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RESISTING FREE TRADE

Duncan Cameron

The recent Canada-U.S. free trade agreement (FTA) is a practical example of how the liberal right sees the relationship between the market and the state. The cross border institutions provided for in the pact show that international law can be used to limit the authority of the representative mechanisms of liberal democracy and to enshrine the particular rights of investors and the general rights of capital. Far from being politically uninformed, or unaware, those who framed the new Canada-U.S. Trade Commission and designed the new dispute settlement mechanism have taken their inspiration from the current of thought known in the U.S. as neoconservatism, that is, classical liberalism with respect to the market, combined with a national security state.

For those who support the creation of a free trade area in upper North America, the principal consideration is to improve the so-called efficiency of the North American economy. From this perspective, the best commercial arrangements for Canada-U.S. trade are those that simply eliminate barriers to trade. Tariffs, quotas, national standards, trade remedy laws and other commercial practices are then to be understood not as the exercise of public authority based on laws voted by representive institutions; rather they are seen, principally, as impediments to the functioning of the market economy. For supporters of the FTA, free trade can be equated with the free market.

The market view of free trade is that interest groups coalesce behind trade barriers that bring them special benefit at the expense of society. By eliminating trade barriers a society does itself a service: it eliminates political distortions to the optimum allocation of economic resources. If at the

same time, one country can induce another country — its major trading partner — to also remove trade barriers, then the economic benefits are increased. By choosing to remove trade barrriers through international negotiation, the two countries can conveniently remove the political problems caused by the special interest groups. Such groups are forced to make their claims for privileged treatment openly, where it can be shown that the costs of "protectionism" will be borne by all.

In this free trade scenario, the rule of law is important. Laws enforce the agreement. The state acts to ensure that market regulation of production and distribution takes place across national boundaries. Free trade means quite literally, free of customs duties. It does not mean free of customs examination. On the contrary, a free trade area applies stringent "rules of origin." For goods traded within the area that contain materials from outside the area, it must be shown that within one of the countries in the free trade area, such materials have been upgraded or transformed, through additional value added in production, before receiving duty free status at the border. This means bureaucracy and coercive regulations.

Of course, then, there is no such thing as free trade in the sense of trade that would be free of some government intervention or regulation. Smuggling remains a crime regardless of the tariff level, illicit drugs are no more welcome than before, and testing for safety and health standards is still required by officialdom. What changes under a free trade area is firstly the rights of those that own production facilities. They receive the benefits of reduced taxes (in the form of lowered customs duties) on transborder shipments of goods within the free trade area. Under the Canada-U.S. pact such owners receive as well the added benefit of freedom to invest (national treatment) on either side of the border. The inclusion of investment rights in the FTA goes beyond the General Agreement on Tariffs and Trade (GATT) definition of such free trade areas.

True to the neo-conservative spirit of the accord, the one sector to be fully exempted from free trade rules is the national security industry. The Canadian grape growers may be a special interest group, ready for sacrifice to the American giant, Gallo Wines, but the military-industrial complex is apparently above such economics. Under the FTA nothing shall be construed, "to prevent any party from taking any action which it considers necessary for the protection of its essential security interests."

The view that free trade reinforces the free market then underlies ideological support for the FTA. Having assumed that markets allocate resources in an optimal fashion through the workings of the perfectly flexible price system, free traders can then point to greater price competition and lower prices as the great benefits for economic efficiency of the FTA. In this way of thinking, assumptions about the economic world become beliefs about the way that this world should be organized. Such assumptions, and therefore such views, ignore, of course, the workings of the economy and in particular the existence of widespread price-setting by large corporations.

Indeed, that there may be no such thing as a free market is simply an uncomfortable observation to be dismissed by the liberal right.

Business leaders who see their corporations as the principal beneficaries of the FTA, are happy to adopt the views of the liberal right but have few illusions about perfect competition and flexible prices. What they wanted, and got, from the FTA was enhanced freedom to act in accordance with the profit motive. For corporate Canada, free trade means dual citizenship. If labour and other business costs are lower in the U.S. then production facilities will be located in the U.S. Knowing this gives business increased leverage in negotiations with government over industrial grants and fiscal incentives to invest.

