

2013

Speed Bumps, Potholes, and Roadblocks on the North American Superhighway

Robert A. Pastor

Follow this and additional works at: <https://scholar.smu.edu/lbra>

Recommended Citation

Robert A. Pastor, *Speed Bumps, Potholes, and Roadblocks on the North American Superhighway*, 19 LAW & BUS. REV. AM. 9 (2013)
<https://scholar.smu.edu/lbra/vol19/iss1/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Law and Business Review of the Americas by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

SPEED BUMPS, POTHOLE, AND ROADBLOCKS ON THE NORTH AMERICAN SUPERHIGHWAY

*Robert A. Pastor**

TWENTY years ago, President George H. W. Bush, Canadian Prime Minister Brian Mulroney, and Mexican President Carlos Salinas initialed the North American Free Trade Agreement (NAFTA), creating the largest free trade area in the world.¹ The three leaders had the vision to replace nearly two centuries of distant relations and high trade and investment barriers with the promise of a continental market.

Despite fears in each of the three countries, by 2001 NAFTA achieved astonishing success with regard to its trade and investment objectives. From 1994, the onset of NAFTA, to 2001, trade had tripled among the three countries and foreign direct investment had quintupled.² Integration—trade within the region as a percentage of the three countries' trade with the world—accelerated from 36 percent in 1988, before the U.S.-Canadian Free Trade Agreement, to 46 percent in 2001. This signified that the three economies were making products together and integrating their markets.

While Ross Perot had warned Americans that NAFTA would lead to job loss, the United States during those first years of trade expansion actually generated more jobs—22 million—than in any comparable period in its history. The region also became a formidable engine of growth, increasing its share of world production from 30 to 36 percent.

Unfortunately, North America peaked in 2001. Since then, the rate of trade growth among the three North American countries declined by two-thirds, and the rate of growth of foreign investment declined by half. The North American share of world production and the magnitude of regional integration both returned to the points that they were at before NAFTA.

* Robert A. Pastor is Professor and Director of the Center for North American Studies at American University. He is the author of *The North American Idea: A Vision of a Continental Future* (Oxford University Press 2011), from which this article was adapted.

1. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).
2. Aaron Sydor, *NAFTA@10: A Preliminary Report* 55-57 (2003), available at http://www.international.gc.ca/economist-economiste/analysis-analyse/research-recherche/10_pre.aspx?lang=eng#prin.

What accounts for the “peaking” of North America in 2001? First, China emerged as a trade powerhouse and surpassed both Mexico and Canada as the main source of U.S. imports. Second, despite the increase in trade and the fact that 80 percent went overland, none of the countries planned or invested in transportation or infrastructure to connect the new market.³ Third, the three governments reverted to dual-bilateralism—separate talks with each country—rather than work together and build on the promise of North America.

There are other reasons why North America “peaked,” but the timing was not a coincidence. In fact, the most important reason was the attack of September 11, 2001. Perhaps, if the “North American Idea”—the spirit of working as a community of nations to improve the lives of everyone on the continent—had been inculcated in the leadership or the people, the three governments would have responded as one after 9/11. But that is not what happened. After the attack, the United States built new barriers to trade, commerce, travel, and communication with its neighbors that proved to be even more formidable than the ones that had been dismantled by NAFTA.

This essay is about those barriers, the feeble response by the three governments to create a seamless continental market for goods and services, and a community of three states and peoples. In the final part of the essay, I shall outline both a vision and a blueprint for what the United States should do to transform the new barriers into an opportunity to deepen and strengthen North America.

I. INEVITABLE AND IRREVERSIBLE, BUT THAT COULD CHANGE

“Economic integration within North America is not only inevitable; it is also irreversible,” insisted Thomas D’Aquino, one of Canada’s most effective and relentless advocates for trade and investment in North America.⁴ The truth, however, is that interdependence is neither inevitable nor irreversible; indeed, it stalled mainly because of 9/11 and has been declining since. On that day, the U.S. government ordered officials at all 300 land, sea, and air ports-of-entry in the United States to a “level one threat status,” which meant complete examination of everything approaching the border.⁵ Within one hour, the two borders virtually shut down.

