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THE NEW PERIMETER INITIATIVE: WILL SECURITY TRUMP TRADE? THE TYRANNY OF THE “OR” AND THE GENIUS OF THE “AND.”

*By: The Honorable Kelly D. Johnston**

When it comes to the latest initiative on improving security and trade in North America, many remember Yogi Berra’s famous line, “It’s déjà vu all over again.”¹ Those of us who have been involved in various initiatives over the years to improve United States-Canada cross-border trade and security, especially since September 11, 2001, have plenty of reasons to be cynical about the eventual success of anything that purports to improve both security *and* trade.

That is because just about every initiative of this nature is robbed of the genius of the “and,” only to be replaced by the tyranny of the “or.”² The most recent example is the *Security and Prosperity Partnership of North America* (“SPP”), launched in 2005 by President George W. Bush, Mexican President Vicente Fox, and Canadian Prime Minister Paul Martin.³ Its premise was not unlike today’s bilateral *Beyond the Border* Action Plan (“BTB”), launched on December 7, 2011 by President Barack Obama and Prime Minister Stephen Harper, which laid out an aggressive plan to create a North American security perimeter by making the border more efficient and enhancing regulatory cooperation between the countries.⁴

A brief history lesson is in order. The SPP was launched with much fanfare in March 2005 as part of a trilateral meeting of the

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1. YOGI BERRA, *THE YOGI BOOK: I REALLY DIDN’T SAY ANYTHING I SAID* 30 (1998).
2. See JAMES C. COLLINS & JERRY I. PORRAS, *BUILT TO LAST: SUCCESSFUL HABITS OF VISIONARY COMPANIES* 43 (3d ed. 2002).
3. SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA (2005), available at <http://www.spp-ppsp.gc.ca/eic/site/spp-ppsp.nsf/eng/00057.html>.
4. BEYOND THE BORDER: A SHARED VISION FOR PERIMETER SECURITY AND ECONOMIC COMPETITIVENESS (2011) [hereinafter BEYOND THE BORDER], available at http://www.whitehouse.gov/sites/default/files/us-canada_btb_action_plan3.pdf.

three national leaders,⁵ followed shortly by a hastily-arranged meeting of business groups with then-United States Secretary of Commerce Carlos Gutierrez to quickly solicit ideas on the kinds of trade-related reforms and initiatives they should consider.⁶ Many United States federal cabinet agencies were represented, and the group was overwhelmed with a reported three hundred submissions from the private sector.⁷

Following a ministerial-level meeting of the three countries in June 2006, they launched the North American Competitiveness Council (“NACC”), which was tasked with prioritizing the ideas into a more achievable set of recommendations.⁸ The ministers said in their announcement, “[t]he purpose of governments is to create the environment necessary for business to prosper. Thus far, the NAFTA has worked well, but it can work better—the NACC will help in that endeavor and the governments look to the private sector to tell them what needs to be done.”⁹ A year later, the NACC, which consisted of thirty private sector and non-profit business entities equally divided between the three countries,¹⁰ narrowed its list of priorities down to fifteen.¹¹

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5. See, e.g., *Leaders’ Statement: Security and Prosperity Partnership of North American Established*, GOV’T OF CAN. (Mar. 23, 2005), <http://www.spp-ppsp.gc.ca/eic/site/spp-ppsp.nsf/eng/00057.html>.
 6. See, e.g., *Security & Prosperity Partnership, Meeting with Hon. Carlos Gutierrez, U.S. Secretary of Commerce*, COUNCIL OF THE AM., http://72.32.12.213/files/PDF/pub_496_322.pdf (last visited Jan. 25, 2013).
 7. See generally *id.*; see also COUNCIL OF THE AM., FINDINGS OF THE PUBLIC/PRIVATE SECTOR DIALOGUE ON THE SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA (2006), available at http://www.hispanicintegration.org/files/editor/image/grp_10_15.pdf (indicating the widespread involvement of various United States government agencies and the private sector in the SPP initiative).
 8. See COUNCIL OF THE AM., OFFICIAL LAUNCH OF THE NORTH AMERICAN COMPETITIVENESS COUNCIL (NACC), POST-MINISTERIAL REPORT (2006), available at <http://www.canadians.org/DI/documents/Council%20of%20the%20Americas%20-%20Official%20NACC%20Launch%20June%202006.pdf>.
 9. *Id.* at 1.
 10. See *NACC Members*, AM. SOC’Y COUNCIL OF THE AM., <http://www.hispanicintegration.org/files/editor/image/03%20NACC%20Members.pdf> (last visited Jan. 25, 2013).
 11. See generally N. AM. COMP. COUNCIL, ENHANCING COMPETITIVENESS IN CANADA, MEXICO, AND THE UNITED STATES: PRIVATE SECTOR PRIORITIES FOR THE SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA (SPP)—INITIAL RECOMMENDATIONS OF THE NORTH AMERICAN

