



*Storm clouds loom over calm waters. Source: Shutterstock.com/kckate16*

# Navigating US-Canadian Relations Through Stormy Weather

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The next eighteen months will see a new US president and Congress take office, and a Canadian federal election. The tendency of many observers to focus on the rapport between US presidents and Canadian prime ministers leads to a distorted view of US-Canadian relations. In practice, the president and prime minister act like a fire department for bilateral relations, managing conflicts and crises when they emerge. US-Canadian relations are too complex and multifaceted to be managed from the top-down. Since the establishment of diplomatic relations between the United States and Canada in 1926<sup>1</sup> the two countries have used several techniques to steer important issues and disputes through uncertain or turbulent political waters.

Economic integration, fostered by trade and investment agreements, draws many areas of domestic policy-making onto the bilateral agenda. That has put public service professionals with domestic policy expertise on the front line of bilateral relations without a background in the historical precedents that might be helpful to them.

This paper highlights some of the means and methods for managing US – Canadian relations employed in the past century, some of which I have observed first-hand. Diplomatic historians should be forewarned that my objective in this paper is to distill certain features of the tools used in each example for the benefit of practitioners today and accordingly as history what follows will be superficial. Yet even superficially, the diplomatic history of US – Canadian relations is not well known today denying officials the benefit of the tools used by predecessors to build the bilateral relationship that remains the envy of other countries.

### *US-Canadian Relations Toolkit*

In one sense, the right tool for the right job is the best way to think about various options. The nature of the issue will shape the choices for policymakers and the appeal or fit for various needs. In classifying the options without reference to a particular issue, it is useful to group them into four categories.

First, the *formal* options. These are explicit and rooted in a written text, operate over a longer period, and take the largest amount of effort or political capital investment to employ. Formal options often result in institutional arrangements to manage similar issues in the future.

Second, there are *semiformal* options. These include “soft institutions” and limited solutions and require a modest investment of political capital. By creating a path to resolution of an issue, semiformal options can develop into new norms or expectations that may have consequences for the handling of future issues.

Third, some options are *protoformal*. These can be conflict resolutions that can set precedents, pilot projects and experiments, and explorations of differences that map out options for the resolution of an issue. For leaders, the protoformal options are low cost, reserving judgment until there is an outcome from the protoformal process, but they do require that policymakers agree to engage in

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1 Before 1926, Britain negotiated on behalf of Canada, a part of the British Empire, on most issues involving the United States.

an area of concern.

Fourth, the two countries have used *informal* means to manage bilateral relations. These are the norms and traditions that can provide opportunities for dialogue or set limits on some disputes. These are the weakest tools available, but they also take the least political effort to employ; in some cases, it can be more politically damaging to ignore informal rules or conventions than to respect them.

The many accomplishments of the officials of both federal governments since 1926 can be understood more fully by applying this four-part framework.

## FORMAL

The best insulation from political storms comes through independent institutions. For most of the 19<sup>th</sup> century, the United States and Britain negotiated over the location of the border between the United States and British North America. Military conflicts such as the War of 1812 and the Aroostook War (1838-1839) gave way to arbitrations and legal disputes. The dispute over the border between the Alaskan panhandle and British Columbia led to two arbitrations, from 1898-1899 and from 1899-1903 which resulted in a decision in favor the US claim that incensed public opinion in Canada.<sup>2</sup> It sparked a rise in Canadian nationalism that viewed the United States as a bully and Britain as a kind of absentee landlord. Washington and London recognized the need for local management of border issues was needed to change to reduce tensions with Ottawa. The result was a treaty that would set a foundation for the emergence of bilateral US – Canadian bilateral relations.

The Boundary Waters Treaty of 1909<sup>3</sup> established a US-Canada International Joint Commission (IJC) with a small staff and three commissioners for each country.<sup>4</sup> Two notable features of the IJC design were a respect and reinforcement of sovereignty and democratic accountability. The Canadian commissioners were appointed by the Dominion government, the first time that Britain had no position on a body or panel that addressed relations with the United States on behalf of the Canadian part of the British Empire, an unprecedented recognition of Canadian sovereignty in an international agreement. Democratic accountability was ensured by the requirement that both the US and Canadian governments needed to agree to refer a question or dispute to the IJC for it to study a dispute or issue, and IJC findings were advisory to the governments that would have the option to act on or to ignore IJC advice. There is no delegation of sovereignty to the IJC, and elected officials in both countries were accountable for whatever action they took in response.