The United States did not need to inform Canada and Mexico what happened because the whole world saw the attack on television, but

-
3. NORTH AMERICA STEEL TRADE COMMITTEE (NASTC), *THE BORDER STORY – A NORTH AMERICAN STEEL INDUSTRY PERSPECTIVE* 5-6 (2008), available at http://www.nastc.org/border_story_feb_2008.pdf.
 4. Stated in a meeting in early 2005 for the Council on Foreign Relations Task Force on the Future of North America, of which he and I were both co-vice chairs.
 5. For this case and similar ones, see EDWARD ALDEN, *THE CLOSING OF THE AMERICAN BORDER: TERRORISM, IMMIGRATION, AND SOCIAL SECURITY SINCE 9/11* 18-21 (2008).

Canadians and Mexicans would have appreciated being consulted or even just informed of the decision to close the borders. Both countries immediately felt the consequences. The impact of shutting the two borders was equivalent to damming two huge, raging rivers.

Within two days, the lines of trucks waiting to cross Ambassador Bridge into Detroit stretched for twenty miles. By then, Ford, which used its Windsor location to supply parts for eight of its fifteen U.S. plants, was forced to shut down five of its assembly lines and one other plant. Chrysler shut all of its plants. Toyota cancelled shifts in its Kentucky plants. In San Diego, traffic stalled for eight hours. President Fox later described the economic aftermath in Mexico as “cataclysmic.”⁶

When governments cannot locate a policy to respond to a crisis of the magnitude of 9/11, they tend to choose one of two “default options:” they go to war or reorganize the government. The Bush administration did both. Bush went to war against the Taliban in Afghanistan, and soon overthrew the regime. Establishing a stable government to replace the Taliban proved to be a lot harder than either.

The job of reorganizing the U.S. government seemed more mundane, but, in the long term, it might prove even more consequential. The President signed into law in November 2002 a law establishing the Department of Homeland Security (DHS). The bill did this by combining twenty-two existing agencies with 200,000 employees. It was the second largest government reorganization in American history, after the establishment of the Department of Defense (DOD) in 1947. As with the case of the DOD, the implications of the decision to set up the DHS will reverberate in the United States and the world for decades.

The mission of the new bureaucracy was simple and repeated as a mantra by every DHS official: “Close the door and stop terrorists!” In a politically correct age, targeting potential suspects is viewed as “profiling,” and to avoid being “politically incorrect,” DHS targeted everyone. It discarded the welcome mat and harassed everyone trying to enter the country legally.

Canada and Mexico were just gearing up to partner with the United States to create “the most efficient border in the world” when they realized that they had been transformed from policy makers to policy takers. Border efficiency had been replaced by border security, and Canada and Mexico were on the other side of a new fortified border.

In an interview with Joseph Misenhelter, the Director of Homeland Security in San Diego, in October 2008, he acknowledged that, since 9/11, DHS officers on California’s border had not arrested a single person coming from Mexico for being suspected of terrorism. This was not for want of trying, and it also wasn’t because few people cross the border. Since 9/11, the California border has been legally crossed from the south more than 500 million times—on average, about eighty-five million per

6. *Id.* at 42.

year.⁷

This was also true of the Canadian border. There, DHS officers were more evasive in answering the question how many people have been arrested at the border for suspicion of terrorism, usually mentioning “that a terrorist incident” had occurred.

When one asks for specifics, they refer to the “millennium” bomber, but he was arrested by a border guard in Washington State in 1999—nearly two years before 9/11.

The costs and consequences of creating a mountain of restrictions since 9/11 have been exorbitant for the hundreds of millions of people who cross the Mexican and Canadian borders each year, but because most of these costs are not widely known, we suffer them quietly.

The problem is that within North America, businesses are not just selling products, they are increasingly making products together. These joint efforts need a “flat” terrain. Security restrictions are like speed bumps; they disrupt traffic and add to the cost of doing business. No one would question their utility if they stopped terrorists, but there is little evidence of that. This is not to suggest that we should open the borders and let everyone pass, but we should raise questions as to the effectiveness of the post-9/11 strategy and open our minds to the possibility of alternatives.

We have created problems on our borders and in our relationships with our neighbors since 9/11, but the more serious problem is what we have not done. When trade tripled, we should have built more highways to connect the North American market, but at that very moment, a movement emerged in the United States to stop construction on a mythical twelve-lane superhighway from Mexico to Canada. The groups, which include a resurgent John Birch Society, identify themselves as opponents of the North American Union—also an illusory target. They fear that the highway aims to undermine the sovereignty of the United States and facilitate migration. The fact that no such highway is either being built or even contemplated has not deterred these groups; indeed, their hysterical videos seem to grow in number and intensity.

