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REGULATORY HARMONIZATION BETWEEN THE UNITED STATES AND CANADA

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INTRODUCTION

Renewed interest in regulatory reform in Washington is a necessary and positive development.

A decadeslong accumulation of red tape and burdensome regulations imposes significant costs on the U.S. economy. One estimate finds the total annual cost of federal regulations now exceeds \$2 trillion and represents a financial burden of \$233,182 for the average firm.¹ Thus, the case for reform can quite literally be measured in basic dollars and cents. And although the recent enactment of regulatory budgeting and the usage of the Congressional Review Act's veto powers should be applauded as important steps toward extricating American businesses and entrepreneurs from the labyrinthine regulatory state, there is still more work to be done.

1. W. Mark Crain and Nicole V. Crain, "The Cost of Federal Regulations to the U.S. Economy, Manufacturing and Small Business, National Association of Manufacturers," Sept. 10, 2014. <http://www.nam.org/Newsroom/Press-Releases/2014/09/Pay-Up>.

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One area of regulatory reform that remains neglected is the possibility for greater regulatory harmonization with Canada. Although past bilateral progress has been made, it is often in the form of minor steps that focus primarily on "low-hanging fruit" instead of fundamental regulatory convergence. However, greater ambition in this regard could boost bilateral economic relations, enable investment and create jobs on both sides of the border.

The economic relationship between the United States and Canada is already the most extensive and successful in the modern world and it is essential that the two countries continue to work together, particularly on issues of mutual interest like border security, energy and climate change. However, superfluous policy differences can impose undue economic costs with little benefit to improved health and safety or to consumer protection. And this is especially true with respect to areas like product approvals (including agricultural goods and pharmaceuticals), transportation, energy infrastructure, labor rules and rules of origin.

Accordingly, the purpose of this paper is to examine recent efforts to improve regulatory harmonization between the United States and Canada, and to recommend opportunities to further reduce these unnecessary and counterproductive regulatory differences.² Its aim is to highlight the often "unseen" costs that stem from regulatory divergence and set out a practical plan for greater regulatory convergence.

THE U.S.-CANADIAN ECONOMIC RELATIONSHIP

It can be easy to overlook the depth and breadth of the U.S.-Canadian economic relationship. This is because it is less high-profile and less complicated than other bilateral

2. The paper does not cover broader trade matters, such as ongoing bilateral irritants (e.g., softwood lumber or dairy products), or the possible renegotiation of the North American Free Trade Agreement (NAFTA). These are complicated questions that are worthy of their own dedicated inquiry, especially given uncertainty as to the future of the NAFTA.

relationships, such as that of the United States and China. However, it is just as important. Consider, for example, the staggering level of economic interdependence between the two nations:³

- In 2014, two-way trade reached \$870 billion—the equivalent of \$2.4 billion every day or \$1.6 million each minute.
- Bilateral investment accounts between the two nations make for nearly an additional \$698 billion.
- About 77 percent of Canadian exports are destined for the U.S. market. Their second largest export market is China, which accounts for only about 3.7 percent, by comparison. Exports to the United States are equivalent to approximately 21 percent of Canada's overall gross domestic product.
- While China is the United States' largest trading partner in terms of two-way trade, Canada buys twice as many U.S. exports. Canada is the largest customer for 35 U.S. states and among the top three in 12 others.
- One in seven Canadian jobs depends upon trade with the United States, and nearly 9 million U.S. jobs depend on trade and/or investment with Canada.

But the economic linkages are not mere macroeconomic abstractions. They reflect the deep continental integration of people, firms and industries. For example:

- Roughly 400,000 people cross the border each day.
- An estimated 8,000 trucks cross the Detroit-Windsor border each day.
- As part of our integrated automobile production market, each vehicle's components move back and forth across the border an average of six or seven times throughout the assembly process.

As then-Canadian Prime Minister Stephen Harper observed in a 2011 speech launching the Beyond the Border Action Plan⁴ with President Barack Obama: “Over the past nearly 200 years, our two countries have progressively developed the closest, warmest, most integrated and most successful relationship in the world.”⁵

This is not just mere political hyperbole, either. The United

3. Laura Dawson and Sean Speer, “Managing the Canada-US Relationship from the Honeymoon to the Long-Term,” The Macdonald-Laurier Institute and Woodrow Wilson International Center for Scholars, March 2016. <http://www.macdonaldlaurier.ca/files/pdf/MLISpeerDawsonCanadaUS-03-16-webready.pdf>.

4. This initiative will be discussed in more detail in subsequent sections.

5. Office of the Press Secretary, “Transcript: Obama and Harper’s Remarks,” The White House, Feb. 4, 2011. <http://www.macleans.ca/authors/luiza-ch-savage/transcript-obama-and-harpers-remarks/>.

