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FOREWARD: BEYOND THE BORDER ACTION PLAN – A CONTEXT

*By: Emmanuel Brunet-Jailly**

The origins of the contemporary Canada – United States exceptionally dense trade flows and close government relations are found in the invention of the automobile, specifically the establishment of Ford Motor Company in Windsor in 1902. At the time, Ford wanted access, through Canada, to the Commonwealth market. Industrial and automotive development in the Detroit-Windsor region took place subsequently. From inception, intra-corporate trade made up a significant part of this trade flow. This trade flow soon justified the Auto Pact of the 1950s, because trade was spilling over and expanding to the rest of Ontario and Michigan. Over time, the widening of trade to the rest of Canada and the United States across diverse industries such as manufacturing, services, and retail supported the Free Trade Agreement of 1989 (“FTA”) and the North American Free Trade Agreement in 1998 (“NAFTA”).

By 2012, Canada and the United States were by far each other’s most important trading partners. In 2011, bilateral trade stood at \$689 billion, or about \$1.9 billion in daily exchanges of goods and services, and thirty-five U.S. states named Canada as their leading market. Furthermore, the U.S. exports to Canada are the largest trade flows in the world – they are greater than both trade with Japan and Mexico combined.¹ In 2011, the United States supplied 51.1% of Canada’s goods imports and purchased 75% of Canada’s merchandise exports.²

Canadian trade with the United States is larger than its European, Japanese, and Mexican trade flows together, suggesting it is the highest level of integration in the world between two large economies, even when compared to the European Union’s Franco –

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1. See GOV’T OF CAN., UNITED STATES FACT SHEET (2012), *available at* <http://www.international.gc.ca/world/embassies/factsheets/US-FS-en.pdf>.
2. IAN F. FERGUSON, CONG. RESEARCH SERV., RL33087, UNITED STATES-CANADA TRADE AND ECONOMIC RELATIONSHIP: PROSPECTS AND CHALLENGES 10 (2010).

German relationship. The Canadian Department of Foreign Affairs and International Trade estimates that trade with the United States sustains about 8 million jobs.³

Free trade has allowed Canadians to secure and develop their grasp on U.S. markets, despite Asian and European competition.⁴ Of all the Canadian provinces, Ontario has the highest degree of economic interdependency with the United States, particularly with the state of Michigan. Ontario's trade with Michigan alone surpasses that of all Canadian inter-provincial trade.⁵ Ontario, with its population of about twelve million, is Canada's most populous and dynamic province. It effectively exploits its locational advantage at the center of the Great Lakes region and the Northeastern United States, where it is one trucking day from 125 million people, including about 20 million Canadians.⁶ In 2002 for instance, Ontario alone contributed about 50% of Canada's GDP;⁷ 93% of its exports went to the United States while 11% of its imports came from the United States.⁸

To sum up, Canada and the United States form a highly integrated economic region of the world because of their trading history; since the signing of the FTA and NAFTA, economic integration has progressed at a faster pace than economic growth. Indeed as a result of free trade, the two-way trade between Canada and the United States, with regard to both imports and exports, has increased from \$45.6 billion in 1977 to \$818 billion in 2010, an increase of 1800%.⁹ While both the United States and Canada depend

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3. See PETER B. DIXON, KEVIN HANSLOW & MAUREEN T. RIMMER, MONASH UNIV. CTR. OF POLICY STUDIES, *THE DEPENDENCE OF U.S. EMPLOYMENT ON CANADA* (2012), available at http://monash.edu.au/policy/canada_us_trade.pdf.
 4. See THOMAS J. COURCHENE & COLIN R. TELMER, CTR. FOR PUB. MGMT., UNIV. OF TORONTO, *FROM HEARTLAND TO NORTH AMERICAN REGION STATE: THE SOCIAL, FISCAL AND FEDERAL EVOLUTION OF ONTARIO* (1998); see also Daniel Goldfarb, *Beyond Labels: Comparing Proposals for Closer Canada-U.S. Economic Relations*, 76 *BACKGROUNDERS: THE BORDER PAPERS* 1, 14 (2003).
 5. ONTARIO, *Ontario Trade (Exports/Imports) with United States*, available at <http://www.sse.gov.on.ca/medt/ontarioexports/en/Pages/tradefacts.aspx?type=us> (last updated Mar. 12, 2012).
 6. *Id.*
 7. ONTARIO, *Ontario Trade Fact Sheet*, available at http://www.sse.gov.on.ca/medt/ontarioexports/en/Pages/tradefactsheet_ontario.aspx (last modified Mar. 12, 2012).
 8. *Id.*
 9. STATISTICS CAN., *Imports and Exports, and Trade Balance*, available at <http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/gblec02a-eng.htm> (last modified Jan. 11, 2013).

on each other in numerous sectors and for jobs, primary goods and automobiles industries form a unique economic ensemble.

