

RESTORING RESPECT FOR THE LAW IN CANADA-U.S. COMMERCE: THE REGULATORY COOPERATION COUNCIL SO FAR

*By: Christopher Sands**

If you have ten thousand regulations, you destroy all respect for the law.

—Winston Churchill

Anecdotes concerning ludicrous regulation are almost as common in democratic societies as complaints about taxes and poor public services. While the average voter accepts the need for regulation in principle, the proliferation of regulation in modern society has gradually reduced respect for the role of government in regulating economic activity. Particularly in the United States, concern over the size and cost of government has put pressure on regulators to focus on economic impacts, cost-benefit analyses, and competing claims about the public good.¹

Regulation has particularly become a growing issue in international trade, with regulatory compliance in multiple jurisdictions adding to costs (and consumer prices), and occasionally limiting or prohibiting market access for certain products or personnel.² In 2011, the United States and Canada embarked on their latest effort in a series of negotiations aimed at limiting the negative impact of regulatory differences on bilateral trade and the economic

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1. See generally Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633 (2012).
2. See, e.g., 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>.

competitiveness of firms operating in either country.³ This paper looks at the context for these talks, their structure, and some of the challenges that will be faced.

PROTECTIONISM'S RESORT TO REGULATION

International trade was badly damaged by the wave of protectionism that coincided with (and exacerbated) the Great Depression.⁴ The United States Congress adopted the Smoot-Hawley tariff in 1930, which raised tariff rates in the United States and prompted other countries to retaliate.⁵ This essentially closed the United States to trade for several years following.⁶ The passage of the Reciprocal Trade Agreements Act of 1934 not only rescinded the Smoot-Hawley tariff rates, but also limited American protectionist measures to just two relatively minor tools: anti-dumping duties (used when another country or a foreign company “dumps” products into the United States market at prices below the cost of production, just to gain a foothold in the market at the expense of other producers) and countervailing duties (a tariff applied provisionally to counter the effect of a foreign subsidy or unfair trade practice).⁷ These two emergency trade measures were retained just in case foreign trade partners attempted to take advantage of the renewed openness of the United States.⁸ This domestic reform was reinforced by the launch of international negotiations under the aegis of the General Agreement on Tariffs and Trade (“GATT”)⁹ in 1947 in an effort to promote

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3. UNITED STATES-CANADA REGULATORY COOPERATION COUNCIL: JOINT ACTION PLAN (2011) [hereinafter RCC ACTION PLAN], available at http://www.whitehouse.gov/sites/default/files/us-canada_rcc_joint_action_plan3.pdf.
 4. See, e.g., Barry Eichengreen & Douglas A. Irwin, *Trade Blocs, Currency Blocs and the Reorientation of World Trade in the 1930s*, 38 J. INT'L ECON. 1, 2 (1995).
 5. See *id.*; see also Robert B. Archibald & David H. Feldman, *Investment During the Great Depression: Uncertainty and the Role of the Smoot-Hawley Tariff*, 64 SO. ECON. J. 857, 860-61 (1998).
 6. See generally Eichengreen & Irwin, *supra* note 4, at 6-7.
 7. See generally Claude Schwob, *Did the Reciprocal Trade Agreements Act of 1934 Initiate a Revolution in the American Trade Policy?*, 34 HIST. SOC. RES. 377 (2009); see also Abraham Berglund, *The Reciprocal Trade Agreements Act of 1934*, 25 AM. ECON. REV. 411 (1935).
 8. See, e.g., Peter D. Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Anti-Dumping Duties*, 58 COLUM. L. REV. 44, 53 (1958).
 9. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

international trade disarmament and further the global retreat from trade protectionism.¹⁰

Within the decade, anti-dumping and countervailing duties were sought by a growing number of American producers, and what had been marginal instruments of trade protection for “emergencies” became the mainstay of both American protectionism and protectionism abroad.¹¹ The lesson of this experience was that the motivations for protectionism are strong and firms will seek to use whatever means are available to gain an advantage (or to compensate for a disadvantage) in their domestic market.

As the GATT negotiations, the Canada-United States Free Trade Agreement (“CUFTA”),¹² and the North American Free Trade Agreement (“NAFTA”)¹³ lowered tariff barriers affecting trade between the United States and Canada, regulatory differences became more significant as obstacles to market access for companies in both countries. At the same time, regulations proliferated in both countries became more significant in shaping each domestic marketplace.

RISE OF THE REGULATORY STATE

Progressivism as a political movement gained adherents and influence in both the United States and Canada in the early part of the twentieth century.¹⁴ Distinct from liberalism, progressivism advocated meritocracy and government by experts as a counterweight to corrupt patronage politics and electoral manipulation.¹⁵ This more enlightened approach to government, progressives believed, would help society to progress with improved living conditions for all, through greater consumer safety, better working conditions, and rising quality standards.¹⁶

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10. See generally, e.g., Harold K. Jacobson, *Beyond Economic Disarmament*, 16 POL. SCI. & POL. 1, 10-12 (1983) (discussing the nature and purpose of the GATT and surrounding negotiations).
 11. See Ehrenhaft, *supra* note 8.
 12. Canada-United States Free Trade Agreement, Jan. 1, 1988, U.S.-Can., CAN. T.S. No. 3 (1989), 27 I.L.M. 281 (1988).
 13. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, CAN. T.S. No. 2 (1994), 132 I.L.M. 289 (1993).
 14. See, e.g., William Schambra, *Obama and the Policy Approach*, NAT'L AFF., Fall 2009, at 129-130, available at http://www.nationalaffairs.com/doclib/20091229_Schambra_Fall09.pdf (discussing the roots of progressivism in the United States and its export).
 15. See *id.* at 130-131.
 16. See generally *id.* at 130.

