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THE CANADA/U.S. ECONOMIC RELATIONSHIP: FROM FTA TO NAFTA TO ???

Derek H. Burney[†]
Canadian Speaker

Let me say that it was refreshing for me, as a bureaucrat, to actually have somebody in the Minister of Trades office doing something like trade. You will appreciate that while the challenges of Canada-U.S. relations occupied a pretty healthy part of my government life, they have been remote, although not completely absent, from my current duties. I say this up front just in case there may be a CAE shareholder in the audience wondering what on the earth I am doing here. I wanted to cover that one right up front.

But, returning to this topic, it is an addiction of sorts for those of us in Canada who served in the trenches. It is one that can even generate headaches if you stay away too long. So I am very encouraged that the subject itself seems to be coming back into vogue even though the climate today is much different than when the agenda was set.

I certainly congratulate you and the Institute on what is now a much more daunting topic for all of us. As you said last night, let it continue, because events in Iraq have definitely thrown Canada-U.S. relations into a snow bank, and I doubt that the spring is going to bring any immediate relief.

Many of you know Canadians can be almost obsessed with the relationship of the United States and the obsession is not always positive. We do worry about what America will do with its awesome power. We can express a high moral attitude of concern from time to time while maintaining an equally lofty position of flexible detachment from global challenges,

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which is why Dean Atchison once described Canada as being like the stern voice of the daughter of God.¹

U.S. action in Iraq has brought these sentiments to the floor in Canada. Distance, differentiation, and detachment appear to be more popular appeal than engagement these days. In my view it need not come to this. Americans, among others, might be wondering why it has. With a little more dexterity and a modicum of coherence, I believe Canada could and should find a way to be supportive of its neighbor; especially in response to what the United States declared was a direct security threat. Canada did not have to contribute our armed forces. Moral support would have sufficed. We actually have more troops in the region providing indirect support than most members of the coalition.

Instead, we chose not to join the U.S. action, citing this is the inherent right of an “independent” or “sovereign” country,² as Bob Hage was reminding us earlier. Sovereignty and independence are sensitive issues in Canada. The Canadian government’s decision was, in my view, ill considered and the timing was unhelpful. Indiscriminate and undisciplined remarks by government representatives only made matters worse.

In any event, optimists might suggest that the split over Iraq makes a bold bilateral issue more timely. The theory being that times of real crisis provoke radical thinking. Pessimists, on the other hand, will see the prospects as more remote now than ever. When I think about what next for this relationship, not surprisingly, my first instincts are more cautious than courageous; all the more so because of the emotions now running. Benign neglect is a phrase often used to describe Washington’s attitude toward its northern neighbor. Henry, you spoke about this last night, but the neglect has been replaced recently by publicly expressed disappointment and most likely less polite private reactions.

Canadian attitudes towards our southern neighbor represent a kaleidoscope of very different sentiments from warm to wary with many, many points in between. We crave differentiation, in part, because there is no distance between us and increasingly, less difference. That is also a major reason why Canadian political leaders can be very reluctant to take on major initiatives with the United States; more to lose than gain in terms of public approval, regardless of the intrinsic merit.

This also helps explain Canada’s ambivalence over Iraq. We share geography, as well as many basic values, but because of neglect on the one

¹ Margaret MacMillan, *A New Foreign Policy? Not Necessarily*, NAT’L POST, available at www.canada.com/national/features/foreignfields/story.html?id=02A48B96-77FD-4215-9FEF-192BD3F23492

² Stephen Thorne, *Update: Alliance motion defeated*, CAN. PRESS, April 8, 2003, available at 2003 WL 18254077.

hand and extreme sensitivity on the other, we both tend to employ our common border more as a barrier than as a bridge. This is what I think Stephen Flynn was implying earlier this morning. With notable exceptions, we tend to shy away from old ways to harness the proximity to our mutual advantage. There were certainly days when the Free Trade Agreement (FTA)³ seemed to be a bridge too far, both for Canada and the United States.

As for NAFTA,⁴ there was a time, initially, when it did not seem like either the United States or Mexico wanted Canada on the bridge and many Canadians thought the same way. But somehow, both got done, against the odds, a lot of emotion, and a lopsided mixture of fierce opposition and gross indifference. That leads me to believe more may now be possible, even if it may not be any time soon.

An attempt at next steps will be hobbled not just by emotions over Iraq, but by a more deep-seated suspicion in some quarters in Canada about sacrifices of sovereignty and by a profound lack of interest or more likely, a distinct lack of priority in Washington. We faced both of those hurdles on the FTA. NAFTA actually generated more of a political challenge in the United States than it did Canada.

The smart border initiatives and its side agreements have been beneficial,⁵ but remember that these were intended primarily to restore the degree of openness we previously had or thought we had at the border before September 11th. I am not discounting the value of new technologies being used, but does anyone really believe entry through our common border has become better, let alone smarter?

