A Continental Divide?

Rethinking the Canada-US Border Relationship

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Executive Summary

The border relationship with the United States is tremendously important to the economy of western Canada. Our heavy reliance upon an open border means that we cannot allow individual border disputes to have a long-term impact upon border relations, or to spill over into other areas of the relationship. Given the magnitude of this relationship, which is exemplified by the almost $2 billion in goods that flow across the border every day, disputes are to be expected; but, with so much at stake, the *process* of resolution is paramount. It may even be fair to say that the two countries should not be judged for what is right with the border relationship, but for how it is managed when things go wrong.

This discussion paper considers the state of the border relationship and the importance of *process* in navigating this relationship by examining the recent dispute between Teck Cominco Metals, Ltd. and the US Environmental Protection Agency over the clean-up of Lake Roosevelt in Washington State. This case is instructive for numerous reasons, not least of which because it demonstrates the potential problems created when disputes arise involving domestic interests in the US. Many cross-border agreements exist between the two countries that bind the signatories (national governments) to adhere to the processes and regulations therein. But when domestic players are involved, the difficulty of utilizing the existing processes for dispute settlement intensifies. For sovereign actors to agree to resolve disputes bilaterally already sets high expectations, but to manage disputes through such channels when additional players are involved, is extremely difficult.

This paper investigates whether the current pressures on the Canada-US border relationship, exemplified by the Teck Cominco case, reflect a troubling new era in the cross-border relationship akin to a "continental divide." The paper examines:

1. key challenges emerging in the Canada-US border relationship;
2. the political and economic implications of these challenges; and
3. how Canada should respond to the current trends in the border relationship.

The Teck Cominco case, framed in the context of other contemporary border disputes, reveals that, for Canada, *getting process right* may be key to resolving border disputes in the future; and even more important than setting a good precedent, is *not setting a bad one*. The Canadian government must take a measured approach toward its border relationship with the United States, balancing our interest in keeping the border open and friendly, with preventing breaches of process and US attempts at extraterritoriality. We cannot afford to drift toward a continental divide; we must focus on the process of building bridges over that which threatens to divide us.

1. Introduction

The significance of the border in the Canada-US relationship is difficult to overstate. The economic and political relationship between the two nations is of critical importance to both and is hailed internationally as a model for cooperative issue resolution. The two nations are distinct, to be sure, but they share *similar* political, economic and social values making them compatible trade partners and natural allies. Each relies considerably on cross-border trade with the other and both countries have long recognized the special relationship that exists between them, which culminated in the Canada-US Free Trade Agreement (FTA) in 1989, later expanded into the North American Free Trade Agreement (NAFTA) in 1994. The border relationship is a critically important subset of the wider Canada-US connection.

Yet despite the depth of the relationship between the two nations, some scholars, practitioners, and citizens claim the relationship is deteriorating, that the assumption of smooth and friendly relations between Canada and the US is losing its currency. As evidence of this deterioration, many point to recent challenges in the Canada-US border relationship.

It is easy to compile a list of recent irritants in the Canada-US border relationship, such as the softwood lumber dispute, the closure of the US border to Canadian beef, and the Devil's Lake diversion project. But are these aggravations exceptional, or do they exemplify a broader dysfunctionality in the relationship? Where is this relationship heading? These are critically important questions and the answers have economic implications for Canadians, including western Canadians. The economic and political significance of the border itself underscores the need to get the relationship right.

A Continental Divide? Rethinking the Canada-US Border Relationship addresses three questions:

1. What key challenges are emerging in the Canada-US border relationship?
2. What are the political and economic implications of these challenges?
3. How should Canada respond to the current trends in the border relationship?

The answers to these questions can be found through an enhanced understanding of recent border challenges and a realistic approach to evaluating them.

To address these questions, this paper presents a case study that contains "a little bit of everything," and which lends important insights into border management. The recent Lake Roosevelt dispute between Teck Cominco Metals, Ltd., (a Canadian company operating in Canada), and the US Environmental Protection Agency (EPA) over the contamination of the Upper Columbia River and the Lake Roosevelt reservoir in Washington State provides a useful entry into understanding current challenges in the complicated border relationship.

The Lake Roosevelt dispute raises important questions about the cross-border management of environmental issues and assets, the sustainability of established dispute-settlement mechanisms, inter-state relationships, international legal responsibilities and jurisdictions, extraterritoriality, and sovereignty—all of which are important considerations in the management of border relations. Because the attempt to apply US environmental law to the Teck Cominco smelting operations in Canada was without precedent, particular emphasis is placed on extraterritoriality. Had the EPA's lawsuit against Teck Cominco been successful, it could have set a new and damaging precedent for future border relations.

The intention here is to use this case to help shed light on the broader border relationship and to demonstrate that *how* disputes are resolved (specifically, *the means by which they are resolved),* may be more important than the terms of resolution themselves, as *process* is critically important. Though the Teck Cominco case has now been resolved, the way the dispute was managed from the outset could set a precedent for future border disputes and could have a ripple effect on the wider Canada-US relationship.

The paper proceeds in the following way: first, because the border relationship is a subset of the wider Canada-US relationship, a brief discussion of the "state of the union" between the two nations after 9/11 is provided; second, a history and chronology of the Lake Roosevelt dispute is given to reveal its usefulness as a point of entry into the key elements of Canada-US cross-border conflicts; next, the key challenges in Canada-US border relations are identified, and their political and economic implications are specified; and finally, recommendations for Canada's response to current border challenges are made.

2. Canada-US Border Relations: A Brief History

The Canada-US relationship is unique. Both neighbours have long bragged about their lengthy "undefended border" and the degree of integration, trade, and partnership that exists between them. Internationally, this partnership has been admired; it has neither precedent nor equal in the international system today.

The relationship has ebbed and flowed since it began and, given the magnitude of the relationship—economically and politically—this is not surprising. Among the many factors that have combined to influence the relationship, leadership and diplomacy have been critically important. Former US President John F. Kennedy once noted about the relationship,

> Geography has made us neighbors. History has made us friends. Economics has made us partners. And necessity has made us allies. Those whom nature hath so joined together, let no man put asunder. What unites us is far greater than what divides us.[1]

The mid-1980s are often described as the halcyon days of the Canada-US relationship. Neo-conservatism in both countries ushered in an unprecedented era of partnership, symbolized by the "Shamrock Summit" between Brian Mulroney and Ronald Reagan in which they performed a rousing rendition of "When Irish Eyes Are Smiling," and culminated in the monumental signing of the Canada-US FTA, the precursor to the NAFTA. Such unparalleled integration meant a sharp learning curve as both nations have struggled to settle into the NAFTA and to allow it the power of law necessary to regulate the trade relationship. This is the crux of the challenge: as will be explained in greater depth later in the paper, it is so often the case in the border relationship that regulatory mechanisms exist and dispute settlement procedures are in place, but they are often not empowered to serve their intended purpose. This may not be surprising, and is best considered in light of what is at stake when two sovereign nations agree to relinquish decision-making authority to a third or alternate party. It may be an exercise in understatement to say that there have been significant growing pains associated with the habituation process.

