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# The Role of Law in the Conduct of Canada-U.S. Relations

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THE ROLE OF LAW IN THE CONDUCT OF CANADA – U.S.  
RELATIONS

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CANADA-UNITED STATES LAW INSTITUTE

DISTINGUISHED LECTURE

LONDON, ON

OCTOBER 4, 2007

I am honoured to be invited to speak to you as the inaugural lecturer at the Canada-U.S. Law Institute distinguished speaker forum. The subject of my talk today is the role of law in the conduct of our relations with the United States.

Thanks to its size and intensity, no relationship between any two sovereign countries is more complex than that between Canada and the United States. For this reason, the University of Western Ontario and Case Western Reserve University showed great prescience and leadership in establishing the Canada-U.S. Law Institute. I congratulate you on your contributions, over the years, to a better understanding of so many of the difficult legal issues that continually arise between our two societies.

I have had the honour to know many of the distinguished Canadian and American scholars and statesmen who have participated in your work over several decades. The partnership and spirit of close collaboration you have created between two important North American institutions serves as an exemplar of how to address our common issues. Professionalism, scholarly discussions, joint undertakings and studies, non-partisanship, bi-national collaboration – these are the key ingredients of a model approach to dealing with our trans-national issues.

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<sup>†</sup> Former Canadian Ambassador to the United States and Undersecretary of State for External Affairs. Senior Advisor to Bennett Jones LLP.

Beyond knowing many of your distinguished participants from both sides of the border over the years, I have another personal connection to your institute. I note from your recent annual report that the William H. Donner Foundation was an early financial supporter of your conferences.<sup>1</sup> I have the honour to serve as chairman of the Donner Canadian Foundation,<sup>2</sup> a sister institution of the U.S. body, both of which were established over a half-century ago by the U.S. steel magnate William H. Donner.<sup>3</sup> I am delighted that the U.S. foundation has supported your endeavours.

I myself have been associated with Canadian-U.S. issues for many years – to be exact, for a half-century. It was fifty years ago precisely that I joined the Department of External Affairs<sup>4</sup> – as it was then known – and shortly thereafter, I was assigned to the legal division, a tiny band consisting of a handful of warm bodies, which, however, was twice the size of the U.S. division, consisting of only two warm bodies.<sup>5</sup> Those were the days.

I subsequently moved in and out of the legal stream, serving later as the head of the Legal Bureau, legal adviser, Undersecretary, and finally Ambassador to Washington.<sup>6</sup> In all these tasks, Canada-U.S. relations remained at the forehand of my responsibilities.

Early on, I formed some very distinct views on how best to conduct our relations with the United States. For a quarter of a century, I was very sceptical about the utility of law and bilateral institutions and mechanisms in conducting relations between us.

But as you will note, I came to a very different view after having served in Washington. The sceptic about the role of law turned into a convert. And the reason why is the theme of my lecture today.

To understand my personal odyssey, I want to take you back to the early years of the post-war era. These critical decades were, of course, the years of

\* Remarks occurred at an event entitled Canada-United States Law Institute Distinguished Lecture, held on October 4, 2007.

<sup>1</sup> About the Institute: History, Canada-United States Law Institute, <http://cusli.org/about/history.html> (last visited Apr. 7, 2008).

<sup>2</sup> See The Trilateral Commission: Allan E. Gotlieb, <http://www.trilateral.org/membership/bios/ag.htm> (last visited Apr. 7, 2008).

<sup>3</sup> See The William H. Donner Foundation, Inc: About William H. Donner, <http://003bd1d.netsolhost.com/aboutwilliam.html> (last visited Apr. 7, 2008).

<sup>4</sup> See About the Department, Mr. Allan Gotlieb, Foreign Affairs and International Trade Canada, <http://www.dfait-maeci.gc.ca/departement/skelton/gotlieb-bio-en.asp> (last visited Apr. 7, 2008) [hereinafter Foreign Affairs]; see also Gotlieb, Allan Ezra, *The Canadian Encyclopedia*, <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0003330> (last visited Apr. 7, 2008).

<sup>5</sup> See *Diplomacy: Speaking for Canada*, CAN. WORLD VIEW, Issue 24, Winter 2005, available at <http://www.dfait-maeci.gc.ca/canada-magazine/issue24/04-title-en.asp>.

<sup>6</sup> See Foreign Affairs, *supra* note 4.

explosive growth in the relationship and its expansion into the largest two-way economic relationship in the world.<sup>7</sup>

In the fledgling Department of External Affairs, during the years of the Second World War and thereafter, there was no great love of international law and international lawyers.<sup>8</sup> One might speculate about the reasons but I believe they were the legacy of the failure of the League of Nations and international law in the interwar era.<sup>9</sup>

The Covenant of the League was rightly seen as a document dominated by legalistic norms and prescriptions.<sup>10</sup> Peace was to be achieved, according to the Covenant, “by the firm establishment of the understandings of international law.”<sup>11</sup> Even more dramatically, great powers, through the instrument of the Kellogg-Briand peace pacts, abolished war forever.<sup>12</sup>

It soon became evident that this reliance on law created complacency and cloaked the reality that war was becoming inevitable. It came to be seen that the international rules, indiscriminately violated, were futile – at best pious norms and at worst deceptions passed off on a pacifist public unwilling to arm in their own defence.