If anything, we are seeing examples of tighter, not looser, arrangements at all border points for all people and goods. All in the name of security in a changed environment. Hillary Clinton reminded us of this when she said American national security trumps international trade. I was reminded of this a couple weeks ago on a family trip. I have one of my sons living in the United States and I was visiting with my wife and her family in Mexico. On the drive back from Mexico we crossed at a very sleepy border point in Arizona. When the fellow came to the car and his first question was “Ya’ll Americans?” My son said proudly, as Canadians tend to do, “No, there are three Canadians.” To which the guard replied, “Out of the car.” Out of the car we marched. He said, “Into the immigration office.” It was quite a ways from where the highway was. We marched into the immigration office. I

³ United States-Canada Free Trade Agreement, Dec. 12, 1987, U.S.- Can., 27 I.L.M. 281 (1988).

⁴ North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.- Can., 32 I.L.M. 605.

⁵ *Smart Border Declaration: Building a Smart Border for the 21st Century on the Foundation of a North American Zone of Confidence*, CANADIAN EMBASSY, Dec. 12, 2001, available at www.canadianembassy.org/border/declaration-en.asp

said to the fellow when I got in there, “Gee, I used to think we were neighbors.” He said, “Neighbors? You’re foreign.” It reminded me a bit of that old movie *Protocol* with Goldie Hawn when she was applying for a job in the State Department and they asked her if she ever traveled to a foreign country and she said, “No. I went to Canada once, but it’s not really foreign. It’s kind of attached, isn’t it?”

A major complicating factor for any new initiative is obviously the huge power imbalance between Canada and the United States. In a way, that is what feeds the sensitivity in Canada and the neglect, benign, or otherwise, in the United States. Many of us who spend time managing Canada’s relations with the U.S. concluded that the best antidote to this power imbalance and the chronic neglect were agreements in shrinking rules with equal application; obligation for both parties. There is no nirvana with this objective, but practical benefits can be derived from agreements that allow for greater predictability and enable the flow of goods, services, and people to be less vulnerable to capricious or politically tainted decisions. Essentially, I am talking about the rule of law, instead of the rule of might, or the rule of the mighty. A point I thought would resonate well with so many lawyers in the audience.

Non-visaging rules simply generate a non-protracted interpretation and time-consuming legal wrangling. In fact, it is this kind of wrangling and never ending hassle that undermines the otherwise positive impact of NAFTA.⁶ The rules should be clear and consistent; underpinning the purposes of whatever agreement has been negotiated, with lawyers engaged as a last and not the first resort. Sorry, as many of you know I am not a lawyer. Practical, even logical, you might say, but neither is easy to achieve or explain. What we need most for any bold initiative is a clear sense of direction or leadership from the political level. This, undoubtedly, is the most difficult commodity to muster in today’s atmosphere. However, it was what really made the difference for the FTA and for NAFTA.

It will be one thing to ignite serious interest at the political level in Canada, but we do have a change of leadership on the horizon, all be it, not a change of government. That provides an opportunity to turn the page and possibly, write a new chapter. Some fence mending may be more necessary in the short-term,⁷ but that involves repair not renovation. Nonetheless, the prospect of arousing interest in Washington will prove even more daunting. Washington is a very busy place where the seemingly urgent often triumphs

⁶ *NAFTA Works for America, Administrative Update on the North American Free Trade Agreement 1993-1998*, U.S. TRADE REPRESENTATIVE, available at www.ustr.gov/nafta/report/home.htm

⁷ Steven Edwards, *War in Iraq*, NAT’L POST, March 27, 2003, at A4, available at 2003 WL 17381553.

over the important. Unfortunately, even on a scale of importance, relations with Canada do not rank prominently. We may be part of the neighborhood, but we are very rarely top of mind. Obviously, the war in Iraq and the fallout will be all-consuming in terms of priority and attention for some time to come. But even if that not were the case, it would seem that the United States has little desire to reopen what it perceives to be as working with Canada.

Other initiatives on the trade side there is the Doha Round; the perennial dispute over agricultural subsidies, new bilateral free trade agreements, and even a hemispherical free trade agreement.⁸ All issues that command more priority. I want to stress that to be successful any major initiative requires a mutual and sustaining commitment from the very top. The very top is an expression that is composed of positive ingredients that are different in our respective political systems. The parliamentary system can deliver expeditiously under confident, majority leadership.

The U.S. system, let me say diplomatically, is more complicated. I remember too well that the free trade initiative was almost stillborn because on the day of the Senate Finance Committee's decision vote to launch the negotiation, the result was a 10-10 tie.⁹ In part, because one Senator chose that day to send the Regan Administration a message concerning the use of slave labor in the Soviet Union. As a result, he voted against the negotiations of the FTA. Washington can be a bit like that.