While their fears of a highway are surreal, their concerns about illegal migration are shared by a broader constituency. Indeed, when Congress reviewed the immigration issue in 2006, the only part of a very complicated bill that was approved was to construct a wall. Instead of eliminating the speed bumps and filling in the potholes or approving comprehensive immigration reform, the United States Congress funded a wall across 670 miles of its border with Mexico.⁸ The declared purpose was to stop terrorists, undocumented workers, and drug traffickers.

7. Data provided by Vincent Bond, Office of Public Affairs, Department of Homeland Security, San Ysidro, California, October 8, 2008. The data covers the fiscal years from 2002-2007. During that time, 29-38 million people entered the United States in cars, and another 7-9 million as pedestrians.

8. Randal C. Archibold & Julia Preson, *Homeland Security Stands By Its Fence*, N.Y. TIMES, May 21, 2008, at A18.

Of course, a wall will not stop all illegal transactions. About 40 percent of undocumented workers—including the 9/11 terrorists—enter the United States legally with visas, and then overstay. Drug traffickers are very adept at finding new routes. A wall can reduce illegal migration and crime, but usually only at a few places on the border. The problem with the wall was that it sent a message to Mexico and to Mexicans in the United States that we view them as the problem. On the northern border, the added restrictions are an annoyance, a serious cost to commerce, and a signal that the United States really does not trust Canadians to look after shared security concerns.

North America's problems are speed bumps (the new 9/11 restrictions), potholes (the failure to maintain or build roads and infrastructure), road-blocks (policies that prevent trucks from transiting the border or picking up return shipments), and hidden tolls (concealed taxes that encourage inefficiency and the lack of harmonized regulations). Together, these problems have hobbled North America, insulted our neighbors, and been so costly as to have turned the North American advantage into a disadvantage.

II. SPEED BUMPS

In the millennium year 2000, inspectors at all U.S. ports of entry counted 534 million people entering the United States. Of those, 437 million entered the United States overland legally from Mexico and Canada. After September 11, 2001, the numbers declined each year until they reached 250 million people in 2009. This was not due to economic recession; the numbers declined even when the economy improved. It was not due to a problem in Mexico; the numbers declined from Canada even more. It was not due to global restrictions; the numbers arriving by sea and air remained steady. It was due to a "thickening" of both borders.

Almost all of the people who entered came for short periods. Many commuted across the border, whether branch managers living in Arizona or nurses from Windsor crossing to work in hospitals in Detroit. Roughly one million a year came as permanent residents with the intent of immigrating to the United States.

Leaving aside the guns, drugs, and commerce, the U.S. government's main preoccupation on the border is people. The legal entries each year have ranged from 240 to 437 million people each year, but the real focus are those who enter the United States without documents or remain after their visas expire.

In a press conference on October 23, 2008, DHS Secretary Michael Chertoff cited estimates by the Pew Research Center that more than 800,000 illegal migrants entered the country each year from 2000 to 2005, but he then noted the reduction to 550,000 in the following two years and saw this as a sign that enforcement "at the border has begun to turn the tide on illegal migration." Of course, allowing the illegal entry of a half of a million people each year is not exactly a success story. During the

Bush years, the total illegal population in the United States increased 40 percent, from 8.4 million in 2000 to 11.6 million in 2008. In 2009, because of the recession and more enforcement, the number fell to 11.1 million, where it has remained through 2012.⁹

The two land borders have not moved or grown longer since 450 officers patrolled them in the 1920s. But from 1986 to 2001, the number of customs agents on the southern border tripled to nearly 9,000. In comparison, there were only 300 border officials and 1,500 customs agents on the 5,525 mile Canadian border. After 9/11, President Bush doubled the number of border agents on the southern border again, and the overall numbers grew to over 20,000 in 2009.¹⁰

The expansion in personnel coincided with a proliferation of programs — each with its own acronym. It wasn't long before the bureaucrats had enough acronyms to design a new game of North American Scrabble. Citizens traveling frequently across the U.S.-Canada border need as many as five separate credentials: (1) NEXUS, a biometric, photo ID card, to allow fast travel across the border; (2) FAST for their commercial vehicle; (3) TWIC for transportation workers; (4) a passport; and (5) PASS, an e-passport in order to be compliant with the Western Hemisphere Travel Initiative (WHTI). Each requires a lengthy and expensive application process, and if someone also wanted to cross the U.S.-Mexico border, they would need an equal number but different set of cards, each with different acronyms.¹¹