In light of recent mounting cross-border tensions, some have decried the end of an era, arguing that the Canada-US relationship has been irrevocably changed. This may be overstating the case, but certainly in the past few years—some say since 9/11, others claim the shift began earlier—concern has been expressed over changes implemented by the current US presidential administration with respect to cross-border trade and security issues, changes that critics claim may permanently alter the relationship. From the closing of the US border to Canadian beef and the softwood lumber impasse, to US allegations of lax Canadian immigration laws and security at airports and other points of entry, and disputes over cross border waterways, navigating the border relationship has become more complicated. Whether this greater complexity will overwhelm existing channels of "quiet diplomacy" remains to be seen.

1. President Kennedy spoke these words in May 1961 in an address to the Canadian Parliament.

Box 1: Bilateral agreements between Canada and the United States

The Canada-US relationship is vast, exemplified by the nearly seven hundred treaties and agreements signed and diplomatic notes exchanged between the two nations, covering everything from border agreements to trade relations. Consider the following sampling of the extensive nature of the treaty framework between the two countries:

Subject Area	Number of Agreements
Boundary	16
Boundary Waters	79
Commerce	38
Customs	2
Defence	82
Economic Cooperation	8
Environment	10
Extradition	12
Fisheries	59
Labor	24
Navigation	43
Pollution	8
Telecommunications	4

This is not an exhaustive list. A complete list of bilateral agreements is available on the website of the Bureau of Legal Affairs, Department of Foreign Affairs and International Trade at: www.treaty-accord.gc.ca

3. The Lake Roosevelt Dispute

The Lake Roosevelt dispute is a useful point of entry into understanding some of the key challenges facing the Canada-US border relationship because it exposes vulnerabilities therein. To understand the dispute and its significance, one must review both the events that occurred and the specific concerns that have arisen around issues of process.

The Lake Roosevelt Dispute Events

Teck Cominco Metals, Ltd. (TCM) operates one of the largest smelting operations in the world at Trail, British Columbia, on the Columbia River, not far from the US border (Parrish 2005). The Columbia River flows south into Washington State and into Lake Roosevelt, which is the reservoir created by the Grand Coulee Dam. The two bodies, both considered recreational areas, were the recipients of large amounts of slag, a by-product of the smelting process, discharged into the Columbia River from the smelting operations at Trail. TCM ceased this practice in 1995.

It is estimated that, since its smelting operations began in the late 1800s, the Trail plant has discharged some twelve million tons of slag into the Columbia River (Parrish 2005), which has raised public health and environmental concerns. The company ceased this activity in the mid-1990s and initially offered to pay for remediation should these elements found in the water and bed sediment be determined to be a risk either to human health or to the environment.

Box 2: CERCLA and Superfund

In 1980, the United States Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). CERCLA was the culmination of mounting concerns over the harmful effects—on humans and the environment—of the dumping of hazardous waste and toxic chemicals. These concerns reached epic proportions, and CERCLA was the Congressional response to an emerging threat to health and human safety.

CERCLA initiated a tax on petroleum and chemical industries that would be channeled into a trust fund (the Superfund), which would enable the federal government to enforce the costly cleanup of hazardous waste sites identified by the Environmental Protection Agency (EPA). In five years, the Superfund grew to approximately $1.5 billion and CERCLA itself permitted the legal prosecution and liability of abusers, and the cleanup of sites in which a contaminator could not be identified. Since its creation twenty-five years ago, over 1600 sites in the US have been remediated thanks to the Superfund.

Despite some successes, however, its reviews are mixed. Former US President Bill Clinton, for example, labeled the "paralyzed" program a "disaster," due to the countless sites that remain untouched while the "potentially responsible parties…quibble over the delineation of responsibility, resulting in enormous costs in attorney's fees" (Stroup and Townsend 1993).

More information on the Superfund can be found at: www.epa.gov/superfund

In 1999, the Confederated Tribes of the Colville Reservation, located adjacent to the reservoir in Washington State, petitioned the EPA to declare Lake Roosevelt a Superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA; see box 2). The EPA then launched a series of site assessments, which determined that containment levels exceeded certain norms. It was alleged that the Trail smelter was the likely source of the contaminants in the Columbia River.

Teck Cominco protested the use of CERCLA (which is American domestic legislation) for a Canadian company acting within Canadian territory, and attempted to enter into a voluntary agreement with the EPA. Under its proposal, Teck Cominco openly acknowledged its responsibility for the presence of slag in the reservoir and offered to undertake and fund a process of remediation, if necessary. However, the EPA refused to negotiate with Teck Cominco, rejected the company's offer to conduct a study under EPA supervision, and issued a Unilateral Administrative Order (UAO) to Teck Cominco's US subsidiary, Teck Cominco American Incorporated, to "perform a Remedial Investigation/Feasibility Study (RI/FS) at the Upper Columbia River site in eastern Washington State" (EPA UAO dated December 11, 2003).

Teck Cominco countered with an offer to fund a $13 million dollar human health and ecological study of Lake Roosevelt, *with* the involvement of the EPA. Both the EPA and the Colville Tribes rejected Teck Cominco's offer to fund an investigation and cleanup because Teck Cominco would not agree to do this under a Superfund designation. Notwithstanding Teck Cominco's protest of the use of CERCLA as an extraterritorial application of US domestic law, the EPA threatened to levy fines totaling approximately $25,000 USD per day for non-compliance with the UAO.

In January 2004, with the two parties seemingly at an impasse, the Canadian government became involved by filing a diplomatic objection to the EPA's action with the US State Department. It also urged the US Ambassador to Canada to advocate that the EPA's UAO be rescinded on the grounds that US law simply does not apply extraterritorially in Canada. The Canadian Embassy in Washington expressed concern that "the issuance of the Unilateral Administrative Order may set an unfortunate precedent by causing transboundary environmental liability cases to be initiated in both Canada and the United States" (Canadian Embassy Note No. 0001, dated 8 January 2004). The Government of Canada also expressed a willingness to refer the matter to the

Box 3: The Boundary Waters Treaty and the International Joint Commission (IJC)

The International Joint Commission (IJC) was established to facilitate cooperation in the management of cross-boundary lakes and rivers. The IJC upholds the 1909 Boundary Waters Treaty, which governs, or is meant to govern, the cross-border implications of approximately 150 lakes and rivers (Fischhendler 2003).

The IJC is the regulatory mechanism responsible for settling disputes. Under Article IX of the Boundary Waters Treaty, both countries agree that they shall resolve any disputes occurring between them, relating to issues or interests along their common frontier, by referring "from time to time to the International Joint Commission for examination and report." The IJC is authorized only to issue a report along with conclusions or recommendations. Final authority regarding the outcome of a dispute is left to the Canadian and American governments.

