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North American Regulatory Co-operation: A Results Agenda

Symposium Report

December 8, 2005

PRI Project
North American Linkages

Prepared by
James K. Martin
AMC Consulting Group Inc.

Canada

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About this Report

The PRI contributes to the Government of Canada's medium-term policy planning by conducting cross-cutting research projects, and by harnessing knowledge and expertise from within the federal government and from universities and research organizations. However, conclusions and proposals contained in PRI reports do not necessarily represent the views of the Government of Canada or participating departments and agencies.

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Glossary

AIT	Agreement on Internal Trade
BSE	Bovine Spongiform Encephalopathy
CEC	Commission for Environmental Co-operation
CER	Closer Economics Relations Trade Agreement
EACSR	External Advisory Committee on Smart Regulation
EC	European Commission
EU	European Union
GD-R	Government Directive on Regulating
IJC	International Joint Commission
MRA	Mutual Recognition Agreement
NAC	Canada's National Advisory Committee for the CEC
NAAEC	North American Agreement on Environmental Co-operation
NAALC	North American Agreement on Labour Co-operation
NAFTA	New Zealand Australia Free Trade Agreement or North American Free Trade Agreement
OECD	Organization for Economic Co-operation and Development
PRI	Policy Research Initiative
SPP	Security and Prosperity Partnership
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TTMRA	Trans-Tasman Mutual Recognition Agreement
WTO	World Trade Organization

1. Introduction

The Policy Research Initiative (PRI) has been examining the issue of international and Canada-US regulatory co-operation for more than two years within its North American Linkages project. It is a complex area, with a wide range of competing views and opinions informing the debate.

In October 2004, the PRI held the Symposium on Canada-US Regulatory Co-operation[1] that led to a number of key observations and conclusions (PRI, 2004: 14).

- There is a strong case for increasing Canada-US or North American regulatory co-operation.
- The political will to move forward exists, but a clear, practical plan is required.
- The plan should focus on selected priority sectors, taking account of both costs and benefits, as well as current best practices.
- The plan must be supported by sound internal organizational and decision-making structures, and provide a role for parliamentarians.
- A final critical piece is a political strategy to frame the initiative, and make it saleable to Canadians and other North Americans.

The December 8, 2005 Symposium used these conclusions as its point of departure. It provided a platform to hear from international experts on the key issues, and to further inform the discussion of regulatory co-operation with practical lessons from experiences around the world. The Symposium's goal was to identify those lessons that would help achieve concrete results for North America.

The December Symposium was divided into four panels focused on lessons from the European Union, from Australia-New Zealand co-operation, institutional and governance aspects, and achieving results. (See Appendix A for the agenda.) Panellists included academics and researchers who had produced commissioned papers,[2] as well as other academics and government practitioners.

This report does not follow the day's agenda per se, but rather starts by summarizing the information presented on where Canada stands now with respect to regulatory co-operation with our North American Free Trade Agreement (NAFTA) partners. This is followed by an overview of what can be learned about successes around the world. Implications of these lessons for Canada-US-Mexico regulatory co-operation are then identified and, finally, the author presents conclusions regarding next steps.

More research into ways and means for achieving regulatory co-operation is always desirable. But, arguably, enough is known to create the needed formal and informal organizational structures and processes, to ensure adequate action plans over the long term, and to start effecting the improvements to ensure Canadians benefit from more liberalized trade and the better regulatory protection that can come with greater regulatory co-operation.

2. Where Canada Stands Now

For over a decade, it has been formal Government of Canada policy that "intergovernmental agreements are respected" and "full advantage is taken of opportunities for coordination with other governments and agencies." Appendix C to this report contains the full text of the policy requirements for all Canadian federal government departments and agencies that have been in place since 1992.[3]

As part of the Smart Regulation initiative, a government directive on regulating (GD-R) is being developed that will establish the Government of Canada's new policy requirements for departments and agencies when they regulate, including those for international regulatory co-operation. The public consultation draft of the GD-R contains the following commitment regarding international regulatory co-operation.

International regulatory co-operation is an integral component of an effective and efficient regulatory system. Co-operation can help countries achieve high standards of environmental, health and citizen protection, and build dynamic, growing economies. Co-operation also allows Canada to promote its best regulatory practices internationally and leverage the best knowledge worldwide. Departments and agencies are responsible for considering international cooperation at every stage in the management of regulation.