States and Canada have managed to achieve an unprecedented degree of economic, business, security and interpersonal cooperation. From the International Joint Commission on Boundary Waters to the Canadian-American Business Council to joint training missions in the Arctic, the bilateral relationship is bound together in a web of institutional and personal pacts that are underwritten by common values and interests.

But because the relationship is so sanguine and productive, it can be easily taken for granted. So much of the partnership occurs outside the limelight of the media or the scrutiny of politics that one can underappreciate its intricacies or importance. For example, people may see the trucks going back and forth between Detroit and Windsor but likely do not stop to consider the complexity of the legal, institutional and policy foundations that have made this cross-border movement possible for decades. The traditional assumption that “no news is good news” is misleading here, as the outwardly quiet success of the partnership should not suggest that there are no bilateral problems or that it does not require extensive ongoing maintenance, negotiation and collaboration.

REGULATORY DIVERGENCES AND THEIR NEGATIVE EFFECTS

Although free-trade agreements and other bilateral arrangements have reduced or eliminated most of the outwardly observable barriers to bilateral trade and investment, one “unseen” aspect of the relationship is the regulatory duplication and discordance that slows down trade, hampers investment and generally erodes the efficiency of our integrated economies:

The main barriers in the way of exporters and importers today are not tariffs or quotas; they are regulatory barriers to trade. These barriers are the results of divergent regulations: legal requirements on goods and services that differ by jurisdiction even though the jurisdictions are pursuing similar goals. As more countries develop more regulations, which they often do in isolation from each other, the trade costs to business will increase.⁶

While it is true that some of these regulatory differences reflect deeply held political views or unique domestic conditions, many others are driven by complacency, inertia and “public choice” calculations by politicians, officials and

6. The Canadian Chamber of Commerce, “Canada’s Next Top Trade Barrier: Taking International Regulatory Cooperation Seriously,” April 2016, 6. <http://www.chamber.ca/media/blog/160413-regulatory-barriers-threat-to-trade/>.

businesses.⁷ The resultant costs are borne by entrepreneurs, investors and workers, and come in three principal forms:

1. Information costs – these are the costs of learning the regulatory details of the market in which a firm wishes to do business.⁸
2. Adjustment costs – these are the costs of redesigning or manufacturing a product so that it conforms to regulations in a market in which the firm wishes to do business.⁹
3. Conformity assessment costs – these are the costs of having a product inspected to ensure that it conforms to the regulations of its destination.¹⁰

Estimates of these costs are difficult to come by, but one study suggests that the national border reduces the volume of merchandise trade between the United States and Canada by half.¹¹ How much of this border-induced opportunity cost is attributable to regulatory differences is difficult to discern, although the authors argue that the “payoff from serious regulatory convergence would be substantial.”¹² Likewise, an Organisation for Economic Cooperation and Development (OECD) study estimates that a reduction of regulatory divergence by one-fifth could increase foreign direct investment around the world by about 15 percent.¹³ Given this, it is no surprise that a Canadian trade policy expert has called these costs stemming from regulatory divergence a “concealed inefficiency tax” that consumers must pay on virtually every purchase.¹⁴

7. The public choice school of thought models the behavior of four groups (voters, politicians, bureaucrats and special-interest groups) to explain actions within the government sector. Public choice scholars assume that each group acts in its own self-interest. Thus, in terms of regulatory policymaking, politicians, for example, may enact new regulations for political rather than policy purposes, bureaucratic officials may do so to grow departmental budgets and existing businesses may want regulations enacted as a barrier to new market entrants and increased competition. For a detailed discussion of the public choice model see William C. Mitchell and Randy T. Simmons, *Beyond Politics: The Roots of Government Failure* (Oakland: Independent Institute, 1994).

8. In fact, firms often hire experts specifically to understand a market’s regulatory details.

9. These costs vary widely but can sometimes cause firms to duplicate their entire production process.

10. These inspection costs also vary and can sometimes require inspection at multiple points along the way.

11. Gary Hufbauer and Claire Brunel, “Economic integration in North America,” *One Issue, Two Voices* Issue #8, Woodrow Wilson International Center for Scholars, February 2008, pg. 2. https://www.wilsoncenter.org/sites/default/files/Nontariff%20Barriers_1i2v8.pdf.

12. *Ibid.*, 6.

13. Jean-Marc Fournier, “The negative effect of regulatory divergence on foreign direct investment,” *OECD Economics Department Working Paper* No. 1268, November 19, 2015, 6. <http://www.oecd-ilibrary.org/docserver/download/5jrgvgv0dw27en.pdf?expires=1493735665&id=id&accname=quest&checksum=213280F1FA45B4718FF6371A2595908F>.

