UNITED STEELWORKERS USW MÉTALLOS

NAFTA Consultations

Global Affairs Canada

Trade Negotiations – North America (TNP)

July 18, 2017

Introduction

The United Steelworkers is one of Canada's largest industrial unions, representing more than 225,000 workers across the country. We are one of Canada's most diverse unions, representing men and women working in every sector of Canada's economy including mining, forestry, healthcare, education and telecommunications. We thank Global Affairs Canada (GAC) for initiating these stakeholder consultations as it makes plans to enter into NAFTA renegotiations with the U.S. and Mexico. We hope that the government will continue to consult Canadians, including trade unions, First Nations and other civil society groups as it develops and pursues this and other trade policy initiatives.

23 years after NAFTA entered into force, it is clear that the agreement has failed workers in all three NAFTA partner countries. Although, as the Canadian government is quick to note, trade volumes have increased dramatically in the post-NAFTA era, inequality has also increased and real wages have stagnated or, in the case of Mexico, fallen further behind.[1] In Canada, NAFTA imports destroyed more jobs than exports created – by 1997 already the net destruction of jobs had reached 276,000 and Statistics Canada data shows that another 540,000 manufacturing jobs have been lost since 2000. Moreover, evidence indicates that it is large corporations and multinational investors that have gained the most under NAFTA. Corporate merger activities, enabled by NAFTA, have contributed to the expansion of large transnational firms, which has

[1] See, e.g., Robert E. Scott, Jeff Faux and Carlos Salas, "Revisiting NAFTA: Still Not Working For North America's Workers," Economic Policy Institute, 2007.

heightened income inequality and redistributed income, wealth and power in the hands of wealthy investors and corporations.[2]

The Mexican experience has been particularly disappointing under NAFTA. In Mexico, poverty has risen since NAFTA's implementation in 1994 and economic growth and real wages have stagnated. Although Mexican workers have become more productive, wages have not risen in response. Mexican manufacturing productivity has increased by 80 per cent over 1994 to 2001, but total compensation declined by 20 per cent over that same period. Agricultural liberalization has displaced nearly five million family farmers, driving Mexico's poor toward migration to the United States. Mexican workers, to use Donald Trump's rhetoric, have not been the big winners from NAFTA.

In two critical respects, these negotiations will be characterized by a dynamic that differs significantly from all previous international trade negotiations in which Canada has been involved. First, whereas countries usually launch trade negotiations as a means to expand access to foreign markets, the U.S. administration comes to negotiations with a mandate to restrict access to domestic markets it wishes to protect. Second, President Trump's fixation on bilateral trade balances, especially U.S. trade deficits, belies a zero-sum, or relative-gains view of trade negotiations. This stands in stark contrast to the prevailing liberal economic view, which is also the view of the current Canadian Liberal government, that trade liberalization is an admirable end in and of itself.

[2] Brennan, Jordan, (2015) Ascent of Giants: NAFTA, Corporate Power and the Growing Income Gap. (February 9) Canadian Centre for Policy Alternatives: Ottawa.

Minister of Global Affairs Chrystia Freeland has referred to these negotiations as a "modernization" of NAFTA, which is a gross understatement. In truth, the U.S. negotiating approach still remains unpredictable and top U.S. leaders have sent mixed messages about both the content and scope of the U.S. negotiating priorities. After a February meeting with Prime Minister Trudeau, President Trump spoke about "tweaking" NAFTA. More recently, however, he has talked about subjecting NAFTA to a "massive" renegotiation.

At the same time, we have heard very little in the way of public statements from the Canadian government regarding what it hopes to achieve in a renegotiation of NAFTA. In this regard, both U.S. Ambassador McNaughton and Minister Freeland have stated to the press that it would be strategically foolish to telegraph our priorities unnecessarily to the Americans. There is some truth to this view. However, such strategic calculations should not preclude transparent and open discourse with the Canadian public on the government's trading priorities.[3]

We note, for instance, that these consultations conclude only one day after July 17, 2017, the date on which U.S. Trade Representative (USTR) Robert Lighthizer has said the administration will come to Congress with its formal negotiating objectives as required under Congressional Trade Promotion Authority. Reports have also stated that

[3] In his criticisms of the previous government's approach to trade negotiations for the Trans-Pacific Partnership, Prime Minister Trudeau said in 2015 that, "[t]he Harper Conservatives have failed to be transparent through the entirety of the negotiations … Canadians deserve to know what impacts this agreement will have on different industries across our country." We believe the Liberal government should be held to a similar standard.

formal negotiations are scheduled to begin in mid-August, which unfortunately leaves practically little time for Canadian stakeholders to provide meaningful public input on the parties' detailed bargaining priorities heading into formal negotiations.

Reports also suggest that both Mexico and the United States are in a hurry to get a deal done before Mexican presidential elections in July 2018 and U.S. congressional mid-term elections in the fall of 2018. There is a sense of urgency here which is unwarranted and, in our view, potentially harmful to Canadian interests, given the important role that the North American trilateral relationship plays in the Canadian economy. From the USW's perspective, the Canadian government should not feel compelled to negotiate quickly to satisfy the domestic political concerns of its trading partners.