The IJC remains relatively weak since it requires the consent of both parties, a stipulation meant to prevent infringements upon sovereignty. This has bestowed on the IJC little more than an advisory status. Fischendler suggests that the IJC lacks "teeth" because it is only effective when there is a high degree of trust and confidence between the parties (2003). Doig notes that, while the IJC does lack discretionary authority in some ways, it retains value in that it *was* given the "power to approve or reject all 'uses or obstructions or diversions' of boundary waters" and its decisions were meant to be final; it recommends remedies to disputes and advises both governments and private companies in this regard (2002).

The Boundary Waters Treaty can be found at: www.ijc.org/rel/agree/water.html

International Joint Commission (IJC), which was designed precisely for disputes of this nature (see Box 3).

In July 2004, the members of the Colville Tribes filed a lawsuit against Teck Cominco to force its compliance with the earlier EPA order. This lawsuit—the first to be filed against a foreign company under the CERCLA—demanded that Teck Cominco pay to the Colville Tribes the accumulated fines for non-compliance with the December 2003 UAO. Still, Teck Cominco refused to acknowledge the jurisdiction of the Order and continued to seek, as it consistently had, a *bilateral* arrangement to resolve the dispute. In August 2004, Teck Cominco filed a motion to dismiss the Colville Tribes lawsuit, in an effort to "dial back" the intensity of the situation and to create conditions conducive to negotiation and compromise (Teck Cominco News Release, 04-24-TC, August 4, 2004).

In June 2006, after numerous attempts to resolve the dispute outside the courts, the EPA and Teck Cominco announced that they had reached a settlement. The agreement was one both sides could live with: for Teck Cominco, its rejection of the UAO on the grounds of extraterritoriality was satisfied and the agreement does not require the company to accept liability for the site; for the EPA, the mining company agreed to fund a remedial investigation into Lake Roosevelt. This cooperative agreement marks the first time a settlement has been reached with a company over pollution that did not originate in the United States.

For Washington State, its relevant counties and two reserves will no longer face a Superfund designation. Teck Cominco agreed to perform an EPA-monitored assessment of the reservoir, with the involvement of the Colville Confederated Tribes, and placed $20 million in escrow to serve as a guarantee of their commitment. While the agreement was hailed as an historic event in the realm of cross-border pollution, one wonders why this arrangement was so long in coming. It appears as though it may have been diplomatic intervention—perhaps a directive from the Bush Administration for the EPA to resolve this issue—that prompted movement.

The Nature of the Lake Roosevelt Dispute: Process, not Substance

Initially, the EPA and Teck Cominco agreed on substance: a risk assessment of the reservoir was necessary and remediated actions would be guided by the results of that assessment. However, they disagreed on process: the EPA wished to manage the cleanup under Superfund, while Teck Cominco refused to submit to the use of CERCLA and Superfund.

There are a number of reasons why Teck Cominco refused the CERCLA/Superfund process. First, Teck Cominco argued that it was not required to submit to EPA authority, as the EPA has no regulatory authority over Canadian firms operating within Canada. Teck Cominco is a Canadian company, operating in Canada, in accordance with Canadian law, and the alleged deposits into the Columbia River occurred *within Canada.* The company argued that the EPA had overstepped its jurisdiction and the Government of Canada agreed. The legal basis for the company's argument was that the United States Congress initially passed the CERCLA as a domestic statute and it was never intended to apply extraterritorially. Teck Cominco was unwavering in its position that Superfund, as an arm of the EPA, could not, in principle, be applied extraterritorially and, were these attempts to succeed, this could set a dangerous example for future cross-border issues, and a dangerous legal precedent as well.

Second, Teck Cominco was concerned that, as a Canadian company, it would not be afforded the same protection in the American process as an American company would receive. Teck Cominco was not prepared to allow the EPA to conduct an investigation under US law, behind closed doors, without the input and involvement of the company itself.

Third, Teck Cominco was concerned that the investigation might unfairly identify the company as being responsible for all contaminants in the reservoir and that the company could wind up paying for the costly cleanup of a reservoir in which it may not have been the sole polluter. The company wanted to be certain that any blame affixed to Teck Cominco for contaminants in the water be *directly linked* to its smelting operations. Though the company did not protest the link outright, they wanted it to be proven, not merely assumed.

Teck Cominco was not the only actor opposed to the use of CERCLA for a Canadian company. The US Ambassador to Canada at the time, Paul Cellucci, echoed TCM's concern over precedent, as did the State Department's Office of Canadian Affairs, and the President of the Association of Washington Business, among others. All expressed serious concern about the potential future vulnerability of American companies to liabilities in Canada, should such a case be allowed to proceed. The issuing of the UAO and the application of CERCLA to Teck Cominco was overstepping jurisdictional boundaries and caused concern, even in the US, about the negative impact upon sovereignty this extraterritorial application of US law could have. The Canadian government and the Canadian embassy in Washington raised similar concerns, as noted earlier.

Unease about this case went beyond diplomats and federal governments. Disquieted about the impact of such a ruling on cross-border trade and business, both the American and Canadian Chambers of Commerce expressed grave concern that the use of Superfund in the case of Teck Cominco was excessive and that it actually contravened a Supreme Court ruling requiring that federal laws be applied in ways that do not interfere with the sovereign authority of other countries.

Others worried that, if the court upheld the Superfund process, it would set a dangerous legal precedent by expanding the scope of liability. After all, the CERCLA establishes liability for the release of "hazardous substances" and also financial liability for parties responsible. This could include businesses, but also local or municipal governments, through their ownership of wastewater treatment plants and landfills. Not surprisingly, the company ensured that the agreement reached in June 2006 relieved them of liability for the site, though they did agree to fund the investigation into the alleged contamination of the reservoir.

Finally, Teck Cominco was not the only actor opposed to a Superfund designation for the affected water bodies. Many local politicians also sought a more cooperative rather than litigious approach (which the enacting of CERCLA would be), fearing that a Superfund designation could damage local tourism should these recreational areas be deemed unsafe.

As stated above, the dispute between TCM and the EPA was not one of *substance.* They basically agreed on the need to determine the degree of contamination, the general nature of the clean-up effort required, and even the basic cost of such an endeavor. Instead, in the words of Doug Horswill, a Senior Vice President with TCM, resolution was impeded "entirely and completely because of jurisdiction and process" (Teck Cominco Media Teleconference, August 26, 2004).

4. Emerging Challenges in the Canada-US Border Relationship

Despite recent declarations to the contrary, the Canada-US border relationship is actually highly successful—there have been many challenges to it over the years, most of which have been overcome with negotiation and a commitment to keeping the border friendly.

Yet, as the Lake Roosevelt issue has demonstrated, tensions in the border relationship arise from time to time. Although this is an isolated example of a cross-border dispute, unique in some ways due to the unprecedented nature of its circumstances, it *does* share some things in common with other notable border issues the two countries have confronted more recently. It can therefore serve as both a window through which to view the relationship more generally, and as a point of departure for a general discussion of some of the chief irritants presently facing the two nations.

The Lake Roosevelt dispute exemplifies three key challenges emerging in the Canada-US border relationship: (1) the issue of extraterritoriality; (2) failures to utilize existing mechanisms for dispute settlement; and (3) the unique challenges posed by the environment as a border issue. As the discussion in this section will demonstrate, each of these three key challenges is evidenced in other contemporary cross-border issues, thus rendering conclusions about the importance of process that are more widely applicable to the border relationship.