The Corporate Agenda and the FTA

Rather than simply examining the FTA as an outcome of negotiations between two sovereign governments, it is more useful to look first at the motives and aspirations of the great backers of the intitiative: corporations in Canada and the United States. What the Canadian big business groups wanted from government is interesting because of what it reveals about late capitalist Canada; it is especially interesting because of what it shows about current relations between those two perennial partners, the state and capital.

When business began its campaign to convince Canadians to set aside traditional suspicions of free trade and move towards a continental economic policy for Canada, leaders needed a winning argument, one that would play well with public opinion and assure them of allies in government. The argument that proved successful, throughout an extended period of lobbying, was that Canada was threatened by American protectionism. Beginning with a Senate committee which reported favourably on free trade in March of 1982 and up to the Macdonald commission report of September 1985, business groups worked publically and privately to rally support within their own ranks, and among governments, for their preferred option: continental free trade. In this respect the fear that the U.S. would somehow cut off access by Canadians to markets for resources and manufactured goods proved persuasive.

It was the Business Council on National Issues and the Canadian Chamber of Commerce that took the lead in selling the idea of free trade in Canada. They also worked with business groups in the U.S. to lay the groundwork for American support. What eventually convinced most resource producing provinces, the Macdonald commission, and ultimately the Conservative government itself to support an FTA was a powerful form of blackmail. Business let it be known that without assured access to the American market, future investment would take place in the U.S., not Canada, and that Canadian markets would be serviced from the U.S., not American markets from Canada.

What made this argument plausible was that the American authorities had shown increasing willingness to use trade remedy laws to block imports. Former Canadian negotiator, Rodney Grey, fresh from his experience during the Tokyo Round, was the first to sound the alarm about U.S. protection, and its potential impact on Canada. Grey pointed out that as a result of post-Tokyo tariff reductions, Canada could expect to develop industries that were fully competitive on a North American scale. Indeed seven major negotiations under GATT had produced virtually tariff free trade in North America. The implication was that, for successful Canadian firms, as much as 80 per cent of production could be shipped to the U.S. If, however, following a ruling in the U.S., such firms were deemed to have received subsidies from the Canadian governement, the industry could be hit by an American countervailing duty that rendered production non-competitive in the U.S. Such a ruling by the U.S. authorities would destroy the Canadian industry. This was the spectre of American protectionism in action and the prospect spooked many in business and government.

From the other side, a North American competitive industry based in the U.S. might export at most ten per cent of its production to Canada. If that industry were deemed by Canada to benefit from subsides, and a Canadian countervailing duty imposed as a result, the impact on the U.S. industry would affect only ten per cent of production. Thus, the use of countervailing powers was asymmetrical: big countries, such as the U.S., could hurt small countries; but small countries, such as Canada, could not hit back with anything like the same effect.

The unequal capacity to hurt each other exists because trade has been imperfectly liberalized. Tariffs have been reduced, but trade penalties are getting more important to deal with the consequences of trade liberalization: increased import penetration; or what is often thought to be a consequence, balance of trade deficits.

For a free trade agreement that has as an objective the assured access by Canadian industry to the American market, trade law becomes the crucial issue. If, at great cost, Canadian industry restructures to benefit from the advantages of free trade, only to find that the price of its success is being shut out of the newly developed American market, what is the point of a free trade agreement? Assured access can hardly be considered to exist without a very clear understanding about the conditions under which Canadian exports can be countervailed. Though this was undoubtedly the argument that most convinced government and business to negotiate the FTA, the interesting point is that the eventual agreement did not deal in any meaningful way with the impact of American protectionist laws on Canada.