IJC advice led to the Columbia River Treaty, the St. Lawrence Seaway system of canals, and the Great Lakes Water Quality Agreements of 1972 and 2012.<sup>5</sup> In each case, the IJC was able to aggregate input from stakeholders and scientific and engineering experts to support political agreements by elected officials for the countries.

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2 I wrote about this in “Canada’s Cold Front: Lessons of the Alaska Boundary Dispute for Arctic Boundaries Today” *International Journal* Volume LXV, Number 1 (Winter 2009-2010).

3 “The Boundary Waters Treaty of 1909” Text: <https://ijc.org/en/boundary-waters-treaty-1909>

4 See “The Role of the IJC” *International Joint Commission*. <https://ijc.org/en/who/role>

5 These and other episodes are detailed in the excellent *The First Century of the International Joint Commission*. Edited by Daniel Macfarlane and Murray Clamen. Calgary, Alberta: University of Calgary Press, 2020. <https://doi.org/10.1515/9781773851099>

The 1957 North American Aerospace Defense (NORAD) Agreement<sup>6</sup> between the United States and Canada established a binational military command structure to defend Canada and the United States. The agreement is a treaty-level executive agreement rather than a formal treaty. It was established in response to the threat of Soviet bombers and later intercontinental ballistic missiles. The NORAD Command enabled a rapid response by US and Canadian militaries to intrusions into either country's airspace for the purpose of continental defense without separate permission from political authorities. NORAD Command also provided a structure for cooperation in building ground-based surveillance systems including the Distant Early Warning (DEW) Line of radar stations, and a secondary Pine Tree Line, to provide warning of an attack. In support of continental defense, NORAD conducting planning, training, and joint exercises by US and Canadian forces.

Canada and the United States also use multilateral institutions to provide a platform for cooperation bilaterally. The North Atlantic Treaty Organization (NATO) established in 1949 coordinates US and Canadian efforts to defend European allies, but in the wake of the 2021 Russian invasion of Ukraine, NATO is a valuable institution for coordinating efforts to defend the North American Arctic.<sup>7</sup> The United Nations, to cite just one case, has provided a venue for discussion of crises in Haiti that has provided international support for US and Canadian efforts to provide security and political stability there.

Three formal institutions were created by separate side agreements during the ratification of the North American Free Trade Agreement (NAFTA): the North American Commission for Environmental Cooperation (NACEC), the North American Commission for Labor Cooperation (NACLC), and the North American Development Bank (NAD Bank).<sup>8</sup> The NAFTA had been negotiated by the US Administration of President George H.W. Bush but securing congressional approval fell to US President William J. Clinton after Clinton defeated Bush in the 1992 election. The Clinton Administration asked the governments of Canada and Mexico to agree to the creation of these institutions to address concerns about environmental protection, collective bargaining, and economic development to persuade Congress to ratify the agreement and approve implementing legislation, which some congressional Democrats saw as promoting and protecting business interests without similar attention to civil society priorities. Each of these NAFTA institutions has a headquarters and staff: the NACEC in Montreal, the NADBank in Dallas, and the NACLC in Mexico City. The NACEC and NACLC fostered data sharing, common definitions, and policy studies until the NACLC was dissolved under the terms of the United States Mexico Canada Agreement (USMCA).<sup>9</sup> The NADBank, originally intended to be trilateral, became a facility for US development project financing to upgrade and expand infrastructure in Mexico after Canada declined to make a capital contribution to the new bank.

What links these institutions, established between 1909 and 1994, are several features. First, there is no

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6 Text of the *NORAD Agreement of 1957*: <https://www.norad.mil/About-NORAD/NORAD-Agreement/>. For details on the accomplishments of the binational command, see Joseph T. Jockel. *Canada in NORAD, 1957-2007: A History* (McGill Queen's University Press, 2007).

7 Text of the North Atlantic Treaty of 1949: [https://www.nato.int/cps/en/natohq/official\\_texts\\_17120.htm](https://www.nato.int/cps/en/natohq/official_texts_17120.htm). For details on the role of NATO in US-Canadian relations, see Joseph T. Jockel and Joel J. Sokolsky, *Canada in NATO, 1949-2019* (McGill Queen's University Press, 2021).