Prior to the September 11, 2001 attacks, trade was the prime driver of Canada – U.S. government relations. In the 1990s, scholars suggested that the primary characteristic of the Canadian – U.S. border, borderlands, and border urban regions, was that it provided an environment facilitating the seamless flow of goods and capital, and, that in essence, it was a border increasingly transparent to trade.¹⁰

However, it has been argued by many observers that the border has hardened since September 11,¹¹ and that securitization has had a huge impact on trade, and is now seeping through and influencing all policy arenas that are concerned with and establish borderland policies. Following September 11, both Canada and the United States engaged in discussions over their friendship and the nature of their relations. While economic integration and interdependence was at the forefront of those debates, in the United States, most issues focused on the nature of security on their northern border, while in Canada issues of economic integration raised questions of sovereignty: the idea that ‘*Security Trumped Trade*’ was on all lips.¹²

The post-September 11 context was also characterized, in particular in the United States, by fragmented, understaffed and under-resourced agencies, and ill-equipped borders. In 2000, there was fewer than 1,000 staff on the U.S. side of the Canadian border, in contrast with about 10,000 staff on the U.S. side of the Mexican border, reflecting the perception of the Canadian border as safe and transparent.¹³

Indeed, since September 11, U.S. staff numbers have increased three fold at both borders, and, as part of the U.S. response to September 11, the Bush administration initiated a regrouping and recentralization of all major border policy agencies, including border

10. See, e.g., Emmanuel Brunet-Jailly, *Comparing Local Cross-Border Relations Under EU and NAFTA*, 58 CAN. AM. PUB. POL’Y 1, 1-59 (2004).

11. See generally VICTOR KONRAD & HEATHER NICOL, *BEYOND WALLS: RE-INVENTING THE CANADA-UNITED STATES BORDERLANDS* (2008).

12. Emmanuel Brunet-Jailly, *Security and Border Security Policies: Perimeter or Smart Border A Comparison of the European Union and Canadian American Border Security Regimes*, 21 J. OF BORDERLAND STUD. 3, 10-11 (2006).

13. See Emmanuel Brunet-Jailly, *NAFTA, Economic Integration and the Canadian-American Security Regime in the Post-September 11, 2001 Era: Multi-level Governance and Transparent Border?*, 19 J. OF BORDERLAND STUD. 71, 71-95 (2004); see also EMMANUEL BRUNET-JAILLY, *BORDERLANDS – BORDER SECURITY IN EUROPE AND NORTH AMERICA IN COMPARATIVE PERSPECTIVE* (2007).

security. In March 2003, the newly created Department of Homeland Security (“DHS”) resulted from the merger of several agencies, which involved well over 40,000 staff.¹⁴ Today, DHS staff stands at about 200,000.¹⁵ Also, the border security budget has grown significantly from an initial \$8.8 billion¹⁶ to about \$31.2 billion for the newly created DHS in 2003,¹⁷ to over \$59 billion in 2012.¹⁸ This progression of resources not only illustrates the prioritization of security but also the swiftness of reforms. The ‘one face at the border’ goal originally set by the White House has been achieved. Customs and Border Protection (“CBP”) officers graduate from the same school (“FLECT”) where they train to become part of specialized airport inspection, anti-terrorism, and passenger-analysis units.

Also in the wake of the events of September 11, Canada, Mexico, and the United States signed agreements to further enhance their security and protect their trade relations. The first such agreement was the *Smart Border Declaration* (“SBD”), which I have discussed extensively in the past; it is primarily focused on implementing procedures to secure borders and trade flows.¹⁹ The Smart Border Agreement (“SBA”), however, set the framework of the Canada-U.S. partnership on issues of security, trade, immigration, and firearm or drug trafficking. The SBA became public on December 12, 2001, when Tom Ridge, the U.S. Director of DHS and John Manley, then Canadian Minister of Foreign Affairs met in Ottawa, Canada.²⁰ In the face of adversity, meeting in Canada symbolized friendship in the implementation of an important agreement, which was then presented as being about securing trade between Canada and the United States. Manley argued that “*keeping the flow of people and goods moving efficiently across the Canada-U.S. border*” was the central feature of