Why did companies care so much about United States-Canada cross-border trade? As former Canadian Ambassador Michael Wilson once said, “we make things together.”¹² In the case of my employer, the Campbell Soup Company, Canada is our largest export market, and the reverse is also true for our subsidiary, the Campbell Company of Canada.¹³ In all, some seven thousand Campbell shipments crossed the United States-Canada border in 2011, with eighty percent of it being intra-company—our example is not unique.¹⁴ While we have never quite quantified it, the cost of complying with different regulatory requirements and regimes, what I have referred to previously as “the tyranny of small differences,”¹⁵ is significant.

The number of these recommendations that were actually enacted remains in dispute, although it is safe to say it was not very many. While the NACC had a much-heralded meeting with the three national leaders at the Montebello resort in Quebec in August 2007,¹⁶ both the NACC and the SPP ceased to exist in early 2009 following the presidential election in the United States.¹⁷ It did not help matters that both Canada and Mexico also changed leaders in the interim,¹⁸ which helped slow the momentum that the private sector had brought at first to the ambitious initiative.

COMPETITIVENESS COUNCIL (NACC) (2007), *available at* <http://www.uschamber.com/sites/default/files/reports/070223nacc.pdf>.

12. Michael Wilson, Op-Ed., *Keep Goods, People Flowing Across Border*, SEATTLE POST (Dec. 11, 2007), <http://jsis.washington.edu/canada/events/Wilson.pdf>.
13. *See generally* Richard Blackwell, *Border Deal Aims to Reduce Tyranny of Small Differences in Regulation*, GLOBE & MAIL (Sep. 6, 2012), <http://m.theglobeandmail.com/report-on-business/economy/border-deal-aims-to-reduce-tyranny-of-small-differences-in-regulation/article4085386/?service=mobile>.
14. *See generally* *id.*
15. *Id.*
16. *See, e.g., Trilateral Business Council Urges Progress in Building a Secure and Competitive North America*, N. AM. COMP. COUNCIL (Aug. 21, 2007), http://www.ceocouncil.ca/wpcontent/uploads/archives/News_release_NACC_August_21_2007.pdf (discussing the meeting at Montebello).
17. *See North American Competitiveness Council*, AM. SOC'Y-COUNCIL OF THE AM., <http://www.as-coa.org/north-american-competitiveness-council> (last visited Dec. 11, 2012) (noting that both the NACC and SPP were active from 2006 to 2009).
18. Prime Minister Stephen Harper of Canada entered office on February 6, 2006; President Felipe Calderón of Mexico entered office on December 1, 2006.

The lessons of the SPP's demise became clear over time. Most notably, "Security" and "Prosperity" were handled as completely separate initiatives. The security aspect was led in the United States by then-Department of Homeland Security ("DHS") Secretary Michael Chertoff, while Secretary Gutierrez led the trade component.¹⁹ Given the lack of senior White House leadership for the initiative during the final two years of the Bush Administration, the lack of coordination—even support—for the initiative between the two cabinet agencies was all too evident.²⁰ In addition, industry efforts to persuade the DHS to pursue certain reforms, such as expanding "pre-clearance" to include "trusted shippers," not just airport travelers, was met with enormous resistance.²¹ Cabinet agencies became veritable graveyards where good ideas from the NACC went to die. Bureaucratic resistance to the SPP and the NACC amidst federal agencies in the United States and Canada was increasingly the norm.²²

Other aspects doomed the SPP, most notably fears both in the United States and Canada that sovereignty would be undermined.²³ In 2005, author Jerome Corsi told *Human Events*, a conservative newspaper in the United States, that the SPP "was fundamentally an agreement to erase our borders with Mexico and Canada."²⁴ Some went so far as to suggest that the SPP's goals included launching a