The intellectual underpinnings of a Royal Commission in Canada from a U.S. think tank would be highly useful. Also necessary is persistent dialog and support from dedicated teams of officials and from some significant stakeholders who see the need as well as the benefit of doing something more. Recognizing the obvious impediments or hurdles, especially in today's climate, I believe that there is hope for a robust, bilateral agenda; one that goes beyond economic issues. So here is what I would suggest. First and foremost, assuming that internal security remains Washington's priority for some time to come, there is a chance that a concrete proposal from Canada to strengthen North American security might attract interest, if not attention, in Washington. It might also help mend the major breach resulting from recent differences over Iraq. It would involve new levels of cooperation and commitments governing defense, intelligence and police cooperation. You have got lots of flavor of what is needed there from the earlier discussion. It might include harmonized or at least common procedures to handle immigration and refugee policies; balancing our individual needs with our

⁸ David Crane, *Why the world trading system matters to Canada*, TORONTO STAR, Feb. 5, 2003, at E2, available at 2003 WL 12871509.

⁹ *Administration Wins Narrow Victory to Gain Fast-Track Authority for Free Trade Talks*, 3 INT'L TRADE REP. (BNA) Apr. 30, 1986, at 565.

mutual desire for greater physical security. As our former Prime Minister Brian Mulroney said at NAFTA's tenth anniversary, and I quote "If we want our internal border to be smart, we must make our external border more secure."¹⁰

There is no question whether Canada should do more on defense in order to participate more effectively in preserving its own national security. That is after all the national assertion of sovereignty. We accept quietly the U.S. guarantee of security without paying much of a price ourselves. Above all, I believe Canada needs to signal in words and deeds that the terrorist threats are real and that better security is imperative. We also need to target our defense spending and policy in a manner that strengthens North American security.

The quid pro quo for cooperation on physical security would be an equally ambitious initiative on the economic front beginning with the new approach on trade remedy. This eluded us in the past and I know too well that the United States will guard jealously the unilateral advantage of its existing trade remedy regime; what we used to call its weapons of mass destruction. I know the United States perceives no need for relief from Canadian trade remedy rules, but to be frank, any attempt to broaden what we now have on trade without reducing the scope for protracted disputes should have little appeal to Canada. If we chart any new avenues of cooperation, we must first of all fix what is not working today.

Although the statistics provide a compellingly positive story about the impact of NAFTA on all three partners,¹¹ punitive and seemingly perennial duties against Canadian softwood lumber and more recently against our wheat exports have sullied the ardor of that success for many in Canada. Most notably in western Canada, which was traditionally the region most attracted to free trade. I suspect the negative affects of these disputes may retard enthusiasm for the next moves. There is a whiff of might is right at play, which many fear will prevail no matter what rules or agreements are concluded. The failure to resolve or contain these disputes also reflects the lack of commitment and constructive chemistry at the top level of governments today.

The idea on trade remedy might be common definitions of countervail and anti-dumping, but the different weight or significance of trade in our two

¹⁰ Scott Miller, *Former Leaders Bush, Mulroney and Salinas Celebrate NAFTA's 10th Anniversary*, WASHINGTON FILE, DEPT. OF STATE, Dec. 9, 2002, available at <http://usinfo.state.gov/regional/ar/trade/02120903.htm>

¹¹ Robert B. Zoellick's Address to the National Foreign Trade Council, U.S. Trade Representative (July 26, 2001), available at www.ustr.gov/speechtest/zoellick/zoellick_7.PDF

economies frustrated previous attempts to move in that direction. It may be a sectoral approach with industries working together, for example, on steel to try to develop common or better understandings of permissible subsidies that would lead to a more general framework.

In more and more products, Canadian and American firms are competing in one industry in a single integrated market. Trade remedy laws should accommodate that reality, especially during the injury determination process. We could also try to tackle the trade remedy problem by exploring the prospect for common anti-trust and competition policy. Common competition and anti-trust regimes certainly help ensure a healthier, more certain platforms for investment, as well as for production and distribution; a genuinely level playing field.

There may be other ways to get the desired result on trade remedies. Some are suggesting a parallel approach to resource management; implying that we really have a softwood lumber problem more than a trade remedy problem. Regardless of how we reach the objective it is essential that we resolve the current disputes in an equitable matter and remove the uncertainty as well the threats that are inherent in the current system. We must examine all possible means of providing greater certainty for the future.