8 Text of the North American Free Trade Agreement: <https://ustr.gov/about-us/policy-offices/press-office/ustr-archives/north-american-free-trade-agreement-nafta>; Text of the Agreement on Environmental Cooperation: <http://www.cec.org/about/agreement-on-environmental-cooperation/>; Text of the North American Agreement on Labor Cooperation: <https://www.dol.gov/agencies/ilab/naalc>; Text of the North American Development Bank Charter and Bylaws: [https://www.nadb.org/uploads/content/files/Charter\\_and\\_Bylaws/Amended%20Charter%202017.pdf](https://www.nadb.org/uploads/content/files/Charter_and_Bylaws/Amended%20Charter%202017.pdf)

9 See M. Angeles Villarreal and Cathleen D. Cimino-Isaacs, "USMCA: Labor Provisions" *Congressional Research Service* IN FOCUS. January 8, 2021. <https://crsreports.congress.gov/product/pdf/IF/IF11308/6>.

delegation of sovereign authority to these institutions. This was intentional on the part of the United States, which both prized its own sovereignty and because the United States wanted to encourage Canada to exercise and value its own sovereignty independent of its British Empire ties. These formal institutions have an advisory role in support of decision making by the governments and undertake actions or perform functions in very specific areas. The United States and Canada established these institutions to foster communication, coordination, and cooperation by the respective sovereign governments.

## SEMIFORMAL

The United States and Canada have employed semiformal institutional arrangements for the management of issues that require urgent attention or that are complex and require action or input coordinated across more than one department, ministry, agency, or governmental entity.

Semiformal institutions include what economist Douglass North categorized as a “soft” institution.<sup>10</sup> Soft institutions may lack a physical headquarters or staff, but they nonetheless guide decision making by public officials and private actors, reifying a political commitment or understanding. The Canada United States Free Trade Agreement, the NAFTA, and the USMCA are examples. They formalize a political commitment to apply or remove tariffs, to permit foreign investment, and resolve trade disputes. Notable, too is the North American Free Trade Commission (1994-2019) and USMCA Trade Commission (2020 – present), annual meetings of the trade ministers of each of the three countries, which can foster agreement to manage trade disputes or to initiate further negotiations.

Although soft institutions set parameters around and help to coordinate the activities of governments and private citizens, they are not ephemeral. Trade agreements are texts, the texts are approved by the sovereign governments and enacted through implementing legislation. Soft formal institutions reduce the number of decisions and political interventions by governments and thereby lower the political cost of managing routine issues in bilateral relations.

Establishing formal institutions requires the engagement of political leaders. Presidents and prime ministers invest time and political capital to negotiate them, and to secure approval for them. In 1998, Canadian Prime Minister Brian Mulroney called an election to secure a political mandate to approve the Canada United States Free Trade Agreement. Even after ratification, the political cost of formal arrangements can rise; after the negotiation of NAFTA, there was a NAFTA opponent in every presidential election, Ross Perot in 1992 and 1996, Ralph Nader in 2000 and 2004, Barack Obama in 2008 and 2012, Hillary Clinton and Donald Trump in 2016.

For this reason, US and Canadian leaders have made use of executive agreements to coordinate policy without the fiscal and political costs associated with creating semiformal or soft institutions. Without budget, staff, or legislative debates to secure approval, executive initiatives provide a means to manage complex issues on an ad hoc basis.

Trade has prompted the frequent use of executive initiatives and agreements.<sup>11</sup> NAFTA established twelve

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10 Douglass C. North. “Institutions.” *The Journal of Economic Perspectives* 5, no. 1 (1991): 97–112. <https://doi.org/10.1257/jep.5.1.97>.

11 The following history is drawn from Greg Anderson and Christopher Sands, “Negotiating North America: The Security and Prosperity Partnership” Hudson Institute (Fall 2007). [https://www.hudson.org/sites/default/files/researchattachments/attachment/680/hudson\\_negotiating\\_north\\_america\\_final.pdf](https://www.hudson.org/sites/default/files/researchattachments/attachment/680/hudson_negotiating_north_america_final.pdf)

working groups to promote cooperations by the governments in managing economic integration. Apart from the North American Energy Working Group, the NAFTA Working Groups did not convene often and were largely unsuccessful. The George W. Bush administration in 2005 invited Canada and Mexico to join in a Security and Prosperity Partnership for North America (SPP) that established 20 working groups, ten to advance and manage economic integration and its knock-on effects, and another 10 to address security-related issues including security cooperation and ways to mitigate challenges for the three countries following the September 11, 2001 terrorist attacks on the United States. The SPP was created along with an annual North American Leaders Summit (NALS). Has NALS been useful?