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14. See generally DEP’T OF HOMELAND SEC., <http://www.dhs.gov/> (last visited Jan. 1, 2013).
 15. *About DHS*, DEP’T OF HOMELAND SEC., <http://www.dhs.gov/about-dhs> (last visited Jan. 1, 2013).
 16. Press Release, The Whitehouse, Securing America’s Borders Fact Sheet (Jan. 25, 2002) (on file with author), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020125.html>.
 17. DEP’T OF HOMELAND SEC., FY 2005: BUDGET IN BRIEF 3 (2005), available at http://www.dhs.gov/xlibrary/assets/FY_2005_BIB_4.pdf.
 18. DEP’T OF HOMELAND SEC., FY 2013: BUDGET IN BRIEF 3 (2012), available at <http://www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf>.
 19. The following information was originally published in Emmanuel Brunet-Jailly, *Securing Borders in Europe and North America*, in A COMPANION TO BORDER STUDIES 110 (Thomas M. Wilson & Hastings Donnan eds., 2012).
 20. *Id.*

this agreement.²¹ Tom Ridge, also insisted “*there is no trade-off between our people’s security and a trade friendly border. We need both, for in fact they reinforce each other.*”²² It is important to note, nevertheless, that Manley talks about keeping the ‘flow ... moving’ while Ridge insists on ‘people’s security.’ Today, it is clear that the Smart Border Agreement has motivated the creation and numerous networks of public and private security officials that develop and implement the border policy together. Over the years, Canada and the United States have worked closely together to implement policies that focus on flows, i.e. transportation infrastructures and flows of goods and people, and have been able to progressively share intelligence despite on-going difficulties.

Indeed, there are some very successful instances of cooperation; the Canada-U.S. Container Security Initiative Partnership Arrangement, which became the model for the Canada-U.S. Joint Container Targeting at Seaports Initiative, is a key example.²³ This initiative brings Canadian Customs and Revenue officers for training to the United States (Newark and Seattle) and similarly allows Canadians to welcome U.S. officers to Halifax, Montreal, and Vancouver.²⁴ Together these officials learn to work out pre-screening containers that have other U.S. or Canadian final destinations.²⁵ Additionally, Canada and the United States have made considerable investments in new scanning technologies, such as the controversial large-scale X-ray imaging systems. They have also increased “the capacity of ports of entry to check seaport containers as well as trains and trucks crossing land border gates.”²⁶ Thus, more containers are being properly inspected with an increase while in 2001 only 7.6% of containers were inspected, this percentage rose to 12.1% in 2003 and may have reached 100% of high-risk containers today.²⁷ Numbers remain very controversial, however, last July the Washington Post

21. *Id.*

22. News Conference by Governor Tom Ridge, September 11, 2001: Attack on America (Dec. 12, 2001) (on file with Yale Law School Lillian Goldman Law Library), *available at* http://avalon.law.yale.edu/sept11/ridge_012.asp.

23. *See Marine Trade Security*, CAN. BORDER SERV. AGENCY, http://www.cbsa-asfc.gc.ca/security-securite/mts_smc-eng.html#ctsi (last modified Oct. 20, 2005); *see also* Brunet-Jailly, *supra* note 19, at 110.

24. CAN. BORDER SERVICES AGENCY, *supra* note 23.

25. U.S. CUSTOMS & BORDER PROTECTION, CUSTOMS-TRADE PARTNERSHIP AGAINST TERRORISM: A YEAR IN REVIEW (2008), *available at* http://www.customs.gov/linkhandler/cgov/newsroom/fact_sheets/travel/fast/fast_fact.ctt/fast_fact.pdf.

26. Brunet-Jailly, *supra* note 19, at 110.

27. *Id.*

reported that only 45,500 suspect containers had been scanned in 2011, that is only two per day at each 58 oversea ports totaling 80% of containers travelling to the United States.²⁸ Indeed, in May 2012, Department of Homeland Security Secretary Janet Napolitano explained to Congress that delays were expected because of a \$16 billion cost and practical issues.²⁹

Indeed, this program is still struggling with common security standards that would allow container operators to label, identify, and screen containers securely. Obviously, security agents from the United States and Canada have been working towards collaborative and cooperative approaches, but since they cannot enforce the law in each other's country, which is expensive, in the end these cooperative approaches only work in an advisory capacity. The core issue is sovereignty protection in an environment where private sector operators are worried about losing business because of specific security norms. Another effective program is the Vehicle and Cargo Inspection System. It organizes the surveillance of the seven busiest Canada-U.S. train crossings. FAST, or Free And Secure Trade, is another example of such a program, as it streamlines the certification program for American and Canadian businesses that want to fully benefit from pre-clearance. What FAST does is similar to any quality certification mechanisms. It primarily screens trucking and transportation businesses against specific security standards, which in turn then allows shipping goods across border gates seamlessly. Trucks are set up with a transponder that allows the transfer of data from the truck to a border gate official that is then able to match the information against a database. The rationale behind FAST is that screening allows for saving of both time and resources. In particular, thanks to FAST, border officials are less likely to find illegal goods on certified vehicles and therefore can spend more time inspecting non-certified ones. Four key agencies are partnering in FAST; the U.S. Customs and Border Protection ("CBP"), Customs-Trade Partnership Against Terrorism, the Border Security Agency, and the Partner In Protection are all involved. One may wonder, however, how successful FAST is – indeed, since 2003 only a minority of businesses and truckers (often one person businesses) have been certified. In all, CBP has approved

28. Douglas Frantz, *Port Security: U.S. Fails to Meet Deadline for Scanning of Cargo Containers*, WASH. POST, July 7, 2012, available at http://www.washingtonpost.com/world/national-security/port-security-us-fails-to-meet-deadline-for-scanning-of-cargo-containers/2012/07/15/gJQAmgW8mW_story.html.

