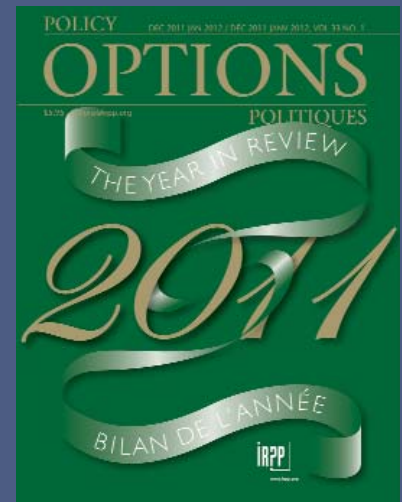


BEYOND THE BORDER AND REGULATORY REFORM

Colin Robertson

The Beyond the Border and the regulatory reform negotiations are another chapter in the long history of closer economic integration between Canada and the United States. Implemented as envisaged, the deal is potentially transformative in improving our mutual competitiveness. The achievement of a Stephen Harper majority government and provincial support should make legislative implementation in Canada easy, but the Obama administration's decision to postpone consideration of the XL pipeline is a complication.

Les négociations entourant l'initiative Par-delà la frontière et la réforme de la réglementation ajoutent un nouveau chapitre à la longue histoire de l'intégration économique canado-américaine. Si l'accord qu'on envisage est mis en œuvre, il pourrait clairement renforcer notre compétitivité réciproque. Proposé par un gouvernement conservateur majoritaire et soutenu par les provinces, il ne devrait rencontrer des obstacles lors de son application législative au Canada. Toutefois, la récente décision de l'administration Obama de reporter l'examen du dossier du pipeline Keystone XL vient compliquer les choses.



Franklin Roosevelt was a president who understood the strategic value of Canada. He determined on a policy of “good neighborhood” in “the realization that the well-being of one nation depends in large measure upon the well-being of its neighbors.” He convinced Mackenzie King of the advantages of a mutual security pact during their meeting at Kingston in 1938. Their thinking was entrenched in the Ogdensburg Agreement setting up the Permanent Joint Board of Defence and its economic corollary, the Hyde Park Declaration.

Their vision set the subsequent rhythm of the relationship. We share “common” space so use it to maximum advantage by satisfying the security requirements of mutual defence while integrating our economic capacities and natural resources to improve our mutual competitiveness. Wherever possible, manage through binational institutions to create the “mutual trust” that Roosevelt described as the essence of the relationship.

This collaborative formula actually began with the joint stewardship of our shared boundary waters through the International Joint Commission, the web of agreements signed during the Second World War, the provision of perimeter air security through NORAD, the Auto Pact, the Canada-US Free Trade Agreement to the current Beyond the Border (BtB) discussions, “a shared vision for perimeter security and economic competitiveness” launched by Prime Minister Stephen Harper and President Barack Obama in February.

BtB is the third significant effort since 9/11 to reduce the congestion and aggravation encountered at the border.

The first effort — the Smart Border Accord developed in

the wake of the terrorist attacks — was directed by then deputy prime minister John Manley and White House special adviser and subsequently first homeland security secretary, Tom Ridge, a former governor of Pennsylvania.

With agreement on the principle of risk management, over a two-year period they developed 32 concrete measures for implementation. These included the creation of the NEXUS fast pass for prescreened travellers, integrated national security enforcement teams, recognition of standards for airport security and container screening.

By contrast, the second effort — the Security and Prosperity Partnership, launched in March 2005 at Waco, Texas, by President George W. Bush with Prime Minister Paul Martin and Mexican President Vicente Fox — never enjoyed the discipline or focus of the Smart Border process.

It foundered on its overly ambitious agenda — 300 issues and a complex process, 20 trilateral working groups and the lack of a champion.

The current effort dates back to February 2009 when President Obama flew to Ottawa in his first foreign visit after his inauguration. He and Prime Minister Harper launched the Clean Energy Dialogue and agreed to improve border access for our shared trade. Delays of people and goods at the border meant greater costs and an interruption of supply-chain dynamics with a commensurate diminution in competitiveness.

While the “clean energy dialogue” would realize joint standards on auto emissions, discussions on the border focused on security. The Shiprider program for joint policing of the

Great Lakes was realized, but there was little progress on border access.

At the G8/20 2010 meetings in Huntsville and Toronto in June 2010, Harper pulled Obama aside and told him that the border process had stalled. In his February 2010 State of the Union address, President Obama had announced he would “double” American exports to help create more jobs and followed it with missions to

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India and Brazil. Surely, said Harper, it would make sense to put some priority on America’s biggest customer — Canada, the top market for 35 states, supporting eight million American jobs.