At the start of the Barrak Obama administration, the SPP working groups were terminated and the United States engaged with Canada and Mexico on the legacy SPP agenda through separate and parallel “dual bilateral” initiatives with both countries.<sup>12</sup> The US-Canada Regulatory Cooperation Council (US-Canada RCC), the US-Canada Beyond the Border Working Group, and a US-Canada Clean Energy Dialogue each addressed issues emerging from the increasing bilateral trade and integration, while NALS meetings continued on a mostly annual basis.

The SPP, RCC, and Beyond the Border Working Group are examples of semiformal institutions established through executive agreements by the US president.<sup>13</sup> Executive agreements are easier to establish because they rely on agreement by heads of government and do not require formal congressional approval or a formally negotiated treaty. However, in the United States executive actions such as agreements and executive orders issued by the president can be abandoned, rescinded, or reversed by future presidents. While formal in the sense that they have a text that reflects an investment of political capital by the president and directs executive branch officials to implement with existing resources (e.g. staff time and budgets already approved by Congress) these initiatives may lack the financial support and capacity that legislation) or a treaty would provide. In addition, executive initiatives face potential challenges to the constitutional legitimacy of administrative law (executive action that usurps the constitutional authority of Congress or other branches of government and may be ruled unconstitutional by future courts).

Another semiformal option is the ministerial working group composed of cabinet level officials who are charged by the president to work with Canadian counterparts to develop ideas for action on or solutions to shared concerns. In 2023 the United States, Canada, and Mexico created ministerial working groups on economic competitiveness and on semiconductors.<sup>14</sup>

For some issues for which significant technical knowledge is required, a working group of officials below the cabinet level but reporting back to cabinet leads for approval, such as those officials assigned to support the US-Canada Joint Action Plan on Critical Minerals Development agreed during the Trump

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12 See Kimberly Brier and Christopher Sands, “North American Pivot? President Obama Meets Canadian and Mexican Leaders in Ottawa at a Crucial Moment” Center for Strategic and International Studies (June 24, 2016). <https://www.csis.org/analysis/north-american-pivot-president-obama-meets-canadian-and-mexican-leaders-ottawa-crucial>

13 For a discussion of the use of executive agreements in US foreign relations, see Stephen P. Mulligan, “International Law and Agreements: Their Effect upon US Law” *Congressional Research Service* Report RL32528 (September 19, 2018). <https://crsreports.congress.gov/product/pdf/RL/RL32528/21>

14 See “Joint Statement on the Launch of the North American Semiconductor Conference and North American Ministerial Committee on Economic Competitiveness” The White House (May 24, 2023). <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/24/joint-statement-on-the-launch-of-the-north-american-semiconductor-conference-and-north-american-ministerial-committee-on-economic-competitiveness/>

administration.<sup>15</sup> The September 2024 creation of a Joint Task Force on Beaufort Sea Boundary is another example, designed to develop a resolution of a longstanding boundary dispute between the two countries.<sup>16</sup> In one instance of cabinet-level engagement, at the Cancun North American Leaders Summit, the United States, Canada, and Mexico added a ministerial working group to the SPP to coordinate and oversee activity in the SPP Working Groups and provide summary reports to the leaders at each summit. The United States Secretaries of Commerce, Homeland Security, and State, joined by Canadian and Mexican counterparts, were added to link the SPP and the NALS and thereby ensure accountability to the president who as an elected officer of the United States was accountable to the public. The Obama administration modified this arrangement when they abandoned the SPP at the Guadalajara North American Leaders Summit in 2009. At Guadalajara, the leaders adopted a slimmed down 10-point agenda for trilateral and bilateral action (the contemporary slogan for when an issue would be managed bilaterally or trilaterally was, “three can talk, two can walk”). Each of the ten items agreed at the Guadalajara summit was assigned to one or more cabinet officials for action.