The rise of progressivism coincided with the growth of the social welfare state in the years following World War II, which saw the role of government in the economy grow in both Canada and the United States as a provider of income security, access to health care, and public infrastructure.¹⁷ Thus, as the state expanded its economic role, it also expanded its regulatory role and the ranks of the civil service were bolstered by credentialed experts.¹⁸ The number of regulatory bodies and agencies in both countries multiplied, and the annual number of pages in publications like the United States *Federal Register* and the *Canada Gazette* surged.¹⁹

The growth of regulation became a burden for domestic economic activity as well as for cross-border commerce. Compliance costs with numerous and often contradictory regulations implemented by federal and also by state and provincial governments grew and became a drag on North American competitiveness.²⁰ Even though other countries had followed a similar path in establishing social welfare programs and regulation of market activity, the European Union (“EU”), for example, also sought to harmonize regulation across the EU region,²¹ while the market growth in developing economies, such as China, outpaced the capacity of regulation, resulting in a greater degree of freedom for economic action.²² Despite the CUFTA and the NAFTA,

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17. See generally, e.g., ELIZABETH A. SEGAL, *SOCIAL WELFARE POLICY AND PROGRAMS: A VALUES PERSPECTIVE* (2009) (discussing the history and development of the social welfare state and related services).
 18. See, e.g., Schambra, *supra* note 14, at 130.
 19. See, e.g., Jonathan H. Adler, *Would the REINS Act Rein in Federal Regulation? Congress Makes Another Effort to Regain Control of Regulation*, CATO INST.: REG. REFORM, Summer 2011, at 22-23, available at <http://www.cato.org/pubs/regulation/regv34n2/regv34n2-2.pdf> (discussing the fact that, as the amount of regulatory activity in the United States greatly increased post-WWII, the *Federal Register* grew from less than 11,000 pages in 1950 to well over 80,000 pages today).
 20. See generally, e.g., ROBERT W. CRANDALL & LEONARD WAVERMAN, *TALK IS CHEAP: THE PROMISE OF REGULATORY REFORM IN NORTH AMERICAN TELECOMMUNICATIONS* (1995) (providing a history of regulatory difficulties and the negative impact of associated costs in several North American telecommunication industries).
 21. See, e.g., MICHAEL HART, C.D. HOWE INST., *STEER OR DRIFT? TAKING CHARGE OF CANADA-US REGULATORY CONVERGENCE* 9-13 (2006), available at http://www.cdhowe.org/pdf/commentary_229.pdf (discussing the move for a “single market” program in the EU region).
 22. See generally, e.g., WENDY DOBSON, C.D. HOWE INST., *TAKING A GIANT’S MEASURE: CANADA, NAFTA AND AN EMERGENT CHINA* (2004), available at http://www.cdhowe.org/pdf/commentary_202.pdf (discussing the rapid market growth in China over the last few decades and the resulting increase in global trade and economic freedom).

the goal of a single North American market for goods and services was not realized due in part to regulatory mismatches.²³ Instead, the three federal governments, along with thirty-one Mexican states, all fifty states in the United States, all ten Canadian provinces, the three Canadian territories, and many county and municipal jurisdictions, sought to regulate cross-jurisdictional transactions with increasing assertiveness.²⁴

REGULATORY REFORM IN THE UNITED STATES

Despite the incidence of regulatory overlap, the United States has generally received high marks for its regulatory system, due to its transparency, non-discrimination between domestic and foreign entities, and the capacity of foreign interests to participate in regulatory processes and reviews.²⁵ For this reason, the United States has been able to attract foreign direct investment and to engage in international trade with little or no tension with its foreign partners concerning market regulation and access.²⁶

Rather, the principal initiative to reform regulation in the United States has been domestic. During the second half of the twentieth-century and continuing today, as the regulatory capacities and interests of government have expanded, a movement of commercial interests, nongovernmental activists, legal scholars, and academics, has emerged to press for greater efficiency in market regulation; in some cases, this has manifested as a call for less regulation, and in others for regulations that do a more effective job at reducing risks to the public.²⁷

In his review of regulatory reform efforts from the Ford to Clinton Administrations, Murray Weidenbaum noted that presidents of both parties had mixed success in attempting to discipline the growth of

23. *See generally, e.g.*, HART, *supra* note 21, at 13-16 (discussing NAFTA limitations due in part to regulatory impact).

24. *See, e.g.*, GARY ANDERSON & CHRISTOPHER SANDS, HUDSON INST., NEGOTIATING NORTH AMERICA: THE SECURITY AND PROSPERITY PARTNERSHIP 5-7 (2007) (discussing several joint efforts to harmonize regulation in North America leading up to the establishment of the Security and Prosperity Partnership of North America in 2005).

25. *See generally, e.g.*, VERA NICHOLAS-GERVAIS ET AL., OECD, REGULATORY REFORM IN THE UNITED STATES: ENHANCING MARKET OPENNESS THROUGH REGULATORY REFORM (1999).