The President agreed. In subsequent discussions, the Americans requested inclusion of regulatory differences. They had already begun discussions with the EU and Mexico, so Canada was the next logical partner. At their February 2011 meeting they agreed to focus on four areas of cooperation: assessing threats early; trade facilitation, economic growth, jobs; integrated cross-border law enforcement; critical infrastructure and cybersecurity.

Following cross-country hearings and over 200 written submissions, two consultation reports, “Perimeter Security and Economic Competitiveness” and “Regulatory Cooperation Council,” were released by the new foreign affairs minister, John Baird, at the end of August.

Feedback on BtB included the requirement for timely information sharing; protection of privacy; the use of biometrics; an integrated exit-entry system and the development of a common protocol in the case of border breakdown; simplified, harmonized border inspection; expansion and unification of trusted traveller programs; extending preclearance and moving inspection to the factory gate; building on existing collaborative law enforcement and

intelligence; a joint approach on infrastructure at the gateways; and deepening collaboration on cybersecurity.

Feedback on regulatory cooperation included developing common approaches to food safety requirements; biotechnology product approvals; crop protection products; labelling; packaging; alignment of motor vehicle safety standards; pre-clearance of passengers; alignment of safety standards for toys, pharmaceuticals, and therapeutic and

personal care products; alignment of greenhouse gas standards for vehicles and engines; energy efficiency standards; and the disproportionate impact that duplication and inefficiencies have on small and medium-sized organizations. Regulators were encouraged to develop so single window, joint certification approval processes, especially for agriculture, transportation, energy, and health and consumer products.

There were specific, practical recommendations concerning food including changing the Environmental Protection Agency (EPA) notice-of-arrival process to remove the advance notification requirement for products that are already EPA-registered, harmonizing approvals for food-safety-enhancing products and technology used in processing, adopting a common approach to nomenclature for meat cuts and developing standard-size containers. Importantly, users encouraged mutual recognition of current and future health and safety standards so as to deem acceptable in both jurisdictions consumer health products that meet US Food and Drug Administration and Health Canada requirements.

Transportation differences were also addressed with recommendations on alignment of weight and height for carriers and the introduction of cabotage in trucking as both “green” and efficient. Shipping interests called for harmonized ballast water regulations, consistency in

screening and reciprocity in the seafarer’s identification. There were recommendations to streamline passenger preclearance, watch lists and exit immigration controls and to align cargo security and passenger baggage screening standards.

All of this is sensible advice.

Many of these suggestions, especially from the business associations — the Canadian Council of Chief Executives, the Canadian Chamber of Commerce and the Canadian Manufacturers and Exporters — have been made before or have been considered by the various evergreen NAFTA working groups. The essential principles — respect for sovereignty and privacy, while aiming for efficiencies that respect environmental and labour standards are well entrenched in the trade policy playbook.

The framework agreement will likely include the following:

- Extending the current preclearance model now in place at airports to all other modes of transport, including commercial clearance of trucks with cargo leaving the factory gate.
- More generous thresholds for inspected goods.
- Substantial improvements to trusted trader programs, including with respect to the burden placed on shippers to provide advance data to customs authorities. The “fast-pass” privileges for trusted travellers will be expanded.
- Elimination of a lot of unnecessary duplicate inspection by ensuring harmonized standards and equipment.
- Integrated entry-exit systems that will satisfy the congressional requirement and provide Canadian authorities a better system to ensure landed immigrants are meeting their residency requirements.
- Improved access roads and ports to make them gateways rather than chokepoints.
- Reinforcement against cyber-threats to electrical grids, oil and

gas pipelines, and the circuitry for everything from ATM transactions to air traffic control.

There will be reforms aimed at greater regulatory compatibility to cover everything from baby food bot-

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tles to seat belts to the Cheerios US ambassador David Jacobson eats for his breakfast.

If implemented as envisioned, the deal holds out the promise of transformational progress.

There must be early results, including faster passage through the border and, for business, less red tape. The first test for the new deal will be in the pilots and practical implementation at ground level to create supply-chain security and efficiency by moving primary inspection to the perimeter.

It will be a multi-year process, requiring commitments by all players.

The biggest challenge within government will be effecting attitudinal change on the part of our border staff. "Risk management" must become the mantra if the exercise is to succeed. They need to listen to US border czar Alan Bersin who, during a recent trip to Ottawa, echoed Roosevelt at Kingston, when he declared that the "old dichotomy between the promotion of trade and heightening of security...is a false choice."

There will be protests about a loss of "sovereignty" — the perennial cause of the Council of Canadians and their allies in any trade deal. The reality, of course, is that we are leagues from either a European-style common market or common currency. Sharing data on cross-border flow of people is a practice that dates back half a century but we maintain separate immigration regimes.

Then there is the noise.