Part of the frustration of people who cross the border regularly is that they spend substantial money and time to acquire NEXUS or SENTRI, and then they discover that those lanes may be slower than the others. The requirements for truckers are even more complicated, expensive, and duplicative. Louise Yako, vice president of the British Columbia Trucking Association, complained about restrictions, duplication, and rising costs, and feared that many of the small trucking companies would go out of business. "They," she said, referring to the Department of Homeland Security, "promised to consolidate the various programs and make them

-
9. MICHAEL HOEFER ET AL., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2007 (2008), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2007.pdf; Remarks by Homeland Security Secretary Michael Chertoff on the State of Immigration (Oct. 23, 2008) (on file with the journal). PEW HISPANIC CTR., UNAUTHORIZED POPULATION: NATIONAL AND STATE TRENDS (2011), available at <http://pewhispanic.org/files/reports/133.pdf>.
 10. For the increase in numbers of personnel under Bush, see Chertoff, *supra* note 9. For the update under Obama, see Peter Schrag, Why Strengthening the U.S.-Mexican Border Leads to More Illegal Immigration, *Washington Post* (July 18, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/16/AR2010071602720.html>.
 11. DEP'T OF HOMELAND SECURITY, NEXUS FACTSHEET (2012), available at http://www.cbp.gov/linkhandler/cgov/travel/trusted_traveler/nexus_prog/nexus_facts.ctt/nexus_facts.pdf; Dep't of Homeland Security, SENTRI Factsheet (2008), available at http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/travel/sentri/sentri_fact.ctt/sentri_fact.pdf.

easier, but the requirements have multiplied and are far more costly.”¹² Yako’s fears that the fees would drive small truckers out of business proved true.

One study commissioned by the Canadian government estimated that the total border costs and fees paid by the trucking industry was about \$10 billion.¹³ Numerous studies since 9/11 have assessed the length and cause of delays and the cost to commerce and the nations, and they all point in the same negative direction. John Taylor and Douglas Robideaux of Grand Valley State University, with George C. Jackson of Wayne State University, calculated that the border management system was costing both the United States and Canadian economies about \$10.3 billion per year.¹⁴ This was equivalent to about 2.7 percent of merchandise trade in 2001,¹⁵ which is higher than the average U.S. tariff before NAFTA.¹⁶ This is a tax, however concealed. If the tax made us more secure, it would be worth it, but there is no evidence that this is the case.

There are fewer studies on the U.S.-Mexico border, but their conclusions are consistent with those on the northern border. The most comprehensive report was done by El Colegio de la Frontera Norte in Tijuana, based on an extensive survey. The study computed total costs of delays of \$436 million per year. In addition, they estimated the cost to the local community of delays, added pollution, and job loss, and concluded that they suffered \$7.5 billion in lost production, nearly 300,000 jobs lost, and \$1.4 billion in lost salaries.¹⁷

The evidence, in brief, is substantial and incontrovertible. Delays have increased by about 20 percent for Canadians going south and 12 percent for Americans going north to Canada according to one of the best non-government analyses.¹⁸ The direct cost to the taxpayer also soared. From 2001 to 2009, the U.S. Border Patrol budget alone tripled from \$1.1 bil-

-
12. THE CAN. CHAMBER OF COMMERCE, *FINDING THE BALANCE: REDUCING BORDER COSTS WHILE STRENGTHENING SECURITY* 7 (2008).
 13. See JUAN CARLOS VILLA, *TRANSACTION COSTS IN THE TRANSPORTATION SECTOR AND INFRASTRUCTURE IN NORTH AMERICA: EXPLORING HARMONIZATION OF STANDARDS* 20 U.N. Sales No. E.07.II.G.122 (2007).
 14. JOHN C. TAYLOR ET AL., *THE U.S.-CANADA BORDER: COST IMPACTS, CAUSES, AND SHORT TO LONG-TERM MANAGEMENT OPTIONS* 2 (2003), available at <http://www.gvsu.edu/cms3/assets/E8FAA6C6-ABE4-9E7B-C7767AF20437813F/CanadaUSBorderCostsReport052103-pdf091905.pdf>.
 15. *Id.*
 16. The average U.S. tariff rate on Mexican imports before NAFTA came into effect was 2 percent. See DANIEL F. LEDERMAN ET AL., *LESSONS FROM NAFTA FOR LATIN AMERICA AND THE CARIBBEAN* 3 (2005), available at <http://ctrc.sice.oas.org/geograph/north/NAFTA%20Lessons%20Executive%20Summary.pdf>
 17. EL COLEGIO DE LA FRONTERA NORTE, *U.S.-MEXICO PORTS OF ENTRY: A CAPACITY ANALYSIS AND RECOMMENDATIONS FOR INCREASED EFFICIENCY: EXECUTIVE SUMMARY* (2007), available at <http://psamex.com/pdf/1.%20Executive%20Summary.pdf>.
 18. HDR|.HLB Decision Econ., Inc., *Imperial Valley – Mexicali Economic Delay Study Literature Review*, County Imperial, <http://www.co.imperial.ca.us/IVAG/ProjectBriefs/2007-20ImperialCountyTransPlan/Literature%20Review.pdf> (last visited Mar. 23, 2013).

