

A Regional Co-operation: Trade, Security and Regulatory Convergence@

By:
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This paper examines border security and economic relations between Canada and the United States, arguing against major reform such as the proposal for a common security perimeter. Regulatory convergence is discussed in the law of both NAFTA and the WTO, and the paper presents a small suggestion for private party access to support recognition of equivalence.

1. Proposals for Deepening NAFTA

Since the attacks of September 11, 2001 on the United States, Canadian exports to the U.S. have been subject to more stringent security measures at the border. As over 76% of Canada's exports go to the United States,² the change has presented a challenge. One study in 2007 found that Canadian companies had internalized the extra costs of U.S. border clearances in order to preserve export markets.³ The fear is that border delays and expenses will encourage firms to establish in the United States rather than in Canada, particularly since many manufacturers have adopted just-in-time systems for the management of inventories.

In response, in Canada, there have been numerous proposals for reform to guarantee the access to U.S. markets that Canadian exporters thought they had achieved in the Canada-United States Free Trade Agreement of 1989 and the North American Free Trade Agreement of 1994. In 2002, Wendy Dobson examined the possibility of a customs union, a full common market, or another "Big Idea" such as a strategic bilateral bargain that would involve cooperation in customs procedures, immigration, energy trade and defence.⁴ In 2003, Danielle Goldfarb surveyed 15 studies and reports published from 2001 to 2003, including suggestions for enhanced border cooperation and infrastructure, a common security perimeter, common refugee and visa policy, harmonization of external tariffs to eliminate internal rules of origin, harmonization or mutual recognition of standards, enhanced dispute resolution, common competition policy, natural resource security, greater cooperation in defence, common currency and institutional reforms.⁵

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2 Statistics Canada. Imports, Exports and Trade Balance of Goods on a Balance-of-Payments Basis, by Country (2007).

3 Conference Board of Canada, *Reaching a Tipping Point? Effects of Post-9/11 Border Security on Canada's Trade and Investment*, by Danielle Goldfarb, June 2007.

4 Wendy Dobson, *Shaping the Future of the North American Economic Space: A Framework for Action*, The Border Papers, C.D. Howe Institute, Commentary No. 162, Toronto, April 2002 at 24 – 27.

5 Danielle Goldfarb, *Beyond Labels: Comparing Proposals for Closer Canada-U.S. Economic Relations*, The Border Papers, C.D. Howe Institute, Backgrounder, No.76, Toronto, October 2003. Further reports followed, including: Gary C. Hufbauer & Jeffrey J. Schott, *The Prospects for Deeper North American Economic Integration: A U.S. Perspective*, C.D. Howe Institute Commentary No. 195, Toronto, January 2004; William B.P. Robson, *The North American Imperative: A Public-Good Framework for Canada-U.S. Economic and Security Cooperation*, C.D. Howe Institute, Commentary No. 204, Toronto, 2004; Michael Hart, "A New Accommodation with the United States: The Trade and Economic Dimension," no. 2 of *Thinking North America*, edited by Thomas J. Courchene, Donald J. Savoie and Daniel Schwanen, The Art of the State, vol. 2, Montreal, Institute for Research on Public Policy, 2004.

In 2005, a Task Force co-chaired by John P. Manley, Pedro Aspe and William F. Weld presented a set of ambitious recommendations to establish a North American security and economic community by 2010. The recommendations included a common security perimeter for the movement of people, cargo and vessels, the harmonization of visa and asylum regulations, investment in border infrastructure, law enforcement and military cooperation, support for economic development in Mexico, a North American energy strategy, a common external tariff, a permanent North American tribunal for dispute resolution, a unified approach to anti-dumping and countervailing duty actions, a trilateral competition commission, a North American approach to regulation, labour mobility between Canada and the United States, mutual recognition of professional standards and degrees, a North American education programme, an annual North American summit meeting of the leaders of government, a North American Advisory Council and a North-American Inter-Parliamentary Group.⁶

2. Smart Border and SPP

Governmental actions since 2001 have not been as far-ranging as the Task Force or other recommendations.