More troubling in this regard, however, are confirmed reports that the United States will view agreements made as part of the Trans-Pacific Partnership (TPP) negotiations as forming the starting position for NAFTA negotiations. As USTR Robert Lighthizer recently said, "I believe that in negotiating a new trade agreement we should learn from, and build on, earlier negotiated trade agreements. In the case of NAFTA and TPP, there is much in TPP that goes well beyond NAFTA. … So, in a renegotiation of NAFTA, we should consider incorporating those provisions as well as improving areas where we may be able to go beyond TPP."[4] As we note in specific instances below we

[4] Lighthizer, Robert (2017) "Responses to Questions for the Record" *U.S. Senate, Committee on Finance*. March 27.

also state here as a general principle: the Canadian government must resist U.S. efforts to incorporate the disastrous TPP into the NAFTA.[5]

As Scott Sinclair at the Canadian Centre for Policy Alternatives (CCPA) argues, Canada should not bargain to save NAFTA at all costs. Were Trump to exercise his threat to tear up NAFTA, the results would not be catastrophic since World Trade Organization (WTO) bound tariff rates would still apply. Under that scenario, Canadian exporters could face an additional US$3.5-5 billion in customs duties, equivalent to the value of 1.25 to 1.8 per cent of current exports.[6] This outcome would not be ideal, of course; but it certainly would not be disastrous either. What would dissolve in this scenario, however, are NAFTA's myriad corporate and investor rights provisions, which benefit multinational business while undermining democratic policy-making in the public interest.

That said, the USW is not advocating for a dismantling of the NAFTA agreement. We believe that Canada should come to the table with the ambitious objective of expanding, improving and strengthening NAFTA in a way that protects workers, democracy and the environment. We will measure the success of these negotiations by a standard that asks: Does it prioritize good jobs? Does it safeguard democracy? Does

[5] See, for example, Neumann, Ken (2016) "Submission by United Steelworkers to the Standing Committee on International Trade regarding the Trans-Pacific Partnership (TPP)" *House of Commons, Standing Committee on International Trade*. May.
[6] Sinclair, Scott and Pierre Laliberté (2017) "What is the NAFTA Advantage?" *Canadian Centre for Policy Alternatives.* June 27.

it elevate and effectively enforce workers' rights and environmental standards? And, does it eliminate excessive corporate privileges?

The Canadian government has said that it wants to pursue a new generation of "progressive" trade deals. Since NAFTA has served as the template for nearly all other trade agreements outside of the WTO/GATT framework, these NAFTA negotiations provide the Canadian government with the opportunity to demonstrate to the world how a "progressive" approach to trade policy can be used to benefit workers, communities, citizens and the environment instead of only benefiting corporations and transnational capital.

In summary, we argue that, towards a NAFTA renegotiation, the Canadian government should:

i. prioritize enforceable and binding labour rights and standards
ii. increase *regional* "rules of origin" requirements
iii. eliminate Chapter 11 Investor-State Dispute Settlement (ISDS)
iv. include stronger provisions to protect public services
v. include binding and enforceable environmental standards
vi. reinforce the regulatory autonomy of democratically elected governments
vii. resist pressure to eliminate or weaken Chapter 19 (binational review)
viii. resist "Buy American" provisions and improve access to Canadian and regional procurement markets

ix. achieve a fair and balanced softwood lumber settlement before commencing NAFTA negotiations
x. improve trade enforcement among all three NAFTA parties

In the pages below we discuss these issues in greater detail and make specific recommendations for improvement. This list is not exhaustive; but we believe these are the areas of the agreement where the Canadian government can practically work with its partners to effect meaningful change that will benefit workers, consumers and citizens.

i) The Canadian government should prioritize enforceable and binding labour rights and standards

The most important and, in our view, achievable reform to NAFTA that should be pursued by Canadian negotiators is the inclusion of binding labour rights and enforceable labour standards in the body of the treaty. From the USW's perspective the labour side agreement as written must be scrapped and replaced with truly effective and robust protections for workers in all three countries, including the right to pursue and exercise sanctions for labour rights violations. After all, we note that President Trump campaigned for a trade agenda to benefit American workers and the Canadian government under the Liberal Party has been actively promoting its "progressive" trade agenda. Both the U.S. and Canadian authorities, moreover, have signalled that they would be willing to negotiate new chapters on labour and the environment as part of a NAFTA renegotiation.[7]

As the labour movement has long argued, although NAFTA provides extensive rights and protections for multinational firms and investors in such areas as intellectual property rights and investment guarantees, it does not provide equivalent protections for workers. The current NAFTA labour side agreements, embodied in the North American Agreement on Labour Cooperation (NAALC), was hastily constructed under the Clinton administration to quiet NAFTA's critics and ensure safe passage of NAFTA through Congress. Binding labour rights enforcement and protections and were not incorporated in the body of the NAFTA agreement and, as such, the NAALC only partially addresses labour rights and labour conditions. Despite widespread violations of labour rights, there has never been one successful 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.