14. Michael Hart, “What about the border?,” *One Issue, Two Voices* Issue #8, Woodrow Wilson International Center for Scholars, February 2008. https://www.wilsoncenter.org/sites/default/files/Nontariff%20Barriers_1i2v8.pdf.

Regulatory divergence can manifest itself in a variety of ways, ranging from major policy deviations to smaller differences concerning approvals and certifications. For instance, the Canadian-American Business Council estimates that only 10 percent of standards between the United States and Canada are harmonized.¹⁵ Moreover, some of the divergent standards are downright silly. For example, Canadian rules only permit 19 ounce cans of processed fruit and vegetable products (like soup) to be sold in stores, whereas the U.S. standard is a 16 ounce can.¹⁶ Such a rule serves no demonstrable purpose and ultimately is only costly and counterproductive.

Another example of counterproductive regulatory divergence can be found in the trucking industry, which retains many rules that are no longer consistent with North America’s integrated logistics system. For instance, current rules prohibit foreign drivers from repositioning empty trailers within the United States. In practice, this means that once a Canadian driver unloads his trailer in the United States, a domestic driver is required to use his own tractor to move the now-empty Canadian trailer to another location across the border, where the Canadian driver with his own tractor can resume possession of it. These unnecessary and impractical restrictions merely result in more trucks on the road and more fuel consumption than would otherwise be the case.¹⁷ Differing models for fuel-savings measures are also a problem.¹⁸ A 2012 study by Canada’s statistical agency estimates that regulatory divergence and other related border issues act as the equivalent of a 21 percent tariff on products transported by trucks between the United States and Canada.¹⁹ Addressing issues such as these would enable the industry to be more efficient and cost-effective, as well as to reduce its environmental impact.

Marine transportation is another area where greater regulatory harmonization would produce greater efficiencies with minimal or no effects on the environment or national security. For example, reciprocity for the Seafarer’s Identification Document, and alignment of marine security regulations and reporting requirements have been identified as areas for easy

15. Canadian-American Business Council, “Priorities Overview,” n.d. <http://cabcc.org/policy-priorities.html>.

16. Richard Blackwell, “Border deal aims to reduce the ‘tyranny of small differences’ in regulation,” *Globe and Mail*, Dec. 8, 2011. <http://www.theglobeandmail.com/report-on-business/economy/border-deal-aims-to-reduce-tyranny-of-small-differences-in-regulation/article4085386/>.

17. Ingrid Paneuf, “Trucking Industry Eyes Cabotage Changes to Curb Carbon Emissions,” *trucknews.com*, March 1, 2010. <http://www.trucknews.com/features/trucking-industry-eyes-cabotage-changes-to-curb-carbon-emissions/>.

18. See, e.g., John T. Jones, *The Economic Impact of Transborder Trucking Regulations* (New York and London: Routledge, 2013); and Stephen Blank and Barry Prentice, “Widening competition in North American freight transport: The impact of Cabotage,” MLI Commentary, The Macdonald-Laurier Institute, April 2012.

19. William P. Anderson and W. Mark Brown, “Trucking across the border: The relative cost of cross-border and domestic trucking, 2004 to 2009,” *Economic Analysis Research Paper Series*, Statistics Canada, November 2012. <http://www.statcan.gc.ca/pub/11f0027m/11f0027m2012081-eng.pdf>.

improvement.²⁰ Additionally, although greater cooperation on ballast water regulations and emission standards for those operating on the Great Lakes may be more complicated to achieve, it would create a significant boost in marine shipping between the two countries.²¹

Regulatory divergences in agriculture are also a barrier to greater economic integration and opportunity. Divergent processes and varying scientific inputs used by both sides can lead to lengthy and unnecessary delays in regulatory approvals for new agricultural products.²² A 2011 study for the Macdonald-Laurier Institute found that regulatory decisions in Canada can “take three to five times as long as in competing countries ... [with] no discernible benefits in safety.”²³ This is because there is a lack of “mutual recognition” with respect to scientific data or other inputs upon which the already-considerable approval process relies. This duplication and overlap effectively acts as an additional nontrade barrier that can impose significant costs on farmers and agricultural companies in both countries.

Moreover, as European University Institute economist Bernard Hoekman shows in a recent study on international regulatory cooperation, there are always new and evolving regulatory barriers that result from a range of different issues.²⁴ Climate-change abatement is just one recent example where the United States and Canada seem to be moving in different directions with significant possible economic and environmental implications. Sometimes these regulatory differences can be attributed to unique domestic circumstances or conditions, but more often than not, they are attributable to complacency, inertia and public choice calculations. Those “legitimate” divergences that can be attributed to unique domestic conditions should be minimized based on a pragmatic assessment of efficacy. Those caused by complacency and political self-interest should be eliminated.