On December 12, 2001, Canada and the United States signed a Smart Border Declaration to enhance cooperation in identifying security threats and high-risk goods while facilitating low risk passage across the border. The Declaration was accompanied by a 30-point Action Plan covering secure biometric identifiers for persons, advance passenger information on airline flights, cooperation on refugee and asylum claims, customs preclearance away from the border, customs data exchange and joint facilities, infrastructure improvements, integrated border enforcement teams, information-sharing and coordination of anti-terrorism efforts, counter-terrorism legislation, freezing of terrorist assets and joint counter-terrorism training of personnel. On customs matters, the Declaration announced the Free and Secure Trade (FAST) programme of speedy clearances for low-risk companies and shipments. On movement of persons, the Declaration confirmed the expansion of the NEXUS programme of simplified entry and dedicated lanes for pre-approved, low-risk travellers.⁷

On March 23, 2005, the three NAFTA governments signed the Security and Prosperity Partnership of North America (“SPP”) which involves an enhanced level of cooperation not tied to border matters. The Prosperity part of the SPP added to previous initiatives by including regulatory cooperation, sectoral collaboration especially in energy, transportation, financial services and telecommunications, environmental stewardship, food safety and public health. On August 21, 2007, the three governments supplemented the SPP with a voluntary framework intended to improve regulatory cooperation through transparency, information exchange and use of best practices in order to eliminate redundant testing and certification processes.

3. Regulatory Convergence

⁶ *Building a North American Community*, Report of an Independent Task Force (John P. Manley, Pedro Aspe, William F. Weld co-chairs), sponsored by the Council on Foreign Relations with the Canadian Council of Chief Executives and the Consejo Mexicano de Asuntos Internacionales, New York, Council on Foreign Relations, 2005.

⁷ The Smart Border Declaration built on a history of cooperative arrangements between Canada and the United States including the Accord on Our Shared Border of February 25, 1995. The United States and Mexico signed a similar arrangement, the United States-Mexico Border Partnership Agreement, in March 2002.

The SPP advances some ideas for the deepening of NAFTA that are not limited to border issues. Michael Hart has recommended an ambitious Canada-U.S. initiative of regulatory harmonization. He suggests an obligation of bilateral consultation prior to the adoption of new regulations, along with a determination that any divergences serve important public purposes.⁸ The goal is to combat the “tyranny of small differences” between Canadian and U.S. regulations, such as the requirement of a prescription for certain pharmaceuticals in one country when they are sold over the counter in the other.⁹ The material below reviews aspects of regulatory convergence within NAFTA and the WTO.

“Behind the border” trade issues are dealt with in NAFTA in Chapter 7B on sanitary and phytosanitary (“SPS”) measures and Chapter 9 on technical barriers to trade (“TBT”). SPS measures relate to the health of humans, animals and plants. The TBT chapter covers all other standards-related measures. Both SPS and TBT provisions in NAFTA contain obligations for equivalence.¹⁰

For SPS matters, Article 714 provides that an importing Party shall treat another NAFTA country’s SPS measure as equivalent to its own if the exporting country demonstrates objectively that the measure achieves the importing Party’s appropriate level of protection. The importing Party may decide, on a scientific basis, that the measure does not achieve that level of protection and, on request, shall provide reasons in writing for this decision. The exporting country is to facilitate access to its territory for relevant inspection and testing (Art. 714(1),(2),(3)). NAFTA Parties are to consider each others’ SPS measures when developing their own (Art. 714(4)). This framework already encourages convergence, although on specific measures rather than in the more general top-down fashion envisaged in the SPP. Article 714 would presumably lead to recognition of equivalence for a specific measure. A general bilateral mutual recognition agreement (“MRA”) recognizing equivalence of SPS measures across a range of goods might raise a possible argument of discrimination against the other NAFTA Party. Article 712(4) states that SPS measures may not discriminate arbitrarily or unjustifiably between goods from a NAFTA party and like goods from any other country. The question would be whether the duty of non-discrimination in Article 712(4) adds an obligation such as good faith or due process to the provisions of Article 714 on equivalence. A blunt refusal to negotiate a similar wide-ranging MRA with the other NAFTA Party would probably breach Article 714 in any case.¹¹

For TBT matters, the obligation of equivalence relates solely to technical regulations of other NAFTA governments, measures with which compliance is mandatory. Other standards-related measures (i.e. standards and conformity assessment procedures) are not subject to this

8 Michael Hart, *Steer or Drift? Taking Charge of Canada-US Regulatory Convergence*, C.D. Howe Institute Commentary No. 229, Toronto, March 2006 at 21. He also recommends the development of a large database of federal and provincial regulations along with U.S. comparisons in order to select priorities for negotiation (*Ibid.* at 19).