At the heart of the Covenant was the famous Article 10, which guaranteed the territorial integrity of all its members against “external aggression.”<sup>13</sup> But the drafters of the U.N. Charter deliberately avoided making U.N. enforcement action conditional on any violation of international law. In a historic shift, mandatory enforcement action required only the determination by the Security Council of the existence of a “threat to the peace” or “breach of the peace.”<sup>14</sup>

The practitioners of diplomacy in the Canadian Foreign Service were well attuned to the political approach enshrined in the Charter.

As a participant in the Department’s puny legal division, a decade after the Charter took effect, I can testify to how marginal legal considerations were in the Canadian approach to maintaining peace and security. The

<sup>7</sup> See Allan Gotlieb, *Bring Back the Special Relationship*, THE NAT’L POST, Aug. 17, 2007, available at <http://network.nationalpost.com/np/blogs/fullcomment/archive/2007/08/17/allan-gotlieb-bring-back-the-special-relationship.aspx>.

<sup>8</sup> See generally EDGAR MCINNIS, CANADA 496 (Ayer Publishing 1971) (discussing Canada’s cautious policy following the war).

<sup>9</sup> See generally *id.* (noting the failure of the League’s collective system).

<sup>10</sup> See generally JOHN O’BRIEN, INTERNATIONAL LAW 739 (Routledge Cavendish 2001) (noting the complicated and legalistic provisions in the Covenant).

<sup>11</sup> See LASSA OPPENHEIM & RONALD ROXBURGH, INTERNATIONAL LAW: A TREATISE 281 (The Lawbook Exchange, Ltd. 3d ed. 2005).

<sup>12</sup> See O’BRIEN *supra* note 10, at 739.

<sup>13</sup> See OPPENHEIM & ROXBURGH *supra* note 11, at 268.

<sup>14</sup> See F.H. HINSLEY, POWER AND THE PURSUIT OF PEACE: THEORY AND PRACTICE IN THE HISTORY FOR RELATIONS BETWEEN STATES 337 (Cambridge University Press, new ed. 1967).

practitioners of diplomacy in Canada's golden age were skilled conciliators and architects of compromises and brokered solutions. They were not writers of new rules for the very good reason that they had lived through that era during which more rules were proclaimed and broken than perhaps at any other time in history.

The culture of favouring diplomacy, not law, was nowhere better reflected in how we collectively dealt with problems arising out of our sharing a continent with the United States.

With the exception of the International Joint Commission,<sup>15</sup> International Joint Commission, the P.J.B.D.<sup>16</sup> and NORAD,<sup>17</sup> and a short-lived attempt at establishing joint cabinet committees between our two governments,<sup>18</sup> the world's closest and deepest two-way relationship was governed by ad hoc methods. "Ad hocery" was the hallmark of the era.

The merits of this approach had no more committed advocate than myself.

The attitude in favour of pragmatism and diplomacy was articulated in the first address I gave in the United States just before I took up duties as ambassador in the fall of 1981. Talking to the biennial meeting of The Association of Canadian Studies in the United States ("ACSUS") in East Lansing Michigan, I devoted the whole of my remarks to explaining how this massive relationship of ours was managed – and indeed was best managed – without the support of bilateral institutions, bilateral machinery, and a grander legal framework.

I speculated that Canadians were somewhat "suspicious of bilateral institutions because of the different weights and sizes of the two countries." But, I pointed out the U.S. itself has never been a "demander" of Canada in terms of creating new bilateral institutions. Both sides would, I said, find unhelpful a "creeping institutionalization" whose net effect would be to encumber the process of conducting bilateral relations."

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<sup>15</sup> See International Joint Commission: Who We Are, [http://www.ijc.org/en/background/biogr\\_commiss.htm](http://www.ijc.org/en/background/biogr_commiss.htm) (last visited Apr. 7, 2008) (defining its purpose as preventing and resolving disputes between the United States and Canada).

<sup>16</sup> See National Defence and the Canadian Forces: Backgrounder The Permanent Joint Board on Defence, [http://www.forces.gc.ca/site/Newsroom/view\\_news\\_e.asp?id=298](http://www.forces.gc.ca/site/Newsroom/view_news_e.asp?id=298) (last visited Apr. 7, 2008); see also JOHN HERD THOMPSON & STEPHEN J. RANDALL, CANADA AND THE UNITED STATES: AMBIVALENT ALLIES 152 (University of Georgia Press, 3d ed. 2002) (noting the PJBOD was the military version of the International Joint Commission).

<sup>17</sup> See National Defence and the Canadian Forces: Backgrounder NORAD, [http://www.forces.gc.ca/site/Newsroom/view\\_news\\_e.asp?id=1922](http://www.forces.gc.ca/site/Newsroom/view_news_e.asp?id=1922) (last visited Apr. 7, 2008); see also THOMPSON, *supra* note 16 (describing NORAD, North American Air Defense Agreement, as a defense production sharing agreement).

<sup>18</sup> See generally DIMITRY ANASTAKIS, AUTO PACT: CREATING A BORDERLESS NORTH AMERICAN AUTO INDUSTRY 1960-1971 158 (University of Toronto Press, 2005) (noting U.S. and Canadian officials met for annual joint cabinet committee meeting on trade and economic affairs).

In conclusion, I called for a premium to be continued to be placed on flexibility, a pragmatic approach to the use (or non-use) of institutions, and a heavy reliance on traditional diplomatic, and conciliatory methods.