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19. See, e.g., M. ANGELES VILLARREAL & JENNIFER E. LAKE, CONG. RES. SERV., RS22701, SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA: AN OVERVIEW AND SELECTED ISSUES 1 (2009).
 20. See generally JANINE BRODIE, THE LAST HURRAH? THE SECURITY AND PROSPERITY PARTNERSHIP AND NORTH AMERICAN GOVERNANCE (2008), available at <http://www.amec.com.mx/revista/016/01%20The%20Last%20Hurra'%20The%20Security%20And%20Prosperity%20Partnership%20And%20Northa%20American%20Governance.pdf>.
 21. See, e.g., Ben Bain, *GAO: Trusted Shipping Program Needs Work*, FCW (May 27, 2008), <http://fcw.com/articles/2008/05/27/gao-trusted-shipping-program-needs-work.aspx>.
 22. See BRODIE, *supra* note 20.
 23. See generally EMILY GILBERT, WHAT ARE THE IMPLICATIONS OF A PERIMETER APPROACH TO SECURITY FOR CANADIAN BORDER AND IMMIGRATION PRACTICES? (2008), available at http://canada.metropolis.net/pdfs/Gilbert_Border_Immigration_practices_e.pdf (discussing the effect of the SPP on cross-border trade and travel and various concerns).
 24. Jerome Corsi, *Bush Administration Erases U.S. Borders with Mexico and Canada*, HUM. EVENTS (June 28, 2006, 9:55 AM), <http://www.humanevents.com/2006/06/28/bush-administration-erases-us-borders-with-mexico-and-canada.0>

new currency called the “Amero,”²⁵ and constructing a “NAFTA Superhighway” from Mexico to Canada.²⁶ Amidst a raging debate in the United States over immigration reform, such claims at the time were widely reported despite fervent denials by government officials and the lack of any credible evidence to support such outlandish claims.²⁷ In addition, while the United States Department of Commerce maintained a website for the SPP to ensure a high level of transparency,²⁸ the NACC was not seen by some as inclusive or transparent enough.²⁹ Other concerns included the lack of accountability, focus, and stronger executive leadership from the highest levels of government both in the United States and in Canada.³⁰ Within certain Canadian circles, complaints arose concerning the “trilateral” nature of the initiative, with beliefs that only a “bilateral” approach would be successful.³¹ Mexico and Canada had only one big thing in common: the same neighbor.

However, the SPP did not really die. While the leadership may have changed, many of the same government officials who helped staff the SPP saw its potential, and its flaws, and over time, crafted the

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25. *E.g.*, Andrew Gavin Marshall, *North-American Monetary Integration: Here Comes the Amero*, GLOBAL RES. (Jan. 20, 2008), <http://www.globalresearch.ca/index.php?context=va&aid=7854>.
 26. *E.g.*, Jerome Corsi, *Bush Administration Quietly Plans NAFTA Super Highway*, HUM. EVENTS (June 12, 2006, 12:00 PM), <http://www.humanevents.com/2006/06/12/bush-administration-quietly-plans-nafta-super-highway/>.
 27. *See, e.g.*, Secretary of Commerce Carlos M. Gutierrez, Remarks to U.S. and Canadian Chambers of Commerce (Oct. 30, 2007), http://2001-2009.commerce.gov/NewsRoom/SecretarySpeeches/PROD01_004605.htm.
 28. At the time of the publication, the website was removed.
 29. *See* Jill Farrell, *Judicial Watch Seeks Access to North American Competitiveness Council Meetings Under Federal Open Meetings Law*, MARKETWIRE (July 31, 2007, 12:30 PM), <http://www.marketwire.com/press-release/judicial-watch-seeks-access-north-american-competitive-ness-council-meetings-under-federal-756318.htm>; *see also* COUNCIL OF CAN., THE NORTH AMERICAN COMPETITIVENESS COUNCIL: THE CORPORATE POWER AT THE HEART OF THE SECURITY AND PROSPERITY PARTNERSHIP 1-3 (2008), available at http://www.canadians.org/DI/documents/NACC_backgrounder.pdf.
 30. *See, e.g.*, Maude Barlow, Op-Ed., *Where’s the Transparency in the ‘Security’ and ‘Prosperity’ Partnership?*, GLOBE & MAIL (Aug. 16, 2007), <http://www.theglobeandmail.com/commentary/wheres-the-transparency-in-the-security-and-prosperity-partnership/article1206557/>.
 31. *See* Stuart Trew, *Will Canada Shove Mexico Out of the SPP?*, COUNCIL OF CAN. (Apr. 7, 2008), <http://www.canadians.org/corporate/2008/Apr-7.html>.

