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Suggestions for Improving Cross-Border Mobility and North American Competitiveness

Border Policy Research Institute

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Suggestions for Improving Cross-Border Mobility and North American Competitiveness

June 2014

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On May 15, 2014, the BPRI hosted a conference titled “Beyond NAFTA: Streamlining the Border to Strengthen North American Competitiveness.” With two decades of NAFTA behind us, and with the U.S.-Canada “Beyond the Border” (BtB) agenda near the end of its phase-one timeline, speakers were asked to produce ideas about what should next be done in order to foster cross-border mobility. Experts were drawn from government, business, academia, and the nonprofit sector (see the left sidebar). The proceedings were videotaped, and some portion of the event is likely to be broadcast on the Washington State public broadcast channel, TWV. Please monitor TWV’s website (<http://www.tvw.org/>) if you want to view the taped presentations. This document is a summary of the main suggestions voiced during the event. The ideas are presented in thematic groups of paragraphs, with each paragraph attributed to the corresponding speaker. The paragraphs are not verbatim quotes, but rather the best effort of BPRI staff to succinctly capture the essence of each idea. We anticipate that this roster of ideas will be of use to policy-makers who are striving to heighten the global competitiveness of the NAFTA nations.

We are grateful for the financial support that was provided by the Consulate General of Canada/Seattle and the Pacific Northwest Economic Region (PNWER).

Move Forward on Works in Progress

» **Complete unfinished items in the BtB Action Plan.** There are significant items within the original BtB Action Plan that remain incomplete (e.g., an updated preclearance agreement for land, marine, and air modes). Visions of what might be incorporated into “BtB 2.0” must not prevent us from completing the original objectives. Among the unfinished business is the full-scale deployment of processes proven to be successful via the BtB pilot projects. *Brown*

» **Fund the U.S. customs plaza needed at the NITC.** With funding now available (from Canada) to build the New International Trade Crossing (NITC) across the Detroit River, a new stumbling block has emerged—USCBP doesn’t have the funds to build a new customs plaza on the U.S. side. The funding must be made available. *Bradley*

» **Review underutilized FAST facilities.** The BtB Action Plan includes a task involving a review of the FAST program in order to determine if future investments are warranted, and if so, at which locations. FAST has been poorly supported by the shippers in the Cascade Gateway region, such that existing dedicated FAST facilities (particularly in the northbound direction at Pacific Highway) are underutilized. The review of FAST should be broadened to include a discussion of whether *existing* FAST facilities should *continue* to be allocated to that traffic stream. *Conroy*

» **Strengthen private-sector engagement in deliberations about border policy.** In consultations leading up to the release of the BtB Action Plan, stakeholders advocated the engagement of the private sector within new BtB entities such as the Binational Port Operations Committees. Unfortunately, private sector engagement was not emphasized within BtB, so bureaucrats fail to hear from the constituency that is most knowledgeable about both the nature of problems and the reasonability of possible solutions. Private sector engagement must be enhanced. *Morrison*

» **Improve the return-on-investment associated with trusted-trader programs.** There is still an insufficient return on investment (particularly for small and medium businesses) associated with enrollment in the trusted-trader programs offered by Canada and the U.S. The benefits to enrollees must be increased and the costs of enrollment lowered, as contemplated within the BtB Action Plan. *Bradley*

» **Implement the long-promised “green lane.”** Once a new preclearance agreement is completed (as per the original BtB Action Plan), the two nations must then work toward the long-promised concept of the “green lane,” in which a truck/trailer loaded at a trusted business is able to roll nonstop across the border. *Bradley*

» **Foster regional cross-border collaboration.** Collaborative cross-border efforts to optimize traffic management and operations have been key to the gains in mobility achieved at the Cascade Gateway. The success of such collaborations depends upon the willing participation of the inspection agencies controlling the actual ports-of-entry, as well as the state/provincial transportation agencies that control the approaching highways. This mechanism of fostering mobility is not dependent upon federal initiatives such as BtB. *Conroy*

» **Migrate best practices to both borders.** A series of dual binational discussions has taken place in recent years—i.e., a U.S.-Mexico series and a U.S.-Canada one. That arrangement has now been expanded such that third-country observers attend a given binational discussion (e.g., a Canadian observer attended a recent meeting of the U.S.-Mexico Bilateral Executive Committee for 21st Century Border Management). A goal is to discern best practices found at either the U.S.-Mexico or the U.S.-Canada border and migrate those practices to all applicable locations upon either border. *Brown*

» **Address lingering problems with the NEXUS enrollment process.** There is a lack of transparency regarding what is involved in the vetting process and what can be expected in the appeals process. The existing ombudsman process is slow and opaque. To reduce the multi-month backlog of people awaiting interviews, allow the interview to be conducted by a single inspection agent. *Audience comment*