The Canadian media have a ten-

dency to cry wolf at every perceived threat to trade and to frame it in terms of sovereignty (while the American media frame it as outsourcing). Our political class has a tendency to over-react and too readily raise the flag

when all that is needed is clarification handled through our ambassador in Washington. We need to develop a better threat assessment standard and graduate our response accordingly.

Unlike our Westminster system, most of the legislative threats wither on the congressional vine. Much of the congressional legislative process is similar to "three yards and a cloud of dust." The system is designed for "block and tackle." An average of 11,000 bills are introduced each Congress. Fewer than 500 of them reach the president's desk for signature or veto.

There is also the American financial situation. The US needs revenue and we can expect more examples like the \$5.50 fee for air and sea visitors, "necessitated" as Ambassador Jacobson frankly admitted in a recent speech, "by the budget situation in my country."

Our best response, always, is to identify American allies whose interests will be affected and let them do the running. When issues are framed as "Canada vs USA," we are at a huge disadvantage except when we are playing hockey. Make it a US issue. In the case of the new travel levy, cruise line operators in Seattle and Portland have protested that it will hurt their business. Nor should we forget that when it comes to additional fees on air tickets, they are much higher in Canada than in the US.

As to the Buy American provisions within the jobs bill, Ambassador Jacobson observed that President Obama "had to make a tough call. He had to introduce a bill that had some

chance of passing. Hence the Buy America provision."

Buy American is a siren song with broad appeal, especially for those who perceive trade in zero-sum terms. International Trade Minister Ed Fast had it right when he pointed out, "There is simply no better American job creator than trade with Canada. And vice versa. And the best way to do that is through free and open trade." The recovery of our shared auto industry, the biggest source of manufacturing jobs in our two countries, was a cross-border effort.

Jacobson's home truth on Buy American also explains why we are constantly in negotiation with the Americans on trade — to preserve, protect and extend our privileged access to the world's biggest market. Past agreements, including the FTA/NAFTA, constitute an important shield that must be constantly reinforced and kept in good order.

Nor can we ever let down our guard. The stalled second crossing at Detroit-Windsor and the decision to punt the Keystone XL pipeline approval decision into 2013 illustrate how local interests operate in the American system.

The saga of the delayed second bridge between Detroit and Windsor is a case study in how a single interest — the current operator of the Ambassador Bridge — can effectively thwart the will of governments with a combination of money, guile and litigation.

Keystone XL is more complicated. The environmental movement is claiming victory, having created a great deal of noise in the media with their "ring around the White House" and deployment of celebrities. Lost in their victory laps is acknowledgement of the reason for the delay — the State Department has ordered a review of alternative routes. Nebraskans, Democrat and Republican, did not want another pipeline in the Sand Hills region that sits astride the Ogallala Aquifer, a critical source of drinking water



PMO photo

Prime Minister Stephen Harper and President Barack Obama in a relaxed moment at their bilateral meeting at the APEC summit in Honolulu on November 13. While there are the usual irritants in the Canada-US relationship, the interpersonal relationship between the two leaders is strong.

for the Great Plains. “All politics is local” and NIMBY (not in my backyard) are powerful factors. Inevitably, a year before a presidential election, all decisions have a strong political dimension to them.

The decision could have been worse: the State Department could have turned down the permit application or required the process to begin anew. Moreover, TransCanada’s response — to build around Sand Hills — has won Nebraskan approval. This will put the ball back in the State Department’s court.

Both irritants are a reminder that the fractious nature of the American system requires our permanent vigilance. The depth and diffusion of our interests obliges us to mount a constant education effort in every state, involving all levels of government, business and labour. Every strategy must have a micro-strategy. Tactics will vary case by case.

While Washington is the centre of American political life, the campaign field is all of America. We need to look at

the relationship as a collection of 63 states and provinces operating under two federal frameworks. This web of networks — governments, business, labour, civil society and the media — is like the interlocking rings in the Olympic logo. The personal relationships of governors and premiers are especially important and constitute the hidden wiring of the relationship. Cultivating these circles of influence and better coordinating these relationships is an ongoing requirement.

We may think we know everything about our American neighbours and Americans may think they know everything they need to know about us. As Ambassador Jacobson has observed, “We are both wrong.” It would serve our mutual interests if we could develop some first-class cross-border centres for the study of the United States at our universities.

We each have experts and specialist centres with expertise but there is no strategic, sustained and comprehensive

research program devoted to the United States or to Canadian interests in the USA. Look at the National Roundtable on the Environment and Economy with its multi-year research programs as a potential model. It has institutional links to business, labour and the provinces; the research and wider community; and a program of outreach and partnerships. Such an institute would also go some distance to satisfy the requirement for additional information, identified by some Canadians and stakeholder groups during the consultations.