9 *Ibid.* at 3.

10 Neither go as far as the Cassis de Dijon decision in the EC, which interprets the ban on measures equivalent to quantitative restrictions on the free movement of goods as requiring that any products lawfully produced or marketed in the Community must also have free access to the rest of the Community unless they would harm legitimate interests in the importing state, such as public health and consumer protection: Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

11 Although NAFTA Article 712(4) appears to use language drawn from GATT Article XX, care should be taken in interpretation, as Chapter 7B is intended to apply independently and not as an elaboration of GATT Article XX. NAFTA Article 710 provides that GATT Article XX(b) as incorporated into NAFTA Article 2101 is inapplicable to SPS measures.

obligation.¹² Article 906(4) provides that an importing Party shall treat another NAFTA country's technical regulation as equivalent to its own if the exporting country demonstrates to the satisfaction of the importing Party that the technical regulation adequately fulfills the importing Party's legitimate objectives. The importing Party must provide reasons in writing, on request, if it decides not to treat the technical regulation as equivalent (Art. 906(5)). As the TBT chapter also contains an obligation to treat NAFTA goods no less favourably than the goods of any other country (Art. 904(3)(b)), the same question might arise of whether a general MRA recognizing a range of technical regulations of one NAFTA Party would generate additional good faith or due process obligations regarding the other NAFTA Party.¹³

On eliminating unnecessary testing, NAFTA is supportive of the SPP goal. The NAFTA Parties are to accept the results of conformity assessments conducted elsewhere in NAFTA wherever possible (Art. 906(6)) and shall give sympathetic consideration to the development of mutual recognition agreements for conformity assessment procedures (Art. 908(6)).¹⁴ The specific mention of MRAs for conformity assessment in Article 908(6) would make it less likely that a wide-ranging bilateral MRA would be criticized for leaving out goods of the other NAFTA Party. Shirley Coffield, an experienced trade lawyer, called mutual recognition of testing "[o]ne of the success stories in the NAFTA," as it would permit a manufacturer to submit to one accrediting agency and get an approval valid elsewhere in the NAFTA territory.¹⁵

For SPS measures and TBT technical regulations, it might be useful to give private parties the right to demand reasons if denials of equivalence are a significant problem. This suggestion is inspired by the doctrine of direct effect,¹⁶ but would not reflect actual direct effect as NAFTA gives this right solely to governments. There might be some concern over allowing private parties to attack domestic standards,¹⁷ but such a right to reasons would only involve arguing that specific goods meet the level of SPS protection or the TBT legitimate objective of the country of import. Using private parties in this manner could be a relatively simple way to identify small differences that are suitable for recognition as equivalent. On the other hand, private access rights would not be workable for the recognition of other NAFTA conformity assessments, since the treaty obligations are too hedged. As well, NAFTA Article 908(2) already provides a national treatment obligation for the recognition of conformity assessment bodies of other NAFTA Parties, which should be sufficient.

As all three NAFTA governments are WTO Members, SPS and TBT measures of Canada, the United States and Mexico are also governed by WTO Agreements. In the WTO, the SPS Agreement contains an obligation of equivalence, while the TBT Agreement contains a less onerous duty to consider a request. A GATT Panel decided in 1981 that EEC recognition of U.S. but not Canadian conformity assessments for exports of beef to the Community breached

12 See the definitions in NAFTA Art. 915.

13 The TBT chapter differs from the SPS provisions in NAFTA, in that the exemptions of GATT Article XX as incorporated into Article 2101 apply.

14 As well, Article 913 establishes a Committee on Standards-Related Measures, with a duty to facilitate the process of making measures "compatible," a concept that includes harmonization, equivalence and permitting goods to fulfill the same purpose or to be used in place of one another (Art. 915).

15 Shirley Coffield, "Commonality of Standards – Implications for Sovereignty – A U.S. Perspective" (1998) 24 Canada-United States Law Journal 235 at 239.

16 See Armand de Mestral and Jan Winter, "Giving Direct Effect to NAFTA: Analysis of Issues" in no. 6 of *Thinking North America*, edited by Thomas J. Courchene, Donald J. Savoie and Daniel Schwanen, The Art of the State, vol. 2, Montreal, Institute for Research on Public Policy, 2004.