Key Challenge #1: US Law and Extraterritoriality

One of the main themes emerging from the Lake Roosevelt dispute is the legitimacy, or lack of legitimacy, of US law for Canadian actors acting within Canadian territory. It is a widely held principle of international law that the domestic affairs of a state are its own concern and that one state's laws cannot be applied in another, unless otherwise stipulated. That being said, there have been questions raised about other attempts by US authorities to apply US laws extraterritorially—to force other states and parties to submit to US legislation. The Teck Cominco dispute is not the first attempt by US authorities at extraterritoriality, though its circumstances (the specific application of the CERCLA) make it unique.

Perhaps the most highly visible example of American attempts at extraterritoriality is the 2001 USA Patriot Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism), enacted following the terrorist attacks of 9/11. It includes elements of extraterritoriality because it requires foreign banks doing business in the US to adopt new procedures of risk minimization, or face the termination of their US accounts. This is akin to cutting off financial ties with the host country (Preston 2002).

Another example of extraterritoriality is the 1996 Cuban Liberty and Democratic Solidarity Act, better known as the Helms-Burton Law. Helms-Burton allows for the imposition of sanctions against non-American companies doing business with Cuba; it essentially forces companies operating internationally to make a choice between doing business with the US or with Cuba. Ultimately its purpose was to compel countries not otherwise inclined to marginalize Fidel Castro's regime to do so, or face penalties. While the circumstances surrounding the Lake Roosevelt dispute and the Helms-Burton Law are different, in principle they deal with a *similar* core assumption: that US law can be applied outside its territorial boundaries.

Helms-Burton has been widely criticized in the international community, particularly by the US's major allies and trading partners: Canada, Mexico and the European Union (EU).[2] Critics of Helms-Burton claim that it violates basic principles of international law and sovereignty, and argue that it infringes on other countries' sovereign right to determine their trade partners, and on the rights of other countries' companies to conduct business with the countries and firms of their choice. The EU referred the Helms-Burton Law to the World Trade Organization (WTO) claiming the law violates the rules of international trade. And in November 1997 the United Nations General Assembly passed a resolution calling on member nations to abstain from trade policy designed to punish other countries and to threaten to disrupt the free flow of trade between nations, as such trade measures "affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation" (United Nations General Assembly, A/RES/52/10, 12 November 1997).

The extraterritorial application of US law—be it Helms-Burton or an attempt to apply the CERCLA within Canadian jurisdiction—has a number of serious implications. First, extraterritoriality undermines American commitment to international law and to the very principles that underscore the WTO itself. Extraterritoriality implicitly challenges the assumption in international law that a state's domestic laws apply only within its sovereign borders and, therefore, that domestic law is not applicable to foreign actors, save those doing business in that state who would then be subject to its domestic legislation.

The second implication is an extension of the first: extraterritorial application of US law undermines the sovereignty of the affected state(s). In a complex international system, navigating interstate relationships is difficult, but it is made even more difficult when the principles of international law are circumvented for the sake of localized interest. To be sure, this is a frequent occurrence, hence the need for the WTO in the first place. But if the spirit of international law is not respected—namely, its fundamental underpinnings of equity and sovereignty—then cross-border relationships suffer. As Parrish warns, this could "turn the principles of sovereignty and international law on their heads" (Parrish 2005).

This leads to a third implication of extraterritoriality: it can damage the political relationship between nations. Parrish aptly characterizes a sentiment of concern surrounding extraterritoriality intruding upon Canadian sovereignty and the overall tone of the Canada-US relationship:

> Aside from the question of whether US environmental laws can be applied and enforced against a company operating solely in Canada, is the question of whether they *should* be so applied. The real or imagined intrusion on Canadian sovereignty, the appearance of unfairness…lead to the conclusion that national adjudication is not a long-term solution to transboundary water issues (Parrish 2005).

A final implication of US extraterritoriality is specific to America's neighbours, Canada and Mexico: successful extraterritorial applications of US laws—trade or environmental—challenge the management of a border relationship of equals, and could create economic disincentives for cross-border transactions. This could have important consequences for industry on *both* sides of the border with cross-border operations—something Mickelson terms the "reciprocity of risk" (quoted in Parrish 2005). In an age of globalization, in which some have characterized the global trend to be the withering away of trade barriers and the deepening and widening of market integration, getting the Canada-US border right has become ever more important. The economic stakes are high for Canadian businesses and industries that depend upon access to the US market, facilitated by an open border and an amicable working relationship with our neighbour to the south.

Had the extraterritorial application of CERCLA succeeded, it could have set a dangerous precedent, one that could have unnecessarily strained the cross-border relationship further—an unfortunate outcome, especially for two traditionally close partners as Canada and the US. It is worth noting that, if the EU, with all its economic and diplomatic influence, has been unsuccessful in its protest over Helms-Burton, there may be lessons in this for Canada.

2. It should be noted that, despite Helms-Burton, Canada maintains a normal trade relationship with Cuba.

Box 4: Sovereignty and International Law

International law rests on the territorial sovereignty presumption, the key provisions of which are: all states are formally equal; no state may interfere (legally) in the internal affairs of another state; and, territory determines jurisdiction (Walker 1984). What this means in practice is that no state should take actions that obstruct the sovereign authority of another state, or that violate its independence—the notion of non-intervention in a sovereign state's affairs.

The "sovereignty first" perspective has remained a key principle of international legal scholarship and has long dictated international relations. The Charter of the United Nations underscores this principle, taking care to note the "sovereign equality of its members." With the exception of Chapters VI and VII of the UN Charter (its collective security provisions), nothing in the Charter provides for or permits the erosion of the key principle of state sovereignty. Even the legal arm of the UN, the International Court of Justice (ICJ), is only given a role in addressing inter-state disputes when sovereign parties willingly submit to its authority. The principle of sovereignty is indeed a critical one; however, it does not negate the value of international law entirely. States are not free to conduct themselves without due regard for other states in the system.

The international community has struggled, since the beginning of the Westphalian state system in 1648, with the boundaries of sovereignty, its challenges, and what it means for international relationships. States have long attempted to balance their right to make sovereign, independent decisions, with a desire to devise a framework of norms and laws to govern inter-state relationships.

States take the principle of sovereignty very seriously and eschew any intrusion into the domestic affairs of a sovereign state, except where there is an identified need to uphold certain international standards of human rights. Here again, this is where the collective security provisions of the UN Charter may override state sovereignty, though collective security deals with physical acts of aggression. This, however, is hotly debated between those who employ a strict interpretation of sovereignty and power derived from *within*—states are inherently legitimate—and those who define a state's legitimacy based on how it is perceived to treat its citizens—a state's right to govern independently may be subject to how the international community measures its conformity to international norms.

