



Renegotiating NAFTA:

Threatening to Consolidate the Power of Big Tech and Undermine Privacy and Consumer Safeguards

The North American Free Trade Agreement (NAFTA) was radically different from past trade deals that focused on traditional trade matters, like cutting border taxes. Instead, most of NAFTA's provisions granted new powers and privileges to multinational corporations and limited governments' right to enforce strong consumer and environmental protections.

NAFTA renegotiations could be an opportunity to fix this power imbalance, by replacing the corporate protections with new terms that benefit workers and consumers. But multinational corporations, like global monopolist Amazon and data-mining giants Facebook and Google, are trying to use NAFTA renegotiations to lock in new powers and protections on issues the original NAFTA did not even cover, such as e-commerce and internet governance. Their goal is to establish NAFTA rules that stop governments from creating new domestic policies to protect their citizens' privacy, personal data and security as new technologies emerge. These mega corporations have considerable sway over officials in all three NAFTA nations.

As a result, under the guise of "modernizing" the 24-year-old agreement, officials from the United States, Canada and Mexico are negotiating new "digital trade" rules that mirror dangerous "electronic commerce" provisions that were included in the Trans-Pacific Partnership (TPP). The TPP, a corporate-dominated deal that was vehemently opposed by unions, environmental organizations, consumer groups, digital rights advocates and more, could never achieve majority support in Congress. So now the corporate interests have turned to the NAFTA talks to try to revive their TPP agenda. Disturbingly, the corporate-friendly "digital trade" rules being pushed for NAFTA have received almost no public attention and have been moving quickly.

The internet is a growing, evolving marketplace. Governments must have the ability, now and in the future, to regulate it and protect consumers without having their hands tied by so-called "trade" agreements. But if the Big Tech companies and Wall Street have their way, the digital trade rules in the NAFTA renegotiations will be another encroachment of corporate control over our daily lives.

Due to the secretive nature of the NAFTA negotiations, where the public has no access to negotiating texts, it is impossible to know for sure what is being negotiated in our name. But, press reports and conversations with knowledgeable sources have revealed that provisions under negotiation in **NAFTA's digital trade chapter could do the following:**

- **Undermine Protection of Consumer Privacy and Security by Prohibiting Limits and Restrictions on Data Flows or Rules on the Location of Computing Facilities**

When you use a service online for free, chances are the company operating the online site or service is making money by turning your personal data – including shopping history, location tracking, home address, and sensitive medical and financial information – into a new commodity to sell or to target advertising to you. This is increasingly the business model



for search engines, email providers and other online services. The biggest companies in the world are racing to control this valuable resource – your personal data – and they don't want consumer safeguards that governments could enact to protect your privacy standing in their way.

If the renegotiated NAFTA incorporates the electronic commerce terms included in the final TPP text, governments would be prohibited from regulating where Big Tech firms send and store your data. That would mean high-tech giants like Amazon, Google and Facebook would be free to transfer your data to any other country and thus avoid privacy and other consumer protections our governments may require. The TPP included such terms and did not require governments to adopt meaningful privacy laws. If NAFTA repeated these dangerous terms, it would mean consumers have no guarantee that their data would be protected where the data were transferred – even if domestic laws require such protections. Countries like Canada that have superior privacy laws could see their data protection rules undermined, while congressional efforts to introduce privacy rules could be thwarted.

These provisions would significantly undermine the ability of governments to secure their citizens' data against unauthorized or unlawful exposure or processing, or against cybercrime, accidental loss, destruction or damage. The so-called exceptions in the TPP ostensibly meant to address these threats were too weak to provide meaningful protection for privacy laws and data protection. Reportedly, provisions being proposed in NAFTA renegotiations would deliver on Big Tech's demands by further narrowing even the weak TPP exceptions.¹

Among the TPP's threats to data privacy was a broad prohibition on local server and computing facilities requirements – meaning the signatory countries would not be able to require companies to store data within their borders. However, the U.S. Treasury Department, concerned about accessing relevant financial data during a financial crisis, insisted on an exception in the TPP to this prohibition for financial services. Wall Street firms were enraged and pushed to have this narrow exception to the TPP's 'anything goes' approach removed in subsequent agreements. If they succeed in NAFTA, its provisions may be even more damaging to our privacy and consumer protections than the TPP.