A twist on the Ministerial Working Group model is Checklist Diplomacy. Essentially a to-do list, the checklist reflects the action items agreed by both sides. One or more senior representatives of the two governments meet in person or virtually for periodic review of the agenda, noting accomplishments, items that need additional support to move forward, and items that are stalled or unworkable. The most notable example of checklist diplomacy was the US-Canada Smart Border Declaration and accompanying 30-point Action Plan<sup>17</sup> adopted following the September 2001 terrorist attacks on the United States. Homeland Security Advisor (later Secretary of Homeland Security) Tom Ridge and Deputy Prime Minister John Manley were in regular contact implementing the Action Plan. Items on the agenda were rated using traffic light colors, with green for issues moving forward, yellow for items that were moving slowly or that had become bogged down, and red for items making no progress. This color-coding permitted President George W. Bush and Prime Minister Jean Chrétien to intervene when necessary to resolve problems.

At their first bilateral meeting in February 2021, President Joseph Biden and Prime Minister Justin Trudeau agreed to work together on a checklist agenda labelled the Roadmap for a Renewed US-Canada Partnership (Roadmap).<sup>18</sup> Specific items for action by officials were grouped into six areas, with US Ambassador to Canada David L. Cohen and Canadian Ambassador to the United States Kirsten Hillman overseeing the process and reporting to Biden and Trudeau regularly.

Semiformal mechanisms are useful for coordinating the work of multiple US government departments and agencies from the top down, but even without such a mechanism, coordination can be initiated by officials at a working level through interagency communication and collaboration<sup>19</sup>. There are policy areas

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15 The Wilson Center convened an expert a discussion of the implementation of the Joint Action Plan on Critical Minerals on July 17, 2020, a recording of which is available here: <https://www.wilsoncenter.org/event/joint-action-plan-critical-minerals-supplies-securing-critical-minerals-canada-and-united>

16 See “Joint Statement on Creation of Joint Task Force to Negotiate Beaufort Sea Boundary” US Department of State (September 24, 2024) <https://www.state.gov/joint-statement-on-creation-of-joint-task-force-to-negotiate-beaufort-sea-boundary/>

17 Text of the Smart Border Declaration and Action Plan can be found here: <https://2001-2009.state.gov/p/wha/rls/fs/18128.htm>

18 “Roadmap for a Renewed US-Canada Partnership” The White House (February 23, 2021) <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/23/roadmap-for-a-renewed-u-s-canada-partnership/>

19 For an explanation of interagency collaboration best practices, see GAO, Managing for Results: GPRA Modernization Act Implementation Provides Important Opportunities to Address Government Challenges, GAO-11-617T

where an interagency process can be more formal and even lead to interagency agreements on collaboration. Close interagency work is most common for national security and in some cases, it is managed by the White House through the National Security Council. Domestic interagency work is often less formal, but the Biden administration issued a presidential decision directive<sup>20</sup> to give the Domestic Policy Council responsibility for maintaining and coordination interagency collaboration. There is growing academic study<sup>21</sup> of the performance of interagency processes in particular cases that suggests flaws such as reluctance of some participants to share information with other departments, and conflicts over which officials have the lead in a multiagency collaboration. Public servants may assert agency “equities” to secure a role in a process that began without their involvement.

Despite problems, semiformal interagency coordination is often necessary to address issues in Canadian relations that touch on issues within the area of responsibility of more than one federal regulator or implementer. Some issues that have domestic policy and national security dimensions, such as the design and implementation of border security screening and related measures as part of pandemic policy responses directed by public health officials. These policy areas were labeled “intermestic” by political scientist James Rosenau<sup>22</sup> and due to the extent of economic integration with Canada many items on the bilateral agenda have intermestic dimensions.

Canadian relations often require the federal government to work with state and local governments, too. In the US system of government, every level of government derives its sovereign authority from a document whether the federal or state constitution or a town charter. Levels of government can legitimately operate in the same or overlapping policy areas, leading to policy competition as well as conflict. In contrast, the Canadian constitution sets out enumerated powers for each level of government.<sup>23</sup> Provinces do not have their own constitutions, and local government organization is the responsibility of provincial government. Federal governments in both countries will employ conditional funding grants and transfers to achieve coordination or uniform services across jurisdictions.

The differences in the design of each federal system are important factors in the management of Canadian relations. One common approach by policymakers in both countries is to employ the principle of subsidiarity in managing issues through federal leadership and local operational decision making. An advantage of subsidiarity is that special cases and exceptions can be managed efficiently at a level closest to citizens affected by those decisions and can limit the level of federal attention and resources involved or required.