There is a delicate balance to be struck, and while there is some disagreement about the reach and applicability of international law, on a basic level it does enjoy a privileged place in today's international system. With no higher authority above states in the international system—a phrase, which, by definition, *implies* a degree of regulation—the laws that govern it are only effective if and when states recognize their authority. Thus, it is generally understood that states enter into legal agreements out of a sense of enlightened self-interest, rather than forced adherence to some higher authority (since one does not exist). That being said, this necessarily means that attitudes—political will—must be present for international law to flourish. There must be willingness on the part of states to enter into, and to uphold, inter-state agreements. This is most likely to exist when states perceive that loyalty to these agreements is in their interest.

The UN Charter may be found at: www.un.org/aboutun/charter/index.html

Key Challenge #2: Paralysis of dispute settlement mechanisms

Another theme that arises from the Lake Roosevelt dispute is the failure to utilize an appropriate framework for dispute settlement—mechanisms already in place with a natural role to play in the process. The IJC contains a mechanism for dispute settlement of transboundary water issues. The IJC offers a number of methods to address disputes, including non-binding recommendations that can be issued, following investigation, at the request of one of the parties to the Treaty, and binding recommendations to

which both parties must consent in advance. Although the IJC has potentially wide powers of investigation and decision, its main role has been fact-finding. However, in the case of Lake Roosevelt, the IJC's mechanisms were not utilized.

Given that there are institutions in place to resolve disputes of this nature—disputes whose resolutions have very high stakes for interests on both sides of the border—why are they often not utilized? Parrish contends that there are a couple of reasons for reluctance to maximize the IJC's potential usefulness. First, though the IJC does contain a provision for dispute arbitration, reluctance to exercise this option reflects a concern over loss of sovereignty. In fact, critics might perceive such a move to be akin to a "roll of the dice," should third parties be permitted to render decisions normally in the purview of national governments (Parrish 2005).

Another explanation for reluctance to use the IJC for resolving the Lake Roosevelt issue specifically was concern that the arbitration process would take too long to complete. This is unfortunate because the IJC could have been used for fact-finding, and probably could have helped speed resolution had it been employed from the outset. After all, Teck Cominco did not reject the claim that it deposited slag into the Columbia River. It did not resist its responsibility to undertake costly remediation of the reservoir if necessary, but instead rejected the claim that this would be best managed under Superfund jurisdiction. Arguably, disagreement over process drew out the dispute much longer than a reference to the IJC might have.

And finally, it must be noted that the key parties to the dispute were not the federal governments—the signatories to the Treaty—but were instead the EPA (though it is an arm of the executive branch of government) and Teck Cominco, as well as the BC government, which is responsible for issuing permits to the mining operation at Trail. The Government of Canada was involved primarily through its issuance of diplomatic statements calling for a resolution to the dispute, outside the bounds of the Superfund, of course.

The failure to use dispute settlement mechanisms is a key border relationship challenge, and one that is not isolated to the Lake Roosevelt dispute. A parallel may be drawn between the decision not to involve the IJC as an outlet for dispute settlement in the Lake Roosevelt case and the US decision to ignore the NAFTA panel ruling on softwood lumber. In both cases, the two countries have implemented a regulatory regime designed to monitor select transboundary issues, but, for whatever reason, such mechanisms have not been recognized and utilized to their fullest potential.

In spring 2001, the United States Coalition for Fair Lumber Imports filed a protest with the US Department of Commerce, alleging that softwood coming into the US from Canada, in particular from BC, was unfairly subsidized because lumber firms enjoyed cut-rate stumpage fees—an accusation the BC government rejected. The Coalition asked that a countervailing duty be placed on imported softwood lumber to offset the subsidy that Canadian producers allegedly enjoyed, thereby rendering American softwood producers less competitive within the US market. The US International Trade Commission (ITC) supported the Coalition's need for anti-dumping or countervailing duties on imported softwood lumber to mitigate the threat to the US timber industry that the alleged subsidies posed. While the Government of Canada was not a direct participant in this case per se, it was a player, since it bears the overarching responsibility for international trade and external relations and maintains an interest in ensuring that practices are consistent with international agreements and regulations of the WTO and the NAFTA.

Chapter 19 of the NAFTA contains provisions for the establishment of a bi-national panel to adjudicate disputes of this nature and to make the final determination in anti-dumping cases. The panel may issue reprimands and its decisions are supposed to be binding. In extraordinary circumstances, a government may request to refer a given issue to the Extraordinary Challenge Committee (ECC) for decision. In the case of the softwood lumber impasse, a NAFTA adjudication panel ruled five times that the US was in the wrong for its decision to impose countervailing duties on softwood lumber imports. A bi-national panel ruled in favour of Canada and its ruling was upheld by an ECC panel. The US ITC rejected this decision and the required repayment of the countervailing duties charged—approximately $5 billion.

Resolution of this dispute looked unlikely until the unexpected April 28, 2006 announcement that the countries had reached a

Box 5: International Law and Treaties

International law is derived from three key sources: treaty, custom and legal scholarship. Taken together, these form the basis of the laws governing relations among nations. The most common among these are treaties and international legal agreements. States enter into treaties voluntarily and therefore signatories are obligated to abide by their precepts. But even within the most extensive of arrangements, entered into by the most well-intentioned of parties, disputes may arise from time to time, so most treaties contain provisions for dispute settlement and even for withdrawal, should this be necessary.* Customary law is generally derived from the consistent practice of states—"it's always been done this way"—and also by international legal scholarship. An attempt to codify customary international law has been underway since the end of the Second World War, but, not surprisingly, this endeavor has been met with reluctance by states concerned about the erosion of sovereignty.

Formally, there is support among nations, Canada and the US among them, for the value of international law. The myriad treaties, agreements, and exchanges of diplomatic notes between them are a testament to this. By entering into these arrangements there is an implicit support for international law, as signatories agree to recognize the principles of a treaty and its binding force.

Treaties create expectations, they coordinate action, and they reduce the risk of transactions. The Canada-US relationship is a prime example of a network of treaties and agreements whose purpose is to facilitate an intensely integrated, high stakes relationship. As stated earlier, the degree to which the two countries' economies are integrated, and the extent of their diplomatic partnership, symbolized in the un-patrolled border they share, is admired around the world. That these historic allies confront challenges to the relationship reflects well the limitations of international legal arrangements. Even agreements among the closest of partners are only as strong as their signatories allow.

The IJC and the NAFTA—as seen in the examples above—are strong so long as their authority is upheld or their mechanisms utilized. Certainly they are different, not least because the IJC can only be used when Ottawa and Washington direct it. But failure to utilize existing institutions or to adhere to institutionalized rules can be seen as failure to negotiate in good faith—a criticism launched by former Prime Minister Martin at the US government over the softwood lumber dispute—and can, unfortunately, threaten the entire system of treaties upon which the relationship is predicated. This can be seen in the tendency of certain Canadian officials and citizens to employ the language of "linkage politics," or, more simply, "tit-for-tat" tactics.