26. *See id.* at 6-7.

27. *See, e.g., id.* at 41 (indicating policy options for more effective regulation with greater benefits to international trade and to the public).

federal regulation.²⁸ Presidents established review groups and executive branch clearinghouses, and issued executive orders mandating review of new regulations, cost-benefit analyses, and other impact assessments, prior to the issuance of new regulations.²⁹ More often than not, Weidenbaum notes that the source of regulatory problems was statutory, that is, originating in congressional action and not in an executive action.³⁰ While there had been an increased awareness on the part of federal regulators regarding the compliance costs of new regulations and some evidence of regulatory parsimony at particular times and in particular agencies, Weidenbaum argues that Congress drove an expanding regulatory state steadily forward in its ambition and reach during the 1970s, 1980s, and 1990s.³¹

Jonathan Adler offers a different view, one in which Congress has lost control of the regulatory process to the ambitions of executive branch regulators:

Over the past several decades, the scope, reach, and cost of federal regulations have increased dramatically. As the federal regulatory state has grown, legislative control over regulatory policy has declined. Long after authorizing legislation is adopted, agencies continue to adopt regulations and implement policies with relatively little legislative input or oversight. At the same time, presidential administrations of both parties have used administrative regulations to implement policies and programs that Congress failed to approve. As legislative control over regulatory policy has waned, so too has congressional accountability for the regulation.³²

Whether Congress or the Executive Branch is to blame, domestic regulatory reform efforts in the United States in recent decades have had only a modest impact on the growth of regulation. As Jodi Short noted in a recent article on this movement:

The promise of the late-twentieth-century regulatory reform movement was a significantly deregulated polity in which the regulators that remained would manage the risks of contemporary society more efficiently and effectively, but four decades of regulatory

28. See generally Murray Weidenbaum, *Regulatory Process Reform: From Ford to Clinton*, REG., Winter 1997, available at http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/5376.pdf.

29. See *id.*

30. See *id.*

31. See *id.* at 25-26.

32. Adler, *supra* note 19, at 22.

reform have produced a society that is neither significantly less regulated nor significantly less risky.³³

However, domestic regulatory reform advocates in the United States have gradually increased the stigma of regulation and the growth of the government in voter perception.³⁴ Similar to the way in which tax rates, fiscal deficits, and public debt began to be a cause for concern among economists and scholars, then among conservative politicians, and eventually became a consensus problem decried by Republican and Democratic politicians alike, the costs of regulation (and concern for over-regulation) have become more important to the general public in the United States.³⁵ This growing consensus is still fragile, but suggests that a certain political momentum for continued efforts at regulatory reform may exist.

So, just as President Bill Clinton declared in a State of the Union Address that “the era of big government is over,”³⁶ President Barack Obama aligned himself with regulatory reformers in his 2011 State of the Union Address, “To reduce barriers to growth and investment, I’ve ordered a review of government regulations. When we find rules that put an unnecessary burden on businesses, we will fix them.”³⁷

President Obama acted on this pledge by issuing Executive Order 13563 in 2011, which remains in effect, mandating that his administration consider the cost of compliance with new and existing regulations, improve the transparency of the regulatory process, and simplify rules and compliance whenever possible.³⁸

At the same time, Christopher DeMuth argues top-down Executive Branch efforts at regulatory reform are consistent with a recent trend toward centralization of power within the Executive

33. Short, *supra* note 1, at 634.

34. See, e.g., *id.* at 668, 679 (discussing “coercive-state anxiety” whenever increased regulation is at stake).

35. See generally, e.g., Edward Alden, *The Costs (and Benefits) of Government Regulations on Business*, COUNCIL ON FOREIGN REL. (Aug. 22, 2012), <http://blogs.cfr.org/renewing-america/2012/08/22/the-costs-and-benefits-of-government-regulations-on-business/> (noting growing public concern over whether regulation is stifling the American economy).

36. President William Jefferson Clinton, State of the Union Address (Jan. 23, 1996), available at <http://clinton4.nara.gov/WH/New/other/sotu.html>.

37. President Barack Obama, State of the Union Address (Jan. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>.

38. See Exec. Order No. 13563 of January 18, 2011, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>.

Branch that has reduced the effective role of Congress and the judiciary, as well as that of the states, in competition with presidential administrations, as constitutional “checks and balances” that provide public accountability to regulatory activities.³⁹ This is a broad argument about the nature of American government that conflicts the spirit of openness and accountability noted by the Organization for Economic Co-operation and Development (“OECD”) as a salient feature of regulation in the United States, as well as with the ongoing efforts at regulatory reform that continue today.⁴⁰

THE REGULATORY IMPACT OF THE SECURITY AND PROSPERITY PARTNERSHIP

This context is important to understand recent efforts made by American administrations to advance the cause of regulatory reform through engagement with American trading partners, most notably with Canada and Mexico.