20. Seafarer Identity Documents are issued by individual countries to citizens who will be working on a vessel. There have been calls for a universal seafarer identification system since the 1950s, but the process for reciprocal recognition has been slow moving.

21. Cole Atlin, “Aquatic invasive alien species and the evolution of Canadian and US ballast water regulations in the Great Lakes – towing in tandem or muddying the water,” *Indiana International and Comparative Law Review* 24:1, 2014. <https://mckinneylaw.iu.edu/iiclr/pdf/vol24p65.pdf>. See also, Mary R. Brooks, “NAFTA and short sea shipping containers,” *AIMS Commentary*, Atlantic Institute for Market Studies, November 2005. <http://www.aims.ca/site/media/aims/AtlanticaBrooks.pdf>.

22. Savannah Gleim and Stuart Smyth, “Is Canada’s agricultural regulatory system competitive,” Policy Options, Institute for Research on Public Policy, May 3, 2017. <http://policypoptions.irpp.org/magazines/may-2017/is-canadas-agricultural-regulatory-system-competitive/>.

23. Larry Martin and Kate Stiefelmeyer, “Canadian Agriculture and Food: A Growing Hunger for Change,” The Macdonald-Laurier Institute, October 2011. <http://www.macdonaldlaurier.ca/files/pdf/Canadian-Agriculture-and-Food-A-Growing-Hunger-for-Change-October-2011.pdf>.

24. Bernard Hoekman, “International regulatory cooperation in a supply chain world,” *Redesigning Canadian Trade Policies for New Global Realities* Vol. VI, Institute for Research on Public Policy, August 2015. <http://irpp.org/wp-content/uploads/2015/08/AOTS6-hoekman.pdf>.

One of the contributing factors that impedes this type of assessment of regulatory differences is a concern that regulatory convergence can undermine health and safety and consumer protection. This sentiment is particularly strong in Canada, where union leaders and left-wing scholars warn that regulatory harmonization will result in the adoption of U.S. standards and ultimately a “race to the bottom.”²⁵ The political resonance of this viewpoint has at times been significant in Canada and contributed to the extent of regulatory divergence.

But these concerns are unsupported by the evidence. Differences in the regulatory approval processes for new agricultural products, for instance, rarely, if ever, lead to different regulatory decisions overall. This suggests that there is considerable room to remove regulatory duplication and divergence without detriment to actual policy objectives on either side of the border.

In fact, a 2012 OECD report on U.S.-Canada regulatory convergence efforts notes that “there is evidence to suggest that RCC [Regulatory Cooperation Council] efforts can have the opposite effect.”²⁶ Bilateral cooperation such as joint review processes, for instance, can actually increase the precision and efficiency of regulatory decisions related to scientific and other factors.

There is a good case therefore to pursue regulatory harmonization and in turn strengthen the U.S.-Canada economic relationship and the jobs it sustains in both countries with no downside with regard to health and safety or consumer protection. This seems like a proverbial “win-win” that is entirely consistent with the Trump administration’s and the Republican-controlled Congress’ focus on bolstering economic growth and job creation.

THE REGULATORY COOPERATION COUNCIL

With respect to regulatory harmonization, a degree of political buy-in already exists in the United States and Canada. A February 2017 joint statement between President Donald Trump and Prime Minister Justin Trudeau emphasized the need for greater progress in this area:

The United States and Canada also recognize the importance of cooperation to promote economic growth, provide benefits to our consumers and businesses, and advance free and fair trade. We will continue our dialogue on regulatory issues and pursue

25. Bruce Campbell, “Trump’s assault on regulations and the NAFTA renegotiation,” *Behind the Numbers*, Canadian Centre for Policy Alternatives, Feb. 9, 2017. <http://behindthenumbers.ca/2017/02/09/trumps-assault-regulations-nafta-renegotiation/>.

26. OECD, Case Study on the Canada-US Regulatory Cooperation Council, OECD, Oct. 15, 2012. [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=G OV/RPC\(2012\)8/ANN1&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=G OV/RPC(2012)8/ANN1&docLanguage=En).

shared regulatory outcomes that are business-friendly, reduce costs, and increase economic efficiency without compromising health, safety and environmental standards.²⁷

This is a positive sign that regulatory harmonization may be a common, if not heralded, policy agenda that can transcend other bilateral issues, such as the renegotiation of the North American Free Trade Agreement (NAFTA).²⁸ Thus, it appears clear that there is potential to make quiet, but real progress on the “unseen” issue of regulatory divergence while politicians and officials dispute the more public bilateral irritants²⁹ that continue to inspire disagreement.

It also builds on a pre-existing foundation set by Trump and Trudeau’s predecessors. In February 2011, Obama and Harper issued a joint declaration on a “shared vision for perimeter security and economic competitiveness.”³⁰ Subsequently, the action plan, known as “Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness,” was to deliver on different aspects of the joint declaration.