Despite the labour movement's reservations about the NAALC, the USW was one of the few unions to attempt to use the side agreement to address labour rights issues. We led the first significant case filed in Canada under NAALC in 1998 (the Echlin/Dana Complaint, Case 98-1). That case highlighted the brutal and violent

[7] U.S. negotiators have signaled that under Trade Promotion Authority they are willing to place enforceable labour and environmental commitments in the main text of the agreement. See, *Inside U.S. Trade* (2017) "USTR notifies Congress of intent to renegotiate NAFTA; U.S. favors trilateral" May 18. See also, Clarke, Campbell (2017) "White House chaos has weakened Trump's NAFTA hand," *The Globe and Mail*. May 18.

repression of an independent Mexican union when it tried to displace a corrupt union that agreed to a protection contract with a U.S.-based auto parts multinational. The case also highlighted the appalling health and safety conditions at this brake parts plant located near Mexico City.

We have since participated actively in two other cases filed in Canada under the NAALC. Our experience with the NAALC process confirms that the side agreement is deeply flawed. The complaint process is cumbersome and slow. It does not allow for parties to independently pursue complaints and the process itself lacks independence. Most importantly, the obligations of the parties are weak and largely procedural; the NAALC does not require the signatory countries to adhere to the most basic labour rights as reflected in the ILO core labour conventions.

There is therefore dire need for improved labour rights provisions and enforcement as part of a “modernized” NAFTA agreement. In Mexico it is still virtually impossible to form independent unions in the export sector and only about one per cent of Mexican workers belong to a democratic union. The Mexican government is known to have a policy of supporting corrupt, employer-dominated “protection unions.” The Mexican government and employers also dominate the labour board structure in Mexico, which oversees and enforces labour laws. If workers do vote for a democratic union, the results are ignored or, even worse, union organizers face harassment and threats.

These were the central issues raised in our 1998 complaint under the NAALC, and yet, almost 20 years later, there has been little or no progress on these issues in Mexico. The U.S. State Department's Mexico 2014 Human Rights Report concludes, for example, that the Mexican government does not adequately protect workers' rights.[8] Likewise, the 2015 Human Rights Watch report on Mexico highlights the fact that "the dominance of pro-management unions continues to obstruct legitimate labour-organizing activity."[9] These conditions have prevented workers from organizing independent unions and have suppressed wage demands from workers.

There is an economic imperative in addition to a human rights argument for improving NAFTA labour standards and enforcement. Trading partners' poor labour standards have a real economic impact as companies relocate to take advantage of workers who lack basic rights and are underpaid. As an illustration, Mexico's manufacturing industry has dramatically expanded since NAFTA. The Mexican auto sector, for example, exports 80 per cent of its output of which 86 per cent is destined for the U.S. and Canada. Mexican labour conditions indirectly affect Canadian and U.S. workers as well, since manufacturers in the U.S. and Canada have routinely implied for decades that they will move operations to countries with lower wage and benefits standards to undermine union organizing drives and limit wage gains.

Some have estimated that the U.S. government will come to the NAFTA table willing to accept labour and environmental provisions that were negotiated as part of the

[8] AFL-CIO, "Mexico: Labour Rights Concerns," August 19, 2015.
[9] Human Rights Watch, "World Report 2015–Mexico."

TPP negotiations. The Canadian government should reject U.S. efforts to model NAFTA labour standards on the TPP. As we noted during the public consultations on the TPP held in May 2016, the TPP does not adequately enforce the standards embodied in the International Labor Organization (ILO) conventions and the labour chapter of the TPP only prevents countries from lowering existing standards if it affects trade or investment between member countries. Neither does the TPP guarantee health, safety or adequate pay for workers if governments are unwilling to implement or enforce appropriate standards and protections.

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 “ongoing and recurring.”[10] The agreement should also require that parties commit to modernize and reform their labour standards, including binding commitments to define “acceptable conditions of work” to include payment of all wages and benefits legally owed; to not waive or derogate from any of their labour laws; to assure that migrant workers receive the same rights and remedies as a country's nationals; to prevent human trafficking and prohibit trade in goods made from forced labour; and enforceable rules for international labour recruiters and employers of foreign labour.

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[10] A recent ruling against the U.S. in a labour violation dispute with Guatemala clearly indicates that labour provisions, as currently written as part of free trade agreements; do not do nearly enough to protect workers. See: Drake, Celeste (2017) “U.S. Trade Policy Fails Workers” *AFL-CIO: Global Workers’ Rights*. June 26, 2017.

Canadian negotiators should also demand that parties ratify the eight core ILO Labour Conventions as part of a NAFTA and include specific references to these provisions as part of the body of the agreement. A mandate to ratify ILO Governance Convention 81 on labour inspections should also be binding on the parties. NAFTA parties should also negotiate a framework for transnational bargaining in situations where transnational employers operate across NAFTA jurisdictions. Domestically, the Canadian government should also pass legislation on due diligence for Canadian companies operating abroad.