During the Clinton Administration, the United States began talks on regulation with the federal governments of Canada and Mexico through a set of trilateral working groups established in the NAFTA to look at “harmonizing standards and eliminating differences in regulation among the three governments and their agencies that, while costly for businesses and consumers, could be reconciled without harming public health or safety.”⁴¹ The NAFTA Working Groups had a mixed record of success, many meeting only once or twice; the controversy that surrounded the congressional ratification debate over NAFTA gave regulators little sense of public (or political) support for regulatory harmonization across North America.⁴²

The George W. Bush Administration sought to re-energize talks on regulation and inspection at the borders and within them. At a March 2005 summit in Waco, Texas, with Canada’s prime minister and Mexico’s president, Bush launched the trilateral Security and Prosperity Partnership of North America (“SPP”).⁴³ The SPP was a process of technical negotiations on economic and security rules and

39. See Christopher DeMuth, *Competition and the Constitution*, NAT’L AFF., Fall 2011, at 38-55, available at http://www.nationalaffairs.com/doclib/20110919_DeMuth.pdf.

40. See generally NICHOLAS-GERVAIS ET AL., *supra* note 25.

41. ANDERSON & SANDS, *supra* note 24, at 5.

42. See *id.* at 5, 11 & 15.

43. SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA (2005), available at <http://www.spp-psp.gc.ca/eic/site/spp-psp.nsf/eng/00057.html>.

regulations conducted by working-level counterparts in the governments of the United States, Canada, and Mexico.⁴⁴

The design of the SPP was innovative, “eschewing the more traditional diplomatic and trade negotiation models in favor of talks among civil service professionals and subject matter experts within each government.”⁴⁵ The design placed the negotiation fully within the authority of the American Executive Branch to enforce and execute the law and statutes, and follow to a certain extent the nature of the subjects of the negotiation (regulatory approvals, standards, and security procedures and requirements).⁴⁶

The Report to Leaders issued in June 2005 (“SPP Report to Leaders”)⁴⁷ identified more than three hundred separate irritants as priorities for one or more of the three governments. These three hundred items were assigned to a slightly more manageable set of twenty working groups (ten on the prosperity side and ten for security issues):⁴⁸

SPP Working Groups

Prosperity Agenda

E-Commerce

Energy

Environment

Financial Services

Food and Agriculture

Health

Manufactured Goods and Sectoral and Regional
Competitiveness

Movement of Goods

44. *See generally id.*

45. ANDERSON & SANDS, *supra* note 24, at 5.

46. *See id.*

47. SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA, REPORT TO LEADERS (2005) [hereinafter SPP REPORT TO LEADERS], available at [http://www.spp-ppsp.gc.ca/eic/site/spp-ppsp.nsf/vwapj/Report-Rappport-Ju2005.pdf/\\$file/Report-Rappport-Ju2005.pdf](http://www.spp-ppsp.gc.ca/eic/site/spp-ppsp.nsf/vwapj/Report-Rappport-Ju2005.pdf/$file/Report-Rappport-Ju2005.pdf).

48. *See Working Groups, GOV'T OF CAN.*, <http://www.spp-ppsp.gc.ca/eic/site/spp-ppsp.nsf/eng/00020.html> (last visited Dec. 27, 2012); *see also* ANDERSON & SANDS, *supra* note 24, at 16.

Transportation

Business Facilitation

Security Agenda

Aviation Security

Bio-protection

Border Facilitation

Cargo Security

Intelligence Cooperation

Law Enforcement Cooperation

Maritime Security and Transport

Critical Infrastructure Protection

Science and Technology Cooperation

Traveler Security

The SPP Report to Leaders then divided the items on the SPP agenda into three basic categories: (1) “early harvest” items, often referred to as “low-hanging fruit”; (2) nearer term “big impact” initiatives that would take more time but yield a bigger benefit; and (3) longer-term ideas and initiatives left on the table for discussion at a future date.⁴⁹ The three categories each corresponded with target completion dates at the request of the leaders, who insisted that the SPP was to be an action-oriented initiative rather than a debating society.⁵⁰

In the three-month period between Waco and the SPP Report to Leaders, numerous “early harvest” objectives had already been achieved. Included among them were progress on work toward modernizing the NAFTA’s temporary entry provisions for professionals, the creation of a harmonized approach to the mad-cow outbreak in North America, improvements to aviation safety and air navigation systems, and work towards liberalizing the NAFTA’s rules of origin.⁵¹ On security matters, progress had been made on infrastructure concerns ranging from the Windsor-Detroit border crossing, to Nogales, Arizona, to the identification of new sites for test

49. See ANDERSON & SANDS, *supra* note 24, at 16.

50. See *id.*

51. See *id.*

programs like NEXUS Marine, and work towards adopting a common trilateral position on standards in the World Customs Organization.⁵² While the “early harvest” items were not unimportant, they were not uniformly a product of the new impetus given by the SPP, but reaped what had been sown in previous bilateral and trilateral discussions, processes, and initiatives.

Progress on the “big impact” and longer-term objectives was a more significant task, especially within the deadlines ranging from as little as six months to several years set in the SPP Report to the Leaders.⁵³ Anticipating this task, the cabinet-level group organized these priorities into six baskets, three on the prosperity side and three on the security side. The importance of the “big impact” or longer term objectives to the fate of the SPP was recognized by referring to these items as Signature Initiatives.⁵⁴ The Signature Initiatives were as follows:

SPP Signature Initiatives

Prosperity

I. Making North America the Best Place to do Business

- Enhancing and Streamlining Regulatory Process in North America
- Fake Free North America
- Expanding Duty Free Treatment by Liberalizing Rules of Origin

II. Sectoral Collaboration to Enhance North American Competitiveness

- Steel: A Strategic Partnership—A Strategic Industry
- Moving Towards a Fully Integrated Auto Sector
- Creating a Sustainable Energy Economy for North America
- Air Transportation: Expanding Our Horizons
- Safer, Faster and More Efficient Border Crossings
- Free and Secure Electronic Commerce
- Enabling Our People

52. *See id.*

53. *See* SPP REPORT TO LEADERS, *supra* note 47.

