

June 12, 2017

Edward Gresser
Chair of the Trade Policy Staff Committee
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Comment on proposed renegotiation of the North American Free Trade Agreement
Docket No. USTR-2017-0006

Dear Mr. Gresser,

The Institute for Agriculture and Trade Policy (IATP), Food & Water Watch (FWW), the National Family Farm Coalition (NFFC), the Rural Coalition and the Western Organization of Resource Councils (WORC) appreciate the opportunity to comment on the proposed renegotiation of the North American Free Trade Agreement (NAFTA). IATP is a non-profit organization based in Minneapolis, Minnesota with offices in Washington, DC and Berlin, Germany that works locally and globally to ensure fair and sustainable food, farm and trade systems. NFFC represents 25 family farm and rural groups in 35 states whose members face the challenge of the deepening economic recession in rural communities. The Rural Coalition/Coalición Rural is an alliance of some 50 farmers, farmworkers, indigenous and migrant organizations working together toward a new society that values unity, hope, people, and land. Food & Water Watch is a national advocacy organization with offices in 14 states that works to ensure that food is equitably, sustainably and safely produced. WORC is a regional network of community based organizations in seven western states whose farmer, rancher, and rural community members have long advocated for a trade system that strengthens the health, environment, food sovereignty, working conditions and labor rights of all countries.

Current U.S. trade policy is designed to promote the interests of agribusinesses and other multinational corporations over those of family farmers and rural small businesses. The resulting agreements have contributed to the economic and social erosion of U.S. rural communities and have devastated farmers in trading partner nations, who cannot compete with the U.S. dumping of below cost of production crops, meat and dairy products. Prioritizing the overproduction of U.S. agricultural products for trade locks in a pattern of low farmgate prices and fails to address very real problems of farmers' ability to stay on the land and the environmental unsustainability of U.S. agribusiness. These problems will be exacerbated, not solved, simply by increasing exports for multinational agribusiness firms.

We support the demands of many civil society organizations who reject NAFTA and similar free-trade agreements. NAFTA should be replaced with a different agreement with the goal of increasing living standards in all three countries. Any provisions related to agriculture must start from a goal of rebuilding farm and food systems to support fair and sustainable rural economies and food supplies.

1) Restore local and national sovereignty over farm and food policy:

- **Improve the transparency of the trade talks.** The input of rural communities and all affected sectors is crucial to an effective agreement. Public consultations must not be limited to the

hearing scheduled in Washington, DC, on June 27. There should be regional consultations throughout the United States, including in rural parts of the country. The trade negotiation process itself must be made more transparent. We urge you to encourage input and dialogue on all draft proposals, negotiating texts, reports and supporting documents about the NAFTA. These documents should be published in as close to real-time as possible, to make possible a meaningful public debate on the agreement as it is developed. We urge you to resist pressure to conclude the talks before there are meaningful consultations on a real path to a better trade relations among our countries.

- **Remove Investor-State Dispute Settlement Provisions:** The proposed modernization of NAFTA is an opportunity to learn from nearly 25 years of experience, and to make significant changes based on that experience. NAFTA was the first U.S. free trade agreement to include the Investor State Dispute Settlement (ISDS) mechanism. We now know that including ISDS in NAFTA and other free trade agreements was a mistake. ISDS is unnecessary, and it undermines our democratic system of government.

It is unnecessary, because Canada, Mexico and the U.S. each have well-developed legal and judicial systems that are fully capable of addressing investor legal disputes related to the application of a country's domestic law, which is the focus of ISDS challenges. It is undemocratic, because it allows private investors to sidestep the courts to directly challenge sovereign nations in private tribunals. Under ISDS, investors have received billions in cash compensation under vague standards that are inconsistently applied by arbitration panels riddled with conflicts of interest.¹ These standards, such as "minimum standard of treatment" do not track U.S. law and would not meet U.S. constitutional tests. In addition, the overbroad interpretation of what constitutes a compensable "investment," including allowing investors to seek compensation based on the loss of poorly substantiated "expectation" of gain or profit, utterly undermines the capacity of elected governments to develop policies to meet the needs of their people and changing circumstances.