If a defining characteristic of our relationship during the decades after World War II was the absence of dispute mechanisms and special machinery, how does one account for the remarkably smooth functioning of the relationship in those years?

The answer, I think, is that this was the era of the special relationship between our two countries.

Because of closely shared values, both of us looked at the world in a very similar fashion and worked together to resist threats to peace, security and freedom. Canada made enormously heavy defence expenditures in those days – as high as 40% of the federal budget in the mid 1950s<sup>19</sup> – and was an architect of NATO,<sup>20</sup> and close western collaborator in the fight against Soviet expansion.<sup>21</sup>

In the Cold War, Canada's northern 'real estate' was seen as especially significant from a geopolitical standpoint,<sup>22</sup> given our ownership of the landmass separating the two super powers.

Hence, U.S. strategic interests could be understood as virtually dictating special consideration for Canada. Even more significantly, there was a sense of trust and friendship. For example, when the U.S. considered nominees for the post of first Secretary General of the U.N., two Canadian civil servants topped the list: Lester Pearson and Norman Robertson.<sup>23</sup>

<sup>19</sup> See THOMPSON, *supra* note 16.

<sup>20</sup> See generally YONATAN RESHEF & SANDRA RASTIN, UNIONS IN THE TIME OF REVOLUTION: GOVERNMENT RESTRUCTURING IN ALBERTA & ONTARIO 170 (University of Toronto Press, 2003) (noting Canada is an architect of the Western alliance).

<sup>21</sup> See generally ROBERT BOTHWELL, IAN M. DRUMMOND & JOHN ENGLISH, CANADA SINCE 1945: POWER, POLITICS, AND PROVINCIALISM 88 (University of Toronto Press, Rev. ed. 1989) (discussing Canada's approach to confronting "the problem of Soviet expansion").

<sup>22</sup> See e.g., David Neufeld, *Commemorating the Cold War in Canada: Considering the DEW Line*, 20 THE PUB. HISTORIAN 9, 13 (Winter 1998) (explaining Canada's role in the Cold War by erecting the Distant Early Warning (DEW) Line, which was a "part of a continent-wide system lending credibility to the retaliatory nuclear threat used by the United States and NATO to contain feared Soviet Aggression"); see also Ann Denholm Crosby, *A Middle-Power Military Alliance: Canada and NORAD*, 34 J. OF PEACE RESEARCH 37, 38 (1997) (discussing the Canadian military role in the North American Aerospace Defence Agreement (NORAD), where "[m]ainstream analyses of Canadian defence policy is determined by the historical, geostrategic, economic, and political factors that predict its alliance arrangements, and by those alliances themselves. This means in the context of the air/aerospace defence of the continent during the Cold War when a Soviet attack on the USA would have been through or over Canadian airspace, Canadian governments were unable to adopt defence postures that might run counter to the interests of the USA.").

<sup>23</sup> James Barros, *Pearson or Lie: The Politics of the Secretary-General's Selection, 1946*, 10 CAN. J. OF POL. SCI. 65, 67 (Mar. 1977) (discussing Edward R. Stettinius' opinion, the

The record shows that the U.S., on a number of occasions, was willing to subordinate its economic interests (as they perceived them) to the larger purpose of maintaining good relations with Canada. It seems at times that it was the policy of the United States not “to treat Canada like any other foreign government.”

For example, Canadian oil imports into the U.S. were granted an overland exemption from restrictions on foreign imports of oil into the United States.<sup>24</sup>

In this same period, when President Kennedy imposed an interest equalization tax on investment abroad, the special relationship meant that when Canada protested, once again we got an exemption.<sup>25</sup> The U.S. on some occasions refrained from applying its pernicious extraterritorial laws on trading with the enemy to our trade with China in trucks and machinery.<sup>26</sup>

When serious countervailing issues arose as a result of duty remission schemes for the manufacture of automobiles in Canada, it was the U.S. that proposed to Canada that we consider an automotive agreement for tariff-free trade between our two countries in the automotive sector.<sup>27</sup> It then used its power and influence to help obtain GATT approval.<sup>28</sup> Thus, in 1965, the auto pact was born.<sup>29</sup>

American representative in the United Nations Preparatory Commission, in discussing the selection of Secretary-General: “The first choice of the American government...should be the Canadian Undersecretary of State for External Affairs, Norman A. Robertson. There were, however, other persons who might have been considered: Lester B Pearson. . .”).

<sup>24</sup> Thomas W. Zeiler, *Kennedy, Oil Imports, and the Fair Trade Doctrine*, 64 THE BUS. HIST. REV. 286, 289 (Summer 1990) (“The program limited imports to 9 percent of estimated domestic demand but exempted Canada and Mexico from quotas in order to maintain their safely imported, overland supplies.”).

<sup>25</sup> Robert L. Maines, *The Interest Equalization Tax*, 17 STAN. L. REV. 710, 720 (Apr. 1965) (“In a joint Canadian-American statement on July 21, 1963, it was agreed that new Canadian issues would be exempt from the tax...,” discussing the Interest Equalization Tax and the power of the President to exempt foreign securities by Executive order).