54. *See, e.g.*, ANDERSON & SANDS, *supra* note 24, at 17.

III. Making North America the Best Place to Live

- Clean Air, Clean Water: Protecting People and Our Environment
- Access to a Safe and Reliable Food Supply
- Healthier North America

Security

I. Securing North America From External Threats

- Biometrics and Secure Documentation Vision
- Real-Time Information Sharing
- Compatible Screening Standards
- Export Controls for Radioactive Sources
- Bioprotection

II. Preventing and Responding to Threats within North America

III. Further Streamlining the Secure Movement of Low-Risk Traffic Across Our Shared Borders

One of the more interesting features of the SPP was the inclusion of the private sector in the discussion through the creation of the North American Competitiveness Council (“NACC”) in March 2006.⁵⁵ The NACC brought together thirty corporate representatives from North America’s largest companies.⁵⁶ Having business at the table was important because it created the potential to broaden the discussion beyond a narrow focus on additional procedures and investment in security hardware. While it would be nice to think that this opening of the discussion to other perspectives was the work of the three governments, the creation of the NACC was in fact the result of a strong push by the United States Chamber of Commerce that led to the Bush Administration agreeing that if business was able to

55. *See, e.g.*, 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 COMPETITIVENESS COUNCIL (NACC) 3 (2007) [hereinafter NACC RECOMMENDATIONS], available at <http://www.uschamber.com/sites/default/files/reports/070223nacc.pdf>.

56. *See id.* at 58-59 (listing all thirty NACC participants).

organize itself, then they would talk.⁵⁷ So with the support of its Canadian and Mexican counterparts, the Chamber of Commerce put together a council.⁵⁸ The NACC held a number of meetings, including meeting privately with the three leaders, and made a number of recommendations regarding greater economic integration within North America.⁵⁹ The various non-governmental organizations (“NGOs”), which had not pushed as strongly for inclusion, were upset at being excluded and responded with an ongoing chorus criticizing the overall initiative.⁶⁰

In August 2007, at the third summit of North American leaders in Montebello, Quebec, President Bush, Prime Minister Harper and President Calderón responded to civil society critics and to the urging of the NACC by issuing a statement on regulatory cooperation.⁶¹ The Regulatory Cooperation Framework (“Montebello RCF”) set forth the following principles for regulatory changes,⁶² if any, by the three federal governments without addressing specific regulations:

RCF Common Regulatory Principles

1. Justify the need for regulation, including the consideration of market failures.
2. Identify alternatives to addressing a regulatory need, including non-regulatory options.
3. Assess the costs and benefits of regulatory and, where appropriate, non-regulatory alternatives so that options that maximize net benefits can be identified.

57. See ANDERSON & SANDS, *supra* note 24, at 21.

58. See NACC RECOMMENDATIONS, *supra* note 55, at 10-11.

59. See *generally id.*

60. These disaffected civil society groups came from all three countries and included, *inter alia*, the Council of Canadians; Fathers for Justice Canada; Stop the North American Union; the Minutemen Project; and the Mexican Action Network on Free Trade. As noted, the SPP was an innovative deviation from tradition trade negotiation models as it deliberately favored the involvement of private organizations and civil society in negotiations. Non-consultation and exclusion of NGOs from the NACC was seen as a breach of this model. See *generally* ANDERSON & SANDS, *supra* note 24, at 24-25.

61. See *id.* at 27-28.

62. SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA, COMMON REGULATORY PRINCIPLES 1 (2007) [hereinafter RCF COMMON REGULATORY PRINCIPLES], available at [http://www.spp-psp.gc.ca/eic/site/spp-psp.nsf/vwapj/RCF-Common-Regulatory-Principles.pdf/\\$file/RCF-Common-Regulatory-Principles.pdf](http://www.spp-psp.gc.ca/eic/site/spp-psp.nsf/vwapj/RCF-Common-Regulatory-Principles.pdf/$file/RCF-Common-Regulatory-Principles.pdf).

4. Minimize the adverse impact of regulation on a fair, competitive and innovative market economy.
5. Minimize unnecessarily divergent or duplicative requirements within North America.
6. Promote performance-based regulation where appropriate and to the extent practicable.
7. Ensure timeliness in regulatory decision-making.
8. Write regulations in plain language so they are easily understood.
9. Ensure transparent regulatory development and implementation, making regulations and regulatory impact analyses easily accessible.
10. Evaluate and review existing regulations routinely.

The Montebello RCF itself was based on the OECD's *Guiding Principles for Regulatory Quality and Performance* ("OECD Guidelines")⁶³ which had already been endorsed by the three governments.⁶⁴ Whereas the "Prosperity" working groups of the SPP were created to address the need to reform the existing "stock" of regulations that were impeding regional competitiveness, the Montebello RCF established principles for the "flow" of future regulation. It emphasized process transparency and the principle of fairness toward the regulated. As such, it was uncontroversial, but at the same time the commitment of the leaders to these principles had no discernable impact on regulatory practices within their respective governments; at best, one of the governments could cite the Montebello RCF in a dispute over a regulatory change that violated these guidelines and insist that the breach of the commitment be justified. Still, the innovation of the Montebello RCF was the attempt to at least address future rulemaking with some kind of discipline.