Although the investor-state tribunal has no power to directly nullify U.S. federal, state and local laws, in practice, when a country loses to an investor, it will change the offending law, pay damages or both. Moreover, a country need not even lose an ISDS case to be negatively affected; the mere threat of suit or filing of a case can chill future policy deliberations. As a result, laws enacted by Congress, executive agency rules adopted to implement those laws, decisions made by state and local governments, and even jury awards are all vulnerable to ISDS challenges. While to date, the U.S. has not lost an ISDS case under NAFTA, a series of decisions have upheld investor challenges to validly adopted, nondiscriminatory public policies in Mexico and Canada that are typical of laws also in effect in the U.S. For example, investors prevailed in NAFTA challenges to toxic waste disposal siting laws (*Metalclad v. Mexico*) and permit decisions intended to protect commercial fishing grounds from mining activities (*Bilcon v. Canada*). Moreover, the legal cost of defending an ISDS case is many millions of dollars. While the federal government is responsible for defending investor challenges that are lodged against state and local measures, state resources are heavily burdened during the course of such disputes, and U.S. states have had to pay millions of dollars in legal costs incurred in support of defending challenges to state environmental and public health measures.²

ISDS is a cross-cutting provision that threatens sustainable food and farming policies, whether addressing the concerns of farmers and rural communities facing polluted water from pesticide and fertilizer run-off, public health measures tackling obesity, or initiatives to reduce manure-produced methane releases that accelerate global warming. It is a fundamentally flawed mechanism that has no place in NAFTA. Adopting the “modernized” version of ISDS agreed to in the final Transpacific Partnership text does not fix these flaws. The proposed TPP changes were both limited and ineffective, and in any event fail to address the fundamental problem posed by ISDS, which is that it allows corporate investors to avoid being bound by the same rules of democratic governance as everyone else.

- **Restore Country-of-Origin Meat Labels (COOL):** As a starting point of the NAFTA agriculture negotiations, the U.S. should request that Canada and Mexico withdraw their Country of Origin Labeling (COOL) complaint under the World Trade Organization (WTO) and agree to delay and ultimately withdraw any action to implement the WTO award. COOL is the centerpiece of good food and farm policy, because it supports the interests of consumers in knowing where their food comes from and of farmers in selling their products at fair prices. At a time when meat and feed supply chains throughout North America are highly integrated, corporate concentration in meat production has increased to unprecedented levels. Today, the four largest beef packers slaughter 85 percent of fed cattle and the top four pork packers process 71 percent of hogs. The lack of competition in the sector has undermined farmers and ranchers’ ability to receive fair prices, as well as consumers’ right to know about their food.

Recognizing the benefits of labeling to both consumers and farmers, Congress included country-of-origin meat labels for beef and pork in the 2002 and 2008 Farm Bill, although the program was not implemented until 2009. Canada and Mexico brought a WTO challenge against the commonsense label as an illegal trade barrier that same year. In response to the WTO COOL dispute, a broad coalition of 207 farm, labor, environmental and consumers’ organizations delivered a letter to the U.S. Senate in support of COOL emphasizing that, “Farmers are proud of the food they put on American dinner tables and support the current COOL labels that allow consumers to make more informed food purchasing decisions.”³

Mexico and Canada prevailed in their WTO case, and Congress addressed the WTO decision by repealing COOL for pork and beef products altogether. The negotiation to modernize NAFTA presents an opportunity to address the complexity of meat labeling to clarify points previously raised by Mexico and Canada, and to ensure that consumers in all three countries may know what is in their food. In the context of the larger NAFTA negotiations, it may be possible to resolve this dispute in a way that meet each countries’ concerns.

- 2) **Reject proposals from the failed Trans Pacific Partnership (TPP) that would undermine fair and sustainable agriculture in all three countries.** We are alarmed by recent statements by Commerce Secretary Wilbur Ross that the TPP would be the starting point, the “low hanging fruit” for the renegotiation of NAFTA.