<sup>26</sup> I.A. Litvak & C.J. Maule, *Conflict Resolution and Extraterritoriality*, 13 J. OF CONFLICT RESOL. 305, 310 (Sep. 1969) (“On May, 1959, it was announced in Parliament that US authorities had lifted the restrictions applied to Canadian trucks carrying Communist Chinese goods in bond through United States territory.”).

<sup>27</sup> See generally Key Economic Events 1965 – Canada-United States Auto Pact, Government of Canada, [http://www.canadianeconomy.gc.ca/english/economy/1965canada\\_us\\_auto\\_pact.html](http://www.canadianeconomy.gc.ca/english/economy/1965canada_us_auto_pact.html) (last visited Apr. 7, 2008) (“The Auto Pact eliminated trade tariffs between the two countries and created a single North American manufacturing market. Tariffs between the two countries were eliminated on cars, trucks, buses, tires and automotive parts.”).

<sup>28</sup> See ANASTAKIS, *supra* note 18, at 119 (“In the end, the waiver passed, on 19 December 1965. The most important reasons for this outcome begin with the fact that the U.S. government puts its full weight behind the request and used the Kennedy Round as a carrot to push other countries towards further tariff reduction.”).

<sup>29</sup> Key Economic Events, *supra* note 27.

In 1971, when the Nixon administration and its Secretary of the Treasury John Connolly imposed a surcharge on all imports into the U.S. in order to address its unfavourable balance of payment, (the famous “Nixon Shokku”) Canadian protests were once again heard and the surcharges for Canadian imports into the U.S. were lifted.<sup>30</sup>

Absolutely key to an understanding of the special relationship is that it corresponded in time not only with the Cold War but also with the period of the imperial presidency. The Congressional role was distinctly subordinate to the administration.<sup>31</sup> We looked to the administration to keep the Congress in line. Moreover, the powers of Congress were exercised in a disciplined way by the dominant congressional leaders.

Nothing better illustrates the relationship of the time – and the changes that were soon to take place – than the memoirs of Arnold Heeney, our ambassador to Washington twice during these years.<sup>32</sup> Heeney wrote that he did not have to deal with economic issues in his time.<sup>33</sup> They were not on his agenda. Nor did he lobby the Congress.<sup>34</sup> Nor did a Canadian ambassador until decades later.<sup>35</sup> We followed the rules by the book: the Congress, being an internal organ of the government, was off limits.

<sup>30</sup> See Richard Veatch, *Review: [Untitled]*, 19 CAN. J. POL. SCI. 388 (Jun. 1986) (reviewing PETER C. DOBELL, *CANADA IN WORLD AFFAIRS, 1971-1973* 471 (Canadian Institute of International Affairs 1985)) (stating, “[t]he 10 per cent surcharge on imports into the United States, the measure about which Canada was most concerned, was lifted in December 1971, and it had not had the drastic short-run effects in Canada which had been anticipated”).

<sup>31</sup> See WILLIAM BUNDY, *A TANGLED WEB: THE MAKING OF FOREIGN POLICY IN THE NIXON PRESIDENCY* 383 (I.B. Tauris 1998) (stating “Congress had been out of play during the fall because of the election campaign, and in the new year reconvened just as the Paris Agreement was being concluded. Despite the Democratic majorities in both houses, many in Washington felt at the time that Nixon had so much prestige that the Nixon presidency was now more powerful than any since Johnson’s 1965 honeymoon or Eisenhower’s first years.”).

<sup>32</sup> Library and Archives of Canada, *Behind the Diary, Arnold Danford Patrick Heeney (1902-1970)*, Library and Archives of Canada, [http://www.collectionscanada.gc.ca/king/05320113/053201130454\\_e.html](http://www.collectionscanada.gc.ca/king/05320113/053201130454_e.html) (last visited Apr. 7, 2008) (“He was Canada’s Ambassador to the United States twice, 1953 to 1957 and 1959 to 1962.”).

<sup>33</sup> See JACOB RYTEN, *THE STERLING PUBLIC SERVANT: A GLOBAL TRIBUTE TO SYLVIA OSTRY* 7 (Mc-Gill-Queen’s Press 2004) (“Arnold Heeney, Canada’s Ambassador to Washington in the late 1950’s, reported to Prime Minister John Diefenbaker that there were no economic issues between Canada and the United States at the time.”).

<sup>34</sup> See generally Brian Bow, “*When in Rome,*” *Comparing Canadian and Mexican Strategies for Influencing Policy Outcomes in the United States*, 65 CAN.-AM. PUB. POL’Y 1, 20 (Jan. 2006) (describing how Heeney “reluctantly resorted to calling the Senate Majority Leader,” as the only occasion he felt it necessary to go directly to the Hill).

<sup>35</sup> See Robert Wolfe, *See You in Washington? A Pluralist Perspective on North American Institutions*, 9 IRRP CHOICES 14 (Apr. 2003) (discussing how, in the 1960s, foreign diplomats preferred “quiet and regular consultation,” but that during the years of Reagan, a new role was established: “the diplomat as public advocate”).



On one occasion some senators from the mid-west were sponsoring a bill that would have caused a diversion of the waters of the great lakes, to Canada's great detriment.<sup>36</sup> Heeneey went to the State Department to complain, in accordance with traditional diplomatic practice.<sup>37</sup> The senior State Department official told him he could do nothing.