29. *See Homeland Security Poised to Breach Port Cargo Screening Mandate*, GLOBAL SEC. NEWSWIRE (July 16, 2012), <http://www.nti.org/gsn/article/homeland-security-set-miss-port-cargo-screening-mandate/>.

6,900 businesses and 90,000 truckers, which is a small fraction of the actual cross-border trade-related traffic.³⁰

FAST lanes, for truckers or for commuters, also led to the construction of new and expansive infrastructures. One example is the famous *Ambassador Bridge* where nearly 50% of all of Canada – U.S. goods cross the border. In 2009, because of the need for a new, dedicated FAST lane, the governments of Ontario (Canada) and Michigan (U.S.) agreed to build a new bridge called the *Detroit River International Crossing* (“DRIC”). However, the DRIC faced much local opposition both because the private owner of the Ambassador bridge wanted to build the new bridge privately, and because the DRIC forecasted increased traffic, which was opposed by local residents of the Canadian city of Windsor. Canadian governments, both federal and provincial, however, partnered to fund the DRIC and to provide financial support up to \$550 million to their partner, the state of Michigan.³¹ The current cost of this new link across the border is an estimated \$5.6 billion.

Other programs providing similar expedited crossings exist for frequent travellers. For instance, the NEXUS program targets pre-approved individuals who can then cross by car, boat or plane more easily. Once certified, travellers carry with them a ‘smart card,’ which clarifies their status as ‘pre-cleared to cross.’ Carrying the card alone doesn’t complete the process; crossings also have to be equipped with card readers and terminals so officials can read the database. Today, a few of the busiest crossings are equipped: Blaine (British Columbia, Canada and Washington State), Buffalo, (New York State), and Windsor-Detroit (Ontario, Canada and Michigan State).

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30. *U.S. Tourists Staying Away from Canada*, BANGER DAILY NEWS (Apr. 6, 2010), <http://bangordailynews.com/2010/04/05/news/us-tourists-staying-away-from-canada/>; INTERNATIONAL ASSOCIATION OF AMUSEMENT PARKS & ATTRACTIONS, RULES OF THE ROAD (Apr. 2010), available at <http://www.iaapa.org/industry/funworld/2010/apr/features/RuleRoad/index.asp>.
31. *Ottawa’s \$550 Million Loan Offer for New Bridge Launches War of Words in Michigan*, GLOBE & MAIL (Apr. 29, 2010, 1:26 PM), <http://m.theglobeandmail.com/report-on-business/ottawas-550-million-loan-offer-for-new-bridge-launches-war-of-words-in-michigan/article1551117/?service=mobile>; Bill Shea, *Bridge Q&A: Your DRIC Questions (Mostly) Answered*, CRAIN’S DETROIT BUSINESS (Apr. 30, 2010), <http://www.crainsdetroit.com/section/c?template=profile&uid=140106&plckPersonaPage=BlogViewPost&plckUserId=140106&plckPostId=Blog%3A140106Post%3A5aa9652e-9d0a-41b2-83edce3522d9b54e&plckController=PersonaBlog&plckScript=personaScript&plckElementId=personaDes>; see also Greg Keenan, *Ahead: Legal Barrier for Detroit Bridge*, GLOBE & MAIL (Nov. 7, 2012), <http://www.theglobeandmail.com/report-on-business/ahead-legal-barriers-for-detroit-bridge/article5077346/> (demonstrating “no” side just lost a referendum on the bridge held during the U.S. presidential election).