17 Robert Wolfe, "Where's the Beef? Law, Institutions and the Canada-US Border" in no. 6 of *Thinking North America*, edited by Thomas J. Courchene, Donald J. Savoie and Daniel Schwanen, The Art of the State, vol. 2, Montreal, Institute for Research on Public Policy, 2004.

Canada's right to MFN treatment in GATT Article I.¹⁸ This summary of "behind the border" issues in the WTO relates to equivalence and MRAs, as well as GATT Article XXIV on regional agreements.

In the WTO SPS Agreement, Article 4.1 requires a Member to treat another Member's SPS measure as equivalent if the exporting country objectively demonstrates that the measure achieves the importing Member's appropriate level of protection. There is no obligation to give reasons for a refusal, but Article 4.2 contains a duty to consult. The SPS committee has adopted several decisions to implement the equivalence provision.¹⁹ Concerning wide-ranging MRAs, the MFN obligations of GATT Article I and SPS Article 2.3 might add or reinforce further duties such as good faith and due process treatment owed to other WTO Members. The SPS Agreement is intended as an elaboration of GATT Article XX(b).²⁰ Should there be a conflict between the SPS Agreement and GATT 1994, the SPS Agreement would prevail.²¹

In the WTO TBT Agreement, Article 2.7 requires Members to give positive consideration to accepting technical regulations of other Members as equivalent if the importing Member is satisfied that the regulations adequately meet its objectives. Under Article 6.1, Members are to accept the results of conformity assessment from other WTO countries whenever possible, if the importing Member is satisfied that the conformity assessment offers assurance equivalent to its own conformity assessment procedures. Article 6.3 encourages the formation of MRAs on recognition of conformity assessments. Article 10.7 provides for notification of MRAs and encourages their formation, including agreements relating to technical regulations and standards. TBT Article 2.1 provides an MFN obligation for like products originating in any other countries, which might add to or reinforce the duties owed to all other WTO Members.²² The TBT Agreement exists separately from GATT 1994 and any GATT exemptions. Should there be a conflict between the TBT Agreement and GATT 1994, the TBT Agreement would prevail.²³

There are differences between the WTO provisions and the NAFTA regime for SPS and TBT measures. GATT Article XXIV permits the formation of regional agreements that would otherwise breach GATT Article I. There may be an issue over whether a distinctive regional SPS/TBT regime is permissible in a free trade agreement, since Article XXIV:5(b) states that an FTA may not impose on outside WTO Members "duties and other regulations of commerce" that are higher or more restrictive than the duties and regulations prior to formation of the FTA. As well, to meet the definition of an acceptable free trade agreement, "duties and other restrictive regulations of commerce" must be eliminated on substantially all the internal trade among the FTA members, in accordance with GATT Article XXIV:8(b).²⁴ In the *Turkey – Textiles* decision, the Appellate Body adopted a rather strict interpretation of Article XXIV,

18 GATT Panel Report, *European Economic Community – Imports of Beef from Canada*, adopted 10 March 1981, L/5099, BISD 28S/92. Most-Favoured-Nation ("MFN") treatment in Article I requires that any advantages and benefits granted be made available immediately and unconditionally to like products of all other GATT member countries.

19 G/SPS/20, G/SPS/19/Add.1, G/SPS/19/Rev.2. See further Joel P. Trachtman, "Regulatory Jurisdiction and the WTO" (2007) 10 JIEL 631.

20 SPS Agreement, Preamble.

21 General Interpretive Note to Annex 1A, Marrakesh Agreement Establishing the World Trade Organization.

22 See further Lorand Bartels, "The Legality of the EC Mutual Recognition Clause under WTO Law" (2005) 8 JIEL 692.

23 General Interpretive Note to Annex 1A, Marrakesh Agreement Establishing the World Trade Organization.

24 The internal trade requirement is subject to a few listed exceptions, none of which are likely to help significantly to justify a separate regional regime. There is controversy over whether the list of exceptions is exhaustive. It does not mention Article XXI on national security, although it is hard to imagine that the drafters would have intended to block internal national security measures within a regional agreement.