One of the key areas was regulatory cooperation and in particular, the creation of a Regulatory Cooperation Council (RCC) to address issues related to enhancing regulatory convergence. The RCC remains in place and continues to be the primary institutional initiative to promote regulatory harmonization between the United States and Canada.

The RCC was established in December 2011 with a joint “action plan” comprised of 29 initiatives in four key sectors: 1) agriculture and food; 2) transportation; 3) health and personal care products and workplace chemicals; and 4) environment.³¹ These “work initiatives” were developed in cooperation with industry representatives and were supposed to lead to greater cooperation and/or convergence. Responsibility was given to central agencies – the Office of Information and Regulatory Affairs in the United States and the Privy Council Office in Canada – to coordinate activities on behalf

of both governments.³² Their broad, three-point objectives were explicitly set out as follows:

1. Increased regulatory alignment and transparency at the earliest possible stage of the rule-making process; participation by relevant stakeholders and the public in general; and “early warning” of upcoming rules that are significant and of mutual interest;
2. Greater alignment in regulations and recognition of regulatory practices. There are opportunities to align regulations, the process of developing new regulations and, most importantly, the activities associated with the application of regulations (testing procedures, inspection and certification activities, etc.). Additionally, efforts should be made to accept and recognize the regulatory work done in each other’s jurisdiction;
3. Smarter, less burdensome regulations in specific sectors. Sectors selected under the RCC Action Plan are characterized by high levels of integration; that have well developed pre-existing regulatory frameworks; that offer significant, emerging growth potential; and where regulatory cooperation will support export growth in North America.³³

While there have been some accomplishments in the 29 key areas targeted in the initial work plans, it would be an overstatement to claim that these three objectives have experienced major progress. On the contrary, progress has been slow to achieve for reasons ranging from a lack of high-level political attention and commitment in Washington to insufficient budget resources to bureaucratic resistance to change.³⁴ For these reasons, in 2016, the Canadian Chamber of Commerce concluded that the RCC process, “largely failed to meet expectations.”³⁵

27. Office of the Prime Minister of Canada, “Joint Statement from President Donald J. Trump and Prime Minister Justin Trudeau,” Feb. 13, 2017. <http://pm.gc.ca/eng/news/2017/02/13/joint-statement-president-donald-j-trump-and-prime-minister-justin-trudeau>.

28. Maryscott Greenwood, “How we can start harmonizing US-Canada regulations,” *Policy Options*, Institute for Research on Public Policy, May 4, 2017. <http://policyoptions.irpp.org/magazines/may-2017/how-we-can-start-harmonizing-us-canada-regulations/>.

29. Like, for example, softwood lumber and dairy products.

30. Office of the Press Secretary, “Declaration by President Obama and Prime Minister Harper of Canada – Beyond the Border,” The White House, Feb. 4, 2011. <https://obamawhitehouse.archives.gov/the-press-office/2011/02/04/declaration-president-obama-and-prime-minister-harper-canada-beyond-bord>.

31. See Appendix 1 attached.

32. In Canada, responsibility has now been shifted from the Privy Council Office (which reports to the prime minister) to the Treasury Board Secretariat (which reports to the Treasury Board president, a role similar to the Office of Management and Budget director in the United States). Some business organizations have expressed concern that this shift represents a downgrading of the initiative’s importance, though the Canadian government denies this. See, B.J. Siekierski, “Liberals shift responsibility for Regulatory Cooperation Council from PCO to Treasury Board,” *IPolitics*, April 10, 2016. <http://ipolitics.ca/2016/04/10/liberals-shift-responsibility-for-regulatory-cooperation-council-from-pco-to-treasury-board/>.

33. Public Governance and Territorial Development Directorate, Regulatory Policy Committee, “Case Study on the Canada-US Regulatory Cooperation Council,” Organisation for Economic Cooperation and Development, Oct. 15, 2012. [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/RPC\(2012\)8/ANN1&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/RPC(2012)8/ANN1&docLanguage=En).

34. Christopher Sands, “Restoring respect for the law in U.S.-Canada commerce,” *Canada-United States Law Journal* 37:2, January, 2012, 336. <http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1066&context=cuslj>.

35. “Canada’s Next Top Trade Barrier,” 19.

Accordingly, in an effort to reinvigorate it, an updated plan was released by the two countries in 2014.³⁶ It is difficult to determine thus far whether this has been successful because changes in personnel and the slow ramp-up of the new U.S. administration have contributed to delays and uncertainty about the prospect of renewed interest and potential. There is reason to be somewhat pessimistic, especially since many of the structural issues – including political disinterest in Washington – remain unchanged.