Finally, the parties should commit to the creation of an independent labour secretariat to oversee an independent dispute settlement process with the authority to apply trade and other sanctions against states and corporations that violate labour rights. The Secretariat should also be provided with a mandate to undertake inspections and conduct independent research and reporting on the parties' progress and commitment to their labour obligations under the agreement.

The current process under the NAALC is woefully inadequate. Cases take years to investigate. The process is costly and cumbersome. Moreover, under the current process, complaints all conclude with ministerial consultations that have led to unsatisfactory results. Despite dozens of cases brought under the NAALC, the results have failed to address the key labour rights issues in the NAFTA countries. In over 20 years since the NAALC was implemented, *not one case* has proceeded to an Evaluation Committee of Experts. Moreover, *not one case* has proceeded to an

Arbitration Panel. All of the cases have ended upon the issuance of an unsatisfactory action plan or an agreement following Ministerial Consultations.

Workers under the NAFTA deserve to have labour rights issues addressed by a process that is effective, expeditious and independent. Further, the process should be driven by workers and their representatives – much like the current mechanism provided for investors. The parties themselves should be given the authority to file and litigate complaints so that meaningful remedies can be ordered and matters are not concluded until the workers and their unions are satisfied with the result.

ii) The Canadian government should negotiate to increase <u>regional</u> "Rules of Origin" requirements

The Trump administration has indicated that it will seek stricter "Rules of Origin" provisions under NAFTA with an aim to bring more manufacturing production to the United States. Some reports indicate that this may involve efforts to modify the rules to specifically require more U.S. content, as opposed to more regional content.

The USW believes that U.S., Mexican and Canadian businesses, workers and consumers can benefit from NAFTA renegotiation if all three nations remain focused on benefits to the region, as opposed to taking protectionist positions seen to benefit only one of the parties. "Rules of Origin" should be set so that North American workers in the NAFTA jurisdiction are the primary beneficiaries of market access commitments. We therefore advocate for proposals to strengthen *regional* rules of origin requirements for autos, auto parts and other manufactured products including steel and aluminum. We believe that higher rules of origin could benefit North American manufacturing workers by discouraging the use of high levels of offshore content, such as auto parts or steel from Asia.

Furthermore, the USW believes that the Canadian government should propose rules of origin relating to the production of steel that require steel to be melted and poured in the NAFTA region in order to be considered for tariff preferences. A similar standard should be adopted for other materials such as aluminum, in order to ensure the entire process relating to the production of these materials occurs in the NAFTA region. As we note later in this submission these provisions also comply with our environmental obligations, since it is well-established that North American steel and aluminum have a reduced carbon footprint relative to cheaper imports of these products from Asian markets.

iii) NAFTA negotiations should eliminate Chapter 11 Investor-State Dispute Settlement (ISDS)

The views of the Trump administration on Chapter 11 ISDS are not clear; although the draft notice on NAFTA circulated to Senate trade committee members in late March by acting U.S. Trade Representative Stephen Vaughn proposes to "maintain and … improve procedures for resolving disputes between U.S. investors and NAFTA countries," rather than eliminating ISDS altogether.[11] The TPP Investment Chapter,

[11] USTR (Office of the U.S. Trade Representative) (2017) "Draft Letter to Congress on NAFTA Renegotiation." March 28.

which Canada agreed to, sought substantive protections for private investors and investments and recourse to investor-state dispute settlement (ISDS) with binding arbitration and no appeal. Here, as in other areas, the Canadian government should resist U.S. pressures to adopt TPP provisions on ISDS as the status quo bargaining position. Although Senate Democrats have called for the elimination of ISDS provisions from NAFTA,[12] it is unlikely that the American government will seek to challenge a system that has served U.S. investors so well. The Canadian government should work with Democrats in Congress to pressure U.S. negotiators to eliminate ISDS Chapter 11 provisions from NAFTA.

ISDS severely constrains environmental, health and safety regulations as well as financial regulations deemed to have significant macroeconomic impacts on the ability of foreign companies to profit from their investments. ISDS operates beyond the domestic jurisdiction of states and national legal systems as it forces the Canadian government into a private arbitration system dominated by international-trade lawyers and economists. In effect, NAFTA's Chapter 11 ISDS provisions grant foreign firms greater rights than domestic firms enjoy under Canadian law and the Canadian court system. Furthermore, while ISDS gives powerful rights to multinational corporations, it does not require of them equivalent responsibilities to respect environmental, anti-corruption or labour standards.

[12] Inside U.S. Trade (2017) "House Democrats lay out a NAFTA wish list," June 15.

Investor protections agreed to under the TPP go even further in that they codify a more generous interpretation of the "fair and equitable" treatment standard under trade and commercial law by allowing investors' "expectations" to be a key factor in determining whether a government has breached its obligations under the treaty. Under such generous provisions it does not even take an actual ISDS challenge to change policy; governments and stakeholders will hesitate to regulate in the public interest lest they incur the considerable costs of defending their position in unaccountable arbitral panels.