* For example, one of the more noteworthy withdrawals from a major international treaty in recent years was the US decision in 2001 to abrogate the 1972 Anti-Ballistic Missile Treaty, for which they provided their Russian counterpart with the requisite six months notice prior to withdrawal.

deal. The agreement includes partial repayment of softwood duties collected by the US, as well as the imposition of certain limits to Canadian producers on access to the US market. The agreement, arrived at outside the bounds of the NAFTA and its dispute settlement mechanisms, is renewable after the initial period of seven years. Given the long-standing nature of this dispute, this "truce" was arguably the best deal Canada was likely to get, even though it circumvented appropriate channels of process.

Both the softwood lumber and the Lake Roosevelt disputes have resonance for the wider border relationship due to what they say about *process*—the institutions created for the purposes of regulation and dispute settlement. When these are ignored or even abused, it raises questions about the parties' commitment to interacting in good faith and to the spirit of the partnership. Both disputes are informative in the sense that they reveal that treaties are only as strong as their signatories allow them to be and that, while mechanisms may be in place to resolve disputes, these processes and institutions are not always empowered to do so. Both the Lake Roosevelt and softwood issues are examples of protracted disputes that have strained the cross-border relationship.

Though the softwood lumber dispute has been resolved through alternate channels, the failure to respect treaties and utilize dispute mechanisms has serious political implications. First, it brings into question the value of the mechanisms in the first place. US reluctance to uphold the NAFTA panel's softwood ruling—for right or for wrong—raises concerns about the strength of existing procedures to serve their purpose. If the NAFTA's dispute settlement process is not utilized, or is overlooked by one or both parties, it can potentially disable future attempts at dispute resolution. Circumventing process potentially weakens the arrangement and may sour the relationship, thus eroding the good faith necessary for sovereign actors to engage in negotiation. Perception is critical. If one party perceives that the pay-off for relinquishing its sovereign authority is not great enough, it may be reluctant to uphold its obligations in this regard, which could have a ripple effect. This can be seen in the breakdown of process in the softwood lumber dispute. Process may be every bit as important as the issue in dispute itself.

What are treaties, really? In one sense, they are institutions—they create rules and mechanisms to enforce these rules and they reflect the prevailing attitudes and values of those they represent. The US and Canada embraced the NAFTA purposefully as a dispute settlement framework. On the surface, the US agreed to relinquish some of its sovereignty—as did Canada—in exchange for economic benefit through a more closely integrated market system facilitated by an open, free-flowing border. Yet should process fail—and arguably, it has—it raises questions about the strength of Canada-US border agreements. The same may be said for the disinclination to utilize the IJC in the Lake Roosevelt dispute—a procedure advocated by Canada, but not favoured by the US. It falls to the states themselves to empower such procedures—without their support they lose their value.

Second, the failure to respect treaties and utilize dispute mechanisms erodes the political relationship between countries. The softwood lumber dispute threatened to drive a diplomatic wedge between two nations that, as US Secretary of State Condoleezza Rice noted in a 2005 visit to Canada, have an otherwise good working relationship characterized by "many, many, many trade agreements." This could have set the tone for future agreements and the resolution of future disputes. Certainly it is true that there is far more to the trade relationship than softwood lumber. This issue represents the exception, rather than the rule, in the Canada-US border relationship, but it would be unfortunate for an individual issue to weaken the wider relationship—this was recognized and explains the desire of both heads of state to find a way around the problem.

Key Challenge #3: The Environment as a Border Issue

Another important consideration in the Lake Roosevelt dispute is its environmental nature. The environment does not know borders and, as such, is considered in some circles to be an extenuating circumstance when it comes to cross-border coordination, regulation and management. It cannot be handled similarly to other cross-border issues because the implications of activities on one side of the border are immediate and cannot be countervailed. Here we may draw a parallel between the Lake Roosevelt issue and the Garrison Dam/Devil's Lake issue between Manitoba and North Dakota.

While the latter issue was resolved through diplomatic channels, the process was lengthy and much was at stake on both sides of the border. There were many players involved, including both federal governments, the governments of Manitoba and North Dakota, farmers in North Dakota and the fisheries industry on Lake Winnipeg. The issue arose when area residents became concerned about the rising water levels of Devil's Lake. The Lake itself has no natural drainage to help maintain normal water levels and, as such, the level of the Lake has risen alarmingly: in the 1990s it rose over 24 feet (Knox 2004). This naturally has implications for farmers due to flooding of local agricultural land.

In an effort to address this issue, a plan was set in motion to dig a channel between Devil's Lake and the Sheyenne River—a ditch, in effect—that would transfer water from the Lake to the River, to accommodate the need for drainage (Knox 2004). The problem was that the Sheyenne runs into the Red River, which flows north into Canada and eventually drains into Lake Winnipeg. Manitoba alleged that the quality of the water in Devil's Lake was suspect and there was concern about contaminants in Lake Winnipeg.

The Garrison Diversion project adds further fuel to the dispute. The Garrison Dam is located on the Missouri River, which contains

a far greater number of foreign species than Devil's Lake (Knox 2004). The Diversion project seeks to divert water from behind the Garrison Dam into eastern North Dakota, so farmers may use it for irrigation (Knox 2004). According to Knox, this concerns Manitoba because it could mean that the Devil's Lake outlet "will be only a preliminary step to an inlet that will bring water from the Missouri River via Lake Sakakawea [the reservoir behind the Garrison Dam] to Devil's Lake" (2004).

The 1909 Boundary Waters Treaty does have something to say about this issue, as it is concerned with preserving water quality in lakes and rivers with border implications; it is meant to protect against pollution on either side of the border. It states:

> [Each party shall retain] the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs (Boundary Waters Treaty, 1909).

And while the two federal governments engaged in discussions about Treaty obligations and much-needed environmental assessment studies, the state of North Dakota, reluctant to delay the diversion project, decided to proceed, creating tension between the state and federal governments. Manitoba also tried to influence North Dakota diplomatically and filed suit in a North Dakota court to find the State in violation of the US Clean Water Act (Knox 2004). Despite a request from Canada for an independent review at the IJC, the US government did not agree to a joint reference to the IJC, even though there was support for a joint referral from congressional representatives, the Governors of Minnesota and Missouri, and the US Council on Foreign Relations.

This dispute was eventually resolved, despite the US government's reluctance to use the IJC to its fullest capacity. On 5 August 2005, the parties to the dispute—including Canada, the US, Manitoba, North Dakota and Minnesota—issued a Joint Canada-US Declaration of Settlement to be managed by the Red River Board of the IJC, which will monitor the implementation of safeguards to ensure that the Devil's Lake project does not result in the deterioration of water quality in the Red River Basin. US Ambassador to Canada, David Wilkins, called the resolution "a triumph for diplomacy" and noted, "it is a wonderful example of how our two countries can work together for the benefit of our shared environment and our shared resources."[3] Though this issue was highly contentious, its resolution demonstrates the value of diplomacy and bilateralism in the pursuit of solutions to cross-border problems.