One of the principal challenges is that the focus has shifted from the central agencies that initially led the exercise to the front-line departments and agencies responsible for the targeted regulations. These organizations may have the technical expertise but they are also the ones with a vested interest in the status quo. Central leadership is necessary to disrupt logjams and maintain momentum. The risk otherwise is that the “process becomes a substitute for policy,” as one Canadian trade expert has cautioned.³⁷

Another problem is a lack of high-level political attention and commitment in Washington that has caused the RCC to focus mostly on low-hanging fruit rather than a fundamental institutionalization of regulatory convergence. This is not to say that fixing immediate problems should be neglected, but it is to say that this is an insufficient vision if the goal is to achieve greater regulatory harmonization. As U.S.-Canada policy expert Chris Sands opines: “modest ambitions lead to modest expectations and, generally, to modest results.”³⁸

The final challenge is that the RCC’s limitation of its efforts to only three prescribed areas also limits its potential to address thousands of regulations that may fall outside these areas but that affect companies on both sides of the border.³⁹ This piecemeal model has difficulty keeping up with the pace of regulations and often new regulatory differences emerge just as old ones are eliminated. It is no surprise that many businesses and other affected organizations frequently question overall progress.

TOWARD GREATER REGULATORY HARMONY

Accordingly, the RCC should be considered an incremental step but not the totality of a regulatory harmonization agenda. Evidence provided by the first six years of its opera-

tion suggests that in addition to the RCC’s current activities, more fundamental reform is required that entrenches convergence in policy development, rather than subjects it to bilateral negotiation between regulatory officials.

In order to augment the RCC’s work, the U.S. and Canadian governments must consider more structural measures related to bilateral regulation-making. While the RCC process should continue to resolve existing specific issues on a case-by-case (or “demand-driven”) basis and should serve as a forum for policy collaboration and joint research and analysis,⁴⁰ more meaningful progress could be achieved through the adoption of the following specific institutional changes:⁴¹

Fully adopt mutual recognition

To enshrine the principle of “mutual recognition” would expedite the process of regulatory convergence by no longer making regulatory differences subject to bilateral negotiation. As an example, the European Union model of mutual recognition ensures market access for products that are not necessarily subject to EU harmonization. It guarantees that any product lawfully sold in one EU country can be sold in another even if the product does not fully comply with the technical rules of the other country.⁴² In essence, it acts as a blanket agreement that market access trumps regulatory divergence.

Different forms of mutual recognition agreements between the United States and Canada already exist in areas such as occupational licensing between bilateral professional bodies⁴³ and a government-to-government agreement on animal-disease zoning.⁴⁴ But there is no broad framework for mutual recognition since NAFTA is largely silent on regulatory cooperation.⁴⁵ In light of this, fully adopting a broad, horizontal framework for mutual recognition would go a

40. National Association of Manufacturers, “Letter to Howard A. Shelanski, Administrator, Office of Information and Regulatory Affairs,” Oct. 11, 2013. http://www.nam.org/Issues/Trade/NAM-Comments-Regarding-the-U_S_-Canada-Regulatory-Cooperation-Council/.

41. These options are not mutually exclusive and could be adopted either in-part or in conjunction with one another as part of a comprehensive package.

42. European Commission, “Regulation Number 764/2008,” European Parliament and of the Council, July 9, 2008. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008R0764>.

43. See, e.g., “Mutual Recognition Agreement between the National Council of Architectural Registration Boards and the Canadian Architectural Licensing Authorities,” June 17, 2013. <http://aibc.ca/wp-content/uploads/files/2016/02/Inter-Recognition-Agreement-Can-US-Jan-2014.pdf>.

44. Government of Canada, “Canada and the United States Sign Agreement on Animal Disease Zoning,” Canadian Food Inspection Agency, January 16, 2013. <http://www.inspection.gc.ca/about-the-cfia/newsroom/news-releases/2013-01-16/eng/1358284644570/1358284687351>.

45. A. Correia de Brito, C. Kauffmann, et al., “The contribution of mutual recognition to international regulatory co-operation,” OECD Regulatory Policy Working Paper No. 2, OECD Publishing, 2016, 74. http://www.oecd.org/gov/regulatory-policy/WP2_Contribution-of-mutual-recognition-to-IRC.pdf.

36. United States-Canada Regulatory Cooperation Council, “Joint Forward Plan,” The White House, August 2014. <https://obamawhitehouse.archives.gov/sites/default/files/omb/oira/irc/us-canada-rcc-joint-forward-plan.pdf>.

37. Colin Robertson, “Unfinished business: Taking stock of Beyond the Borders and regulatory cooperation,” *Inside Policy*, The Macdonald-Laurier Institute, February 2013. <http://www.macdonaldlaurier.ca/files/pdf/MLIInsidePolicy/FebMar2013/Robertson.pdf>.