In this case, as it is for FAST, the rationale is that the NEXUS card allows border officials to focus their attention on all other cases. However, in 2010 this program had only approved 265,000 individuals and only 16 border gateways, with just 8 airports and 3 harbor crossings equipped effectively.³² The primary security feature of NEXUS cards is that they are like passports. However, their implementation has been plagued with administrative and regulatory tribulations. Indeed, a report commissioned by the United States and Canada found that a number of unresolved legal, institutional, and enforcement issues limited its success. One of those problems was border officials' right to carry weapons. Others, underlined by the 2008 Government Accountability Office of the United States, included disagreements over arrest authority, fingerprinting practices, right to withdraw applications at the U.S. pre-clearance office.³³

The SBA and SBD were followed by the *Western Hemisphere Travel Initiative* ("WHTI") which is a U.S. initiative primarily known for unilaterally requiring and implementing passports for border crossing in North America. The WHTI was a provision of the *Intelligence Reform and Terrorism Prevention Act* of 2004 that required all travelers from Canada and Mexico to present a passport, or another form of secure documentation, to enter the United States. The WHTI was supposed to start on the 1st of January 2007 for air travelers, and a year later for land or sea crossings, but the initiative was so controversial that implementation was postponed to June 2009. Clearly, this initiative was nearly revolutionary, in particular between Canada and the United States where crossing had always taken place with limited documentation such as a credit card or a driver's license.

When WHTI implementation was postponed nearly two years, 'enhanced driver's licenses', i.e. driver's licenses with a passport-level of security clearance, were introduced for land crossing for residents of British Columbia and Washington, and, Ontario and Michigan. Currently, such 'enhanced drivers licenses' are being issued in the provinces of British Columbia, Manitoba, Ontario, and Quebec, and in the states of Michigan, New York, Vermont, and Washington.³⁴

32. Brunet-Jailly, *supra* note 19, at 111.

33. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-1141T, SECURE BORDER INITIATIVE: OBSERVATIONS ON DEPLOYMENT CHALLENGES (2008).

34. For additional information regarding this program, see *Enhanced Driver's License*, WESTERN HEMISPHERE TRAVEL INITIATIVE, http://www.getyouhome.gov/html/lang_eng/eng_edl.html (last visited Feb. 1, 2013) and the Canadian compliment, *Enhanced Driver's License*, WESTERN HEMISPHERE TRAVEL INITIATIVE, http://www.getyouhome.gov/html/lang_can/can_edl.html (last visited Feb. 1, 2013).

Another instance of this added attention to border and security took place in March 2005 at the first meeting of the *Security and Prosperity Partnership of North America (SPP)* in Crawford, Texas, which had the mandate to discuss a long list of security policies such as border improvements, land preclearance measures, and joint port security exercises. Most of those items had already been part of the Canada – U.S. 32-point Action Plan of the Smart Border Agreement. The leaders of all three countries met again in Cancun in March 2006, in Montebello in August 2007, and in New Orleans in April 2008. However, despite this context of relative success the *Security and Prosperity Partnership of North America* discussions were stopped in the meeting of Guadalajara in 2009 because of lack of progress and disagreements between government agencies and stakeholders; yet, the -then new- Obama Administration had re-affirmed its commitment to continue past efforts on North American cooperation, and to meeting with neighboring leaders.

One aspect of this new framework was announced in February 2011 when Prime Minister Harper and President Obama met to launch two new initiatives that, interestingly, do not include Mexico. The first initiative is regulatory cooperation that takes the form of the *U.S. – Canada Regulatory Cooperation Council*. The second is a joint declaration on the *U.S. – Canada Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness* that lists principles and objectives for future actions.³⁵ Together, these have been called the ‘*Washington Declaration*.’ It is too early to judge whether these initiatives are game-changing but it is clear to the authors of this special issue that they are important initiatives that may lead to enhanced relations between the United States and Canada. Indeed, the usage of the words ‘regulatory cooperation’ and ‘perimeter’ suggest major changes, and this is what the authors of this special issue of *Canada United States Law Journal* are attempting to assess.

Hence the Beyond the Border Action Plan, and the timely conference organized by the *Canada-United States Law Institute* to assess this new initiative; the proceedings of this conference are

35. Press Release, White House, Joint Statement by President Obama and Prime Minister Harper of Canada on Regulatory Cooperation (Feb. 4, 2011) (on file with author), available at <http://www.whitehouse.gov/the-press-office/2011/02/04/declaration-president-obama-and-prime-minister-harper-canada-beyond-bord>; See also, Press Release, White House, Declaration by President Obama and Prime Minister Harper of Canada – Beyond the Border (Feb. 4, 2011) (on file with author), available at <http://www.whitehouse.gov/the-press-office/2011/02/04/declaration-president-obama-and-prime-minister-harper-canada-beyond-bord>.

presented in this special issue of *Canadian United States Law Journal*. Four themes organized the discussions: regulatory harmonization, trade and jobs, cyber-security and infrastructures, and border management. Eight papers address those in turn, and, what we learn is not only coherent with the current literature but is also at the vanguard of key discussions on the Canada – United-States relationship.