Build on Positive Economic Forces Within the NAFTA Bloc

» **Capitalize on advantages inherent in intra-continental supply chains.** Globalization has caused fragmentation of manufacturing processes and the development of supply chains that span the globe. North America is a space that provides much of the upside of global value chains, while reducing some of the disadvantages (such as long delays and high shipping costs). *Storer*

» **Bolster Mexican and Canadian offshore exports in order to benefit the U.S.** Mexico and Canada are major destinations for U.S. exports, and there is a much higher ratio of U.S.-sourced content within Canadian and Mexican products than there is within products from other nations (e.g., the value of U.S. content in Chinese-built transportation equipment is four percent, whereas the value of U.S. content in Canadian- and Mexican-built equipment is 20 percent and 16 percent, respectively). When Canada and Mexico are successful, the U.S. is also successful. *Storer*

» **Make a POE facilitative for distant shippers as well as the adjacent region.** In North America, clusters of related manufacturers exist within major metro areas, and those metro areas are not necessarily located adjacent to the border, or near each other. Major trade flows then occur between those metro areas (e.g., a major flow of aircraft-related trade occurs between Montreal and Seattle). This implies that while a border must efficiently serve its immediate near-border communities, it must also serve cross-border trade that originates in distant metro areas. *Storer*

» **Develop new methods of funding border infrastructure.** New paradigms for facilitating secure flows of people and goods will be important, but equally important is the development of adequate infrastructure at major border crossings. Public-sector budget constraints will necessitate greater use of public-private partnerships (P3s) in order to pay for such infrastructure. Legislation was recently passed in Mexico to allow P3s to fund border infrastructure. *Baca-Cuenca*

» **Attract institutional investors to fund infrastructure P3s.** Public-sector institutional investors [such as the B.C. Investment Management Corporation (BCIMC), which invests pension funds] have long investment horizons and seek steady returns, which

makes them well suited to serve as partners within P3s that fund infrastructure. *Lawless*

» **Make the U.S. tax code more favorable for foreign real-estate investments.** Because of U.S. tax law, foreign direct investment (FDI) in the U.S. is more problematic than is FDI in either Mexico or Canada. The U.S. Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) establishes that a foreign investment that touches real property must be treated as an actively managed business investment, which results in taxation of income at the standard corporate rate of 35 percent. A broad range of possible industrial investments might involve a real-estate component, and all such investments thus become less appealing because of FIRPTA. In addition, there is an aggregation issue—if BCIMC and another Canadian investor *together own greater than a 50 percent stake* in a U.S. business, then unfavorable tax consequences result. *Lawless*

» **Make the U.S. tax code consistent with NAFTA.** FIRPTA is at odds with Article 1102 of NAFTA, in that FIRPTA results in unequal treatment of foreign capital within the U.S. U.S. investments in Canada are treated more favorably for tax purposes than are Canadian investments in the U.S. Whereas a U.S.-based public-sector pension fund enjoys exemptions from U.S. taxes, a similar foreign fund is subject to FIRPTA. *Lawless*

» **Enhance the mobility of venture capital between the NAFTA nations.** Make it easier to perform due-diligence, to transfer capital, and to repatriate capital from a failed venture. *Sands*



Chris Lawless, Chief Economist of the B.C. Investment Management Corporation, speaks about the U.S. tax code.

Incremental Improvements to Border Mobility for People and Goods

» Convene the Temporary Entry Working Group to update the list of NAFTA professionals.

NAFTA includes a list of 63 kinds of professional workers who are provided exemptions from some barriers to procuring employment in a neighboring NAFTA country (e.g., a listed U.S. professional is exempt from the need to get a Canadian “Labour Market Opinion” prior to filling a job in Canada). The list of 63 categories has not changed since the enactment of NAFTA, despite the fact that the nature of professional work has changed—i.e., entire new high-tech professions exist now, such as those involved with the Internet and with “cloud computing.” The decision as to whether such professionals fit within the single category of “Computer System Analyst” is at the discretion of border officials, and there is resulting inconsistency in treatment of professionals, including denial of entry. An updated list of professions would resolve many current problems. NAFTA includes a mechanism that could be used to update the list of professionals—the NAFTA Temporary Entry Working Group. This group has not met since 2008, however, despite the fact that NAFTA mandates the group meet at least once a year. The U.S. has been reluctant to allow the working group to convene, despite the urging of both Mexico and Canada. *Rajasansi*

» **Allow liberal interpretations of the work that can be done by listed professionals.** Aside from the need to update the categories of professions in the NAFTA list, there is also the need to allow more liberal interpretations of existing categories. As an example, “engineer” is a listed category, and USCBP will allow an engineer to enter the U.S. to produce engineering drawings, but *not* to manage an engineering project. *Boos*