Canada is the most challenged country under NAFTA Chapter 11 provisions. Since 1994, Canada has been sued 35 times by U.S. corporations under NAFTA, forced to reverse several of laws and regulatory measures, paid out over $200 million in NAFTA fines and faces claims of $6 billion more. The United States has not lost a single case. ISDS provisions do not serve the public interest and should therefore be eliminated from the agreement.[13]

[13] It is worth noting that this year, Ecuador terminated 16 bilateral investment treaties, including one with Canada, based on the recommendation of the Ecuadorian Citizens' Commission Comprehensive Audit of Investment Protection Treaties and of the International Arbitration System on Investments (CAITISA) report. One of the Commission's key recommendations was to exclude the ISDS mechanisms from any future treaty. This demonstrates that it is possible to reject ISDS in pursuit of fairer trade relationships. See, Transnational Institute (tni). 2017. "Audit Commission President praises Ecuador's termination of treaties." Press release, May 9.

iv) The Canadian government should negotiate stronger provisions to protect public services

The renegotiation of NAFTA brings with it significant new risks to public services, but it also presents an opportunity to challenge NAFTA provisions that preclude democratic decision making in provision of public services. One key problem is that NAFTA is a negative list agreement – meaning that all of the obligations in the treaty, including those related to services and investment, apply to *all* state activities *except* those that are specifically carved out through reservations or exceptions. NAFTA contains no general exception from all treaty obligations for public services and there is no exception for services delivered in the exercise of governmental authority. NAFTA also puts serious restrictions on the establishment of new public services.

The Canadian government should approach NAFTA renegotiation with an aim to ensure that existing public services, as well as new public services (e.g. a national pharmacare program; a national child-care program) are protected from the investor rights articles of the agreement. NAFTA as currently written does not contain exclusions for energy, postal, water and sewer, sanitation, immigration and public transportation services from its Annex II reservation. Negotiators should expand the public services exception in Annex II so that public services are fully carved out from the agreement. NAFTA should also abandon and replace the negative list model and its ratchet mechanism. These features of the agreement endanger public services by automatically locking in any future liberalization of listed reservations, thus supporting future efforts to weaken or eliminate public services. Finally, we assert that NAFTA does not adequately shield public services from investor claims under Chapter 11 or National Treatment provisions. These chapters should be rewritten so that NAFTA cannot interfere with the right of a country's citizens to determine how to provide services to residents.

v) The Canadian government should ensure that NAFTA reinforces the regulatory autonomy of democratically elected governments

NAFTA in particular, and North American economic integration more generally, has encouraged a “downward harmonization” toward U.S. levels of many regulations and policies including unemployment insurance, health and education transfers, social assistance and housing programs – all in the name of competitiveness. But NAFTA also restricts the policy tools that governments may implement to protect the environment, public health and other broadly shared priorities. The agreement includes no provision to protect public interest policies from NAFTA's restrictive investment rules except for Article 2101, which incorporates the “general exception” of the World Trade Organization's GATT. However, at the WTO this “exception” has failed as a defence for challenged government policies in all but one instance. We therefore assert that any deal that replaces NAFTA must include a broad “carve-out” that exempts non-discriminatory public interest polices from all of the NAFTA’s rules, especially those that prioritize the rights of investors. Canadian negotiators must ensure that North America’s democracies retain the right to develop, advance and implement protections on health and safety, environment, licensing and certification requirements, or any other public interest measure. NAFTA should also create space for governments to pursue policies and strategies to address the impacts of disease, epidemics and weather events, such as the Fort McMurray wildfires, Calgary floods and the Quebec/New Brunswick ice storms, without being constrained by clauses to protect investors.

Intellectual property and patent protections for the pharmaceutical industry are another area of concern in these negotiations. As a result of the Canadian patent-linkage system for pharmaceuticals, which allows brand-name patent holders to contest regulatory approval for generic drugs, Canadians pay the second-highest per capita drug costs in the developed world. The Canadian and U.S. patent regimes are already very similar. However, U.S. enforcement provides more latitude to patent holders while Canada has been more restrictive. The Canadian pharmaceutical industry is also to a much greater extent based off the production of off-patent generic drugs than the U.S. industry.

The drug patent and IP provisions negotiated under the now-defunct TPP would have required Canada to extend patent terms to compensate brand-name pharmaceutical firms for regulatory delays in approving drugs. This would have made it more difficult and costly for Canadian governments to establish new public health programs, including pharmacare.[14] Tougher patent protection under the TPP would also affect the price of drugs, especially costly new "biologics" used in treating cancers and autoimmune disorders. Nonetheless, reports also confirm that Republicans were angered that the TPP patent protection and IP provisions negotiated by the Obama

[14] Lexchin, Joel (2016) "Involuntary Medication: The Possible Effects of the Trans-Pacific Partnership on the Cost and Regulation of Medicine in Canada," *Canadian Centre for Policy Alternatives*. February 3.

administration did not go far enough.[15] We may therefore assume that U.S. negotiators will view TPP's more corporate-friendly IP and patent provisions as the floor rather than the ceiling for NAFTA talks.[16]