Despite further trade liberalization in the form of tariff reductions, under the FTA, Canada is still not out from under the protectionist impact of U.S. trade law. With the FTA, Canada only exchanges the right to appeal unfair laws to an American international trade court, for a new right to

appeal the *same* laws to a binational review panel. In presenting the new binational review panels as going some distance to meet the guaranteed access sought by the government, the reasons that led Canada to negotiate with the U.S. in the first place, the reasons invoked by the Business Council on National Issues, the Macdonald Commission, and the government itself, to sell Canadians on free trade talks, seem to have been forgotten. As a result, the more liberalized trade negotiated under the agreement will make Canada even more vulnerable to U.S. protectionism.

While for the Americans, Canadian trade law is nothing more than an irritant, for Canada, the continued existence of American trade protection, and the promise of more, means that new investment in Canada will still not be encouraged or existing investment any more protected under the FTA than before the talks began. Thus Canadian companies still have an incentive to invest in the U.S., rather than in Canada, and service the American market from a U.S. location, rather than through countervailable exports from Canada. Yet it was to encourage new investment that Canada supposedly went into negotiations with the U.S. in the first place. There will be no benefits to Canada from free trade if, as can safely be assumed, the result of the FTA will be that new investment is undertaken in the U.S., not Canada, and existing investment "rationalized" to U.S. locations.

So what happened to the argument about American protectionism, so prominent in business circles before the agreement, and so important for selling free trade negotiations to government and the public? The short answer is that the Canadian business community got something else to forestall the impact of American protection on Canadian exports; they got the right to national treatment of Canadian investment in the U.S. While this measure offers an alternative to Canadian manufacturers, who can now more easily move production to the U.S. to avoid American protection, it does little for resource exporters who obvously cannot move mines, forests and fish stocks to U.S. territory.

Canada and the U.S. Under the FTA

It is now being asserted by Ministers defending the FTA that it is not American protectionist laws, current and future, that, as such, constitute problems for successful Canadian exporters. Rather, what threatens potash producers, the softwood industry, steel, fish, hogs and other Canadian exports, is the way these laws are interpreted and applied in the U.S., by the Commerce Department and the International Trade Commission. Following this line of reasoning one changes the judge, not the law. This is a curious perspective to adopt, especially for members of a legislative body.

The proposed binational review panels are supposed to protect Canadian exporters, unjustly accused under U.S. law with benefiting from subsidies or of selling in the U.S. at prices below those prevailing in Canada, by introducing a new set of trade umpires to review U.S. decisions made

under U.S. law. A jointly chosen chairman and two nominees from each country will sit down to sift the evidence presented in the U.S. The very existence of this new review process is expected to influence the application of American law by the American authorities, or so we are told. While Canadians guilty of receiving subsidies or of dumping in the U.S. will be still be prosecuted, the innocent will now be better protected, according to the government.

Moreover, it is further claimed that Canada has its own trade remedy laws, its own countervailing duties for subsidized exports and anti-dumping mesures, that mirror U.S. laws and that, therefore, Canadians can always act against guilty American exporters. While no doubt accurate, this argument fails to address the issue of the unequal impact of such laws on Canada.

This defence of binational review panels is being put forward in order to claim that Canada's principal objective in talks with the U.S. — guaranteed access to the American market — has been dealt with. This view, that binational review is sufficient to constitute assured access, does not stand up to close examination. Indeed, it is misleading, for two further reasons.

First, the issue that led Canada's negotiator to break off talks, before the subsequent political intervention, was precisely the issue of so-called Canadian subsidies and American countervailing duties that deal with them: the issue of U.S. trade laws. The Americans simply refused to recognize that Canadian regional policies, industrial development grants or social policy measures were normal practices for a nation with a small population inhabiting a huge territory, with all that implies for an open economy. In interviews following the suspension of the talks, chief negotiator Reisman acted appalled at the American lack of sensitivity to Canadian practices and needs. Thus Canada tried, and failed, to secure American agreement as to what constitutes fair and unfair trade laws. Is it because of this negotiating failure that these laws are now less important?