"Complain to the Congress," he told him. "Who should I see?" the ambassador asked. "Lyndon Johnson, the Senate Majority Leader," was the reply. "Will you make the appointment?" Heeneey asked. "Yes" was the response. Heeneey made the call, told Johnson that he had a problem and explained it. Johnson then said, "No boy, you don't have a problem." "What do you mean?" said Heeneey, "I just explained it." Johnson replied "and I just fixed it."

Then came the Trudeau era, and in the U.S., Vietnam and Watergate. There was a sense that the threats of the Cold War were receding and the need for alliance solidarity diminishing. Among Canadian elites, the conviction grew that we needed to assert more vigorously our independence from the Americans on the global stage.

Accordingly the Trudeau government introduced the "third option" aimed at reversing the movement towards greater economic interdependence between our two nations. It also adopted foreign ownership policies ("FIRA")<sup>38</sup> and national energy policies (Petro Canada, N.E.P.)<sup>39</sup> aimed at asserting our independence on the global stage and reducing our dependency on the United States.

With this change of direction, it was inevitable that the very notion of a "special relationship" was deemed inappropriate and fell from favour.

But the Trudeau policy in favour of establishing the "ordinariness" of the Canada-U.S. relationship – assumed to be a sign of our new maturity, failed to take account of deep and important political changes underway in the United States.

Ironically, we proclaimed our view that special consideration for our interests was no longer necessary at the very moment when we were going to need it more, i.e. when Congress was reasserting its jurisdictional primacy in the area of external trade.<sup>40</sup>

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<sup>36</sup> See generally Bow, *supra* note 34, at 20.

<sup>37</sup> *Id.*

<sup>38</sup> See J.L. GRANATSTEIN & ROBERT BOTHWELL, *PIROUETTE: PIERRE TRUDEAU AND CANADIAN FOREIGN POLICY* 72 (University of Toronto Press 1990) (discussing the establishment of the Foreign Investment Review Agency because of the enlargement of Trudeau's "natural tendencies towards intervention in the management of the economy.").

<sup>39</sup> See *id.* at 315 (discussing the government's attempt to "assure" Canadian oil supply).

<sup>40</sup> See Martha Liebler Gibson, *Managing Conflict: The Role of the Legislative Veto in American Foreign Policy*, 26 *POLITY* 441, 442-443 (Spring 1994) (stating that more than half of the legislative veto provisions written into domestic and foreign policy statutes were

Ottawa was out of touch with the revolution in governance that was taking place in Washington in the wake of Vietnam and Watergate. As the presidency was weakened, so was party discipline.<sup>41</sup> A new crop of younger post Watergate congressmen came to Washington, eager to exert power and influence.

Decision-making in Congress became fragmented and atomized as the spectre of protectionism cast a deep shadow over the corridors of Congress. New trade legislation gave U.S. bodies far-reaching powers to investigate and retaliate, if there was perceived discrimination against U.S. and services.<sup>42</sup> Section 201 and 301 actions and anti-dumping and countervails mushroomed to the point where almost nothing that came from under the ground or grew on top of it or moved in the sea escaped attack.<sup>43</sup>

Because of the weakened presidency and the fear of decline in U.S. industrial primacy, the era was over when the U.S. would subordinate its economic interests to its geopolitical goals.<sup>44</sup> Prominent senators trumpeted this fact to foreign audiences.<sup>45</sup>

Truth to tell, Ottawa was not the only one out of touch with the hanging political realities in the United States. I was too. Today I find it hard to explain why.

After all, it was on my watch as Undersecretary that the historic Canada-U.S. fisheries agreement failed to come to pass. This was because of the opposition of only one senator.<sup>46</sup>

Under the direct authority of President Jimmy Carter and Prime Minister Pierre Trudeau, special ambassadors succeeded in negotiating a radical resource treaty that would have created a new bilateral institution to manage jointly all species of fish exploited on the Northern Atlantic East Coast.<sup>47</sup>

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incorporated in the 1970s, with 80 legislative vetoes “enacted between 1975 and 1978 alone”).

<sup>41</sup> See John LeBoutillier, *The Death of Party Discipline*, NEWSMAX, May 21, 2001, <http://archive.newsmax.com/archives/articles/2001/5/21/54822.shtml> (discussing that after Watergate, many Republican candidates for Congress proclaimed themselves independents and viewed party loyalty negatively).

<sup>42</sup> See Cletus C. Coughlin, *U.S. Trade-Remedy Laws: Do they Facilitate or Hinder Free Trade?*, FED. RES. BANK OF ST. LOUIS REV. July-Aug. 1991, at 3, 8-13, available at [http://research.stlouisfed.org/publications/review/91/07/Trade\\_Jul\\_Aug1991.pdf](http://research.stlouisfed.org/publications/review/91/07/Trade_Jul_Aug1991.pdf).

<sup>43</sup> *Id.* at 7-9.

<sup>44</sup> See e.g., Jonathan Clarke, *America, Know Thyself*, NAT’L INT., 1993/1994 Winter, at 1-9.

<sup>45</sup> *Id.*

<sup>46</sup> See *U.S. Moves on Fish Treaty Upset Ottawa*, GLOBE & MAIL, Mar. 7, 1981, at Climate of Past Special Issue.

<sup>47</sup> See Henry Giniger, *Disputes Await Reagan on Canada Trip*, N.Y. TIMES, Mar. 2, 1951 at A3.