The Canadian government must resist pressures from U.S. negotiators to further liberalize our patent regime to bring it in line with the United States' more industry-friendly system of intellectual property protections. Concessions in this area would be extremely costly for Canadian consumers and risk undermining Canada's public health-care system as well as future efforts to implement a national pharmacare program.

vi) The Canadian government should insist on binding and enforceable environmental standards

NAFTA must be reformed to include strong environmental standards that will be enforced. NAFTA's current weak and unenforceable environmental side agreement, the North American Agreement on Environmental Cooperation (NAAEC), is flawed for many of the same reasons as the NAALC labour side agreement. Rather than protect the environment, NAFTA has instead facilitated a race to the bottom in which corporations could offshore jobs to exploit lower environmental standards in Mexico. As noted, U.S. negotiators have signalled that the Trump administration is willing to consider the incorporation of environmental provisions into the body of NAFTA. However, here, as in

[15] See, for example, Weisman, Jonathan (2015) "Patent Protection for Drugs Puts Pressure on U.S. Trade Negotiations," *The New York Times*. July 30.
[16] Here, we may we may look to the USTR's March draft letter to Congress, which has a large section on the protection of intellectual property rights.

other areas, Canadian negotiators must resist U.S. pressures to adopt TPP provisions on the environment, which are wholly inadequate for protecting the environment and public health. The TPP's environment chapter only requires governments to uphold enforcement if failure to do so affects trade or investment. It is silent on climate change and on greenhouse gas emissions from global trade.

A modernized NAFTA must recognize core principles of environmental protection and sustainability as an integral part of any trade agreement. Environmental provisions must also create a fair playing field by requiring parties to adopt, implement and maintain policies to ensure compliance with domestic environmental laws and important international environmental agreements including the Paris climate agreement and treaties protecting Indigenous rights. The agreement must also include a non-derogation clause that obligates the countries not to relax their environmental laws in order to encourage trade or investment. Environmental commitments must be included in the core text of the agreement and be made enforceable via an independent dispute settlement process in which trade sanctions are used to discipline states and corporations for their environmental abuses.

A modernized NAFTA should also require signatory governments to include a preference for goods and services with low environmental impacts in procurement decisions, subject to non-discrimination principles between NAFTA partners. Currently, NAFTA's procurement rules limit governments' ability to use "green purchasing" requirements that ensure government contracts support renewable energy, energy efficiency, sustainable goods and a reduced carbon footprint.[17] Likewise, NAFTA should mandate that partners impose a border tariff on imported goods with significant climate pollution. Chinese steel mills, for example, produce more than 10 times the greenhouse gas emissions of Canadian plants, by official estimate.[18] In the same vein, Canadian negotiators should insist on equivalency taxes for carbon pricing so that trade is both fair and commensurable with our climate action objectives. Likewise, NAFTA should not preclude government measures to assist the transition of carbon-intensive industries as Canada looks to meet its international commitments to curb climate change.

vii) The Canadian government should resist pressure to eliminate or weaken Chapter 19 (binational review)

In all three NAFTA countries, domestic law provides for the imposition of duties if an imported good is dumped or subsidized and if the imports cause material injury to a domestic industry. However, even among NAFTA partners the application of AD and CVD laws has long been controversial. In particular, Canada has complained that the

[17] As the House of Commons trade committee has recently recommended in its report "The Canadian Steel Industry's Ability to Compete Internationally," regulators can "assist Canadian steel producers in benefiting from the low carbon footprint of Canadian steel compared to foreign steel, including through government procurement processes that take carbon dioxide emissions into account when awarding contracts."
[18] Environment Canada in a 2016 Access to Information memo researched the introduction of the world's first carbon tariff on imports. "The goal of a border tax adjustment related to greenhouse gases would be to mitigate impacts on competitiveness flowing from domestic carbon pricing … Border carbon adjustments can reduce the impacts on competitiveness of higher carbon costs and avoid carbon 'leakage' where production and emissions shift from a jurisdiction with a high carbon cost to a jurisdiction with a lower cost."

United States unfairly relies on these laws to impose duties on Canadian goods including, most notoriously, softwood lumber. During the negotiation of the U.S.-Canada Free Trade Agreement (CUSFTA), the treatment of AD/CVD laws was a deal breaker for Canada, because Canadian negotiators rightly feared that domestic protectionist pressures would compel the U.S. to abuse AD/CVD unnecessarily. As a compromise, NAFTA partners agreed to Chapter 19 review, which allows parties to appeal adverse AD/CVD determinations directly to a binational panel of five experts, rather than to the domestic courts of the country imposing the duties.

The Trump administration and some members of Congress have stated that they want to weaken or eliminate this provision, citing "U.S. experiences where panels have ignored the appropriate standard of review and applicable law." This is an area of particular concern for USW members, given that Chapter 19 has been used most successfully and consistently to resolve disputes with the United States over softwood lumber, an industry in which the USW has significant representation in Canada. In our view, preserving Chapter 19 should be regarded as a red line for Canadian negotiators in NAFTA talks with the U.S.