bilateral BTB initiative that was launched in February 2011 by President Obama and Prime Minister Harper.³² Unlike the SPP, the BTB would be bilateral, with one process for Canada, and leaving an entirely separate one for Mexico.³³ Strong leadership from the White House and the Office of the Prime Minister would direct it.³⁴ Unlike with the SPP, where some “pilot projects” to test various initiatives were rejected by Bush Administration officials,³⁵ they would be integrated as part of the BTB to test various concepts and ideas and fine-tune them to determine what would actually work.³⁶ Finally, it would preserve the genius of the “and” by ensuring a high level of coordination between the “trade” and “security.”³⁷ Clearly, the new initiative reflected a strong belief that security and trade go hand-in-hand. After all, a long line of trucks sitting at a United States-Canada border crossing can look a lot like sitting ducks to a prospective terrorist.

Following a very open and transparent public comment period and consultation in the United States and Canada throughout 2011, the leaders unveiled their “Action Plan” on December 7, 2011.³⁸ It was clear that there would be no NACC, nor any other official or semi-official advisory group; it would be replaced by stakeholder sessions.³⁹ While there would be two separate initiatives, with the BTB for security and the Regulatory Cooperation Council (RCC) for trade,⁴⁰ their common purpose and coordination was made abundantly clear, even if without the fanfare of the SPP (or the opposition, which

32. See BEYOND THE BORDER, *supra* note 4.

33. See *id.*; see also Stuart Trew, *A New Perimeter to Expand NAFTA?*, FOREIGN POL’Y IN FOCUS (June 21, 2011), http://www.fpip.org/articles/a_new_perimeter_to_expand_nafta (noting that the “increasingly complicated relation between the United States and Mexico” would be left on its own, apart from the BTB initiative).

34. See BEYOND THE BORDER, *supra* note 4, at v.

35. See, e.g., VILLARREAL & LAKE, *supra* note 19, at 7-8.

36. See BEYOND THE BORDER, *supra* note 4, at 6-7, 10, 12, 14, 21, 23.

37. See *id.* at i-iv.

38. See Press Release, The White House, Fact Sheet: U.S.-Canada Beyond the Border and Regulatory Cooperation Council Initiatives (Dec. 7, 2011), <http://www.whitehouse.gov/the-press-office/2011/12/07/fact-sheet-us-canada-beyond-border-and-regulatory-cooperation-council-in>.

39. See, e.g., *Stakeholder Sessions in Washington—January 30 & 31, 2012*, GOV’T OF CAN., <http://actionplan.gc.ca/en/page/rcc-ccr/stakeholder-sessions-washington-january-30-31-2012> (last visited Dec. 12, 2012) [hereinafter *Stakeholder Sessions*].

40. See BEYOND THE BORDER, *supra* note 4, at 1.

has so far been non-existent, or at least invisible).⁴¹ Furthermore, the RCC initiative would have an initial timeline of two years in which to complete its mandate.⁴²

Yet, the private sector has not rushed to support the initiative with the same vigor as it did with the SPP. Why not? Probably because most companies simply did not know about it. Aside from launching a public comment period in Spring 2011 through the Department of Commerce,⁴³ the United States made no other public outreach on the initiative until early 2012, when they announced the first joint “stakeholder sessions” with representatives from the Canadian Government.⁴⁴ Some private sector support, however, was evident. The Canadian Manufacturers and Exporters association, along with several other groups, including the National Association of Manufacturers in the United States, launched a “Businesses for Better Borders” coalition just prior to the launch of the BTB,⁴⁵ which now coordinates private sector activity related to it.⁴⁶ Canada’s BTB leaders more openly and aggressively participated in forums to inform the private sector and build interest in, and support for, the initiative.⁴⁷ The initial stakeholder sessions, hosted by the United

41. *See id.*

42. *See, e.g., Stakeholder Sessions, supra* note 39.

43. *See* Request for Public Comments Concerning Regulatory Cooperation Activities That Would Help Eliminate or Reduce Unnecessary Regulatory Divergences in North American That Disrupt U.S. Exports; 76 Fed. Reg. 18,165 (Apr. 1, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-04-01/pdf/2011-7849.pdf>.

44. *See, e.g., Stakeholder Sessions, supra* note 39.

45. *See* CAN. MFR. & EXP. ET AL., RECOMMENDATIONS TO THE CANADA/U.S. BEYOND THE BORDER WORKING GROUP (BBWG) (2011), *available at* http://www.nam.org/~media/121CA4199F204B6991E973EFA063285A/Business_for_Better_Borders_Letter.pdf (indicating the members of the Business for Better Borders coalition and outlining the coalition’s action plan); *see also* Carter Wood, *Better Borders for Business Will Aid U.S., Canadian Economies*, SHOPFLOOR (May 3, 2011, 11:54 AM), <http://www.shopfloor.org/2011/05/better-borders-for-business-will-aid-u-s-canadian-economies/20533>.