» **Implement pilot projects related to worker mobility at the B.C.-Washington border.** PNWER advocates the development of pilot projects that would support greater cross-border mobility of workers. For instance, at the B.C.-Washington border there are significant numbers of people employed in a border-straddling cluster of software businesses, and the laptop computers of such workers are subject to search at the border. The pilot would involve enrollment of those workers in NEXUS, lessening the need for customs agencies to search computers. In a second pilot project, unemployed blue-collar workers living

adjacent to the border in Montana would be given the right to work at nearby mills in B.C., despite the fact that mill workers are not a category now eligible for such visas under NAFTA. *Morrison*

» **Implement an RFID pilot project at the Cascade Gateway.** A pilot project is proposed in which Passport Canada issues RFID-enabled passport cards, free of charge, to roughly 75,000 Canadians living in the Lower Mainland of B.C. who together account for about 50 percent of the cross-border trips at the B.C.-Washington border. The result would be greatly diminished border queues. A complete description of the proposed pilot can be retrieved at http://www.wvu.edu/bpri/files/2014_Spring_Border_Brief.pdf. *Davidson*

» **Investigate the dynamic allocation of highway lanes.** Continued development of information sharing and shared traffic-management systems could result in additional efficiency gains. Of particular interest is the concept of changeable approach lanes that can be easily repurposed depending upon the profile of the approaching traffic (which changes by time-of-day and by day-of-week). For example, heavy weekday truck traffic at Pacific Highway is supplanted by bus traffic that peaks on weekends, so the most efficient use of an approach lane might be achieved by dynamically repurposing it between the two traffic modes. *Conroy*

» **Make cabotage rules more consistent with modern logistic practices.** Cabotage (barring foreign carriers from conveying goods from point to point within the U.S.) is inconsistent with modern logistics practices, and repeal of cabotage (and the corresponding Canadian law) would lower logistics costs in North America. Short of repeal, allowing the repositioning of an empty foreign tractor/trailer would be a step forward. As things now stand, the U.S. allows an *empty Canadian trailer* to be repositioned point-to-point within the U.S., but not by a Canadian driver and tractor. The Canadian driver and tractor must deadhead the identical route, resuming control of the trailer at the point at which it on-loads Canadian-bound goods. North of the border, Canada applies a similar rule to U.S. drivers and rigs. Both nations should take the immediate incremental step of allowing the foreign driver/tractor to reposition the empty trailer. *Bradley*



Eduardo Baca-Cuenca, Consul of Mexico in Seattle, describes Mexican programs under development.

Incremental Improvements (cont.)

- » **Recognize in Canada the Jay Treaty rights of aboriginal persons.** The Jay Treaty of 1794 between Great Britain and the U.S. confers rights of border passage to aboriginal persons. The U.S. now confers those rights upon persons born in Canada who can demonstrate an aboriginal bloodline of 50 percent or greater. Such persons are referred to as “American Indians born in Canada” (ABCs). Canada does not consider the Jay Treaty to be in effect, because *Great Britain* was the signatory. Canada should use statutory means to confer a right of passage to American Indians born in the U.S. identical to the right the U.S. now confers upon ABCs. *Boos*
- » **Issue a “Jay Treaty Card” to aboriginal persons.** The U.S. process for documenting an ABC is to issue the person a green card, which triggers undesirable requirements applicable to holders of such cards. For example, the cardholder is subject to the Foreign Account Tax Compliance Act (FACTA); the cardholder must file an IRS Report of Foreign Bank and Financial Accounts. Also, if the cardholder has a spouse or child with a bloodline less than 50 percent aboriginal, the treaty rights are unavailable to the spouse/child, and the spouse/child must wait through a 7-to-10 year backlog in order to gain the rights that accrue to family members of green-card holders. The U.S. should instead issue a “Jay Treaty Card” to eligible persons. The card should be RFID-enabled, should meet the requirements of WHTI, and should serve as proof of eligibility to work in the U.S. (i.e., should be a stand-alone document that satisfies the requirements of the DHS I-9 form). *Boos*