Although it is true that the Chapter 19 panels have proved to be ineffective in providing a direct remedy to Canadian lumber producers, their findings have helped to influence the U.S. to withdraw CV and AD measures and move towards negotiating in good faith with Canadian producers. Moreover, since the U.S. Trade Representative under the Trump administration has essentially declared it would ignore WTO rulings that it regards as unreasonable,[19] Canadian producers have little confidence that WTO dispute settlement can effect a fair resolution to unfair CVD/AD measures by the United States. Another advantage of Chapter 19 is that a favourable resolution under that chapter leads to a retroactive refund of wrongly imposed AD or CVD duties, which is not available under the WTO dispute settlement system.

Since the implementation of NAFTA, the U.S. has been the target of most cases brought before Chapter 19 panels, with 43 of the 71 matters heard by the panels being directed against the U.S. Canada's success rate under Chapter 19 has been positive. The Canadian softwood industry in particular has had its position consistently vindicated under the Chapter 19 process and the weakening of this protection would be a significant loss for the Canadian softwood industry and forestry workers. With U.S. industries pursuing a long list of trade remedy challenges against Canadian industries, including, but not limited to, softwood lumber and aircraft, Canada must resist U.S. demands to eliminate or weaken NAFTA's Chapter 19 binational review process.

viii) The Canadian government must resist "Buy American" provisions and improve access to Canadian and regional procurement markets

The U.S. public sector is one of the largest procurement markets in the world, since U.S. federal and state government procurement account for roughly 10 per cent

[19] USTR (Office of the U.S. Trade Representative) (2017) *2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program*. Executive Office of the President (March). Washington

of U.S. GDP.[20] Already, the U.S. is far more protective than Canada with respect to public procurement.

The Buy American Act of 1988 and related executive orders limit foreign participation in the U.S. federal procurement market through various means. Under the original NAFTA, the United States opened covered procurement valued at or above specified U.S. dollar thresholds for 53 government entities and six government enterprises to bids by Canadian and Mexican firms.

However, the American Recovery and Reinvestment Act of 2009 (ARRA), implemented under the Obama administration, undermined these NAFTA commitments. The immediate effect of these policies was that ARRA-financed procurement at the state and local levels for iron, steel, and manufactured products was effectively shut down to Canadian bidders, which caused considerable harm to Canadian producers and workers. In 2010, the Canadian and U.S. governments penned an agreement that allowed Canadian iron, steel and manufactured goods to be used in future ARRA-financed procurement projects. But our concerns in this area have recently been heightened by President Trump's January 2017 memorandum mandating that pipelines laid in U.S. soil must use materials and equipment produced in the United States, [21] although this mandate violates NAFTA and WTO obligations that prevent discrimination between domestic and foreign goods. We are also concerned about the Administration's

[20] Canadian procurement represents 13 per cent of Canadian GDP. OECD, Government at a Glance--2015 edition: Public Procurement.
[21] White House (2017) "Presidential Memorandum Regarding Construction of American Pipelines," January 24, 2017.

decision to launch so-called 232 Investigations to determine whether steel or aluminum imports threaten U.S. national security. The USW has strongly asserted, on both sides of the border, that Canadian steel and aluminum exports clearly do not threaten U.S. national security and hence Canada should be excluded from any order pursuant to the U.S. 232 investigations.

However, we are nevertheless concerned that the U.S. will pursue further protections in steel, aluminum and other industrial and manufacturing sectors where USW has a Canadian presence. These concerns were again validated in April 2017 with President Trump's call to "Buy American and Hire American."[22]

We recognize that, in the past, strategies seeking exemption for Canadian suppliers with respect to U.S. "Buy American" procurement policies have not fared well and will likely not fare much better under the Trump administration. Nonetheless, at the very least Canada should seek a restatement of the 2010 agreement as part of NAFTA negotiations; especially since President Trump's economic plans consider major infrastructure spending to be a top priority. Canadian negotiators should also propose reciprocal bilateral procurement provisions for new public infrastructure and government procurement which would enforce non-discrimination against U.S. content in Canadian projects and Canadian content in U.S. projects. If rejected, Canada should implement "Buy Canadian" policies for its own coming investment priorities.

[22] White House (2017) "Presidential Executive Order on Buy American and Hire American," April 18, 2017.

Canada also can and should do more to ensure that Canadian companies and workers benefit from Canadian public infrastructure projects. Recently it was revealed that Canadian-made product accounts for only 19 per cent of the steel used in the construction of the $4 billion Champlain Bridge in Montreal, by official estimate.[23] As we have discussed, enhanced regional rules of origin requirements in the NAFTA jurisdiction for steel, iron and aluminum would be beneficial in this regard. Canadian negotiators should also consider proposing a “Buy North America” procurement policy with the aim of circumventing the invasion of cheap foreign imports into the North American market, a policy that has been advocated by industry actors such as the Canadian Institute of Steel Construction.[24] Finally, procurement provisions under NAFTA should not prevent governments from making purchasing decisions that could protect the environment or promote sustainable development, so long as these policies are non-discriminatory with respect to the other NAFTA partners.

ix) The Canadian government should reach a fair and balanced settlement on softwood lumber as a pre-condition to the commencement of NAFTA talks

The Softwood Lumber Agreement (SLA) between Canada and the United States expired on October 12, 2015. The agreement was negotiated to appease U.S. lumber producers and policymakers, who wrongly accused Canadian and provincial governments of unfairly subsidizing forestry producers that operated on public lands.