This issue was a tricky one. It demonstrates the challenge of dealing with cross-border environmental issues in which the stakes for parties on either side of the border are high. It also reflects the difficulty national governments face in compelling sub-national governments to enforce or uphold the international legal obligations of the federal government—in this case the Boundary Waters Treaty. As Knox notes, international law is generally the purview of national governments and they are best positioned to utilize international dispute settlement mechanisms, far more so than are sub-national entities. And finally, this issue demonstrates, yet again, a reluctance to use the existing international legal mechanisms in place to address cross-border disputes. Though the IJC will be used for monitoring water quality in the Red River Basin, it was not the primary channel of negotiation when the dispute first arose. Knox argues that the IJC is woefully under used, largely because both federal governments are reluctant to use it when it comes to disputes that are likely to be controversial (2004).

Additionally, in the cases of the Devil's Lake diversion project and Lake Roosevelt, there were so many players with such diverse

3. The Joint Declaration can be found at: w01.international.gc.ca/minpub/Publication.asp?publication_id=382873&Language=E

Box 6: The Rio Declaration

According to international law, states may not engage in, or allow, activity within their borders that may cause serious harm to the territory or people of another nation. This sentiment, as it applies to the environment, is enshrined in the 1992 United Nations Rio Declaration on Environment and Development. Principle II of the Rio Declaration provides, "states…have the sovereign right to exploit their own resources, pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states…."

The Rio Declaration on Environment and Development is available on the UN website, www.unep.org

interests that it is difficult to imagine strict usage of standard dispute settlement mechanisms. Not surprisingly, when the number of actors increases, the number of viewpoints and interests also increases, thereby complicating the path to resolution. And ultimately, as noted above, international agreements are only meaningful when they are empowered by their signatories. Failure to use these instruments further undermines them and the spirit in which they were written in the first place. When it comes to cross-border environmental issues, it is difficult to balance the sovereign right to pursue activities on a state's own territory with an appreciation for the fluidity of the environment.

Both the Devil's Lake and the Lake Roosevelt resolutions—and even the softwood lumber agreement—are good examples of the power of diplomacy and of what can be achieved with political will—both are essential in the pursuit of solutions to cross-border problems. Even though the full potential of existing processes were not realized—the IJC was not employed to its fullest capacity in the first case, was unused in the second case, and chapter 19 of the NAFTA was not respected in the softwood case—these issues were still resolved. But these mechanisms were circumvented or ignored because the political will to use them was absent.

5. Moving Forward: Recommendations

The previous discussion has illuminated three key challenges to the current Canada-US border relationship: extraterritoriality; failure to utilize dispute mechanisms; and, the challenge of managing environmental issues that do not respect international borders. These challenges have significant political and economic implications. If addressed inappropriately, these challenges could result in a loss of Canadian sovereignty, damage to the Canada-US diplomatic relationship, increased vulnerability and liabilities for Canadian governments and businesses, and damage to the investment climate and the overall economy. There could also be implications for federal and provincial policymaking and regulatory regimes. Processes of dispute resolution exist for a reason and Canada must work hard to ensure these are respected, or we run the risk of undermining them, which could set an undesirable precedent for future action.

But, at the same time, Canada must act carefully when seeking to address border challenges of this nature. It is worthwhile for Canadians to step back from the discussion of the parameters of international law and treaty obligations, and from political rhetoric rooted in frustration, to consider the border relationship objectively. Perhaps the outrage and indignation felt by Canadians over recent disputes with the US—particularly softwood lumber—are reasonable. But consider for a moment that Canada and the US are hardly equal players economically. Canada has long been attempting to play the very difficult game of integrating its economy with a much larger neighbour's; the metaphor of the mouse and elephant exists for good reason. Thus, *A Continental Divide?* makes three key recommendations.

Recommendation #1: Canada should be realistic in its expectations for dispute mechanisms

Canada invokes the importance of international law and advocates strict adherence to treaty obligations *because it has to.* Outnumbered ten to one, it is no small wonder that Canada often does not find itself on equal footing when dealing bilaterally with the US. For this reason, in part, the NAFTA has tremendous appeal for Canada. The use of multilateral instruments to contain the mighty US is seen to be easier than to engage on a purely bilateral level with the Americans—the more voices, the more influences, the easier it may be to contain the economic giant and its many constituent parts. Therefore, Canadians must appreciate that there is a distinction to be made between what the NAFTA *is:* a statement of goals and principles to which the signatories *hope* to adhere, and *what we expected it to be:* an agreement capable of containing US domestic interests and of channeling those interests through NAFTA-related dispute settlement processes rather than risking the pursuit of these interests through US domestic courts.

The Lake Roosevelt dispute is evidence of a similar problem: concern over the use of US domestic law to regulate border relations when US domestic interests are engaged. From the perspective of Canada, this represents a serious challenge, and perhaps when it comes to NAFTA-related issues, this is where Canadian interests are vulnerable. Both NAFTA and the IJC may be perceived to limit sovereignty, but they do not succeed (as Canada would prefer) in shutting down access to domestic channels.

So perhaps the problem for Canada is not that its border agreements with the US, such as the NAFTA and the IJC, have failed to equalize Canada and the US as partners in the border relationship. In other words it is not *simply* a question of the US being ten times our size (though this cannot entirely be ignored), but rather that these agreements have been unable to tame domestic players within the US—the US government often bows to domestic pressure groups—and this was both problematic and visible in the Lake Roosevelt case.

Recommendation #2: Canada should not engage in trade retaliation or linkage politics

Canada does not hold many cards when it comes to its relationship with the US, and it might behoove Canadians to take this into account when engaging in negative discussions about linking cross border issues (such as the tendency by some to link energy to softwood, prior to the resolution of this dispute). At the end of day, the question becomes, "what is in our best long-term interest?" In light of the more than $1.9 billion in goods and more than 300,000 people moving across the Canada-US border each day, we really cannot afford to jeopardize this relationship. The border relationship is central to our economy and it sustains our quality of life as Canadians.

Ultimately, Canadians will have to decide: in the long-term, what do we want? Are we willing to jeopardize the larger bilateral relationship, a very possible outcome of the negative rhetoric and recent threats of linkage politics, for singular issues? This does not mean Canadians should capitulate on the issues in dispute, but rather that we must play our cards wisely—to "know when to hold 'em," and to realize we cannot "fold 'em"—and work to the best of our ability to realize the kind of relationship we would ideally like to have with our southern neighbour. Inevitable tensions exist in a multi-billion dollar relationship, one that is inherently unequal, and Canadians may have to take it as it comes. We hope for a respectful, process-driven relationship characterized by mutual trust and benefit, but we must prepare for foreseeable impediments. The importance of political will in overcoming what threatens to divide us is paramount.

An oft-heard response to border disputes with the US is that Canada should distance itself from reliance upon the border, diversify our trade partners, and maybe even retaliate against the US for its trade tactics. But it is important to bear in mind that such maneuvers would have done nothing to resolve the border disputes discussed in this paper. In fact, it could have exacerbated them, risking the erosion of the political will to resolve them. We live next door to the world's largest economy and this presents untold opportunities for Canada. We simply cannot afford, nor are Canadians really prepared for, the consequences of the loss of access to this market.