After the September 2001 attacks on the United States, the federal governments drew on local experiments for ideas. One such experiment was the PACE (Peace Arch Crossing Entry) and CANPASS expedited crossing programs that operated at the Peace Arch/Douglas Ports-of-Entry which connect

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(Washington, D.C.: May 10, 2011) <https://www.gao.gov/products/gao-12-1022>

20 See “Domestic Policy Presidential Decision Directive – 1 (DPPD-1)” The White House. May 6, 2021. <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/06/domestic-policy-presidential-directive-1-dp-pd-1/>

21 As examples, see Frederick M. Kaiser. “Interagency Collaborative Arrangements and Activities: Types, Rationales, Considerations” *Congressional Research Service* Report R41803, May 11, 2001; Jennifer Nou. “Intra-Agency Coordination.” *Harvard Law Review* 129, no. 2 (2015): 421–90; and Antony B. Poole. “Interagency Conflict Assessment Framework: A Pragmatic Tool for Army Design,” 2010.

22 See James Rosenau, *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (Cambridge University Press, 1997).

23 *Constitution Act of 1982* following the *British North American Act of 1867* includes Section 91 (division of powers), Section 92 (federal powers) and Section 93 (provincial powers).



to Interstate 5 and B.C. Highway 99 from 1992 until 2001<sup>24</sup>. Developed by the International Mobility & Trade Corridor Program (IMTC) to manage border crossing delays affecting tourism and commuter traffic, this local initiative offered a special lane at the border crossings for commuters who shared information about themselves and presented their account card when crossing. This allowed regular crossers to bypass long lines of tourists and day trippers at peak times of day. The IMTC was managed by the Whatcom Council of Governments in Whatcom County, Washington State, and the PACE and CANPASS cards were managed respectively by the US Immigration and Naturalization Service and Canada Customs and Revenue Agency which ran the experiments and collected data on it. The limited test provided proof of a concept that led to the border-wide adoption of the joint US-Canada NEXUS card and other trusted traveler programs such as the US Global Entry program.

The Pacific Northwest was home to the first Integrated Border Enforcement Team (IBET) in 1996<sup>25</sup>. An IBET is a kind of cross-border standing joint task force of law enforcement agencies and departments of the federal, state and provincial, and local governments in a geographic area. In a structured but voluntary team, officers share information and coordinate exercises, investigations and operations. After 2001, the IBET model was expanded along the US-Canada border, and in 2005 gave rise to the US-Canada integrated maritime enforcement program called Shiprider<sup>26</sup> which allows the US Coast Guard to operate effectively across maritime borders such as those in the Great Lakes by having a Canadian law enforcement officer on board US vessels to lawfully arrest and detain individuals who crossed the border into Canadian waters. Shiprider provides US officers to Canadian vessels as well.

The option to run pilot projects were subsequently incorporated into the Security and Prosperity Partnership<sup>27</sup> and the Beyond the Border Working Group<sup>28</sup> initiatives as a method for experimenting with solutions jointly before committing to wider employment of a solution. Pilot projects often have a bilateral agreement that provides ground rules and clear limits, as well as funding commitments from each government involved.

The US Senate must approve treaties and in certain cases related to Canada, the Senate has provided formal or informal guidance to federal officials to require a consensus among local governments and groups prior to the submission of any treaty for Senate ratification. This results in another type of semiformal issue management. Examples include the renewal of the Great Lakes Water Quality Agreement, the renegotiation of the US-Canada Pacific Salmon Treaty, and the renewal of the Columbia Treaty. In these cases, federal officials set up processes for consultation with stakeholders including state and local governments, indigenous groups, businesses and business associations, and even labor unions. At the same time, federal officials lead in talks with the Canadian federal government which must ratify treaties. While any treaty that emerges from this process would be a formal arrangement for the conduct of Canadian relation, this pre-decisional stage of the process is semiformal.