The fourth North American leaders summit in New Orleans in 2008⁶⁵ introduced an agreement on phytosanitary regulatory cooperation and progress on a mutual assistance framework for

63. OECD GUIDING PRINCIPLES FOR REGULATORY QUALITY AND PERFORMANCE (2005), available at <http://www.oecd.org/regreform/liberalisationandcompetitioninterventioninregulatedsectors/37318586.pdf>.

64. See, e.g., RCF COMMON REGULATORY PRINCIPLES, *supra* note 62, at 1.

65. See, e.g., *North American Leaders' Summit*, THE WHITE HOUSE, <http://georgewbushwhitehouse.archives.gov/infocus/naleaders/> (last visited Dec. 27, 2012).

emergencies and natural disasters.⁶⁶ The agreement allowed relief personnel (from doctors to utility line workers) to receive temporary permission to work with recognition of professional credentials in response to situations such as Hurricane Katrina, which had devastated New Orleans.⁶⁷ In addition, an “Initial Workplan” was issued under the Montebello RCF that was intended to advance the principles of the framework into the regulatory practices and procedures of the three governments.⁶⁸

President Barack Obama attended the fifth summit of North American leaders in Guadalajara, Mexico in August 2009.⁶⁹ At that meeting, the SPP and its working groups were officially terminated in favor of a new, streamlined ten point agenda.⁷⁰ One of the items on the Guadalajara summit agenda endorsed by the leaders was regulation. President Obama, President Calderón, and Prime Minister Harper called for continued trilateral action toward reduction of “unnecessary regulatory differences”⁷¹ and “instructed . . . respective ministers to continue this work by building on previous efforts, developing focused priorities, and a specific timeline.”⁷²

Despite the leaders’ 2009 Guadalajara commitment to continue regulatory cooperation negotiations, the momentum from the SPP working groups dissipated with the groups themselves, and the disestablishment of the SPP was also accompanied by the dissolution of the NACC.⁷³ The governments of Canada and Mexico each engaged the Obama Administration on a bilateral basis on specific priorities, returning to the dual-bilateral approach to North American diplomacy

66. Agreement Between the Government of the United States of American and the Government of Canada on Emergency Management Cooperation, U.S.-Can., Dec. 12, 2008, *available at* <http://www.state.gov/documents/organization/142916.pdf>.

67. *See id.*

68. *See* REGULATORY COOPERATION FRAMEWORK, INITIAL WORKPLAN (2008), *available at* [http://www.spp-ppsp.gc.ca/eic/site/spp-ppsp.nsf/vwapj/RCF-Work-Plan.pdf/\\$file/RCF-Work-Plan.pdf](http://www.spp-ppsp.gc.ca/eic/site/spp-ppsp.nsf/vwapj/RCF-Work-Plan.pdf/$file/RCF-Work-Plan.pdf).

69. *See, e.g.*, CHRISTOPHER SANDS, HUDSON INST., THE CANADA GAMBIT: WILL IT REVIVE NORTH AMERICA? 4, 10-11 (2011).

70. *See id.* at 10-11, 21-22.

71. *See* Press Release, The White House, Joint Statement by North American Leaders (Aug. 10, 2009) (on file with author), *available at* <http://www.whitehouse.gov/the-press-office/joint-statement-north-american-leaders>.

72. *See id.*

73. *See, e.g.*, Luiza Savage, *The End of North American Trilateralism*, MACLEAN’S (June 29, 2012, 9:18 AM), <http://www2.macleans.ca/2010/06/29/the-end-of-the-trilateral-dream/>.

that had typified the Clinton Administration (after NAFTA ratification) and the George W. Bush Administration (prior to the SPP). The economic recession in 2010 only further undermined trilateral progress on regulatory cooperation.

The Obama Administration, however, dedicated considerable effort to domestic regulatory reform in 2010, tasking Cass Sunstein with the development of a regulatory reform plan that led to Executive Order 13563.⁷⁴ President Obama's strong statements on regulation and the economic recovery in his State of the Union address in 2011 further evidence the importance of reform.⁷⁵

REGULATORY COOPERATION IN THE OBAMA ERA

The new effort in the United States at domestic regulatory reform quickly translated into two parallel bilateral negotiations on regulatory cooperation with Canada and Mexico. Prime Minister Harper met President Obama on February 4, 2011, and the two issued a joint statement on regulatory cooperation that established the United States-Canada Regulatory Cooperation Council ("RCC") that would work alongside a United States-Canada *Beyond the Border* Working Group.⁷⁶

It should be noted that Mexico was more proactive in engaging the United States on regulatory cooperation than Canada was following the Guadalajara summit. In May 2010, Mexican President Felipe Calderón put regulatory cooperation on the agenda of a bilateral meeting with President Obama, and the leaders agreed in principle to establish the United States-Mexico High Level Regulatory Cooperation Council ("HLRCC").⁷⁷ This was followed in March 2011 by the issuance of specific terms of reference for the HLRCC,⁷⁸ just a

74. See Exec. Order No. 13563, *supra* note 38.

75. See President Barack Obama, State of the Union Address, *supra* note 37.

76. Press Release, The White House, Joint Statement from President Obama and Prime Minister Harper of Canada on Regulatory Cooperation (Feb. 4, 2011) (on file with author), *available at* <http://www.whitehouse.gov/the-press-office/2011/02/04/joint-statement-president-obama-and-prime-minister-harper-canada-regul-0>.

