



NAFTA 1.0 to 2.0: From Chapter 11 to regulatory cooperation

On November 30, 2018, Canada, the United States and Mexico signed a new trilateral trade agreement for North America called the Canada-United States-Mexico Agreement (CUSMA). This deal – if ratified by all three countries – will replace the North American Free Trade Agreement (NAFTA). The “new NAFTA” needs to be fixed in several key areas. The Council of Canadians is calling on the Trudeau government to hold on ratifying the deal until these changes are made.

For decades, the Council of Canadians and Labour, environmental and civil society organizations sounded the alarm over NAFTA’s Chapter 11 provisions. These provisions allow foreign corporations to sue governments over changes to policies, laws and regulations that affect corporate profits.

Multinational corporations have used Chapter 11 to sue the Canadian government over environmental and health protections. Canada is the most sued developed country in the world because of NAFTA. According to the Canadian Centre for Policy Alternatives, Canada spent more than \$300 million defending and paying for so-called “violations” such as regional economic development programs, prohibiting fracking, disallowing a dangerous fuel additive, and not extending a pharmaceutical company’s market protections.

In the recent NAFTA renegotiations, close to 30,000 Council of Canadians supporters wrote the Canadian government telling it to get rid of Chapter 11. Surprisingly, the provision was removed from the new NAFTA – at least between the U.S. and Canada. This is an important victory.

But as one corporate-friendly provision was removed, behind closed doors, another one was being created. While American corporations will no longer be able to use Chapter 11 to sue or threaten to sue Canada, they have a new way to oversee our regulations. It is called regulatory cooperation.

Regulatory Cooperation = deregulation

Historically, corporate lobbyists used free trade agreements such as NAFTA to target government regulations that stand in the way of corporate profits. Regulations on chemicals, pesticides, food safety, disease management, and food labelling are considered “red tape.” Big Business sees these rules as hampering their ability to cross borders and operate in new markets. With fewer rules, it is argued, businesses will be more efficient and innovative.

But often, these rules are meant to protect us as consumers, workers, and citizens. Our societies and democracies develop policies and regulations in order to protect our health, well-being and our environment from harm.

Individual countries develop country-specific measures that reflect their own democracies. In international trade agreements, these different policies are seen as obstacles to a world in which minimal, business-friendly regulations would allow companies to effortlessly enter new markets without having to change their product or offering, or adhere to different regulations that affect their bottom line.

Both the original and the new NAFTA provide businesses with a back door to challenge our policies and regulations. Instead of having democratic discussions within Parliaments, or within communities about what our policies should be, corporations are given the power to bypass our democracies through trade deals like the new NAFTA.

From NAFTA 1.0....

The original NAFTA was the starting point for Big Business to explore how regulations could be changed and it was one of the first agreements to introduce the harmless sounding idea of “regulatory cooperation.” In the original NAFTA, voluntary working groups were created to discuss regulations. Dominated by corporate representatives, these meetings were held in the context where governments in the U.S. and Canada actively promoted deregulation.

In one case study researchers found that the working groups on pesticides were not only corporate-dominated, but the committee was used by bigger players – companies with patents – to shape the rules to keep out smaller players from entering the market.

Fewer regulations can be harmful. According to research by Stuart Trew from the Canadian Centre for Policy Alternatives, regulatory cooperation could be responsible for the listeria outbreak, where there was a lack of regulatory oversight.

He argues that regulatory cooperation could be responsible for the 2013 Lac Mégantic train disaster, where a train carrying oil exploded, killing 47 people. Canadian regulations were harmonized to U.S. standards, allowing tanker cars to stay on the rails for a longer period of time and in poorer condition. Also, Canadian regulations were changed to allow trains to be staffed by only one person, which contributed to the Lac Mégantic disaster.

....to NAFTA 2.0

In NAFTA 2.0 regulatory cooperation is no longer voluntary. It has become a permanent, binding process that all NAFTA countries must follow. Unelected “stakeholders” now have a back room to shape regulations not in their favour, with no public participation or oversight.

Regulatory cooperation:

Gives corporations advance notice of new regulations.

So called “interested” persons are notified in advance of planned government regulations and are allowed a consultation process before any regulation goes through a legislative process.

Requires all regulations be “science based.”

In other words, regulations cannot be prescribed for ethical or social reasons. The emphasis is on the regulator to prove that a regulation is backed by science, and not on the corporation to prove that their product does no harm. The latter, known as the precautionary principle, is precluded by this approach.

Makes regulators defend rules to corporations.

Regulators have to vigorously defend proposed regulations and are even required to suggest alternatives that don’t involve regulating. They have to provide extensive analysis, including cost-benefits to industry.

Makes standards decline.

The new NAFTA encourages the three countries to harmonize, or have similar regulations. This is not about raising standards, but bringing standards down to the lowest common denominator.

Corporations can contest.

Regulatory cooperation is subject to dispute resolution. This means corporations can directly challenge government actions.

As corporations push for GMOs, glyphosate, against health labelling, cigarette labelling, rules on food inspections, and against many public safety rules, under the new NAFTA they now have a new forum to not only be heard, but to contest regulations behind closed doors.

Regulatory cooperation in the new NAFTA takes away our ability to set standards and regulations to protect our health safety and well-being. The Council of Canadians opposes ratification of a new NAFTA that gives corporations a powerful voice over our policies and regulations.

Read more about the new NAFTA and take action at canadians.org/nafta or call us toll-free at 1-800-387-7177.