In turn, we understand, that harmonizing regulatory systems is contentious and depends both on internal and external factors because regulatory systems impact the rules of the game in international as well as national markets, and that, while there is urgency to increase North American competitiveness, progress is slow. We learn that trade and jobs are a North American issue, not just a national concern for the United States or Canada independently. Indeed, both countries are in great need of skilled laborers not just university graduates. Also, while we know that during the SPP negotiations, industries and governments did not see eye-to-eye, which led to its demise, we learn that disagreements may be ongoing. And, we are told that the World Wide Web is indeed worldwide but that Canadian and U.S. government policies are not yet caught up with the staggering impact of its integrating force in the business world across North America, and with the rest of the world. Making threats likely is only one consequence; two papers discussing cyber-security agree that Canada and the United States neglected cyber-security in the *Beyond the Border Action Plan* and should remedy to it urgently.

In the area of regulatory harmonization, Sands and Johnston agree that past initiatives such as the Security Prosperity Partnership were unsuccessful. Moreover, that the harmonization of regulation is a central item on business agendas, and that the Beyond the Border initiative brings new hope.

For Christopher Sands the central issue of the initiative is in its potential to curtail the large amount of regulation that results from both the U.S. and Canadian Government activities and that makes North America less competitive. Sands reminds us that for famous and admired statesman Winston Churchill too much regulation damages all respect for laws; he also underlines how challenging such attempts to thin out regulations have been because identifying and implementing common regulatory standards is a complex affair, but especially when it concerns bilateral trade and economic competitiveness. There are no doubts in Sands mind that the Security Prosperity Partnership failed to re-energize talks on regulation, and that the Obama administration is committed to streamlining domestic regulations. Proofs are found in the nomination of former Harvard Law Professor, Cass Sunstein, as director of the Office of Information and Regulatory Affairs, and in the 2011 State of Union address. But Sands' assessment of progress is that domestic and international regulatory reforms are sensitive areas that affect a lot of industries

and are scrutinized and opposed or lead to difficult negotiations. Yet, he underlines that in the United States, both industry and Congress need to be involved. To sum up, Canada – U.S. policy alignment is both a bureaucratic and institutional issue where international and domestic interests are at play and conflict with what may be termed Pan-North-American necessities.

In “*The New Perimeter Initiative: Will Security Trump Trade?*” the Hon. Kelly Johnston questions the possible success of improving – both – security and trade, basically making the point that both countries are secured: The gist of the argument is that the *Security and Prosperity Partnership* (“SPP”) and the *North American Competitiveness Council* (“NACC”) led too many discussions and proposals that no government in Mexico, the United States or Canada was able to digest, which then led to the failure of the SPP. Johnston writes that ‘*Bureaucratic resistance to the SPP and the NACC amidst federal agencies in the US and Canada was increasingly obvious.*’ Yet the author goes on to suggest that the Beyond the Border and SPP share an important question, namely ‘*what does success look like?*’ he proposes that ‘equivalency’ is the answer. The idea of equivalency is that each country’s regulatory standards should be recognized in the other as acceptable: “*If it is good for Canada, it’s good for the United States, and vice versa*” Johnston writes. The Hon. Kelly Johnston concludes suggesting that both ‘equivalency’ and the elimination of conveyance and travelers’ fees imposed on Canadians entering the United States would be celebrated decisions.

In the areas of trade and jobs Vandervert, Matthiesen, and Cunningham make two sets of central arguments. While Vandervert and Matthiesen make the case that government policies should ease security standards between Canada and the United States, they suggest different solutions. Vandervert suggests more trusted programs are needed, while Matthiesen ultimately argues none of the actions the United States is taking to protect and regulate trade world-wide are necessary between Canada and the United States. Cunningham suggests that the Canada – U.S. job market faces the same issue of shortage of skilled labor.

In “*To Go Forward, We Must Remember and Rely Upon Our Past*” Paul Vandervert proposes we must know our past to proceed successfully. His argument is that trade facilitation, economic growth, and jobs are at the core of the Canada – United States relationship, which in short should lead us to enhance trusted traders type programs in order to increase trusted trade flows with high volume, repetitive, and frequent border crossers to relieve border congestion and focus security where there is uncertainty. Vandervert also suggests that the current U.S. elections will not change much in the future because the current process forms a ‘*deepening and institutionalization of the US-Canada relationship,*’ as functioning below the political levels and across ‘*almost the entire U.S. and*

Canadian governments' is the greatest protection against future difficulties. Interestingly this is not a view shared by all participants, not the least Theresa Brown, who argues that political leadership remains fundamental.³⁶

Brigit Matthiesen, in *"Trust in so many words"* suggests Canada is special and should be treated as an exception by the United States regulators. Matthiesen suggests that regulatory and security standards imposed by the United States to the rest of the world should never have applied to Canada. Canada and the United States are each other's number one trading partners in so many economic sectors and trade in such large volumes that U.S. blanket regulations make no sense. Indeed she illustrates explaining that large and smaller businesses trading across the Canada – United States boundary lines are for 30% dealing in intra-corporate trading, or dealing for 30% with first or second tier suppliers. In brief, Matthiesen basically agrees with many ideas already found in Sands and Johnston, and Vandervert and Cunningham's papers but her argument and policy suggestions single out Canada from both Mexico and the rest of the world.