38. “Restoring respect,” 338.

39. Canadian Manufacturing Coalition, “Letter to the Assistant Secretary, Regulatory Cooperation Council Secretariat RE: Regulatory Cooperation Council,” Oct. 11, 2013. <http://www.manufacturingourfuture.ca/download.php?id=152>.

long way to facilitate greater economic integration and to achieve regulatory convergence.⁴⁶ It would have the added benefit of overcoming regulatory divergence at the subnational level.

In this regard, the EU model of mutual recognition is worth exploring, as is the Trans-Tasman Mutual Recognition Agreement between Australia and New Zealand, which forms the basis of a regime of “functional equivalence” whereby the two jurisdictions recognize one another’s regulations as equivalent.⁴⁷ Irrespective of which model is selected, the goal should be to achieve broad regulatory convergence across the widest number of possible areas.

Apply a convergence test

Another idea is a basic commitment on the part of both governments that all new or amended federal regulations must meet a convergence test. Such a requirement would place the onus on national regulators to defend any divergence from a continental standard.

Although it would not establish regulatory convergence as the default—and thus differs from full harmonization, mutual recognition or functional equivalence—it would begin to shift policy development and institutional culture in that direction. As Canadian trade expert Michael Hart observes: “positive experience with this approach would build a basis for tackling the broader agenda.”⁴⁸

The present regulatory process in both countries requires that policymakers consider a number of different factors and inputs. The Canadian government’s Regulatory Impact Analysis Statement, for instance, sets out cost/benefit analysis including the estimated impact on businesses and health and safety.⁴⁹ The template presently requires analysis of regulatory convergence within the United States and the adoption of a “Canadian model,” where applicable. But the present guidelines are focused more on complying with international laws and treaties than with limiting regulatory burdens and/or enabling economic integration. This should not be a defensive consideration about legal liability, but rather an economic one about reducing red tape and the associated costs imposed on businesses and consumers.

46. Christopher Sands, “The case for a ‘mutual recognition’ deal with the US,” Policy Options, Institute for Research on Public Policy, May 12, 2017. <http://policyoptions.irpp.org/magazines/may-2017/the-case-for-a-mutual-recognition-deal-with-the-us/>.

47. See, “Arrangement between the Australian Parties and New Zealand Relating to Trans-Tasman Mutual Recognition,” June 1996. <http://www.mbie.govt.nz/info-services/business/trade-tariffs/documents-image-library/Trans%20Tasman%20Mutual%20Recognition%20Arrangement%20-PDF%20173%20KB.pdf>.

48. “What about the border,” 16.

49. Government of Canada, Regulatory Impact Analysis Statement (RIAS): Medium- and High-Impact Template,” July 4, 2014. <https://www.canada.ca/en/treasury-board-secretariat/services/federal-regulatory-management/guidelines-tools/regulatory-impact-analysis-statement-medium-high-impact-template.html>.

Both the United States and Canada should therefore review their current regulatory processes to ensure that they involve a basic convergence test with a focus on promoting regulatory harmonization for economic rather than legal or treaty reasons.

Establish joint review processes

A third option would be to follow the Australia and New Zealand model of joint review bodies in key areas. For example, Food Standards Australia New Zealand (formerly the Australia New Zealand Food Authority) shares responsibility for setting common food standards in both countries. There have also been efforts to establish a similar joint body for therapeutic products, such as over-the-counter and pharmaceutical medicines.

There has been some similar progress in the United States and Canada. For example, a recent regulatory partnership between the Environmental Protection Agency and Canada’s Department of Transportation is a positive step.⁵⁰ This partnership allows the two agencies to work together on joint consultations, collaborative policy and regulatory development, and the review of existing processes and programs. The first fruits of this arrangement are expected to be common emissions standards for locomotives.⁵¹ There is also a broader partnership on climate change with some common governance and the potential for common policies.⁵² And, of course, there are several others related to food safety, agricultural production and consumer safety.⁵³

At a minimum, this demonstrates that there is opportunity to build on existing regulatory partnerships and create permanent shared-governance arrangements that acknowledge common science and other inputs in regulatory decision-making and approvals. Current pilot programs between the U.S. Food and Drug Administration and Canada’s Department of Health on the simultaneous review of veterinary drugs are an example of current institutional arrangement that can be built upon.

50. See, e.g., Government of Canada, “Regulatory Partnership Statement Under the U.S.-Canada Regulatory Cooperation Council Between Transport Canada and the United States Environmental Protection Agency,” Transport Canada, May 2, 2016. <https://www.tc.gc.ca/eng/acts-regulations/tc-usepa-858.html>.