It was perhaps, to that date, the most ambitious economic agreement ever signed by our two governments in the post-war era. And it died in the Senate thanks to the scallop-catching constituents of one or two senators.<sup>48</sup>

With the failure of this historic agreement, it became obvious, or should have been, that Canada could not rely on a powerful U.S. presidency to resolve Canada-U.S. issues or better manage them without the support of Congress.

As Canadian ambassador to Washington, I rapidly became conscious of the power of senators and congressmen to originate legislation that could have far-reaching effects on our relationship. I realized that Congress had not just legislative but co-executive powers.<sup>49</sup> This was my first and most enduring lesson.

I became convinced that we needed a stronger legal foundation to support our rapidly integrating economies. Accordingly, I enthusiastically participated in Mulroney's historic shift in our approach to Canada-U.S. relations.

Breaking with the past, the Mulroney government ushered in a new era in the management of our relationship. Although not originally in favour of a comprehensive free-trade agreement with the U.S., the Mulroney government changed gears twelve months after its election.<sup>50</sup>

The achievement of a free-trade agreement with the United States was my principal preoccupation in Washington for two years. (If you want a day-by-day harem-scarem account, let me put a plug-in for my recently published diaries.<sup>51</sup>)

The free-trade agreement proposed by the Mulroney government was, without question, a radical departure from the past.<sup>52</sup>

A) It established a new rules-based framework to support the phenomenal flows of trade and economic activity between our two countries.<sup>53</sup>

B) The free-trade zone was to be bilateral in nature. On a one-on-

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<sup>48</sup> *U.S. Moves on Fish Treaty Upset Ottawa*, *supra* note 46, at A3.

<sup>49</sup> See generally, James Kuhnenn, *GAO Suit is Latest Clash Between Legislative, Executive Branches*, KNIGHT RIDDER/TRIB. NEWS SERVICE, Feb. 25, 2002, at 1-4.

<sup>50</sup> See generally Carol Goar, *The 'Blueing' of Canada*, TORONTO STAR, Dec. 31, 1987 at A16.

<sup>51</sup> ALLAN GOTLIEB, *WASHINGTON DIARIES: 1981-1989* (McClelland & Stewart Ltd. 2006).

<sup>52</sup> Goar, *supra* note 50.

<sup>53</sup> See Andrew F. Cooper, *Good Global Governance or Political Opportunism? Mulroney and UN Social Conferences*, in *DIPLOMATIC DEPARTURES: THE CONSERVATIVE ERA IN CANADIAN FOREIGN POLICY, 1984-93* 160, 170 (Nelson Michaud & Kim Richard Nossal eds., 2001).

one basis, we were seeking a closer economic embrace from our neighbour to the south.<sup>54</sup> Ottawa did not have a more extended North American or Western Hemisphere agreement in mind. It was a preferential regime for Canada and the United States.

- C) It was to include all sectors of the economy with the exception of culture – that meant investment, services, energy, and other resources.<sup>55</sup>
- D) Trade remedies were to be abolished or restrained.<sup>56</sup>
- E) New institutional arrangements were to be entered into to settle disputes – the first innovative proposal in the institutional field in half a century or more of our bilateral relations.<sup>57</sup>

Despite the degree of hostility in the Congress (at one time approximately 40 senators were opposed to the Accord), many of our goals were largely achieved.<sup>58</sup> The result was a huge increase in the free flow of goods, investment, and services across our boundaries with exports tripling in scale and, softwood lumber notwithstanding, a significant falling off in the number of U.S. Trade actions initiated against Canadian exports.<sup>59</sup>

But the evolution of North American trade since that time revealed that there were problems in going further in the direction of a deeper rules-based integration and common institutions.

First, the Canada-U.S. Free Trade Agreement soon evolved into a trilateral accord, the North American Free Trade Agreement or NAFTA, in

<sup>54</sup> See generally Denis Stairs, *Architects or Engineers? The Conservatives and Foreign Policy*, in *DIPLOMATIC DEPARTURES: THE CONSERVATIVE ERA IN CANADIAN FOREIGN POLICY, 1984-93* 25, 30-33 (Nelson Michaud & Kim Richard Nossal eds., 2001).

<sup>55</sup> See e.g., Tammy L. Nemeth, *Continental Drift: Energy Policy and Canadian-American Relations*, in *DIPLOMATIC DEPARTURES: THE CONSERVATIVE ERA IN CANADIAN FOREIGN POLICY, 1984-93* 59, 65 (Nelson Michaud & Kim Richard Nossal eds., 2001).

<sup>56</sup> See generally Brian W. Tomlin, *Leaving the Past Behind: The Free Trade Initiative Assessed*, in *DIPLOMATIC DEPARTURES: THE CONSERVATIVE ERA IN CANADIAN FOREIGN POLICY, 1984-93* 45, 48-52 (Nelson Michaud & Kim Richard Nossal eds., 2001).

<sup>57</sup> See, e.g., Claire Turenne Sjolander, *Adding Women but Forgetting to Stir: Gender and Foreign Policy in the Mulroney Era*, in *DIPLOMATIC DEPARTURES: THE CONSERVATIVE ERA IN CANADIAN FOREIGN POLICY, 1984-93* 220, 231 (Nelson Michaud & Kim Richard Nossal eds., 2001).

<sup>58</sup> See Clyde H. Farnsworth, *Canadian Pact Voted By Senate*, N.Y. TIMES, Sept. 20, 1998 at D1.