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24 For details, see the report on the PACE Promotion from the International Mobility & Trade Corridor Program web site: <https://theimtc.com/project/pace/>

25 "IBETing on a Secure Border" *TechBeat* (quarterly newsmagazine of the National Law Enforcement and Corrections Technology Center system, a program of the National Institute of Justice) Fall 2002. <https://www.ojp.gov/pdffiles1/nij/nlectc/211901.pdf>

26 "Shiprider Training reinforces successful US Coast Guard – Royal Canadian Mounted Police Partnership" *Coast Guard News* December 12, 2014. <https://coastguardnews.com/shiprider-training-reinforces-successful-u-s-coast-guard-royal-canadian-mounted-police-partnership/>

27 "Fact Sheet: Security and Prosperity Partnership for North America" The White House (March 23, 2005) <https://georgewbush-whitehouse.archives.gov/news/releases/2005/03/20050323-4.html>

28 Some of the pilot projects conducted under the aegis of the Beyond the Border Working group are detailed here: <https://www.cbp.gov/newsroom/national-media-release/us-and-canada-announce-beyond-border-deliverables>

## **PROTOFORMAL**

The third set of options for the management of issues in bilateral relations are protoformal, in the sense of a prototype model for something that can set a precedent, employ a limited experiment, or identify the basis for future negotiations.

The use of arbitration by dispute settlement panels was introduced in the Canada United States Free Trade Agreement (CUFTA) as an alternative to costly litigation. A panel of arbiters is selected from lists of qualified experts maintained by each government with a challenge process to allow objections. CUFTA panels included three arbiters, one from the plaintiff's country and two from the defendant's country. NAFTA panels include five arbiters chosen from the three countries by a similar formula. For a company with a complaint to have access to CUFTA or NAFTA dispute process, the host government must agree to take the case, a government action known as espousal. Panel rulings can include a remedy such as the right of a home government to impose tariffs to recoup damages.

Companies have the option to bring a dispute to courts without home government espousal. Foreign direct investors in the United States have the option and standing to bring a suit to federal court, while trade issues can be brought by businesses before the United States Court of International Trade.

NAFTA was the first trade agreement to establish an investor state dispute settlement process through the agreement's Chapter 11. Investor state dispute settlement processes proved controversial. One feature of these panels that attracted criticism was the elimination of espousal; firms could initiate a complaint directly and seek damages from a government found to have violated national treatment for international investors. When some academics raised the concern that companies might abuse the process to seek damages from "regulatory takings" hypothetical losses of fixed capital investment, future customers, or market share. For some, such a scenario could have a chilling effect on future regulation. The three countries largely eliminated investor state dispute settlement in the USMCA retaining it only for certain investments by US and Canadian firms in Mexico's energy and mining sectors.

Litigation has also been used to address business concerns. When the State of Michigan sought to deny permits to operate the Enbridge Line 5 pipeline after the company announced a multibillion-dollar project to upgrade the pipeline, Enbridge filed suit to claim that the US federal government had primary jurisdiction over the project under the terms of the 1977 Pipelines Treaty. This dispute is ongoing.

Another example of litigation related to the permitting of the proposed Keystone XL pipeline connecting Alberta to refineries and ports on the Gulf of Mexico. Among the many permits the company required for the pipeline to transit many restrictions along the route, a presidential permit was required for infrastructure and other projects that crossed the US land border. The presidential permit requirement was established by executive order and the process for project review and presidential decision on such permits was not clearly specified. This allowed presidents freedom of action but created uncertainty for the pipeline's investors and delays in securing necessary permits (as well as the expiration of permits that the company needed to reapply for) with the result that presidential approval by one administration was overturned by another administration. After the project was shelved due to numerous and costly delays, the company sued the US federal government.

Both arbitration and litigation can establish findings, inspire reforms, create precedents, or underscore the need for new approaches that could be helpful to issue managers in the conduct of Canadian relations. However, capitalizing on the lessons and insights from specific disputes requires some knowledge of these

disputes and knowledge management in the US federal government is a challenge. For disputes that involve domestic policymakers, the Office of Canadian Affairs at the States Department and US representatives at Embassy Ottawa and the seven US consulates in Canada are the best source available for historical examples for the management of Canadian issues.

Another protoformal option that can be employed for issues where the positions of the United States and Canada are far apart or unclear is the appointment of special envoys. The envoys meet with stakeholders, consult experts, and report back with recommendations for resolving a dispute or for creating a process to find a path to resolution.