In *"Trade and Jobs,"* Richard Cunningham analyses the job prospect situation and suggests that skilled jobs are the current priority for North America. He argues that manufacturing jobs have been lost as a result of trade policies including the Trans-Pacific Partnership and North American Free Trade Agreement, and goes on to advocate that what is central to the Canada – U.S. relationship is skilled training. Cunningham submits a gap between industry-needs in vocational and skill training, and, college education is the issue making too few employable people. Cunningham is in effect arguing that polytechnic training, rather than general academics, needs to be the new priority so that both Canada and the United States remain attractive business locations.

Cyber security is another area where integration is grounding new ideas. According to Rosenzweig and de Laat, cybersecurity is the Achilles heel of the Beyond the Border Action Plan; Rosenzweig and de Laat agree that governments underestimate the spectacular rise and importance of the World Wide Web on the North American economy and business integration across the boundary line. This in their view puts North America at the mercy of cyber-criminality and terrorism. Both have explanations and list proposals to remedy this issue. McDaniel's focuses his argument on cross border infrastructures, in other words, stable and established mechanism of cooperation spanning the border in diverse areas of emergency preparedness policies.

36. Unfortunately, Theresa Brown's article was unable to be published in this issue. It has been slated for later publication with the Canada-United States Law Journal.

In “*The International Governance Framework for Cybersecurity*” Paul Rosenzweig raises the question of what Chris Demchack and Peter Dombrowski termed the “*rise of a cybered Westphalian age*,” an interesting play on words making a reference to the 1648 peace of Westphalia, which brought together all the contenders of the Thirty Years War and established for the first time ever in history the international community’s recognition of sovereign states, the principle of non-intervention in internal affairs and states’ boundaries. In the current age of information communication cyberspace is a potential challenge to such principles. In particular, the author notes some states attempt to control their citizens’ cyber activities but at great costs – China relies on 300,000 Internet monitors. In fact, cybersecurity, for Rosenzweig, raises a number of policy challenges such as cooperation and international agreements leading to concerted standards and actions, the protection of sovereign data, and the issue of Internet freedom. In conclusion, Rosenzweig suggests, however, that joint Canada – U.S. work is below what would be expected from the nature of shared interests and Canada – U.S. relationship, suggesting that when financial systems, electric grids and air traffic controls, all, are to some degree, shared, only a robust coordinated joint defense system has any prospect of success.

Michael McDaniel’s article “*Beyond Beyond the Border: A Proposal for Implementation of the Action Plan’s Recommendation on Cross-Border Critical Infrastructure*” is a description and commentary of the emerging development of *Emergency Management Assistance Compacts* and *Regional Critical Infrastructure Coalitions* across the Canada – U.S. borderland. McDaniel key recommendation is that those frameworks for cooperation be combined with public and private partnerships and focus in particular on what the Canada – United States Action Plan for Critical Infrastructures has designated as critical infrastructures or key resources. These include organizations such as the Pacific Northwest Economic Region, the Great Lakes Hazards Coalition, the Northern Light Coalition, the Alaska Partnership for Infrastructure Protection, and the Pacific Northwest Emergency Management Arrangement. These would include information sharing, standard cross border assessment risk, planning, emergency assistance and emergency planning, and the formal establishment of sustainable consortia.

In “*Critical Infrastructure and Cybersecurity in the Beyond the Border Action Plan*” William de Laat is suggesting that the action plan is underestimating the importance and influence of cyber terrorism and related issues, in particular, it argues “*the Canada-U.S. Plan for Critical Infrastructure ... are still for too general to provide a robust roadmap for joint activities in these areas.*” The paper ends with a list of eight possible priorities including a protocol for cybersecurity, role distribution, sets of rules of engagement for joint operational activities, analytical capability, engage with the private

sector, multilateral engagements with other agencies such as the European Union and NATO, and immediately assess cyber-security standards.

To sum up, what is arguable, however, is that these two initiatives seem typical of the Canada-U.S. form of integration, deemed *policy parallelism*,³⁷ in an area where Canada and the United States already share a long history. Indeed, current border practices are in harmony with the history of bilateral co-operation in the areas of trade, free trade, energy, water management, and military co-operation. Few of these involve Mexico and none of these agreements have led to any institutional development similar to that found in the European Union.