[23] *Blacklock’s Reporter* (2017) “Why Are We Building a Bridge in Montreal with Foreign Steel?” March 10.
[24] Marotte, Bertrand (2015) “Steel Industry calls for Canadian Content in Champlain Bridge Project,” *The Globe and Mail*. January 19.

This agreement required Canada to put an escalating tax on exports of softwood once prices dropped below a predetermined threshold, ending five years of litigation and returning $4 billion in duties unlawfully collected by the United States back to Canadian producers. The agreement provided market certainty for lumber manufacturers in British Columbia and the rest of Canada, while enabling the provinces to manage their forest resources and maintain access to the U.S. market.

At the expiry of the previous SLA, U.S. lumber groups again successfully lobbied the U.S. government to slap anti-dumping and countervailing duties averaging 27 per cent on Canadian lumber. Again, the ongoing allegations levelled by the U.S. industry are without merit. In fact, the U.S. can only currently supply two-thirds of its own softwood lumber needs and must import from Canada. U.S. protectionist actions in this sector are therefore not only harming Canadian workers and producers, but are also unnecessarily increasing costs for U.S. wood processors, home builders and other consumers.

U.S. softwood duties are unfair and vexatious. The Canadian government should coordinate with Canadian unions and producers and U.S. consumers and lumber processing firms to push the U.S. government to achieve a fair and balanced agreement on softwood lumber. Further, the Canadian government should insist that it will not enter into formal NAFTA talks until the softwood disagreement has been cleared off the table.

x) The Canadian government should negotiate to improve trade enforcement among all three NAFTA parties

Finally, a renewed NAFTA agreement must include commitments to ensure the benefits of trade are not abused by non-party countries. To this goal, NAFTA negotiators must work towards a common enforcement strategy which will address and create enforceable standards to control currency manipulation; overcapacity, illegal dumping and subsidization, particularly with respect to Chinese steel and aluminum; and the activities state-owned enterprises originating in non-NAFTA partners. These rules should also focus on the enforcement of existing rules against forced technology transfer, performance requirements and forced localized production. Finally, trade enforcement should focus on creating a fair and level playing field to support employment and rising wages in the NAFTA region. The government of Canada should also move to introduce and implement the regulatory amendments to the Special Import Measures Act that were promised in the 2017 federal budget, which would enable unions to fully participate as parties in trade remedy proceedings.

Conclusion

Under the previous Harper government, decisions about international trade were made behind closed doors with input only from corporate interests. Those agreements, as a result, have primarily advanced the policy preferences of political and economic elites, not the broad interests of workers, unions, civil society or indigenous communities. From the USW's perspective, the Canadian government has an obligation to ensure that the trade regime does not become even more imbalanced against the interest of Canadian workers and families. This means that it cannot continue to grant a privileged seat at the negotiating table to corporations and investors during NAFTA talks.

Negotiations to rewrite NAFTA should be transparent, democratic and participatory. They must include broader and deeper consultations with the public and citizens and organizations must have opportunity to provide timely and meaningful input on developing proposals and to provide advice regarding trade-offs, impacts and priorities. This includes the opportunity to review both initial proposals and working texts as negotiations proceed.

A new, “modernized” NAFTA must promote growth while simultaneously improving working conditions in all three NAFTA partners. Its rules must promote stable investment within the NAFTA region rather than facilitate the flight of capital to the lowest-cost jurisdiction. NAFTA must also promote sustainable growth and provide the latitude for governments to respond to the needs of their constituents.

We hope that the government will take a patient, measured approach to furthering its trade agenda. Before moving forward on any trade negotiation, including NAFTA, we urge the government to conduct a balanced, honest and comprehensive feasibility study which includes not just growth estimates, but also sectoral and distributional projections as well as human rights, labour and environmental impact assessments. Finally, we call on the government to clearly detail the specific components, principles and provisions which make up what it has called its "progressive trade agenda." In that way, Canadians will be able to participate more fully in the policy process and our trading partners may have a clear understanding of where Canadians really stand on these important policy issues.

Our union is not anti-trade. We believe that trade as an instrument of economic policy can forge a new approach; one that would lift wages up rather than push them down, one that would reduce our growing trade deficit. We support a trade policy that would promote domestic manufacturing and employment rather than more outsourcing and offshoring, one that would begin to reverse the widening gap of income inequality. We believe trade policy can and must respect workers' rights to a healthy and safe job, and also respect the environment in which they live and work.

We thank Global Affairs Canada for permitting us the opportunity to speak about our members' concerns and we look forward to answering any questions you may have.

Respectfully submitted by:

Ken Neumann
National Director for Canada
United Steelworkers
July 18, 2017