There are two recent examples of the use of special envoys that illustrate the benefits and the limits of this option. In July 1997, US President Bill Clinton and Canadian Prime Minister Jean Chrétien agreed to appoint William Ruckelshaus, a Republican environmentalist who was the first Administrator of the US Environmental Protection Agency, and Dr. David Strangway, President of the University of British Columbia, as special envoys to recommend a path forward to resolve a dispute due to overfishing of pacific salmon.<sup>29</sup> The Ruckelshaus Strangway effort led to the 1985 Pacific Salmon Treaty which established a Pacific Salmon Commission that manages the shared fishery today.<sup>30</sup>

Following the expiration of a 1996 bilateral agreement on softwood lumber trade in October 2001, US President George W. Bush and Prime Minister Chrétien appointed former Montana Governor Mark Racicot and Minister of International Trade Pierre Pettigrew as envoys to explore options for resolving a pernicious trade dispute that erupted while the governments were developing policy responses to the September 11 attacks.<sup>31</sup> Racicot and Pettigrew helped launch talks that led to the 2006 Softwood Lumber Agreement.<sup>32</sup>

## INFORMAL

When new issues emerge, the United States and Canada rely on informal but vital means of starting a dialogue. The foundation of the diplomatic relationship is the mutual goodwill between Americans and Canadians. This makes it easier for officials to work together with a minimal investment of political capital. Ease of communications (sharing time zones) and travel means that collaboration requires fewer resources.

Traditionally, US presidents make their first foreign visit to Canada. Presidents and prime ministers call one another after natural disasters to offer support. The United States and Canada participate in many of the same international institutions, from the Group of 7 and Group of 20 economic forums to NATO, the United Nations, the World Bank, International Monetary Fund, the World Trade Organization, the Asia

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29 “Pacific salmon: report to the Prime Minister of Canada and the President of the United States / Prepared by David W. Strangway and William D. Ruckelshaus” Available from Fisheries and Oceans Canada, 1998. <https://publications.gc.ca/site/eng/9.646839/publication.html>

30 “The Pacific Salmon Treaty” US -Canada Pacific Salmon Commission. <https://www.psc.org/about-us/history-purpose/pacific-salmon-treaty/>

31 For context, see Lawrence L. Herman. “Softwood Lumber: The Next Phase” *Backgrounder* (Toronto: C.D. Howe Institute) December 6, 2001. Available at [https://www.cdhowe.org/sites/default/files/attachments/research\\_papers/mixed/softwood\\_lumber.pdf](https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/softwood_lumber.pdf)

32 For details, see Katie Hoover and Ian F. Fergusson. “The 2006 US-Canada Softwood Lumber Trade Agreement (SLA): In Brief” *Congressional Research Service* Report R44851. May 18, 2017. <https://crsreports.congress.gov/product/pdf/R/R44851/3>

Pacific Economic Cooperation forum, and more. Summits of leaders and ministers provide opportunities for personal interaction and informal conversations about issues.

Subnational governments have regular meetings as well, and the fact that many national US leaders began their careers at the state level mean that many presidents, senators, representatives, cabinet officials, and their staffers arrive in Washington with extant relationships with Canadians that can allow concerns to rise informally to the attention of US leaders.

Regional organizations such as the Pacific North West Economic Region, the Great Lakes Governors and Premiers, the New England Governors and Eastern Canadian Premiers meet regularly. Three of the regional conferences of the Council of State Governments, the Eastern, Midwestern, and Western, have provincial government participants and US-Canada relations committees.

Civil society organizations connect across the borders, including labor unions like the Teamsters, religious groups and charities, environmental activists, and the Kiwanis Clubs, founded as a social club in Detroit in 1915 with its first international chapter in Hamilton, Ontario that same year.<sup>33</sup>

On many issues of common concern, local initiative provides the first cooperative response and national capitals get involved later or not at all. This impromptu problem solving can make a difference when more formal efforts are impractical or rendered unnecessary.

### ***US-Canadian Relations Carry on Come Rain or Come Shine***

Into any relationship, some rain must fall. This paper has highlighted some of the means and methods for managing US – Canadian relations employed in the past century through stormy political weather. Sometimes an umbrella was enough, at other times we started building an Ark. The lesson of the history of US-Canadian relations offers is that we have overcome problems large and small with solutions both extraordinary and routine. As elections bring new leaders to steward each country and the bilateral relationship, that history is a reassuring promise that we will work through future challenges, soggy perhaps, but together.

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33 More on the history of Kiwanis available here: <https://www.kiwanis.org/who-we-are/history/>



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Thinking Canada is a series of commentaries and working papers on public policy issues in Canada, topics relevant to U.S.-Canadian relations, and the North American region. The views of the authors are their own and are published by the Woodrow Wilson International Center for Scholars through its Canada Institute to promote greater awareness and insight on the United States' neighbor and longstanding partner.

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