To do so, departments and agencies are expected to take advantage of opportunities for co-operation, either bilaterally or through multilateral forums, by:

- reviewing international best practices, sharing knowledge, adopting or contributing to the development of international standards and conformity assessment procedures, and developing and pursuing compatible approaches with major international partners;

- limiting the number of specific Canadian regulatory requirements or approaches to instances where they are merited by specific Canadian circumstances and when they result over time in the greatest overall benefit to Canadians; and

- identifying the rationale for their approach, particularly when specific Canadian requirements are proposed (Canada, 2005a: 8).

A framework on international regulatory co-operation is also being developed by the Privy Council Office and International Trade Canada. The framework will provide guidance to federal departments and agencies for implementing the regulatory co-operation requirements of the GD-R, identifying appropriate partners for co-operation, respecting international obligations, and determining the appropriate types of international engagement (Canada, 2005b: 19).

Several speakers at the December 8 Symposium commented that co-operation is not a new phenomenon, and spoke to the wide range of existing initiatives for regulatory co-operation. Rick Findlay, for instance, spoke of the hundred years of history that Canada and the United States have of collaboration through the International Joint Commission (IJC), the organization Canada and the United States created to ensure effective management of boundary waters. Findlay identified some shortcomings with respect to the current situation – the need for a new vision to address future issues, for instance – but overall he concluded that the IJC had a good track record of managing the complex, ever-evolving issues requiring co-operation among national, regional (state and provinces), and local governments.

John Kirton, in his remarks, noted the success the Commission for Environmental Co-operation (CEC) has had since it was created to manage the North American Agreement on Environmental Co-operation (NAAEC), which came into effect on January 1, 1994 along with the North American Agreement on Labour Co-operation (NAALC) and NAFTA. The Kirton and Richardson paper noted that, as with the IJC, the CEC has been able to facilitate growing co-operation among multiple levels of government, despite substantive differences in philosophy and approach. By focusing on the environmental facts, the CEC has been able to identify issues of common interest and get governments to work together for the common good. As a newer institution than the IJC and with a wider mandate, the CEC has more easily built the transparent processes and mechanisms to engage civil society and interested stakeholders that characterize modern regulatory systems. As well, by taking a "soft-law" approach[4] the CEC has arguably made quicker progress than if it had tried to use the legal powers at its disposal. Kirton concluded that the NAFTA partners should build on the existing CEC mechanisms to further environmental regulatory co-operation.

Bruce Doern spoke to many examples of Canadian international regulatory co-operation, including several instances where Canadian and American regulators had developed a good rapport. He cited the Pest Management Regulatory Agency, for instance, as a case where agency leadership in both Canada and the United States had plainly understood the benefits of co-operation and driven close collaboration with their counterparts. Similarly, the New Substances Branch in Environment Canada has had to rely on international co-operation through the Organization for Economic Co-operation and Development (OECD), but especially US counterparts in the Environmental Protection Agency (Doern, 2005: 28), to ensure safety of chemical entities. Doern identified several other areas of practical co-operation between Canadian and American agencies to their mutual

benefit. For instance, both the Canadian Food Inspection Agency and Agriculture and Agri-Food Canada work closely with American colleagues to address border issues (pursuant to the 2002 Canada-US Smart Border Declaration) and, more generally, to promote better trade practices given the highly interdependent and integrated nature of the Canada-US agriculture and food markets. The Competition Bureau has extensive day-to-day contact with American counterparts to minimize the impact of differences in rules and to work toward a "soft convergence" of approaches to competition regulation.[5]

Nevertheless, no speaker thought Canada was as well placed to reap the benefits of regulatory co-operation as it could or should be. Despite believing that the IJC and the CEC were good platforms on which to ground future co-operation in the environmental area, both Kirton and Findlay noted there were new substantive challenges that needed to be addressed; new vision was required to address new challenges. Kirton especially noted that proactive discussion with other co-operation mechanisms was needed (improved dialogue at both the official and political levels regarding the environment and the energy sector, or environment and trade). The latter was specifically highlighted as needed to ensure opportunities for additional co-operation are opened up and to ensure consistent policy directions.