lion to \$3.5 billion,¹⁹ while the entire budget of Customs and Border Protection (CBP) grew from \$3 billion to \$10 billion.²⁰

Canada and Mexico were initially sympathetic to the U.S. need to create a more secure border, but they were also wary of new barriers to trade. Canadians repackaged many of the initiatives that had been broached over the years into a “smart borders” agreement in December 2001 that increased border security without unduly harming commerce. The Mexican Foreign Minister tried to convince Canada to negotiate the agreement trilaterally, but Canada rejected that approach, and so Mexico replicated it with a similar agreement in March 2002. Despite those agreements, intrusive restrictions proliferated.

Canadians and Mexicans resented the restrictions, as well as the way that the U.S. government imposed them. The U.S. decision to fortify its borders has reduced trade, investment, tourism, and jobs; all while irritating or angering its neighbors. The investment in border security was substantial, but there is no evidence that it has provided more security.

III. POTHOLES

If trucks and pedestrians only had to drive over several speed bumps, they could manage, but in the next stage of their journey to the heart of North America, the highway is ravaged with potholes, some so deep that they would immobilize any vehicle. These potholes come in many forms. Some are the old-fashioned kind caused by governments that do not maintain roads, bridges, railroads, ports, communications, and border facilities. In those cases, vehicles break down, and there are more accidents.

Other potholes have strange names, “drayage” and “cabotage”. Both raise the cost of trade by protecting markets rather than promoting competition. “Drayage” literally means “the cost of carrying wagon,” but it actually means that many trucks are needed to do a job that one truck could do if there were free trade. “Cabotage” restricts foreign trucks, planes, trains, and ships from carrying shipments between cities within a foreign country. After Canadian trucks, for example, deliver their load in Chicago, cabotage prevents them from picking up other shipments to deliver to another U.S. city, and often they have to return to Canada empty, thereby doubling the transportation cost for consumers.

NAFTA was supposed to permit Mexican trucks to cross the border by 1995, but the U.S. prevented it. Only after the World Trade Organization authorized Mexico to raise tariffs in response to the U.S. failure to imple-

19. *Enacted Border Patrol Program Budget by Fiscal Year*, U.S. BORDER PATROL, http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy11_stats/budget_stats.ctt/budget_stats.pdf (last visited Mar. 23, 2013).

20. *Charts: Border/Enforcement Spending and Deportation Levels Continue to Skyrocket Under Obama*, AMERICA'S VOICE, http://americasvoiceonline.org/research/charts_enforcement_spending_and_deportation_levels_continue_to_skyrocket/ (last visited Mar. 23, 2013).

ment this agreement did the President, in 2011, finally allow a few trucks to cross the border. For most of the commerce going north, at least three trucks are still used to transport produce when only one is needed. The Mexican government estimated that the additional “border transfer” cost of drayage was about 15 percent of the volume of trade—or about \$616 million for 2008.

The Jones Act of 1920 is one of the oldest examples of cabotage in the United States. Its purpose is to protect and maintain the U.S. maritime industry by preventing foreign ships from picking up cargo in the United States and delivering it to another city in the country. The U.S. International Trade Commission estimated that the cost to the U.S. economy of the “concealed tax” of the Jones Act was \$656 million in 1999.²¹

If the trucks are ever able to cross the continent, they will find real potholes—not just the political-bureaucratic kinds—in the roads, bridges, and infrastructure. In a report to the Canadian-U.S. Inter-Parliamentary Group, Val Meredith, a member of Parliament, wrote: “While continental trade has skyrocketed, the physical infrastructure enabling the movement of these goods has not.”²²

There were other signs. On August 14, 2003, a few trees fell on power lines in Ohio, and, within hours, a power outage affected fifty million people, including one-third of the population of Canada. Bill Richardson, who had been secretary of energy, said the essence of the problem was that the United States was “a superpower with a third world electricity grid.” Three years later, a bridge near Montreal collapsed, killing five people.