77. Press Release, The White House, Joint Statement from President Barack Obama and Prime Felipe Calderón (May 19, 2010) (on file with author), *available at* <http://www.whitehouse.gov/the-press-office/joint-statement-president-barack-obama-and-president-felipe-calder-n>.

78. TERMS OF REFERENCE FOR THE HIGH-LEVEL REGULATORY COOPERATION COUNCIL (2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/oir/irc/high-level_regulatory_cooperation_council-terms_of_reference_final.pdf.

few weeks after the similar initiative was first announced with Canada.

In December 2011, the United States and Canada issued a joint action plan for the RCC.⁷⁹ The joint action plan focused the initial activity of the RCC on five areas: (1) Agriculture and Food (with priority for addressing the regulation of food safety, agricultural production, and marketing);⁸⁰ (2) Transportation (with priority for addressing the regulation of road and rail systems, marine, and other transportation issues);⁸¹ (3) Health and Personal Care Products as well as Workplace Chemicals;⁸² (4) Environmental regulation;⁸³ and, (5) two Cross-Sectoral Issues (regulations affecting small business and regulation of the emerging field of nanotechnology).⁸⁴ An initial agenda of twenty-nine regulatory issues was identified as “low hanging fruit” to be picked by fifteen task-specific RCC working groups that draw in regulators from the appropriate agencies of the American and Canadian governments.⁸⁵

There are several specific deadlines in the RCC action plan to keep the plan moving forward.⁸⁶ There is, however, no specific budget for this initiative, and regulators must carve out time to participate from their extant schedules and budgets. Stakeholder input is to be solicited as needed and prior to any final decisions, in the interest of transparency.⁸⁷ In addition, the various governments and the public have received updates from the RCC thus far.⁸⁸

It is too soon to judge the results of the RCC, and so this paper will conclude with some thoughts on the challenges the governments will face in pursuing this initiative in the coming years.

79. See, RCC ACTION PLAN, *supra* note 3.

80. See *id.* at 7-10.

81. See *id.* at 11-13.

82. See *id.* at 14.

83. See *id.* at 16.

84. See *id.* at 17.

85. See *Initiatives and Working Groups: RCC Work Plans*, GOV'T OF CAN., <http://actionplan.gc.ca/page/rcc-ccr/initiatives-and-working-groups> (last visited Dec. 27, 2012).

86. See generally RCC ACTION PLAN, *supra* note 3.

87. See *id.* at 1, 3 & 5.

88. See, e.g., CANADA-UNITED STATES REGULATORY COOPERATION COUNCIL JOINT ACTION PLAN: PROGRESS REPORT TO LEADERS (2012), available at http://actionplan.gc.ca/sites/default/files/pdfs/rcc_progress_report_en_final.pdf.

CHALLENGES AHEAD

Competitive Regulatory Reforms

The Obama Administration has launched several simultaneous regulatory reform initiatives with limited staffing and funding, and no clear indication of the relationship among them. These initiatives include domestic regulatory reform, the RCC, and the HLRCC, but also the Transatlantic Economic Council Regulatory Cooperation Initiative,⁸⁹ and the Trans Pacific Partnership (“TPP”).⁹⁰ There has generally been a beneficial relationship between domestic regulatory reform efforts in the United States and international cooperation in the past, and indeed the former may be considered a *sine qua non* for the latter. In the specific cases of the HLRCC and the RCC, absent the Obama Administration’s domestic efforts at regulatory reform, it is unclear whether any bilateral engagement would have occurred following the Guadalajara summit in 2009.

It may be that Mexico’s proactive approach to regulatory cooperation with the United States following the Guadalajara summit, building on the progress made by the “Prosperity” working groups of the SPP initiative, helped to spur Canada to pursue a similar regulatory cooperation dialogue with the United States; anecdotally, the evidence suggests that Canada was more interested in border security cooperation in 2010 and 2011.⁹¹ If so, the competition between Canada and Mexico could be complementary to domestic efforts in the United States at regulatory reform, and could sustain momentum in this direction.

However, competing regulatory reform/cooperation processes domestically and internationally could also permit reluctant regulators in the United States to stall changes to their current practices and procedures, accepting only foreign concessions to accept American standards and harmonization with unreformed American regulatory practices. A further complication is the launch of the TPP negotiations, which include regulatory harmonization.⁹² The United

89. See, e.g., Press Release, EU-U.S. Transatlantic Economic Council, Joint Statement (Nov. 29, 2011) (on file with author), available at http://trade.ec.europa.eu/doclib/docs/2011/november/tradoc_148385.pdf (discussing regulatory harmonization efforts).

90. See, e.g., *Outlines of the Trans-Pacific Partnership Agreement*, OFF. OF THE U.S. TRADE REP., <http://www.ustr.gov/about-us/press-office/factsheets/2011/november/outlines-trans-pacific-partnership-agreement> (last visited Dec. 27, 2012).

91. See, e.g., SANDS, *supra* note 69, at 13-14.

92. See, e.g., *Trans-Pacific Partnership (TPP) Negotiations*, DEP’T OF FOREIGN AFF. AND INT’L TRADE CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tppptp/faq.aspx?view=d> (last visited Dec. 27, 2012).