In the final analysis, it is perhaps useful to frame a consideration of Canada's options, at least as far as border relations are concerned, within two critically important contexts: the disparity in national size; and, disparities with respect to the importance of the border relationship. Like it or not, it counts more for us than it does for them. Thus, the tone of the measures we take, the ability to strike the right balance in terms of how we approach these potentially divisive border issues is critical. Whatever path is taken it must be chosen with the right goals in sight: to retain a friendly and open border with our closest trading partner, to advocate the value of process in regulating transactions and disputes, and to build an environment conducive to the resolution of disputes. Certainly these goals require efforts on both sides of the border, but Canada must be realistic about what we can achieve and about what actions are most likely to get us there.

Recommendation #3: Canada should emphasize bilateral cooperation over unilateral action, and work to avoid negative precedent

How individual disputes are settled may have long-term consequences for the border relationship. And perhaps the "how" is even more important than the outcome itself. The softwood lumber and Lake Roosevelt disputes offer lessons about the wider border relationship; they demonstrate just how difficult it can be to contain domestic actors within the US, and reflect the difficulty in channeling disputes—and upholding decisions—through the NAFTA and IJC mechanisms and the complex set of problems created when they are not utilized.

Individual border disputes are important for Canada-US border relations more widely because they can set a precedent for handling such disputes in the future, regardless of the specific outcome. *How the issue is handled* may serve as a model for the future management of border disputes, and if a precedent is to be set that could have ripple effects on broader border relations, economic and political, then surely we want it to be a positive one. Extraterritoriality makes this very difficult because it circumvents bilateral processes and instead privileges the authority of domestic courts. This precludes diplomacy, or at least makes it very difficult to go back, once measures have been taken to over-step the bounds of sovereignty. It also threatens to weaken the cross-border trade atmosphere by setting a precedent that allows cross-border liabilities to be imposed upon business and industry, thereby potentially raising the costs of doing business. Extraterritoriality threatens to transform the dispute settlement process, driving it into a legal win/lose framework, rather than leaving the door open to negotiation and compromise. This would be a very precarious precedent to set.

The cases discussed in this paper represent the kinds of cross-border tensions that can be expected in the Canada-US relationship, but also the extent to which disputes can escalate when appropriate channels of dispute resolution are not employed. As discussed above, in each of these disputes, a resolution was negotiated outside of the appropriate processes available to the parties, yet in each case the settlement reached was understandable. We cannot expect a private company like Teck Cominco, for example, not to negotiate the best deal they can get for themselves, simply because the process isn't right. But the longer-term impact of these kinds of deals, like softwood as well, may be the erosion of process or the view that process—institutionalized and treaty-based dispute settlement mechanisms—can or should somehow be circumvented. This could have an impact upon the wider border relationship and is something the Canadian government should take very seriously.

In each of the cases presented, diplomacy had a role to play in reaching a bilateral settlement, but only after great expense to the interested parties and after it seemed as though there were no other options. In the case of the softwood lumber agreement, the conflict had lasted for years and the NAFTA panel had ruled in favor of Canada repeatedly and still this failed to bring about resolution. Certainly diplomacy is important, but sometimes it fails; it cannot be relied upon solely to resolve disputes. This is why process is so important. We have agreements in place for a reason, the principles of which need to be respected, or confidence in them may be eroded and they may lose their value. Given the extent to which Canada's economy relies on cross-border access—a point that cannot be overstated—we really have little choice but to try to negotiate our way, the best we can. Given our relative size, this must involve an emphasis on bilateralism and the importance of process in the resolution of disputes.

6. Conclusion

Does the current state of the border relationship amount to a "continental divide?" Not yet. But wisdom can be found in the words of Robert Frost, who said: "good fences make great neighbours." While Canada and the US are friends, allies, and partners, they are also sovereign, independent nations governed first and foremost by national interest. This does not imply that the many treaties and agreements between them are not valuable, nor that the parties do not engage each other out of a degree of "enlightened self-interest." Instead, it suggests that a measured approach to dealing with disputes, which appreciates the need for flexibility in their resolution, would be useful. While disputes may be inevitable, the manner in which they are handled is not.

It has been suggested in this paper that, even though states benefit from entering into agreements, they do so based on a calculation of their interests (as well as a desire to create norms that govern relations between sovereign actors in a volatile world). How Canada defines its interests, however, may not be the same as how the US defines its interests. For Canada to pursue institutionalized processes of border dispute settlement is in our interest due to our desire to keep US domestic actors at bay; US reluctance to be bound by these same processes may be in theirs. We have achieved great things with the NAFTA and with the IJC. Let's not risk throwing these away when problems arise. It is how we choose to pursue our interests and to resolve our disputes—process—that will make or break the relationship into the future.

In June 2006, the EPA and Teck Cominco announced they had reached an agreement: the Company would pay the cost of an investigation into the contamination of the reservoir and would fund the clean-up process—something they had offered to do anyway. For their part, the EPA agreed to drop the UAO, thereby ending the company's concerns over the attempt to apply US laws extraterritorially.

The dispute reflects a wider challenge to the border relationship. Disputes will arise; of this we can be sure. Given Canada's comparatively weaker hand *vis-à-vis* the US, it is how disputes are managed—process—that is critically important. Bilateralism is the appropriate process, but the EPA's UAO against Teck Cominco was an attempt at unilateralism.

Both the IJC and the dispute settlement provisions of the NAFTA reflect an acknowledgement of the need to get process right. Sometimes it works and sometimes it doesn't. But we must be careful not to create the conditions under which process can be circumvented.

To avoid further potentially precedent-setting disputes that could have negative implications for businesses on both sides of the border in the future, process is critical. Both the Canadian and American governments must work together to support the use of existing dispute settlement mechanisms to help resolve conflicts—inevitable in a border relationship of such magnitude—mechanisms that respect sovereignty and process.

It is when process is circumvented and alternate legal mechanisms are used, or when side deals are struck, that we risk setting negative precedents for border relations. There is no better example of this than the US decision to ignore the NAFTA panel rulings in favour of Canada in the softwood dispute and the subsequent pressure to find a diplomatic solution—outside the bounds of the NAFTA—to an otherwise seemingly endless conflict.

Teck Cominco cannot be faulted for seeking a deal that advances its interests, but the government of Canada must take very seriously the apparent need for finding resolutions to cross-border disputes in which appropriate process is circumvented—in this case the use of the IJC to mediate cross-border water quality issues. How disputes are resolved today can have consequences for the future management of border relations—the stakes are too high if we get it wrong. CWF

List of Acronyms

CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
ECC	Extraordinary Challenge Committee
EPA	Environmental Protection Agency
EU	European Union
FTA	Free Trade Agreement
ICJ	International Court of Justice
IJC	International Joint Commission
ITC	International Trade Commission (US)
NAFTA	North American Free Trade Agreement
TCM	Teck Cominco Metals, Inc
UAO	Unilateral Administrative Order
UN	United Nations
USA PATRIOT ACT	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism
WTO	World Trade Organization

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