What is likely to be difficult for Canadians is the entry-exit system, which will become a target for nationalists and the civil liberties groups. Noting the differences in Canadian and American privacy oversight, Federal Privacy Commissioner Jennifer Stoddart recently blogged “Rather than jumping into a newly defined relationship with both feet, we should only do so with both eyes wide open.”

She concluded that “if we compare a security perimeter agreement to a marriage and Canadian negotiators wish to enable Canadians to keep control of their personal information, a clear line on privacy needs to be written into a strong ‘pre-nup.’”

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A majority government ensures that Canada can meet its formal commitments on BtB and regulatory reform. Effective implementation, however, is part of the “permanent campaign” requiring a Team Canada effort, especially on the part of premiers and legislators, reaching out to their American counterparts.

The auspices for relatively uncontroversial implementation were good on the Canadian side until the Keystone decision. The noise around Buy American, threatened port levies, the Internal Revenue Service granny-chasing and the new air and sea fees was containable. But Keystone was the Canadian priority. Ambassador Gary Doer became the Canadian champion taking on the critics and quoting Montana governor Brian Schweitzer’s pithy comment that “I will never have to send my National Guard to patrol the border with Alberta to protect an oil supply.”

The case for Keystone remains strong.

In their recent study for the Center for Strategic and International Studies, *Much Ado about a Pipeline*, Sarah Ladislaw and David Pumphrey wrote, “On the energy security, economic, and foreign policy arguments, it is very difficult to find a solid reason why the project would be ‘against’ the national interest. The United States has long encouraged strong trade ties with Canada and increased production of Canadian oil sands. It would be a significant reversal of position to now decide not to advance those two longstanding goals.”

Within Canada, the XL decision will be used by critics who claim we can-

not trust the US. Many of these are, of course, the same critics who oppose the pipeline and oil sands development. The tar sands remains their target and they will also try to stop any pipeline to the Pacific, again with support from Hollywood allies like Robert Redford.

Although the rationale for closer integration is sound, the cause of closer integration has taken a hit. “Good neighbourship,” in the wake of Keystone, rings a little hollow around a decision the Prime Minister once described (in the *Globe and Mail*) as a “no-brainer.”

But the Prime Minister got it right when he attributed the decision, on Global News, to “the political season in the United States and decisions...being made for domestic political reasons.” And it is not the Macleans cover headline “I thought we were friends” but rather the picture in Honolulu of the two leaders — comfortable with one another — that portrays the real story.

Nonetheless, it obliges us to think about alternative markets, especially for our oil and gas. Finance Minister Flaherty has said recently (quoted in the *Globe and Mail*) that “we may have to move quickly to ensure that we can export our oil to Asia through British Columbia” by moving ahead with Enbridge’s Northern Gateway Pipeline project. At the ASEAN summit in Honolulu, Harper signalled that we would seek entry into the Trans-Pacific Partnership (currently the United States, Australia, New Zealand, Singapore, Malaysia, Brunei, Chile and Peru) that, with the addition of Canada, Japan and Mexico, would be 40 percent bigger than the European Union.

If the Canadian picture is now more clouded, the American picture is opaque. Even without the requirement for congressional approval (and the negotiators purposely sought to avoid anything requiring the approval of Congress), effective implementation will require the exercise of considerable political will and

capital on the part of President Obama.

Bureaucratic resistance to change will be reinforced by the inertia that descends on Washington during a presidential election year. Election campaigns inevitably encourage protectionist sentiment. During the 2008 primary campaign, then Democratic candidates Obama and Hillary Clinton promised re-examination of the NAFTA. Protectionist messages are also emerging from this year’s Republican field. Now as then, much of this is noise and we need to modulate the Canadian response accordingly.

Meanwhile time is running out. Ronald Reagan personally intervened to save the FTA in 1988, during the last months of his administration. But the Canada-US partnership inaugurated by President Clinton and Prime Minister Jean Chrétien in 1999 evaporated into the bureaucratic ether with the end of the Clinton administration. So did the Security and Prosperity Partnership with the end of the Bush administration.

President Obama has some heavy lifting to do in the coming months. He can draw inspiration from his Democratic predecessor, Franklin Roosevelt. Facing similar challenges when seeking his second term — unemployment was 16 percent — Roosevelt came to Chautauqua, New York, in August 1936 and proclaimed:

The noblest monument to peace and to neighborly economic and social friendship in all the world is not a monument in bronze or stone, but the boundary which unites the United States and Canada — 3,000 miles of friendship with no barbed wire, no gun or soldier, and no passport on the whole frontier. Mutual trust made that frontier.

A former diplomat, Colin Robertson was a member of the team that negotiated the FTA and NAFTA. He is a senior strategic adviser to McKenna, Long and Aldridge LLP.