Secondly, on the economic front, a move towards a common external tariff would be beneficial, Mr. Hage. For one thing, it would reduce some of the complexity around the country of origin determinations. Third, I would suggest some good housekeeping is called for. Moving to mutual recognition of standards and regulations in order to facilitate joint customs inspection and reduce redundant paperwork while expediting FAST Track procedures.¹²

Fourth, an economic area that I believe is right for more bilaterally and just possibly trilaterally, would be energy. Particularly as the volatile situation in the Middle East tightens, concern in North America about dependence on foreign oil will increase. We could look together at more efficient exploitation of reserves in North America and make a joint commitment to develop new sources of energy; preferably without subsidies or tax credits for extraction or transmission. Just in case anybody from Alaska is in the room. A new electricity grid with more efficient, broader channels of distribution would also be timely. In the same vein, we might try to develop mutual and tangible commitments to reduce greenhouse gas emissions blending. Commitments in the spirit of Kyoto reflecting the reality of our North American economies.¹³

¹² Lenore Sek, *Fast-Track Authority for Trade Agreements (Trade Promotion Authority): Background and Developments in the 107th Congress*, CONGRESSIONAL RESEARCH Service Report IB10084, May 14, 2001, available at www.ncseonline.org/nle/crsreports/economics/econ-128.cfm?&CFID=11368903&CFTOKEN=7581945

¹³ The Kyoto Protocol to the United Nations Framework Convention on Climate Change,

I do not see labor mobility or common currency as a part of our next agenda. Mexico has more interest in the former. While a common currency may have merit, I seriously doubt whether it would attract any support in Washington, let alone Ottawa. That is assuming, of course, that common means something other than the U.S. dollar. The fact that labor mobility is a major priority for Mexico illustrates to me that a trilateral approach initially would be more likely to stumble over different, if not competing agendas. Just as NAFTA followed the FTA extending and in some instances improving the terms for all three parties, I believe future negotiations have a better chance of success if they proceed in phases.

In a nutshell, I am contending that by combining mutual priorities for greater physical security and economic security we could embark on a bold agenda of next steps aimed at establishing twin pillars of pragmatism to the benefit of both countries. If we were able to forge new agreements in these areas, I believe we would need some new institutional arrangements to support their implementation and an end to maintain political oversight. A permanent Joint Council on Homeland Security and a North American Commission on economic security would represent a good start with political as well as bureaucratic levels underpinning each. The model for the former could be the Permanent Joint Board on Defense,¹⁴ which nurtured exceptional cooperation between Canada and the United States during World War II. It is important that we involve both politicians and officials in these institutions. Regular reviews of the political level would be intended to act as a catalyst and a prod for action at the official level. I think it would also help temper some of the inevitable concerns about sovereignty. Clearly, this would be an ambitious agenda, one fraught with pitfalls, sensitivities and obstacles, but if we are serious about turning our geography to our advantage, these are the kinds of issues that should be addressed by our leaders in the years ahead.

The Canadian Council of Chief Executives is advocating a broad series of initiatives for a relationship with analyses and ideas reinforcing much of what I suggested to you today. But success will not come from analyses or careful deliberation involving business and academia. I say that with respect. What is needed most of all is political leadership, a signal of willingness from the top to explore possible means to these ends, along with the stamina to see them through. I have no illusions on either account. The obstacles

available at www.unfccc.de/resource/docs/convkp/kpeng.html (adopted by 159 nations in Kyoto, Japan, on Dec. 11, 1997).

¹⁴ *Canadian-American Permanent Joint Board on Defense*, DEPT. OF STATE BULLETIN, Aug. 24, 1940, available at www.ola.bc.ca/online/cf/documents/1940OgdensburgAgreement.html (established on the basis of the Ogdensburg Agreement on Hemispheric Defense of August 17, 1940).

range from complacency to hostility, the tyranny of the status quo and the allergy against deeper association. Not much room for pragmatism, especially if emotions take center stage. The best antidote, perhaps the only antidote, is leadership.

While sensitivities about sovereignty are often seen as the relenting preserving of Canadians, you may recall the binational Dispute Settlement Panel in the Free Trade Agreement generated similar concerns from the U.S. Legislators.¹⁵ But the track record of success from the Free Trade Agreement and NAFTA, even with their limitations, is the best foundation for mutual confidence; that is the prize of trying to do more is worth the effort. It would be easier, perhaps more politically palatable, to contemplate incremental steps; easier but not better. What we must resist above all else is a tendency to coast or drift on the assumption that bold action is beyond our reach or not worth the political capital it would require. The remarkable thing about the Free Trade Agreement and NAFTA is that success emerged despite heavy obstacles and strong emotions.

The power of a good idea should never be underestimated, least of all by political leaders who concentrate excessively on polls rather than on policy options. Leadership and perseverance paid dividends before for Canada and the United States. It could happen again. It should happen again. Thank you very much.

¹⁵ Ton J. M. Zuijdwijk, *Dispute Settlement Mechanisms Under the Free Trade Agreement*, 40 ME. L. REV. 325 (1988).