Joelle Schmitz argued that Canada has a rich opportunity to make progress at this time, but appears to suffer from complacency. She had interviewed 70 players in regulatory co-operation, and many of her federal government interlocutors had expressed the view that regulatory co-operation with the United States had gone about as far as it could. Schmitz characterized Canada's progress as having "reached a plateau. Initiatives are plentiful, achievements marginal, and gains ad hoc and inconsistent."[6]

Schmitz also raised the link between freer internal and external trade. She noted that both would require greater regulatory co-operation and argued that mutual recognition agreements (MRAs) would be the easiest and perhaps only way to achieve this. Canada's Agreement on Internal Trade (AIT) may have mutual recognition as a vision, but in Schmitz's view, the AIT is without effective mechanisms, and so mutual recognition remains spectral, not a concrete reality.

Schmitz further argued that having a single internal market would provide a strong base from which Canada could then pursue greater international co-operation and collaboration. Moreover, in her view, failure to achieve adequate internal market liberalization while expanding regulatory co-operation with NAFTA partners would increase the imbalance between the north-south and east-west flow of goods and services; this could create unnecessary tensions within Canada.

Armand de Mestral expressed the view that NAFTA was not the "living" agreement originally envisioned. He noted that the technical barriers to trade (TBT) provisions and the sanitary and phytosanitary (SPS) provisions in both NAFTA and the Uruguay Round agreement of the World Trade Organization

(WTO) had not had as large an impact as desired. He noted in particular that in NAFTA, both Section 7 on agriculture and Section 9 on TBTs had envisioned an elaborate array of committees to implement the existing agreement and make further progress in improving the lives of Canadians, Americans and Mexicans. De Mestral argued that the signatories had not used these vehicles to ensure currency in NAFTA, and that a reasonable early step would be to do so.

In short, the speakers elaborated on the message of Jean-Pierre Voyer, the Executive Director of the PRI, who noted that research strongly suggested that NAFTA has generated substantial economic benefits for Canada. However, he also remarked that there was evidence that differing regulatory approaches in Canada and the United States sometimes limited Canadians' ability to reap the full benefits of that agreement. Despite years of effort, overall progress on North American regulatory co-operation has been characterized by outside experts as "glacial," especially when compared to progress made in other jurisdictions, such as the European Union (EU) and Australia and New Zealand (Purchase, 2004).

This same conclusion was also reached earlier by the External Advisory Committee on Smart Regulation (EACSR). In its September 2004 report, the EACSR stated that much of Canada's regulatory co-operation to date has been "ad hoc and uncoordinated," exacerbated by the government's "inability to accurately assess whether its international initiatives have helped to meet Canadian policy objectives" (EACSR, 2004). It recommended that Canada "take a more deliberate and strategic approach to regulatory co-operation with our North American partners."[7]

In short, 17 years after the Canada-US Free Trade Agreement came into force, 11 years after NAFTA came into force, and more than a decade after the Government of Canada explicitly made the requirement for ministers, departments, and agencies to take "full advantage of opportunities," it was clear that more definitive action was required if Canadians were to achieve the full benefits of greater regulatory co-operation. The phrase "unfulfilled promise" might best capture the sentiments of many Symposium speakers regarding Canada's performance to date in regulatory co-operation.

Security and Prosperity Partnership

The participants and the research papers noted that the Security and Prosperity Partnership (SPP) Initiative[8] – launched by the heads of government for Canada, the United States, and Mexico on March 23, 2005 – held promise to energize regulatory co-operation. The text of the SPP agreement stated its general objectives:

- In a rapidly changing world, we must develop new avenues of cooperation that will make our open societies safer and more secure, our businesses more competitive, and our economies more resilient.

- Our Partnership will accomplish these objectives through a trilateral effort to increase the security, prosperity, and quality of life of our citizens. This work will be based on the principle that our security and prosperity are mutually dependent and complementary, and will reflect our shared belief in freedom, economic opportunity, and strong democratic values and institutions.

- Also, it will help consolidate our action into a North American framework to confront security and economic challenges, and promote the full potential of our people, addressing disparities and increasing opportunities for all.

- Our Partnership is committed to reach the highest results to advance the security and well-being of our people. The Partnership is trilateral in concept; while allowing any two countries to move forward on an issue, it will create a path for the third to join later.

With respect to the prosperity portion of the SPP, the agreement stated:

> We will work to enhance North American competitiveness and improve the quality of life of our people. Among other things, we will:
>
> - Improve productivity through regulatory cooperation to generate growth, while maintaining high standards for health and safety;
>
> - Promote sectoral collaboration in energy, transportation, financial services, technology, and other areas to facilitate business; and invest in our people;
>
> - Reduce the costs of trade through the efficient movement of goods and people; and
>
> - Enhance the stewardship of our environment, create a safer and more reliable food supply while facilitating agricultural trade, and protect our people from disease.

