part of the renegotiations. Canada's need for an energy reserve and its own long-term energy security must be recognized. Export controls must be allowed in the context of domestic environmental frameworks, especially in light of the recently agreed to Pan-Canadian Framework on Clean Growth and Climate Change.

Commission for Environmental Cooperation

NAFTA's Commission for Environmental Cooperation (CEC) has been effective, though slow, in holding all three NAFTA countries to account on issues of environmental stewardship. Some have suggested the future of the council is in jeopardy due to recent Trump cuts to the Environmental Protection Agency. Despite this more recent development, it's been Canada, not the US, that has been threatening the credibility and effectiveness of the Commission. During a period of one year under the former Harper administration, the Canadian government successfully stopped three separate CEC investigations into Canadian misconduct, including BC



salmon farms, polar bear protection and Alberta's tailings ponds. Renegotiation serves as an opportunity to not only redouble our commitment to the principles of the CEC, but also to protect and strengthen the Commission by putting into place mechanisms to ensure the Commission operates free from political interference.

Health Care

The threat of a NAFTA challenge from the American for-profit health care industry cannot be over-estimated. Allowing further for-profit health care schemes to operate in Canada will be the 'thin end of the wedge' that could jeopardize our entire health system. Based on the rules for 'national treatment,' if Canada allows increasing numbers of for-profit facilities, we run the risk of losing our entire universal single-payer system in a single NAFTA challenge. We cannot take that risk. As Dr. Danielle Martin, vice-president at Women's College Hospital Toronto, recently framed the issue: "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."

Canada's Dairy Industry

Canada needs to ensure that supply management is defended and protected. One key reason has to do with human health and the health of dairy cow, namely that Canada rejected regulation of the Monsanto product, Bovine Growth Hormone (BGH). Competition between US dairy products and Canadian dairy products will inevitably lead to the approval of BGH in Canada, unless we reject changes. We must be very clear - any US dairy products allowed into Canada must be free of BGH. Canadian regulators found that the health risks were too high. This aspect of Canadian dairy supply management must be advocated forcefully by Canada's negotiators.

Solidarity with Mexico

Canada may not be in the cross-hairs of the US Administration, but Mexico surely is. Mexico's economy underwent a far more radical transformation than Canada's due to NAFTA. The Maquiladora areas set up under NAFTA have created pollution havens. The diesel truck exhaust has negatively affected the health of Mexican children along heavily trafficked routes. The dumping of US corn in Mexico undermined local agriculture and led to a movement of displaced growers to urban areas.

Mexico must not be abandoned by Canada. We should use our economic influence and clout to help protect the economy and people of Mexico.



The Possibilities and Perils of Renegotiation

As Canada enters a renegotiation of NAFTA, we have an important opportunity to address the negative impacts of the agreement. As President Trump rejected the TPP, perhaps he is open to removing the ISDS provisions from NAFTA. Protecting legitimate economic activity while removing perverse elements of NAFTA is a winning formula that may give the US President what he craves in populist approval domestically, while protecting the significant and symbiotic trade linkages between Canada, the US and Mexico. Canada's success in these renegotiation talks depends on standing up for Canada – acknowledging that not all of NAFTA was ever to our benefit.



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