The U.S. Department of Transportation reported that one-fourth of America’s nearly 600,000 bridges needed significant repairs. The Federal Highway Administration reported that one-third of the country’s major roads were in substandard condition, and that this was a “significant factor” in 43,000 traffic fatalities each year.

The debt crisis of the mid-1980s compelled the Mexican government to reduce its spending for infrastructure—from about 8 percent of GDP in 1981, to less than 2 percent in 2002. By the latter date, the World Bank estimated that Mexico had a ten-year infrastructure deficit of \$20 billion per year.²³ Canada, like Mexico, reduced its investments in infrastructure significantly in order to close its fiscal deficit. By 2005, the Western Transport Ministers reported that total government spending for infrastructure as a proportion of GDP dropped by more than half—from 2.9 percent in 1991 to 1.4 percent in 2002–03.²⁴

21. See JUAN CARLOS VILLA, *supra* note 13 at 32.

22. *Id.*

23. MEXICO: A COMPREHENSIVE DEVELOPMENT AGENDA FOR THE NEW ERA 2, 10-11, 357-76 (Marcelo Guigale et al. eds. 2001).

24. Stephen Blank et al., *Freight Transportation Infrastructure Policies in Canada, Mexico, and the U.S.: An Overview and Analysis* 8-9 (Ariz. State Univ. N. Am. Ctr. for Transborder Studies, Working Paper No. 5, 2008), available at <http://courses.washington.edu/cec587/Readings/North%20America.pdf>.

After the financial crisis, all three governments diverted some funds to infrastructure, but each tended to use local plans, rather than develop national or continental plans. One area did witness some breakthroughs in North American transportation—railroads—and that was mostly because the governments cleared the way to allow the private sector to integrate the system. In the mid-1990s, several of the largest American railroad companies merged. At about the same time, the Canadian and Mexican governments privatized their railroads. Two U.S. railroads bought Mexican railroads, and the newly privatized Canadian National acquired assets in the United States. The result was that the railroads became more continental.

Instead of planning for a North American highway, the United States invested in expensive walls to separate the countries. Congress moved with unusual speed to appropriate \$2.1 billion for a 670-mile wall on the southern border.

IV. HIDDEN TOLLS

North America's prosperity has been stunted not just by speed bumps, potholes, roadblocks, and walls at its borders, but also by tolls that are concealed in the higher prices consumers have to pay for North American products. Unlike "drayage," which protects trucking firms, no one benefits from these concealed taxes. They are simply the unnecessary costs of doing business within the continent. These additional tolls fall into three categories: (1) "rules of origin," which impose unnecessary costs at the border in identifying the part of the product that is made in North America; (2) trivial differences in regulations that compel exporters to adapt their products to three different sets of regulations; and (3) taxes that encourage inefficiency.

Michael Hart, a Canadian trade negotiator and one of the foremost authorities of regulatory divergence in North America, defines these inefficiency taxes as "the sum of duplicative regulations, border administration delays, and other regulatory impediments." The duplication occurs when truckers (and indirectly, consumers) have to pay for multiple credentials from at least two governments to cross the border in a theoretically expedited lane and fill out slightly different customs forms on both sides of both borders.

NAFTA eliminated tariffs among the three countries, but it allowed each country to set its own external tariff to the rest of the world. In order to prevent China from using one country's relatively lower tariff as an entry point to swamp the other two markets, the three North American governments instituted "rules of origin" provisions. These procedures require every exporter to fill out a certificate describing the origin of each part in a product. The complicated administrative procedures and cumbersome paperwork cost, according to Danielle Goldfarb of the

C.D. Howe Institute in Canada, as much as \$31 billion annually.²⁵

Another study suggested Mexico could save as much as 2 percent of the value of its exports to the United States, which, in 2008, would amount to \$4.7 billion.²⁶ Using a general equilibrium analysis and examining the deeper effects of the procedures on the three economies, Alex Appiah estimated that the total cost of the “rules of origin” procedures amounted to about 2 to 3 percent of North America’s GDP. With a GDP of \$17 trillion in 2008, 2.5 percent would amount to \$425 billion.²⁷ This constitutes a colossal tax that consumers and producers unknowingly pay in North America. A common external tariff would eliminate this tax.