This would not appear to be the case, because, secondly, the issue of American protectionist laws and Canada's presumed subsidies is still on the table. The two countries will spend a further five years trying to come up with a new set of trade rules. If they fail, the draft agreement provides for a yet two more years of negotiation on trade remedy legislation. Since the U.S. believes that its $ 150 billion (U.S.) trade deficit is due to unfair competition by subsidized exports from the the rest of the world, it was quite simply unwilling to cut a deal on trade law concerning subsidies, before the time table for the current GATT negotiations had run its course.

The issue was considered to be so important for Canada that major concessions were made to the U.S. on investment, energy, autos, banking, services and agriculture in order to sign what is really only an interim agreement for Canada, nothing more than an agreement to keep on negotiating. Since Canada has the option of negotiating the same issues within the context of the present GATT round which is slated to end by 1991, fully two years

earlier than the proposed new bilateral talks, surely this was unwise in the extreme.

What then is the effect of the FTA on American protectionist laws? Simply put, it legitimizes practices that are dangerous for Canada. By accepting, under the terms of the FTA, to have U.S. countervailing duty and anti-dumping law applied to Canada, Canada has accepted the very practices that were considered so dangerous that, throwing caution to the winds, Canadian business organizations called for a comprehensive bilateral agreement, in order to banish them as instruments for dealing with disputes arising from cross border trade. The falure to address these laws is such an unwelcome consequence of the accord that its was serious enough to lead some businessmen concerned about Canada's trading future to reconsider support for the FTA.

Since various versions of the proposed omnibus U.S. trade bill would remove existing discretionary authority from the U.S. administration over trade disputes, and impose new penalties for so-called unfair competition, this effectively ties the hands of U.S. negotiators in the future talks planned with Canada. Under this evolving "process protectionism," U.S. trade weapons will more than ever be in the hands of U.S. industry. Falling customs duties over ten years mean little new opportunities for exporters without agreement from the U.S. on what constitutes acceptable government assistance for export industries.

Even Canadian measures to move workers from low to high productivity industries, the very rationale behind trade liberalization, are still subject to the countervailing duty power in the U.S. Unfortunately, this may explain why the Canadian government was initially unwilling to announce such new adjustment assistance measures. But the failure to have these measures included in the agreement either speaks very poorly of the prospects for the much vaunted increased productivity and efficiency under the agreement, or it flies in the face of everything free trade boosters have said. Thus, for instance, the agreement fails the Macdonald Commission's test of providing "for agreed measures of transitional adjusment assistance and safeguards."

As if this were not bad enough, in the way of concessions sought, Canada even failed to get the U.S. to accept, as the stronger economy, the removal of its tariff protection more quickly than Canada. In fact, since Canada is removing a roughly ten per cent tariff over ten years, and the U.S. removing a five per cent tariff over ten years, it seems that on a proportionate basis the weaker economy is removing its tariff protection twice as fast.

Regardless of whether one agrees, or not, that foreign investment rights should be unrestricted and non-reviewable, that pooling energy resources with the U.S. is a fine idea, that U.S. ownership of major trust companies is unimportant, that free competition with the world's most subsidized farmers is healthy, and that Canadian operations of U.S. services firms can be sacrificed, it should be clear that these were American bargaining items

agreed to by Canada. In exchange for this list of concessions, about all that Canadian negotiators can point to is the trade disputes procedures.

Unhappily, as a close reading of the basic elements of the agreement attests, all both parties agreed to on trade disputes was the use of ad hoc binational review panels that have no power to find facts, or examine new evidence. On individual disputes, these panels will only come into play for Canadian exporters at the end of an already long, expensive dispute process in the U.S. And of course, it is this very process that has been seen by Canadians as unacceptable harassment of successful traders.

What should not be overlooked is that it is this trade harassment that hurts exporters or scares them away. If you win, if you are competitive, if you succeed under liberalized trade, then you can be punished in the U.S. by trade remedy law. It is this uncertainty that led Canada to negotiate guarantees about market access. It was liberalized trade that led to the increased use of trade remedy law by the U.S. It was success by Canadians that led the U.S. to try and countervail softwood lumber. The new draft agreement liberalizes trade yet again, without changing the rules that hurt Canada but not the U.S. On this issue, Canadians are being mislead when it is claimed that bianational review addresses the question of guaranteed market access. For Canada, binational review of decisions taken under U.S. national law, gives nothing to exporters other than to ensure that U.S. procedures were properly followed, procedures Canada rejects as unacceptable in the first place. Under the FTA disputes settlement scheme it is fair to ask who is binding whom.