51. Government of Canada, “Regulatory Area to be Addressed-Locomotive Emissions,” Transport Canada, November 22, 2016. <https://www.tc.gc.ca/eng/acts-regulations/tc-usepa-860.html>.

52. Government of Canada, “Regulatory Partnership Statement between the United States Environmental Protection Agency and Environment and Climate Change Canada,” Environment and Climate Change Canada, July 18, 2016. <https://www.ec.gc.ca/international/default.asp?lang=En&n=FD4CFB5C-1>.

53. The potential for binational regulatory reviews could be significant particularly with respect to product approvals in agriculture, pharmaceuticals, and other consumer products. Not only would it expedite the review process, it could also leverage expertise and resources on both sides.

Interaction with regulatory budgeting

Finally, both the United States and Canada have adopted regulatory budgeting at the federal level.⁵⁴ The basic premise is that departments and agencies must eliminate at least one regulation for every new regulation that is promulgated. This presents an opportunity to think about how regulatory budgeting can contribute to greater regulatory convergence.

One option is to incorporate regulatory convergence into the incentives inherent in the regulatory budgeting model. For instance, departments and agencies could receive “credit” for enacting reforms that lead to regulatory convergence even if such changes do not produce significant regulatory “savings.” Departments and agencies could effectively build up this credit to enable future regulations.

Another option would be to make new regulations that diverge from the continental standard more “costly” from a regulatory budgeting perspective and thus require greater “savings” from elsewhere. This model would basically capture the “inefficiency tax” reflected in regulatory differences and ensure that regulatory departments and agencies are held accountable for them. Effectively, it would increase the consequences provided in the “convergence test” recommendation above.

This is critical. There have been some concerns raised that regulatory budgeting can actually hinder regulatory changes that produce greater harmonization, but it does not have to be this way.⁵⁵ Regulatory budgeting can be leveraged to incentivize a focus on regulatory harmonization. It is a policy-based scenario that would be a productive augmentation to the existing regulatory budgeting regimes in the United States and Canada, and thus both governments would benefit from short-term efforts to pursue it.

CONCLUSION

The Trump administration has wisely put regulatory reform near the top of its agenda and early signs are promising. It is fair to say that efforts to repeal regulations and enact regulatory budgeting are among the president’s most significant accomplishments to-date. But, there is much more to be done to reduce the regulatory burden that has built up in the United States.

One area with potential is regulatory cooperation with Canada. The bilateral economic relationship is among the largest

and most successful in the world and yet superfluous regulatory differences limit economic integration and impose costs on businesses, investors and workers on both sides of the border. This regulatory divergence basically functions like an “inefficiency tax” with costly “unseen” implications for two-way trade and investment.

Achieving greater regulatory harmony would thus not only advance the president’s regulatory reform agenda, it could also infuse the U.S. economy and could be pursued separately from other, more controversial bilateral issues like NAFTA renegotiation. And although there have been past efforts in this regard in the form of the RCC, the time is ripe for a bolder, more comprehensive vision. It is now up to policymakers to seize the opportunity to create one.

ABOUT THE AUTHOR

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APPENDIX I: 2011 RCC ACTION PLAN 29 ‘WORK INITIATIVES’

Agriculture And Food

- Equivalency of meat safety systems
- Meat and poultry product export certification
- Zoning for farm animal diseases
- Perimeter approach to plant protection
- Meat cut nomenclature
- Financial protection to produce sellers
- Common approach to food safety
- Mutual reliance on food safety testing
- Veterinary drugs
- Product approvals and maximum residue limits/tolerances

Transportation

- Existing motor vehicle safety standards
- New motor vehicle safety standards
- Rail safety standards
- Means of dangerous goods containment
- Locomotive emissions
- Unmanned aircraft systems
- Marine transportation security regulations
- Regulatory oversight regime on the Great Lakes and Seaway
- Life saving appliances
- Construction standards for small craft

54. Alexander Panetta, “As Trump orders bureaucrats to slash regulations, Canada shares lessons learned,” *The Canadian Press*, Feb. 23, 2017. <http://www.news1130.com/2017/02/23/as-trump-orders-bureaucrats-to-slash-regulations-canada-shares-lessons-learned/>.

55. Guillaum (Will) Dubreuil, “Regulatory Barriers: Threat to Trade,” *The Canadian Chamber of Commerce*, April 12, 2016. <http://www.chamber.ca/media/blog/160413-regulatory-barriers-threat-to-trade/>.

Personal Care Products and Pharmaceuticals

- Electronic submission gateway
- OTC therapeutic product approval and licensing
- Good manufacturing practices

Environment

- Emission standards for light-duty vehicles
- Air pollutants
- GHS of classification and labelling of chemicals (workplace hazards)

Cross-sectoral

- Nanotechnology
- Small business lens