<sup>59</sup> See generally Daniel T. Griswold, Editorial, *By Every Reasonable Measure, NAFTA Has Been a Success*, CHICAGO SUN-TIMES, Dec. 27, 2002, at 39.

which Mexico shares a privileged market-access position into the United States.<sup>60</sup> Canada lost its unique status. But the problems and challenges in the Mexican-U.S. relationship were very different from ours and, I believe, much more intractable.<sup>61</sup>

Second, the free trade agreement fell short of what needed to be attained. There were no agreed rules in the critical area of what constitutes a subsidy; there were serious weaknesses in the dispute settlement provisions; much work needed to be done to embrace unfettered free trade in such areas as agriculture and forest products and to facilitate the free movement of peoples across boundaries.<sup>62</sup>

Thirdly, neither the Canada-U.S. Free Trade Agreement nor its successor, NAFTA, contained within it the dynamic necessary to lead to its own improvement. Unlike the European Community, there were no internal mechanisms to spur momentum towards deepening and widening the common economic space our countries were forging.<sup>63</sup>

The consequences for Canada would not have been so serious had the events of September 11, 2001 not taken place. The effect was transformative.

National security soared to the top of the U.S. agenda to an unprecedented degree, and an era was born in which defence of the homeland trumped all other concerns.<sup>64</sup> New obstacles began to arise impeding cross-border commerce and the movement of peoples. The Canada-U.S. border began to thicken.

The Chrétien government struggled to address the issues through its 'smart border' negotiations with the U.S. This effort evolved into the much broader trilateral process launched in Waco, Texas: the Security and Prosperity Partnership, through which the three North American states sought to address the vast array of regulatory and security obstacles that stood in the way of deepening our common economic space.<sup>65</sup>

<sup>60</sup> See *OXFORD ANALYTICA: NORTH AMERICA: NAFTA Impact Free Trade Faces Challenges*, *GLOBE & MAIL*, July 11, 1994.

<sup>61</sup> See generally *id.* (explaining certain unique NAFTA issues that Mexico and Canada had with each country's respective relationship with the United States).

<sup>62</sup> See Jessica K. Hodges, *When Enough is Too Much: The Threat of Litigation NAFTA's Constitutionality and a Lost Chance to Examine Undue Process in Antidumping and Countervailing Duty Determinations*, 15 *GEO MASON L. REV.* 201, 219 (2007), available at <http://www.gmu.edu/departments/law/gmulawreview/issues/15-1/documents/Hodges.pdf>.

<sup>63</sup> See Gary Clyde Hufbauer & Gustavo Vega- Cánovas, *Whither NAFTA: A Common Frontier?, THE REORDERING OF NORTH AM.? INTEGRATION AND EXCLUSION IN A NEW SECURITY CONTEXT* (forthcoming 2003) (manuscript, available at <http://iie.com/publications/papers/hufbauer1202.pdf>).

<sup>64</sup> See e.g., Thomas H. Kean & Lee H. Hamilton, *Reviewing our Defenses, Four Years After 9/11*, *THE FORWARD*, Sept. 9, 2005, at 1.

<sup>65</sup> See Richard Tomkins, *Analysis: North America partnership*, *UPI*, Mar. 23, 2005.

The effort continues to this day. Judging by what is happening at our borders, the process has been moving very slowly, if it is moving at all. It has lacked the leadership, energy and momentum necessary to achieve results. Now, thanks to the Congressionally-inspired Western Hemispheric travel initiative with its requirement for overland passport controls, Canada and the U.S. are at risk of reversing the great historic trend towards reducing the significance of the border in our national life.<sup>66</sup>

So where do we go from here?

We should pursue a deeper and more comprehensive rules-based framework for our economic and security relations. Our goal should be nothing less than a North American community of law. Only in this way can we reduce political arbitrariness in settling disputes and disinvesting our economic interests.

With a minority government in Canada and a lame-duck administration in the United States heavily preoccupied with Iraq, you would be right in saying that this is not the most propitious time for grand initiatives or possibly even for modest ones.<sup>67</sup>

But, the relationship between Ottawa and Washington has significantly improved since the election of Stephen Harper's government.<sup>68</sup> Moreover, our formidable commitment to fight terrorism in Afghanistan has substantially increased good will towards Canada both in the White House and on The Hill and among both Republicans and Democrats.<sup>69</sup>

Why not propose to the United States that we begin to explore ways to advance our respective national interests through the further development of special bilateral machinery, consultative arrangements, and rule making?

We could at least try to make some progress in this direction. For example, our two governments could:

1. Commit to convene official annual summits between the President and the Prime Minister. These began in the Mulroney-Reagan years and were highly productive.<sup>70</sup> For unknown reasons, the

<sup>66</sup> See Doug Struck, *Rush of Passports seen in Canada, U.S.; New Rules Set to Tighten Security*, SUN-SENTINEL, Jan. 14, 2007, at 29A.

<sup>67</sup> See generally Tim Harper, *U.S. Won't Budge on Khadr; Ahead of Next Week's Talks by Bush, Harper, Calderón, White House Signals Canadian to Face Tribunal at Guantanamo*, THE TORONTO STAR, Aug. 18, 2007, at A13 (President Bush's political capital has long been exhausted and he has been consigned to lame duck status).