Moreover, in selling the new binational review panels as a substitute for the guaranteed access sought by the government, it is conveniently forgotten that the panels have no teeth. Granted, they have the power to uphold a decision *against* Canada. But, as a trade dispute agency, if they want to find in Canada's favour, the panelists can only "remand" the decision, i.e. send it back to the American authorities and hope for the best. Given this situation, can it fairly be claimed that these panels "assure" anything? It appears not. For Canadian exporters, uncertainty still prevails.

Though the panels fall far short of what Canada was seeking in talks with the U.S., it still is being said by FTA supporters that the situation is improved nonetheless. In other words, though Canada did not get an independent tribunal that would serve as a court of *first* resort for trade disputes, and though Canada did not get a substitute set of trade laws that recognizes and legitimizes Canadian practices in the areas of regional assistance, social policy and industrial development, to replace existing laws that do not, what Canada got is supposedly preferable to the status quo.

In addressing this doubtful proposition, it should be remembered that Canada can now appeal unsatisfactory decisions on trade remedy law to GATT. The new FTA panels, and the proposed trade commission must be seen, in a reading of the elements of the agreement, as a substitute, and *not* as an alternative, to existing GATT panels. There is a strong case that

can be made that Canada has much more to gain through improving the GATT panel process than from the proposed binational review process. As well, it can be shown that the binational process weakens the GATT not strengthens it. What is most certain is that it could never be envisaged that Canada would be obliged to give up anything like what was conceded in the FTA in order to get improvements in trade disputes from GATT. So rather than seeing the binational review process as preferable to the status quo, it is no doubt worse: first, because when it is chosen it effectively closes down recourse to the existing GATT procedure; and second, because it weakens GATT for the future.

The FTA is a bad bargain. The U.S. gets too much and Canada not enough. From any study it should be clear to fair minded observors that the accord fails to meet Canada's main objective in the talks, to get out from under current and future U.S. protectionist law. Given this failure, the U.S. gets more, far more, than the creation of a tariff free trade area in North America should ever warrant. On these grounds alone it will probably be rejected by Canadians in an election where free trade is an issue. But there is a larger issue involved than simply the merits of this free trade agreement.

Conclusion

The FTA is favoured by large business interests as a way of putting additional pressures on representative institutions to introduce measures that strengthen market regulation of productive (and therefore social) relations. In contrast, the forces that oppose the FTA support a more democratic ordering of society. For trade unions, church and farm groups, womens' organizations, social agencies, seniors, artists and others opposed to the FTA, the market vision of society it embodies is what is most unacceptable. In this sense, the fight against free trade includes the need to work out alternative social and political practices. This requires developing alternative visions and envisaging ways of creating new social relations. For instance, measures to de-commodify labour, or to democratize institutions, ideas that have long been on the socialist agenda, take on a new meaning when they emerge out of a political struggle waged by groups that want to do more than simply defeat the FTA.

The politics of building opposition to the FTA involves strengthening social solidarities. The release in Ottawa on December 10, 1987 of a major statement by progessive groups opposed to the policies of the liberal right marks an important stage in creating a base of support for an alternative to traditional politics. Entitled *A Time to Stand Together ... A Time for Social Solidarity: A Declaration on Social and Economic Policy Directions for Canada by Members of Popular Sector Groups* this document demonstrates that alternatives to the dominant ideology of the liberal right are very much alive in Canada. This statement represents the ideas, and reflects the energies, of a new generation of social and political activists. As a defi-

nition of Canada's future, it may well prove to be a more significant document than the final text of the FTA that was initialed by negotiators the same day.

Science politique
Université d'Ottawa