

## FREE TRADE THREATENS HEALTH AND SAFETY IN CANADA

Because NAFTA, if implemented, will affect most sectors of the Canadian economy, we may expect that it will also significantly affect the Canadian environment, including the workplace environment, and workers' health and safety.

The term "health and safety" only appears twice in the agreement, Article 2101, Section 2 ("General Exceptions") affirms the right of governments to enact measures pertaining to health and safety, if they are consistent with other requirements of NAFTA. Article 1603, Section 1 permits the temporary entry of business persons to the three countries if they otherwise qualify under health and safety requirements. (This presumably refers to the usual public health measures pertaining to international travel).

### FREE TRADE IMPACTS ON STANDARDS

However, given the wording of certain provisions of NAFTA, and the international trade jurisprudence on environmental measures, we are concerned that NAFTA will lead to a downgrading of health and safety standards in Canada.

NAFTA binds both national and provincial governments and establishes a new legal regime to which the laws of these governments must conform. They can continue to pass laws as they see fit: however, if they differ from NAFTA, the laws risk being challenged as trade barriers. Such challenges are heard by trade dispute panels, in secret processes to which the public and provincial governments have no rights of access. This restrictive regime applies to national and provincial measures for health and safety.

Although the NAFTA preamble contains words regarding improving workers rights, the Canada NAFTA negotiators are clear that the preamble is not enforceable.

I am unaware of an international trade case in which a law pertaining to labour standards has been challenged, but there are numerous cases in which environmental standards have been challenged. In most of these cases, the trade dispute panels have found against the environmental standard. Cases include the Tuna/Dolphin case, concerning the US Marine Mammals Protection Act, decided under GATT, and the Salmon and Herring case, concerning Canadian fisheries regulations, decided under the FTA. Unfortunately, many of the standards of review used by these panels have been codified in NAFTA.

In addition, in the Corrosion Proof Fittings case, the US courts struck down the US EPA's planned phase-out of asbestos. The Canadian government intervened in that case, and argued, with the Canadian asbestos industry, that the planned ban contravened the Free Trade Agreement.

The legal tests on which these cases were reviewed include whether the measures were

"necessary" (ie. the only means to achieve the domestic policy objective;) the "least trade restrictive" test; the "least-GATT inconsistent" test; and in the Tuna/Dolphin case, whether the impacts of the challenged law could extend outside the territory of the US.

I am therefore concerned when I read Chapter 7 of NAFTA, which pertains to setting sanitary and phytosanitary standards, including pesticides, with implications for exposures of farm workers. I find that the trade panels' tests are included in the criteria by which standards are to be set. "Risk assessment", not routinely used in setting Canadian standards, is also included, as is "scientific justification."

I agree with American critics who argue that while scientific analysis can assist in the technical means for attaining a given level of protection, the choice of level to be achieved reflects societal values for which science provides little, if any, guidance.

I believe that any future substance bans will be difficult to sustain in the face of trade challenges, as the asbestos case shows. This has significant potential impact for strategies of pollution prevention (ie. elimination of toxics) in both the workplace and wider environment.

Chapter 7 of NAFTA codifies the approach of dispute panels to standard-setting, which has already caused the loss of environmental standards.

NAFTA Chapter 9, which applies to all other standards-related measures, provides a less restrictive regime, and does not include all the specific tests listed in Chapter 7. However, it does prohibit standards created with the intention or the effect of creating an unnecessary obstacle to trade, and permits challenges, under the "Nullification and Impairments of Benefits" clause of NAFTA, of measures that are consistent with NAFTA.

It permits standards for the protection of human health, but so did the FTA. That didn't prevent the Canadian government from using it against the proposed asbestos ban.

It permits standards for the protection of the environment, as does the FTA, but that didn't save the Canadian Fisheries Act regulations.

Both NAFTA chapters establish new committee structures for standard setting, and specify certain international bodies that will be setting standards. There is no provision for public access to these committees.

NAFTA also permits countries to set standards more stringent than the international ones, subject to the constraints in Chapters 7 and 9. However, given the record of trade panels on standards issues, we doubt that individual, more stringent standards will survive trade challenges.

## FREE TRADE IMPACTS ON INVESTMENT

NAFTA does not prohibit a jurisdiction from lowering its domestic health, safety or environmental measures to attract investment. It merely says (Article 1114) that it is "inappropriate to do so", and that if one country thinks another has done so, they will hold consultations on the matter. Binding dispute settlement does not appear to be an option.

There is considerable evidence that, as some critics of free trade predicted in Canada, there has been a shift of US investment away from Canada since the FTA was enacted, partly related to Canada's standards for labour and environmental protection. The evidence includes:

- a study for the Federal Department of Finance finding that many corporate managers are now shifting investment to the US and focusing on "the possible de-industrialization of Canada".
- survey evidence compiled by the Canadian Centre for Policy Alternatives that traced the relocation of Ontario manufacturing plants to southern US states generally considered to have lower wages, low unionization, and less stringent environmental and health and safety standards than Ontario.
- a report by the New York based Americas Society on subsidiaries of US-owned corporations which found, amongst their executives, a perception that Canadian labour legislation and environmental regulation constitute threats to their ability of continue producing in Canada.
- a Wall Street Journal poll of 455 senior US executives of whom one quarter admitted they would use NAFTA to bargain down wages.

A specific example of an attempt by corporate investors to harmonize Canadian health and safety standards downward to US ones has occurred over the past year in Ontario, as new exposure limits are being set for numerous workplace chemicals. A joint labour/management task force, with equal numbers of each, working in a fully public process, decided to work toward adoption of the most stringent standards in Europe. The response of business to the task force proposals was overwhelmingly negative, often including direct threats to relocate production to US or Canadian jurisdictions with lower standards. Reichold Chemicals of North Carolina stated:

For companies currently manufacturing in Ontario there are options available should they wish to avoid the costs of compliance. Relocating to Quebec or the US, contracting out production to out-of-province shops, and simply ceasing production are all options...any review of the current 50ppm OEL for styrene in Ontario should be conducted with a view to raising it to 100 ppm...(in line with US and Quebec thresholds).

In addition, at the federal level, the Canadian government has said that our environmental standards must move "in step" with our major trading partners.

### PARALLEL AGREEMENTS

The proposed side agreements on labour and environment contain no provisions that would "fix" the negative effects on worker health and safety likely to flow from the agreement.

### CONCLUSION

Given the comprehensive scheme of harmonization of standards provided by the NAFTA provisions, the record of trade panel decisions, and the attitude of corporate investors, free trade poses a significant threat to strong, Canadian health and safety standards.

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