And further that:

> Because the Partnership will be an ongoing process of cooperation, new items will be added to the work agenda by mutual agreement as circumstances warrant.

The June Progress Report to Leaders (FAC, 2005) summarized the progress over the first 90 days. It noted that to enhance North American competitiveness and improve the quality of life of citizens, 9 working groups had been established covering the prosperity agenda, in addition to those supporting the security agenda. The nine prosperity working groups are:

- Manufactured Goods and Sectoral and Regional Competitiveness
- Energy
- Environment
- E-Commerce and Information Communications Technologies
- Movement of Goods
- Financial Services
- Food and Agriculture
- Transportation
- Health

These working groups build on earlier co-operative efforts such as the Canada-US "Smart Borders Initiative" and consulted closely with stakeholders to "develop detailed workplans on prosperity and quality of life, identifying concrete, forward-looking strategies and initiatives" (FAC, 2005: 14).

The report further noted a number of early improvements in the regulatory and trade areas, touching on e-commerce, liberalized rules of origin, information sharing regarding product safety, textile labelling (use of care symbols), temporary work entry, migratory species and biodiversity, a harmonized approach to bovine spongiform encephalopathy (BSE), aviation safety, airport capacity, harmonized air navigation systems, and better information to increase the cost effectiveness of border traffic flow analysis.

Of particular interest is the first cited working group. They are to develop a trilateral Regulatory Co-operation Framework by 2007. Regulatory co-operation is viewed as a key priority and the framework was given high profile in the Report to Leaders. Part of its goal will be to "strengthen co-operation among regulators and encourage the compatibility of regulations and the reduction of redundant testing and certification requirements, while maintaining high standards of health and safety" (FRAC, 2005: 15). It is expected that through this framework on-going mechanisms will be established for promoting beneficial regulation and regulatory practices among the NAFTA partners and their agencies. On-going priority setting and the sustainability of the SPP initiative are intended to be achieved through continued trilateral negotiations within the working groups and the periodic Reports to Leaders.

The research papers noted that the SPP might just represent the political push needed to kick-start co-operation; the working groups established may suffice to capture the benefits of enlivening the NAFTA Committees, as suggested by de Mestral.

In Schmitz's view, however, the managers of the tri-lateral SPP processes need to be conscious of a risk that faces their plans to improve regulatory co-operation.[9] Initiatives, once launched, could lead to some "low-hanging fruit" being gathered that then withers on the vine due to a lack of political will or to bureaucratic inertia (Schmitz, 2005: 9). A second major risk stems from the fact that international trade liberalization – once tariff and trade remedy issues are addressed – essentially becomes one of domestic regulatory reform and management. The challenge for the SPP therefore, is to develop mechanisms, through the Regulatory Co-operation Framework, to promote over the long term

consistent, rational, good rule-making and regulatory practices across the three NAFTA governments.[10]

Lessons from other jurisdictions and the progress they have made in regulatory co-operation may help ensure that the SPP initiative leads to a permanent regime of continuous improvement in the way the NAFTA partners regulate and co-operate.

3. The Secret to Others' Success

Canada's success in regulatory co-operation may be disappointing to date, but other jurisdictions have been quite successful. How did they achieve this and what can we learn from them?

The European Union

Brian Jenkinson, Deputy Head of Unit in the European Commission's (EC) Directorate General for Enterprise and Industry noted that within the EU significant progress had been made to create a single market especially over the past two decades. The relentless focus by the EC and member states on creating a single market post-1985 was an important ingredient in achieving it.

Success has meant a substantial reduction in costs to businesses, a widening of choice to consumers, and as good or better product safety for the public at large. Moving to qualified majority voting procedures in the EC helped, as did having a supra-national European court. (Schmitz, in her paper, pointed out the critical importance of the *Cassis de Dijon* case which kick-started the EU on the road to mutual recognition.)

The main techniques to ensure regulatory concordance among the states involve a mix of mutual recognition for most products and the harmonization of detailed rules across the EU in select areas (generally through the EC issuing rules that have direct effect and do not require national implementing legislation). The EC is excited about its new approach in which the EC issues rules that identify "essential requirements"[11] but leaves it to national governments to put in place more detailed/technical rules that reflect local preferences, thus bringing the concepts of subsidiarity and shared responsibility to a new level. Combined with mutual recognition, the EC believes that this ensures the benefits of a single market while providing considerable flexibility and adequate, if not better, consumer protection. The new approach can also be viewed as a technique for addressing lingering concerns regarding jurisdictional integration, and thus promoting legitimacy.