A second area where North Americans are paying taxes without getting benefits is the result of different rules. “Regulatory divergence” represents the next generation of issues that the three governments need to negotiate in order to improve market competitiveness. The logic of harmonization is clear-cut. All three governments have laws to protect the environment, ensure that food is safe, and guarantee good labor conditions. In those cases where the laws are very different, harmonization is not an option, but in many cases, the differences in the laws and regulations are trivial—say, on the size of a label. These increase the costs of production without benefit to society. In these cases, the three governments should negotiate a common standard.

These issues have become more important for three reasons. First, in a free trade area, the administration of regulations has replaced the collection of customs duties as one of the main responsibilities of border administration, and it adds considerably to the time needed to inspect commercial shipments. Secondly, in the last two decades, most countries have seen regulations multiply and extend to the full gamut of public concerns: food and car safety, environmental protection, labor rights, market failure, and so on.

Soon after NAFTA came into effect, the three governments set to work to harmonize standards on the weight and length of trucks. So the administrations convened a group—the NAFTA Land Transport Standards Subcommittee—to harmonize the sixty-four different standards. In 1997, the Subcommittee gave up, saying “there is no prospect of developing a complete consensus within North America on a common set of truck weight and dimension limits.”

The OECD estimated that divergent standards add 2 to 10 percent to

-
25. Danielle Goldfarb, Commentary, *The Road to a Canada-U.S. Customs Union: Step-by-Step or in a Single Bound?*, 184 *Border Papers* 8 (C.D. Howe Institute 2003), available at <http://tinyurl.com/apdxn3d> (automatically downloads .pdf file).
 26. Olivier Cadot et al., *Assessing the Effect of NAFTA’s Rules of Origin* (Lab. D’Economie Appliquee, INRA Research Unit, Working Paper No. 0306, 2002), available at <http://www.inra.fr/Internet/Departments/ESR/UR/lea/documents/wp/wp0306.pdf>. Mexican exports to the United States were \$216 billion in 2008.
 27. Alex Jameson Appiah, *Applied General Equilibrium Analysis of North American Integration with Rules of Origin* (1999) (unpublished Ph.D. thesis, Simon Fraser University) (on file with the author).

overall costs of production.²⁸ The NAFTA governments have been groping since 2005 for a formula to harmonize standards, but they have not found it. Despite the high priority given to it by Presidents Bush and Calderon and Prime Minister Harper, the governments failed even to agree on jelly-bean regulations—an interest of Harper’s—and cereal—an interest of then-Secretary of Commerce Carlos Gutierrez, a former CEO of Kellogg.

V. THE VISION AND THE BLUEPRINT

NAFTA promoted competition transformed three national markets into a continental market, but in the absence of measures to govern the continental space, it failed to solve problems like harmonizing truck standards or unifying regulations on candy. It also did not share the gains of trade, and thus income disparities widened.

The changes within and between the three countries are still not widely understood. Mexico, the poorest and most stratified, experienced the most profound modernization and democratization. While Mexico’s middle class grew the fastest, those who were better off and in the north benefited more. Canada kept its fiscal house in order and thus experienced a positive economic jolt, but 9/11 confounded their manufacturing strategy and, together with the speed bumps and potholes, the country found its entire economic trajectory at risk. Canada’s dependence on the U.S. market deepened, but the United States treated the convergence of the two economies as if it had not happened.

The groups in the United States that opposed NAFTA initially blamed it for the decline of manufacturing and the rise of immigration. The drug-related violence in Mexico that exploded during the Felipe Calderon administration led to a higher degree of collaboration between Mexico and the United States on security issues, but at the same time, it harmed the perception of Mexico and diverted the governments from an agenda of economic cooperation.

Obama sought to warm the two bilateral relationships, but his agenda was so full—with two wars, a deep recession, and health insurance—that he could not devote the time or political capital to refashion the North American relationship. This is the political context that explains why the three governments failed to take any steps to flatten the speed bumps, fill the potholes, eliminate the roadblocks, tear down the walls, and stop extracting tolls in the absence of roads. Real integration stalled and went into reverse. The costs of doing business among the NAFTA countries increased.