Larger Revisions to Border-Management Principles

- » **Enhance mobility by targeting the *positive* (i.e., the trusted travelers and traders).** Problematic people or goods are a tiny fraction of the cross-border traffic stream, and interdiction of those problematic items is akin to “finding a needle in a haystack.” Looking to the future, the best paradigm is to “make the haystack smaller” by engaging in segmentation of the traffic stream, with trusted travelers and shipments moving through an expedited process, while inspection resources are focused upon goods and people about which *nothing* is known, or which are *already suspect* because of derogatory information. Conceptually, this segmentation is accomplished by means of targeting the *positive* (i.e., identifying the trusted travelers and traders), rather than by searching only for the negative. *Bersin*
- » **Integrate the private sector into screening processes.** The paradigm of traffic segmentation depends upon advance knowledge concerning the people and goods approaching the border, with that knowledge used to perform threat assessments. It is the private sector (carriers, shippers, airlines, etc.) that possesses most of the necessary knowledge. The private sector must collaborate with inspection agencies to develop systems by which privately-held data can be fed to analytic processes that will perform both positive and negative targeting, supporting at-border processes that can expedite the low-risk traffic. *Bersin*
- » **Institutionalize the “trusted trader” concept across all relevant government agencies.** At this point, trusted-trader programs are applicable mostly within the arena of customs-related transactions. Other agencies, such as the U.S. Food and Drug Administration, should also adopt a trust-based model, such that fees and rates of inspection are reduced for trusted businesses. *Bradley*
- » **Develop Mexican programs akin to those used at the U.S.-Canada border.** Mexico is developing programs to complement the trusted-trader and trusted-traveler programs that exist elsewhere in North America. Mexico is also working on initiatives similar to those found in BtB, including pre-inspection of land cargoes, sharing of law enforcement information, and cross-border security communications networks. *Baca-Cuenca*

Paradigm Shifts That Would Greatly Enhance Mobility & Competitiveness

» **A North American right-to-work.** Right-to-work would not be conflated with citizenship; people would be able to take a job in a neighboring country while retaining citizenship in their home country. Issues of taxation, health care, and credentialing would have to be resolved (e.g., a foreign lawyer would need to pass a local bar exam to establish competency). A corollary would be a right to attend university in a neighboring country, without complicated visa processes. *Sands*

» **Border management as a data-collection task.** The act of crossing the border would result simply in a notification to federal authorities. Most enforcement would then be shifted off the border, making greater use of local law enforcement to investigate anomalies. A greater degree of information sharing would be needed in order to implement this vision. *Sands*

» **A level playing field for small- and medium-size enterprises (SMEs).** Efforts such as the RCC have been subject to regulatory capture—large corporations influence rule-making such that rules don't suit the needs of SMEs. Instead, establish a future date upon which there will be *blanket mutual recognition of all regulatory standards*, and then work to establish the truly necessary exceptions. *Sands*

» **Privatized compliance-testing.** Private labs would conduct product-safety testing, such that a car-maker could have *one lab* perform crash testing of a *single* set of cars. The lab would submit reports to three governments, showing how the test results compare to all relevant standards. Private labs would compete with one another, offer faster service at a lower price, and thus enable faster time-to-market. Governments would be in the position of establishing and publishing standards and auditing private labs. *Sands*

» **A North American Infrastructure Planning Commission.** A tri-lateral commission could tackle issues such as “What is the best route for new north-south rail capacity?” Like the International Joint Commission, this one would be a lean organization with authority to take on only those tasks referred to it by federal governments. The commission would then use best science, conduct local/regional hearings and consultations, and recommend a best solution (i.e., not issue a binding decision) to the federal governments. *Sands*

» **A pilot zone.** Today, pilot projects are creations of the federal governments. Instead, establish a zone within which pilot projects can be proposed and tried in a bottom-up manner. Federal authorities would still be engaged during all phases of a pilot, but allowing ideas to emanate from the local/regional level might result in more ambitious changes. *Sands*

» **True perimeter security.** Threats should be interdicted at the first point of arrival (within any of the three NAFTA nations) of non-NAFTA travelers and goods. If true security threats were interdicted at the continental perimeter, processes at the internal land borders could be radically streamlined, which would foster mobility and competitiveness. *Payan*

» **Joint bilateral border management.** Because borders are actually bilateral constructs, there should be joint management and processes—not two agencies and two inspections, but rather a single inspection and clearance. Mexico would need to address the obvious issue of trust. *Payan*

» **Decriminalization.** In order to justify the continued buildup of the border-security apparatus, agencies have increasingly emphasized (and succeeded at) criminal interdiction at the border. But scrutinizing the stream of travelers in order to detect minor criminality (e.g., minor drug offenses, old warrants) results in hindered mobility and has nothing to do with true threats to the security of the nation. Decriminalization of some activities (as Washington State has done with marijuana) is needed, as well as a change in at-border processes to sharpen the focus upon true security threats. *Payan*

» **Privatization of border enforcement.** A private contractor can be held accountable to a specific set of agreed standards and metrics, which is not possible to do with government. *Payan*

» **Devolution of some federal authority to state/provincial governments.** Border residents are the most affected by the at-border security apparatus, but they are the least consulted, despite the fact that they have the best knowledge of local conditions. *Payan*

» **Preparation for 2017.** Each successive U.S. presidential administration has produced its own effort toward improved continental competitiveness and cross-border mobility. Work should be underway now in an effort to guide the next president toward a better North America. *Sands*