<sup>68</sup> See *Canada-U.S. Relationship gets Warmer; Change in Ottawa Brings Change in D.C.*, GUELPH MERCURY, Apr. 26, 2006, at A7.

<sup>69</sup> See Jeff Sallot, *Canadian Troops May Not go to Iraq, But to Afghanistan*, THE GLOBE AND MAIL, Feb. 5, 2005, at A10.

<sup>70</sup> See Martin Cohn, *SUMMIT/Leaders No Longer Sing Same Tune Stakes High for PM in Talks with Reagan*, THE TORONTO STAR, Apr. 24, 1988, at B5.

practice lapsed. Summits of this nature increase dramatically the focus and priority that Canadian issues would receive at the highest echelons of the U.S. system.<sup>71</sup>

2. Establish special procedures for the preparation of these summits, under the control and direction of the two leaders.
3. Reinstitute the commitment to hold quarterly meetings of our Foreign Minister and the U.S. Secretary of State, established in the Reagan years, but, again for unknown reasons, allowed to lapse.<sup>72</sup> This was a unique feature of U.S. diplomatic practice. It guaranteed 'quality time' for top officials to get their counterparts to focus on their grievances and concerns.
4. Adopt the same practice for ministers in other key areas – e.g., energy, the environment, defence, and law enforcement.
5. Develop a protocol between our two governments, which would define principles for cooperation. For example, require that prior notification and opportunity for consultation would be provided with regard to any initiative that could have an adverse impact on the other's interests.

Given the fact that, as with the Western Hemispheric Travel Initiative, so many of our problems originate in the Congress, obtaining such an agreement would be very meaningful for Canada.<sup>73</sup> Admittedly, such a commitment will not be easily obtained. But it would also be of substantial benefit to the United States (think legalization of marijuana).<sup>74</sup>

6. Appoint personal envoys or czars, answerable directly to the President and Prime Minister, to take hold of the entire process of border facilitation.

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See generally Jim Harper, *U.S.-Imposed Border Bedlam Will Hurt Michigan*, DETROIT NEWS, Jan. 30, 2008, available at [http://www.cato.org/pub\\_display.php?pub\\_id=9128](http://www.cato.org/pub_display.php?pub_id=9128) (discussing the problems in the implementation of the Western Hemisphere Travel Initiative).

<sup>74</sup> Cohn, *supra* note 70 (discussing the importance of a strong relationship between the United States and Canadian leaders).

7. Establish the principle that new bilateral institutions should be created to plan, maintain and oversee the openness of our borders. Vast consequences hinge on how well they are managed. Unilateral decision-making affecting the principal choke points should be brought under the responsibility of new trans-border commissions with effective powers.

There is more than a whiff of the 19th century in how we currently go about our business of border management.<sup>75</sup> The International Bridge at Buffalo / Fort Erie is an example. Years pass and the problems of congestion, insufficient infrastructure, and security remain unresolved: too many players, too many jurisdictions, too little planning, and too much unilateralism.

Almost a century ago, the International Joint Commission was formed by Britain and the U.S. to manage issues relating to our international boundary waters.<sup>76</sup> A century later, our approach to management of the land frontiers remains mired in obsolete notions of sovereignty.<sup>77</sup>

8. Mandate special envoys to begin planning for the negotiation of a new comprehensive agreement to create a single economic and security space embracing our two countries. This should include adopting a common external tariff, rules of origin, and customs union, strengthening dispute-settlement, abolishing trade remedies, establishing a common competition policy, creating a common security perimeter, and furthering the free movement of people across our boundaries.<sup>78</sup>

In other words, a community of law.

Could such an agreement be obtained? Only with great patience and difficulty. But our free-trade experience shows that in the Congress big

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<sup>75</sup> See *NAFTA Lacks a Sense of Community*, THE TORONTO STAR, Aug. 23, 1998 (unilateral actions have the potential to create serious disputes).

<sup>76</sup> IJC.com, International Joint Commission- Who We Are, [http://www.ijc.org/en/background/biogr\\_commiss.htm](http://www.ijc.org/en/background/biogr_commiss.htm) (last visited Apr. 7, 2008).

<sup>77</sup> See e.g., Editorial, *Stop Bridge Delay: United States, Canada must Resolve Harmful Impasse on Boarder Security*, BUFFALO NEWS, Feb. 25, 2007.

<sup>78</sup> See generally Danielle Goldfarb, *The Road to a Canada-U.S. Customs Union: Step-by-Step or in a Single Bound?*, C.D. HOWE INSTITUTE COMMENTARY, July 1, 2003 (discussing the options for a bi-national customs union).



initiatives can have a greater chance of success than small ones.<sup>79</sup> This is because there are more interests in play, more trade-offs available, and more opportunities for national interests to trump local ones.<sup>80</sup>

In order to ensure our sovereignty and independence, the Canada-U.S. relationship must be based on a stronger and more comprehensive regime of law. We should recognize this and make its attainment our highest foreign-policy priority.

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<sup>79</sup> See C. Fred Bergsten, *Globalizing Free Trade: The Assent of Regionalism*, FOREIGN AFF., May-June 1996, available at <http://www.foreignaffairs.org/19960501faessay4203/c-fred-bergsten/globalizing-free-trade-the-ascent-of-regionalism.html>.

<sup>80</sup> *Id.*