- **Do not require intellectual property rights rules that limit farmers’ ability to save and share seeds.** The TPP would have required countries to ratify the International Convention for the

Protection of New Varieties of Plants 1991 (UPOV-91), an international treaty protecting plant breeders. UPOV-91 requires 20-25 years of intellectual property protection to be provided for all plant varieties. It prevents farmers and breeders from saving and exchanging protected seeds. Mexico has not yet ratified UPOV-91, but would be under pressure to do so under such a requirement. In an era of increasingly volatile weather patterns and rising temperatures, farmers' ability to innovate and to share knowledge on better seeds, inputs and practices must not be limited by rules in NAFTA or other trade policies.

- **Reject new proposals in TPP that speed up rules on approval of agricultural biotechnology products in ways that bypass national efforts to assess their safety, effectiveness and impacts on workers, rural communities and ecosystems.** For example, a TPP provision on "Trade in Products of Modern Agricultural Biotechnology," would include not only food and agricultural products derived from 20th century genetic engineering traits, but products derived from far more powerful and unregulated 21st century GE techniques, such as CRISPR. A renegotiated NAFTA must not allow trade in food and agricultural products derived from novel and unregulated technologies.

Another provision in the TPP calls for scientific evidence to be used in risk assessments to be "reasonably available." This is a low standard for the use of scientific evidence, since it allows risk managers to continue the current U.S. practice of classifying large portions of commercialization applications for food and agricultural technologies as Confidential Business Information (CBI) and therefore not "reasonably available" for public review. A renegotiated NAFTA must require that all scientific studies and data be publicly available and that CBI classification not be granted to any evidence affecting food safety, animal disease, plant disease or invasive species.

Trade negotiators routinely claim that Sanitary and Phytosanitary Standards (SPS) chapters protect the right of all Parties to protect consumer, animal, plant and environmental health. However, these rights are meaningful only insofar as governments have or procure the financial, personnel and infrastructure resources to realize the right to protect. A renegotiated NAFTA must contain a provision to oblige governments to provide adequate resources to implement the SPS chapter and ensure consumer, agricultural animal, plant and environmental protection. If governments fail to do so, a renegotiated NAFTA must require governments to engage in state-to-state dispute settlement to provide the necessary resources, whether from public funds or from regulatory service fees applied to the supply management chain for food and agricultural products, ingredients and inputs.

- **Do not pressure Canada to weaken its dairy supply management program.** Undermining Canadian supply management will not bring a large increase in U.S. dairy exports. Supply management helps ensure that dairy prices are high enough to cover the cost of milk production and keep Canadian family dairy farmers in business. The lack of U.S. dairy supply management results in overproduction and dairy processors pouring millions of gallons of raw milk down high tech sewers. U.S. dairy Confined Animal Feeding Operations survive not because of their so-called efficiency, but because of government payment to manage, unsuccessfully, the

environmental and public health problems of fertilizing fields with uncomposted manure. Rather than exporting a dairy trade model that benefits price-fixing companies, the U.S. should emulate Canadian dairy supply management and export high quality dairy products instead of low quality products enhanced with imported Milk Protein Concentrate.

- 3) Ensure economic viability and resilience in rural communities.** Rural decline has escalated in all three nations since NAFTA took effect. Increasingly vertically integrated agribusiness processors, distributors and retailers are squeezing more income from small farmers and ranchers. Small businesses have disappeared. The larger retailers who hastened their decline are also pulling out. Convenience stores with poor food choices have become the only retail grocery option for hundreds of rural communities. The current export-oriented model of production enshrined in NAFTA and other trade agreements needs to be reversed, not intensified. The recently proposed reorganization of the U.S. Department of Agriculture (USDA) to add an Undersecretary for Trade is more cause for concern, especially if it portends the U.S. trade negotiating position on agriculture. If enacted, this would not only further orient USDA toward generating exports, it inexplicably decimates the Rural Development function altogether.