What Canada and the United States have in common is a rather long history of collaboration and where NORAD in particular may have become the model.³⁸ Indeed, although Canada – U.S. relations have a long and well-established tradition of close co-operation in particular between the two federal administrations and bureaucracies, their agencies and other lower-level governments in various areas of public policy, this privileged relationship, and its multitude agreements, has never led to any international institutional developments. Primarily, Canada and the United States establish functional linkages of co-operation and rely on the shared values of expertise and efficiency.

The Smart Border Declaration of December 12, 2001 focused on co-operation in four areas of policy: (1) information sharing; (2) customs; (3) immigration; and (4) security. And clearly, the U.S. Bush administration strategy to implement a form of institutional ‘perimeter’ was not successful; the SPP of 2005, guided by the idea of security integration, failed in Guadalajara on August 10, 2009 when the leaders agreed that their negotiations had resulted in years of stalled negotiations on economic and security rules and regulations conducted by officials of Canada, Mexico, and the United States.³⁹ The GOA report of 2009 noted clearly that SPP negotiations were

37. Emmanuel Brunet-Jailly et al., *An Emerging North American Model of Cross-Border Regional Cooperation – Leader Survey on US-Canada Cross Border Regions: The Results in Perspective* (Ottawa: Gov’t of Can., Pol’y Research Initiative, Working Paper No. 008, 2006). See also Emmanuel Brunet-Jailly, *In the Increasingly Global Economy, are Borderland Regions Public Management Instruments?* 25 INT’L J. OF PUB. SECTOR MGMT. 483 (2012).

38. See generally, NORTH AM. AEROSPACE DEFENSE COMMAND, <http://www.norad.mil/> (last visited Feb. 1, 2013).

39. EMMANUEL BRUNET-JAILLY, POLICY BRIEF: CANADA-EUROPE TRANSATLANTIC DIALOGUE: SEEKING TRANSNATIONAL SOLUTIONS TO 21ST CENTURY PROBLEMS (2011), <http://canada-europe-dialogue.ca/publication/2011-06-17-BrunetJailly-CanadaUSPerimeter.pdf>.

unable to differentiate between Southern and Northern borders or to resolve internal inefficiencies and conflicts between U.S. Border Patrol and U.S. Forest Services, Immigration and Custom Enforcement, and Drug Enforcement Administration. Furthermore, the GOA report underlines that it underestimated Canadian efforts to secure the U.S. border, including cases of close cooperation contributing to U.S. security.⁴⁰

Interestingly, however, a number of initiatives were successful, including the Container Security Initiative, the Integrated Border Enforcement Teams (“IBETs”) and the Integrated Maritime Enforcement Teams (“IMETs”) have been very successfully implemented as joint networked forces of the United States and Canada security agencies. The Terrorist Watch list is also integrated to serve better immigration officials. Airline and cruise liners also provide Advanced Passenger Information and programs to allow trusted travelers and shippers to cross the border faster. These programs are coordinated with a new regional all-service command, US NORTHCOM, which coordinates U.S. involvement in NORAD, the joint-U.S.-Canadian Air defense organization established during the Cold War.

All in all, the recent Washington Declaration is in many ways inescapable. In essence, the Washington Declaration, however, brings Canada-U.S. relations back to traditional bilateral relations. There seems now also to be a return to less transparency; indeed both business and civil society organizations are now complaining that they have difficult access. In the end, the Washington Declaration’s goals are very different to SPP. It differentiates the Northern and Southern borders’ policy perspectives, a Canadian goal since 2001. It brings cooperation on entry-exit within reach. It links security and regulatory issues, hence working both on securing and easing trade flows between Canada and the United States.

In North America border security policies are typical of the specific and functionally focused approaches found in all agreements between Canada and the United States since the beginning of the last century, where function does not spill over into overlapping policy arenas. These initiatives are focused on specific aspects of security and regulatory frameworks; these are not the broad principled framework policies unifying information systems or understandings of security and regulations from a multi-sector perspective. These are central government policies that are steeped in sovereignty issues and where the fundamental principles established by Westphalia are not in

40. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, GAO-11-97, BORDER SECURITY: ENHANCED DHS OVERSIGHT AND ASSESSMENT OF INTERAGENCY COORDINATION IS NEEDED FOR THE NORTHERN BORDER (2012).

question; both security policies and regulator alignment are visible and targeting specific functions necessary to enhancing trade.

Canada-United States agreements are motivated by a desire to tackle security matters from the focused perspective of potential terrorist threats, and where security is not broadly understood as potentially multi-sectoral but as primarily associated with criminal activities. While regulatory matters are also concentrated on trade flows led by specific industries. The *Washington Agreement* will not change these fundamental assumptions even if it is premised on the creation and implementation of a secured and further aligned free trading perimeter to Canada and the United States.