46. *See generally* CAN. MFR. & EXP., MANUFACTURING OUR FUTURE, *available at* <http://www.cme-mec.ca/download.php?file=h8q5gph6.pdf> (discussing a private sector manufacturing and growth plan for Canada).

47. *See generally* CANADA’S ECONOMIC ACTION PLAN, <http://action.plan.gc.ca/> (last visited Dec. 12, 2012) (since the initial declaration announcing the BTB initiative in February 2011, the Canadian government has regularly posted about its efforts within the private sector to gain support for the initiative).

States Chamber of Commerce in January 2012, were generally well attended.⁴⁸

However, the SPP and the BTB share several questions in common, including some that the SPP never did answer: What does success look like? When two years of pilot programs, a well-defined timeline of projects and actions take place, and stakeholder sessions and other activities are at least launched or even completed, how will things look? Will Congress be brought into the process? After all, money will be needed to launch new technologies. How will Congress react when they learn that staffing levels at ports of entry could be reduced, thanks to the goal of inspecting everything that enters the United States or Canada just once, instead of twice or more as happens now? Will the initiative limit itself to just regulatory changes, or will they discover that some underlying legislative initiatives will be needed to address some of the differences that plague competitiveness? Will government agencies, both in the United States and Canada, genuinely get on board or fall back into familiar patterns of resistance? What about fees that the United States has been imposing on both conveyances and passengers traveling to the United States from Canada? Will the initiative focus on differences in regulation, or will it also eliminate harmful regulations imposed by both countries that hinder manufacturing and trade? Things look promising right now, but nothing concrete has transpired just yet. This journey is just getting underway.

For my company, and perhaps others, we have our own ideas for what success might look like. For my company, we are most excited about the acknowledgment by the United States Government that the United States-Canada border, and relationship, is unique.⁴⁹ Standard rules cannot, and should not, apply. This acknowledgment opens the door to a concept known as “equivalency,” wherein each country recognizes the other’s regulatory standards and inspections as acceptable, even though they may technically differ (if it is good enough for Canada, it is good enough for the United States, and vice versa).⁵⁰ That should mean that a food product inspected by the

48. See generally *Organizations Registered to Participate in January 30, 2012 Regulatory Cooperation Council (RCC) Stakeholder Session*, GOV’T OF CAN, <http://actionplan.gc.ca/page/bap-paf/registered-organizations-january-30th> (last visited Dec. 12, 2012).

49. See, e.g., *U.S. Relations with Canada*, U.S. DEP’T OF STATE (June 19, 2012), <http://www.state.gov/r/pa/ei/bgn/2089.htm>.

50. See, e.g., *Canada-US Organic Equivalence Arrangement: Overview*, CAN. FOOD INSPECT. AG’Y, <http://www.inspection.gc.ca/food/organic-products/equivalence-arrangements/us-overview/eng/1328068925158/1328069012553> (last visited Dec. 12, 2012) (discussing the significance and effect of an equivalency determination).

Canadian Food Inspection Agency at a manufacturing plant in Toronto or Montreal does not have to be stopped and re-inspected at the American port of entry on its way to American retail outlets. It means that a shipment of ingredients, parts, or products arriving at Prince Rupert, British Columbia, and then shipped by rail to Chicago, does not have to stop at the border between Manitoba and Minnesota. It might even mean that a company like mine can take advantage of rail shipments from our facilities or distribution points in Canada to the United States, and vice versa, where we now must use trucks since the Food and Drug Administration and the United States Department of Agriculture do not have inspection facilities at rail points of entry. Seeing those ideas become reality would excite companies of all sizes in both countries. Eliminating conveyance and traveler fees imposed on Canadians entering the United States since September 11 would also be welcomed—even celebrated.

It is simply not possible to eliminate the differences in all regulatory initiatives and standards between the two countries, especially on issues like food labeling. But while the initiative is in its early stages, it appears that President Obama, Prime Minister Harper, and their respective staffs have learned valuable lessons from the less-than-successful initiatives that preceded them. While the private sector continues to tread cautiously, if quietly, towards more overt support and participation, another Yogi Berra quote comes to mind: “The future ain’t what it used to be.”