deciding that it authorized only measures that were necessary to the formation of a regional agreement, a view that probably would not cover a separate SPS/TBT regime.²⁵ The necessity interpretation is, however, controversial.²⁶ Assuming the separate NAFTA regime remains in place, there may be a possibility that non-NAFTA countries might use it as the basis for MFN claims to supplement their rights under the WTO SPS and TBT Agreements.²⁷

4. Trade and Security

It now seems clear that a common NAFTA security perimeter would be very difficult to establish due to developments in Canada, quite apart from any views or preferences of Mexico and the United States. Within Canada, there have been challenges to parts of the Smart Border Declaration dealing with the movement of people and information sharing. In 2006, a Commission of Inquiry reported on the actions of Canadian officials in relation to Maher Arar, a Canadian citizen who was detained by U.S. officials in September 2002 while transferring on a flight through a U.S. airport and then sent to Syria, his country of birth, where he was held in custody until October 2003. The Commission found that an RCMP unit established in the fall of 2001 had given U.S. authorities inaccurate and unfairly prejudicial information on Mr. Arar, had shared information without the usual review for relevance and reliability and had handed over an entire investigative database consisting of three compact discs without screening the information or attaching written caveats.²⁸ As recommended by the Commission, a further inquiry has been established concerning the detention of three other individuals in similar circumstances. That inquiry is expected to report in September 2008.²⁹ In addition, the Federal Court of Canada recently invalidated the designation of the United States as a safe third country to which refugee claimants could be returned. As the United States was in breach of international treaties relating to the protection of refugees and the prohibition of torture, the court found that the designation was not in accordance with the relevant legislation or with the Canadian *Charter of Rights and Freedoms*.³⁰ The Safe Third Country Agreement,³¹ which was a major part of the Smart Border Declaration, continues in operation while the judgment is under appeal, but faces an uncertain future.

25 Appellate Body Report, *Turkey–Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999.

26 Joost Pauwelyn, “The Puzzle of WTO Safeguards and Regional Trade Agreements” (2004) 7 JIEL 109.

27 NAFTA Article 2005(4) provides that the responding Party can require any dispute settlement to be under NAFTA procedures rather than the WTO for SPS or TBT matters relating to the environment, health, safety or conservation, but this provision would be inapplicable to non-NAFTA Parties.

28 Commission of Inquiry into the Actions of Canadian Officials in Relations to Maher Arar, *Report of the Events Relating to Maher Arar, Analysis and Recommendations* (Justice Dennis O’Connor, Commissioner), 2006. The Commission found as follows (p.9): “Mr. Arar has never been charged with any offence in Canada, the United States or Syria. Indeed, although RCMP officers conducting a terrorism-related investigation were interested in interviewing Mr. Arar, they did not consider him a suspect or a target of that investigation. They wished to interview him as a witness because of his associations with certain other individuals. I have heard evidence concerning all of the information collected about Mr. Arar in Canadian investigations, and there is nothing to indicate that Mr. Arar committed an offence or that his activities constitute a threat to the security of Canada.”

29 Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, established December 11, 2006, Honourable Frank Iacobucci, Commissioner.

30 *Canadian Council for Refugees v. Canada* [2007] F.C.J. No. 1583, 2007 FC 1262, stayed while under appeal [2008] F.C.J. No 131, 2008 FCA 40. See further Emily Carasco, “Canada-United States ‘Safe Third Country’ Agreement: To What Purpose?” (2003) XLI Canadian Yearbook of International Law 305.

31 *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, Can. T.S. 2004 No. 2, in force 29 December 2004.

The proposal for a common security perimeter is in some respects contrary to parts of the Smart Border Declaration. If the internal border is expected to disappear soon, it makes little sense to invest in the infrastructure, administration and technology required for speedy clearances.³² It now appears that border procedures are likely to remain and the need to facilitate clearances for low-risk entries will be a top priority for some time. There is no particular reason to link regulatory convergence to security as in the SPP, but support for equivalence and MRAs may be a sensible objective, assuming due attention is directed to possible MFN claims under NAFTA and the WTO. A goal of harmonization to uniform regulations in one borderless market would be overly broad, however. Societies do not have to be the same in order to trade with each other. In Canada-U.S. economic relations at the moment, there is really no need for Big Ideas, although there is always room for small practical ones.

³² Rey Koslowski, "Smart Borders, Virtual Borders or No Borders: Homeland Security Choices for the United States and Canada" (2005) 11 *Law and Business Review of the Americas* 527.