The EC is also now focusing on ways to improve the impact analysis of new regulation, simplifying existing rules, reducing administrative costs to all parties through smarter processes, and improving consultation standards. In other words, despite the EU's progress, it continuously seeks further improvements.

With respect to the EC working on regulatory co-operation with other states, Jenkinson noted that this was an expensive proposition and that there were often

minimal results just because of limited trade volumes. Nevertheless, they are engaged in co-operative exercises with major trading partners. These have been launched to reduce existing TBTs, prevent new ones from arising, encourage the greater use of international standards, and strive for mutual recognition of conformity assessment processes. International regulatory co-operation, therefore, had to be considered on a case by case basis and the potential benefits had to be weighed against the time and effort required.

Joelle Schmitz, Fulbright scholar at McGill University, in her paper and her remarks at the Symposium, stressed the remarkable success of the EU in regulatory co-operation. Europeans had clearly benefited from the single market and from the stable political environment created by this co-operation. In Schmitz's view, Canada appears locked into the mindset that characterized the EU during its so-called period of "Eurosclerosis" in the 1970s. But as she pointed out, the EU was able to break out of that phase.

Schmitz's main conclusions regarding success factors in the EU experience included the following.

- Periodic bouts of *political will*,[12] vision, and courage were required for the European project to be successful; despite important long-standing cultural, political, and legal differences among countries, this was achieved.

- A *history of significant successes* along the way to the single market (i.e., discernable economic and political pay-offs, such as in the coal and steel industry) led to a willingness and desire to go further.

- There was a willingness to make progress with some countries and let others fall to the wayside if they did not "opt in."

And more specifically:

- Schmitz identified *mutual recognition* as "the one initiative most responsible for continued [economic] integration." Mutual recognition was "key to the success of the European experiment."

- Related to mutual recognition, the "new approach" to *specifying essential requirements* is an important step forward; it is complementary to, supportive of, but dependent on mutual recognition.

- Mutual recognition-related decisions of the supra-national European Court brought about the *universal* versus ad hoc *nature of regulatory co-operation*.

Schmitz, in her remarks, noted that new research pointed to the importance of the desire for public sector organizations to seek autonomy, autonomy being more important than budgetary growth to many agencies. In her view, this was possibly the key impediment to progress in regulatory co-operation, which can certainly be seen as limiting the autonomy of regulatory agencies. Autonomy arguments

against co-operation can sometimes be disguised as sovereignty arguments. The EU has demonstrated that overcoming this impediment requires leaders with a clear focus on the public, not organizational interests.

Charan Devereaux, Senior Researcher at the Kennedy School of Government at Harvard University, spoke on the EU as well, but addressed an issue only lightly touched on by Jenkinson, namely external EU regulatory co-operation. Devereaux focused on the EU-US MRAs and their success.

The focus of this EU-US initiative was on conformity assessment procedures. In large part, this was driven by American concerns that the newer regulatory approaches in the EU in the use of standards and third party conformity assessment could create TBTs for US products. It was estimated that on $50 billion in traded products, about $1 billion could be saved through mutual recognition of conformity assessment procedures. Devereaux confirmed Schmitz's view regarding resistance to co-operation on the part of regulatory agencies; they were simply uninterested at the beginning.

Two factors in achieving progress stood out.

- A *positive role for American and European industry*, through the Trans-Atlantic Business Dialogue, pushed governments on both continents to make progress. Devereaux noted that, in a survey of American chief executive officers, 40 percent identified standards and regulatory differences as reducing trade and economic opportunities.

- *Unbundling* achieved progress differentially by sector, with the EU having a clear vested interest in progress in some areas and the United States in other areas.