States is currently negotiating under the TPP with Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam; at the Asia-Pacific Economic Cooperation (“APEC”) summit in Honolulu in 2011, the United States convinced the others to issue an invitation to Canada, Mexico, and Japan to join the talks.⁹³ With this new participation in the TPP, this proliferation of parallel dialogues could slow the RCC process down or diminish its capacity to deliver results.

Role of Congress

Several committees of the United States Congress have been briefed on the RCC to date, and it is likely that congressional interest and engagement in the RCC will be triggered by specific proposals to change American regulatory practices.

The United States Government has several overlapping regulatory agencies, and many businesses and commercial activities are subject to regulation by several different parts of the federal government (not to mention state governments).⁹⁴ This overlap—a key target for elimination by regulatory reformers in the United States since at least the Ford Administration—is due in part to the Congress itself, which has by statute granted such regulatory authority and thereby ensured that particular congressional committees (and their members) have a role in oversight and regulation of the economic activities important to their constituents.⁹⁵ Streamline domestic regulation, and you may eliminate a congressional committee of jurisdiction; yet, be prepared for a congressional response.

This is not a criticism of the involved governments at this stage; they have kept the legislatures apprised to the extent possible at this early stage in the RCC negotiations. However, it is not clear that Congress is as of yet successfully engaged or supportive of this process. As Adler warns, Congress has its own ambitions for regulatory reform that are not encompassed in the RCC model.⁹⁶

93. *See Canada Joins Trans-Pacific Partnership Trade Talks*, CBC NEWS (Oct. 9, 2012), <http://www.cbc.ca/news/politics/story/2012/10/09/pol-parry-tpp-talks.html>; *see also* Hugh L. Stevens, *Canada Chases the TPP Holy Grail*, THE DIPLOMAT (Feb. 25, 2012), <http://thediplomat.com/2012/02/25/canada-chases-the-tpp-holy-grail/>.

94. *See generally, e.g.*, Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields and Statutory Discontinuities*, 29 VA. ENVTL. L.J. 237 (2011).

95. *See id.*

96. *See generally* Adler, *supra* note 19.

United States 2012 elections

To the extent that the 2012 federal elections in the United States might yield a change in administration or control of the House of Representatives or the Senate, the RCC process could become stalled. As the RCC eventually emerged to pick up the agenda of the SPP working groups on prosperity in a manner consistent with the Montebello RCF, there is reason to hope that, after some delay, the work of the RCC will continue (albeit under a new name or process). The broader trend towards addressing regulatory differences as an obstacle to market access and international trade, as well as national and regional economic competitiveness for business activity and investment, will ensure that the agenda will not disappear. However, the RCC was established late and will face institutional resistance within both the American and Canadian Governments from front line regulators; it can be expected that the prospect of a change in political leadership in 2012 will be used to forestall change in the coming year, and perhaps thereafter.

Berry picking? Low-hanging fruit forever?

The domestic efforts at regulatory reform in the United States have been high-level, serious, and limited in their results. However, they have gradually raised the issue of regulation as a drag on the economy with the general public. Policy journals, academic studies, campaign rallies and blogs reflect frustration with the regulatory status quo that has gradually made regulatory reform a bipartisan American priority.

Yet, regulatory cooperation with trading partners is not seen in the same light: many groups worry about the “race to the bottom” that will follow if regulations are changed to remove barriers to foreign products. The modest ambitions of international efforts at regulatory disciplines, such as the OECD Guidelines, and the RCC and HLRCC agendas, reflect this ambivalence, which is not solely American.

The RCC is still picking low-hanging fruit, as prior efforts have done. That is worthy work, but modest ambitions lead to modest expectations and, generally, to modest results.

Just as the key to international success in tariff barrier reduction was premised on domestic processes in many countries that reduced the importance of tariffs for national revenue and promoted economic development and competition behind gradually reduced tariff protections, the key to international efforts to discipline regulatory barriers to trade must be a domestic commitment on the part of governments to reform their regulatory processes and rules. This has begun to be manifest in Canada, Mexico, and even the United States.

It may be that the RCC is a worthy effort that may only serve as a milestone on a long road toward progress on regulatory cooperation. The key, it seems, is the progress of domestic commitment in the

United States to regulatory reform; to the extent that this matures, the RCC and successor initiatives will make gains. To the extent that it does not, we ought not fault the RCC particularly.

RESTORING RESPECT FOR THE LAW

The challenge of regulatory reform begins domestically, and is confounded and promoted by domestic political considerations. At the same time, domestic regulations have come under increasing scrutiny and criticism as barriers to trade, and accordingly, have found a place on the international agenda.

Conflicting regulations that are impossible to comply with in good faith have been the fodder for jokes—recall the “Catch 22” of Joseph Heller’s story in the United States Army in World War II. As Churchill advises, such jokes and anecdotes accumulate to reduce the respect for the law among voters.

This has led to a movement for domestic regulatory reform in the United States and elsewhere that has made important but limited progress. In an atmosphere of severe fiscal resource constraints, there will be growing pressure for public sector productivity gains in the United States and in Europe, at least. Domestic regulatory reform should contribute momentum to international efforts at regulatory cooperation like the RCC. The RCC, however, may be only a marker on the road to reform.

