

Intelligence MEMOS



From: Lawrence Herman
To: Trade Observers
Date: March 12, 2024
Re: **PRESERVING BRIAN MULRONEY'S FREE TRADE LEGACY**

There's good reason to celebrate the late Brian Mulroney's courage in embarking on the quest for a free-trade agreement with the Americans in his first term as prime minister.

While eliciting strong opposition in many quarters at the time, it was a historically bold move, and getting Washington to sign the 1987 Canada-U.S. Free Trade Agreement, or FTA, has to be viewed as a milestone achievement.

Equally significant was FTA's successor, the North American Free Trade Agreement (NAFTA), bringing in Mexico as a partner in 1994. While NAFTA came into force under prime minister Jean Chrétien, it was negotiated and concluded under Mr. Mulroney, and stands as another success of his tenure. NAFTA cemented North American trade relations among the "Three Amigos," to use Mr. Chrétien's positive description at the time.

But Three Amigos was then. Today, things are much less rosy. In spite of the Canada-US-Mexico Agreement (CUSMA) that succeeded NAFTA in 2018, bilateral trade relations are in a fraught state. There are a range of irritants on the boil, unlikely to simmer down as the Americans, whether under Democrats or Republicans, continue on the path of unilateralism – a reversal of the multilateral rules of the World Trade Organization (WTO) and CUSMA.

There are forces at play that pose some difficult challenges.

The first involves the continuation of unimpeded market access, the main feature of FTA, NAFTA and CUSMA, each enshrining preferential access in trade among the parties. This is allowed under WTO rules because the preferences cover all or substantially all trade between them. This was and remains a huge benefit for Canada, as well as for Americans shipping here.

But the last few years have put serious doubt on US willingness to respect those obligations – not because of anything Mr. Mulroney agreed to, but because of the way the trade rules have been unilaterally applied.

Under WTO rules, incorporated in CUSMA, as with FTA and NAFTA, countries are allowed to suspend trade obligations for reasons of "national security" – an elastic concept, difficult to pin down, grey at the edges. While the exemption wasn't used for decades, Donald Trump used the national security off-ramp to impose tariff surcharges on aluminum and steel in 2018. (Restrictions that were eventually removed for Canada and Mexico in return for commitments to prevent steel and aluminum surging into the US.)

Even if resolved, national security remains one of the widest exemptions that the Americans can unilaterally employ – as in steel and aluminum – to frustrate Canadian trade access. Think of high-tech components or critical technologies.

The other problem concerns the bilateral dispute settlement system. Getting a panel process was one of the most contentious issues in the original FTA negotiations. Brian Mulroney was committed to a deal that allowed Canada to get out from under the American trade remedy system, which had been repeatedly targeting Canadian exports. This was a deal-breaker, and it took a late-night call from him to the Treasury Secretary James Baker to get the Reagan administration to agree to a panel system.

Today, the Americans seem much less committed to the panel process, reflected in their unwillingness, after more than a year, to comply with the panel decision supporting Canada on CUSMA's automotive rules of origin. This kind of America First position and distrust of international dispute settlement is reflected at the WTO, where the US has effectively paralyzed the multilateral panel process by refusing to agree on members of the Appellate Body.

While Mr. Chrétien may have lauded the Three Amigos back in 1994, the fact is that many American political leaders and trade experts never really bought into the North American concept. They rather saw the US as the centre, and Canada and Mexico as appendages to the trade arrangements.

After more than three decades of the Mulroney government's milestone achievements, at least two overarching trade differences with the Americans are percolating. And more could emerge when the CUSMA comes up for review in less than two years. The challenge will be to ensure that it does nothing to lessen Brian Mulroney's vision of strong and mutually respectful relations between the US and Canada.

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