■ Increase the Monopoly Power of Software Giants Like Microsoft and Thwart Efforts to Regulate Anti-competitive and Discriminatory Behavior

Every interaction we have on our computers, smart phone applications, or internet-linked devices is based on a source code, or human-readable instructions that programmers use when developing any computer program or application. The TPP text included provisions that would prohibit governments from requiring big mass-market software companies to disclose such source code. NAFTA negotiators have reportedly added a prohibition on disclosure requirements for algorithms – the sets of rules that calculate, process data and solve automated reasoning tasks. This prohibition could shield companies from having to share how their algorithms determine ads and contents for users.² If such provisions are included in NAFTA, it would have wide-ranging ramifications for governments' ability to protect consumers.

Regulators must be able to access the source code to investigate and remedy anti-competitive, discriminatory, abusive or fraudulent corporate behavior. For instance, currently the Securities and Exchange Commission and Commodity Futures Trading Commission have access to high frequency trading source code, given that such source code can destabilize the stock



market by exacerbating flash crashes. In 2002, the Federation Trade Commission (FTC) ordered MSC Software Corporation to transfer source code (by a royalty-free compulsory license) as a penalty for violating antitrust laws when it acquired its only competitors and monopolized the market for advanced versions of its software. Inclusion of the proposed rules in NAFTA could undermine these regulatory actions.

And regulators may need to review source code to adjudicate whether online companies are engaging in deliberate discrimination in their advertisements. For example, a study by a senior technologist at the FTC found that Google searches for typically African American names produced negative ads posted by the background check site Instant Checkmate.com (even when there was no actual arrest record), while typically Caucasian names drew neutral ads. And an AdFisher study by Carnegie Mellon University found that when Google presumed users to be male job seekers, they were much more likely to be shown ads for high-paying executive jobs, than women, even when the accounts used were more or less identical, except for their listed gender identity. While the companies argue that their algorithms are not responsible for deliberate discrimination in these examples, experts have pointed out that the only way to know for sure would be for regulators to check the underlying source code algorithms – and NAFTA source code rules could thwart such efforts.

■ **Undermine Cybersecurity and Regulations to Minimize Vulnerability to Hacking**

As more household appliances, toys and other items are connected to the internet – from “smart” shoes that track steps directly into fitness apps to “smart” refrigerators that can order groceries – regulators and independent researchers will need to have access to source codes to minimize vulnerability to hacking and malware. Even medical devices, such as pacemakers, have been found to be vulnerable to hacking.³ Source code disclosure is crucial to make “smart” devices more secure and less prone to attackers. If the TPP provisions on source code are included in NAFTA, consumers would be left vulnerable to having their sensitive information stolen by hackers, with our governments’ hands tied in trying to address such security vulnerabilities.



■ **Fail to Safeguard Net Neutrality by Introducing Weak and Unenforceable Standards That Are Insufficient to Ensure an Open Internet**

All of us depend on a free and open internet, which requires strong protections of net neutrality. The TPP text, however, included a weak provision addressing only the most egregious neutrality violations (those that block access to content) and still allowed blocking access as part of “reasonable network management.” This leaves out all the other ways that service providers can violate net neutrality, such as unjustifiably giving significant advantages to certain services over services owned by competitors, thus slowing down internet rates and increasing cost for users.

The FTC decision to repeal net neutrality rules granted telecommunications giants the power to potentially reshape the internet to their benefit at the expense of consumers. In the wake of this decision, Congress has worked on a bipartisan basis to restore net neutrality. If, as suspected, the weak TPP standard is included in NAFTA and other agreements, it would serve to lock in a woefully unenforceable standard without advancing the principles of net neutrality needed to protect a free and open internet.