With the election of a young and vigorous President in Mexico, and the re-election of Barack Obama in the United States, the two governments

28. MICHAEL HART, CTR. FOR N. AM. STUDIES AT AM. UNIV. and U.N. ECON. COMM’N FOR LATIN AM. AND THE CARIBBEAN, *TRADING UP: THE PROSPECT OF GREATER REGULATORY CONVERGENCE IN NORTH AMERICA*, at 16, U.N. Sales No. S.07.II.G.47 (2007).

have another chance to restore the promise of North America. Obama and Peña Nieto should join with Prime Minister Stephen Harper to propose a “North American Community” that would invigorate the three economies, improve competitiveness vis-à-vis Asia and Europe, enhance continental and public security, address more effectively the new transnational agenda, and design 21st century, lean but effective tri-national institutions.

The vision that undergirds this proposal is based on a principle of interdependence—if one country suffers a setback, all are hurt, but a success in one helps the others. The principle is simple, and often voiced by leaders, but they rarely act on those principles. If the United States actually accepted its “shared responsibility” for the drug problem, it would not permit the 7,500 gun shops on the U.S. side of the border to sell assault weapons to the drug cartels. If all three countries actually incorporated a sense of Community, they would advertise “Buy North American” instead of respective national products.

The word “Community” refers to a group in which the members feel an affinity and desire to cooperate. It is not a Union, and the NAFTA countries’ relationship would differ from Europe’s, though it should try to learn from EU experiences in order to avoid mistakes and adapt successes. A “Community” should be flexible, allowing for the three countries to define the new relationship that they would seek.

In December 2011, the United States and Canada presented “Action Plans” on the border and regulatory convergence. The United States and Mexico repeated the same exercise. The three countries restated the goal on borders that they did a decade before in the two “Smart Borders’ Agreement”—to make the border efficient and secure. And they affirmed the need to harmonize regulations just as they did in 2005 when they established the Security and Prosperity Partnership—to avoid “the tyranny of small differences in regulations” that serve only to protect companies rather than consumers. Instead of taking actions, the Plans actually proposed studies and pilot projects. The leaders called the plans “game-changers,” but anyone who bothered to read them knew they were playing the same games.

It is clear that the only way to move forward on the agenda is for the leaders to give North America a high priority and organize their governments to accomplish their goals. They will also need tri-national institutions, because the three governments are not designed to think continentally. They should start with a North American Advisory Commission to do research and prepare continental options for all three leaders to consider and choose at annual summits. They should encourage the two bilateral legislative committees to merge into a single North American Parliamentary Committee.

The three leaders of the nations should call for a North American Plan for Transportation and Infrastructure, and establish a North American Investment Fund that would connect the poorest southern regions of

Mexico with the richer North American market. Such a Fund would create the infrastructure in the south of Mexico that would attract investment and jobs and thus reduce migration to the border and the United States.

To create a seamless market, the three countries should negotiate a Common External Tariff. This would eliminate the excessive “rules of origin” tax of about \$500 billion per year, and the common tariff would yield about \$45 billion per year, which could be placed in the North American Investment Fund to build continental corridors. With a sense of Community, the three governments could then eliminate unnecessary border restrictions, expand educational opportunities across the continent, harmonize and lift environmental and labor standards, and train tri-national teams of customs officers. These steps would begin to invigorate the sleeping giant of North America.

In November 2011, President Barack Obama toured Asia and committed the United States to negotiating a “Trans-Pacific Partnership” (TPP) in order to harness Asian dynamism for the benefit of the U.S. economy. This seems like a good idea, but is actually a strategic mistake because it diverts scarce U.S. attention from a project that would have a more profound and positive effect on the U.S. economy and society—deepening economic integration in North America.

It is unrealistic to expect these ideas to become policy in a short time. Big ideas take time for the body politic to absorb. When American women convened a meeting in Seneca Falls, New York in 1848 to seek the right to vote, no one would have thought it would take seventy-one years to succeed.

Still, this does not mean we should give up or slow our efforts. Representatives from the border regions could generate support for the “North American Idea.” The three leaders could begin by articulating a vision and announce a merging of the two sets of working groups on borders and regulations into a single North American group. They could ask their Ministers of Transportation to develop a North American Plan. They could allocate just \$15 million for scholarships and support for Research Centers for North America.

None of the many proposals that have been advanced for the region can be achieved without such a vision. Americans and Canadians will not provide funds to a North American Investment Fund to narrow the development gap with Mexico without a convincing vision of how Mexico’s growth will benefit their countries. There is little prospect of reaching an agreement on labor mobility, on harmonizing environmental standards, on forging a transportation plan, or any proposal that would cost money or change the status quo unless there is a vision of a wider Community that could attract the support of the people and their legislatures.

A vision can inspire the three nations to rethink and renew North America.