With the additional deep cuts proposed in rural development and nutrition programs, and a Farm Bill approaching in 2018, it is important to restore, not further restrict, the rights of the U.S. and its neighbors to construct the food and farm policies that best meet their needs. Trade agreements must promote policies that ensure farmers and ranchers receive prices that meet their costs of production and restore agriculture as the economic base of the rural sector. The changes made through NAFTA and in increasingly draconian immigration policies have left an agribusiness sector deeply compromised by worker shortages, yet still unwilling to offer fair wages and working conditions. Any new trade agreement must establish binding accords to address immigration and to protect farmworkers' labor and other human rights, potentially including transnational collective bargaining efforts. Nations also should have the right and ability to protect their farmers from unfair imports that distort the domestic market, undermine prices and ultimately compromise the economic viability of independent farmers.

- **Apply existing laws to prevent dumping.** The United States has several tools to prevent unfair imports, including anti-dumping mechanisms (when imports from a company are unfairly priced below the cost of production), countervailing duty mechanisms (for artificially low-priced imports that benefit from government subsidies) and import surge protections on products that flood and distort domestic markets. The U.S. International Trade Commission generally has not effectively applied them to farm products despite numerous investigations. Similar mechanisms should be employed in all three NAFTA countries, starting with investigations of fruit and vegetable imports to the United States and corn imports to Mexico.
- **Protect public food programs and keep state and local procurement commitments voluntary.** Communities across North America are working to transform local economic systems so that they are more sustainable and equitable. Programs that support the production of nutritious and culturally appropriate food by local farmers and locally sourced renewable energy, construction and even office supplies benefit local producers, businesses, workers and

consumers. Many states and communities are utilizing public procurement programs to support those efforts, including bidding preferences for healthy, locally grown foods, energy or transportation programs that create local jobs, and fair markets. Farm to School programs that incentivize purchases from local farmers have grown in all 50 U.S. states. Innovative efforts are also underway to expand this approach to other institutions such as hospitals, universities and early childcare programs like Head Start.

The Canadian government recently agreed to commitments that mandate sweeping coverage of provincial and municipal level purchasing in the Comprehensive Economic and Trade Agreement (CETA) with the European Union, and may seek similar commitments from the U.S. in the NAFTA negotiations. U.S. negotiators should resist making any changes to the current voluntary procurement policy in NAFTA that protects these state and local procurement provisions.

- **Support local efforts to address climate change.** Climate change is already adversely affecting farmers and rural communities deeply connected to natural resource based economies in all three countries. Policies focused on addressing climate change, both mitigative and adaptive, are in place in all three countries – and more policies are in the process of being developed. Both Mexico and Canada are part of, and committed to, the United Nations’ Paris Climate agreement. And while the U.S. federal government has signaled it will withdraw from the Paris Agreement, at the time of this comment, nine U.S. states and 125 U.S. cities have expressed their commitment to the Paris Climate Agreement. Under a new NAFTA, each country, state and local government should retain their sovereignty to enact and implement policies designed to reach their commitments under the Paris Climate Agreement.

We are deeply concerned that the renegotiation of NAFTA could worsen the problems of rural livelihoods, unsustainable production and corporate concentration in agriculture that our organizations have experienced and documented over the last 23 years. We call on you to set aside this failed model and instead promote fair and sustainable trade and investment relations in North America.

Sincerely,

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¹ How law firms, arbitrators and financiers are fueling an investment arbitration boom,
<http://www.tni.org/briefing/profitting-injustice>

² The State of California was among several to ban gasoline containing MTBE (methyl tertiary-butyl ether), due to the propensity of small amounts of the chemical to quickly move through aquifers and contaminate drinking water supplies. Methanex brought an ISDS suit against the U.S. under NAFTA for \$970,000,000. At the close of the Methanex dispute, while the federal government was awarded full payment of the millions of dollars in fees and costs that it incurred while defending the case, California was not similarly compensated. States were also out of pocket defending NAFTA tobacco regulation challenges. See, Intergovernmental Policy Advisory Committee report on Transpacific Partnership (December 2015): <https://ustr.gov/sites/default/files/Intergovernmental-Policy-Advisory-Committee-on-Trade.pdf>

³ <http://www.r-calfusa.com/wp-content/uploads/2015/01/141202CoalitionLetterOnFY15AppropLegislation.pdf>