Trans-Tasman Co-operation

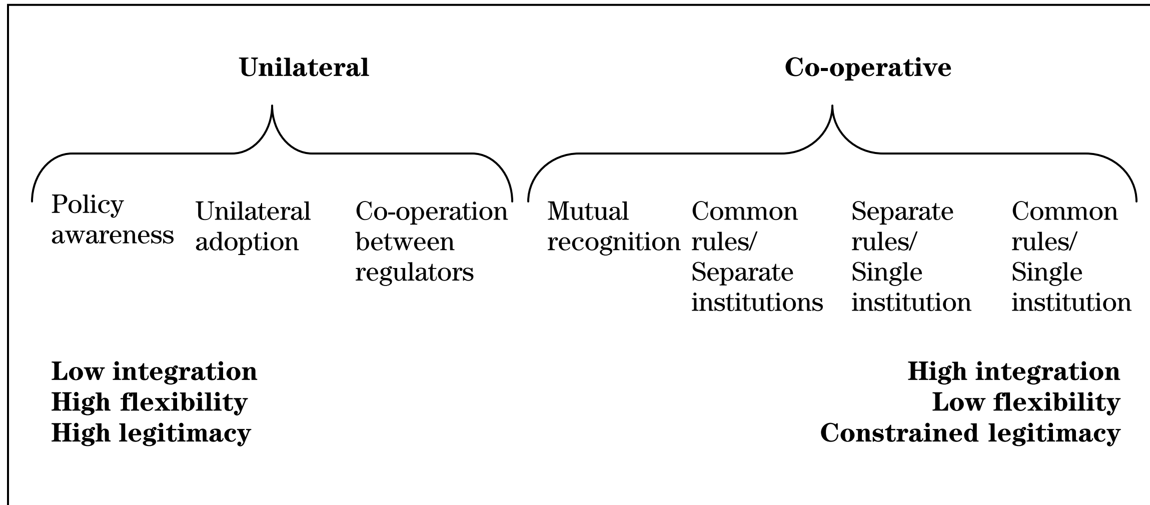
Another panel focused on regulatory co-operation between Australia and New Zealand. For a number of reasons, the Trans-Tasman relationship has a lot to offer Canada in the way of lessons learned. Both countries have Westminster-style governments; Australia's economy is much larger than New Zealand's, and Australia is a federation not unlike Canada. Moreover, Australia and New Zealand have had great success at regulatory co-operation as mentioned above.

Murray Petrie, Director, Economics and Strategy Group Ltd., spoke on the question of sovereignty and the governance of regulatory co-operation. From his experience as a participant in regulatory co-operation exercises, Petrie brought clarity to this issue and provided a useful framework for thinking about co-operation.

Petrie stressed the emotive and imprecise nature of the language used to describe sovereignty and, therefore, its lack of usefulness in determining good public policy in this domain. His alternative was to focus on jurisdiction (an aspect of sovereignty), and the authority to make rules and enforce them.[13] He then defined

jurisdictional integration to be a process by which a state chooses to restrict its de jure autonomous authority to make and/or enforce decisions in a specific domain. Exhibit 1 below shows the range of possible situations.

Exhibit 1: A Stylized Spectrum of Regulatory Co-ordination[14]



Petrie identified a number of factors to consider in determining where a particular initiative would lie on this spectrum:

- the place of coercive powers;
- making of primary and secondary laws;
- the scope for policy divergence regarding efficiency and redistribution;
- the scope of legal rights and obligations for the private sector;
- safeguard and opt-out clauses;
- the level of legalism of dispute resolution; and
- the depth of regulatory co-ordination.

Petrie demonstrated to the Symposium how the jurisdictional integration spectrum could be applied to questions of rule making and regulatory decision making[15] (Prescriptive jurisdictional integration), governance and accountability arrangements[16] (Executive jurisdictional integration) and, finally, to judicial enforcement (Judicial jurisdictional integration).

As one moves along the spectrum from left to right, a government loses flexibility to change/react, constrains its ability to tailor policies and rules to distinctive local circumstances, and risks diminishing the legitimacy of decision making and enforcement, although there are mitigating strategies to address those risks. On

the other hand, a shift from left to right reduces consumer and business costs and increases the credibility of a government's commitment to policies and rules that promote efficiency.

In Petrie's view, the critical policy trade-offs therefore are economic efficiency versus policy flexibility[17] and commitment to efficiency versus legitimacy risks. He noted that many efficiency gains could be made at the low integration end of the spectrum, particularly through unilateral adoption of another government's standards.

Tony Hinton, Commissioner, Productivity Commission, Australia, turned to the question of whether federal systems are an impediment to economic reform – of which both internal and external regulatory co-operation can be an important element. In Hinton's view, the short answer is yes, but these impediments can be overcome.

Economic efficiency improvement tends to be a challenge in any government system, because costs are often front-end loaded and concentrated on particular groups, and because bureaucratic structures typically align with economic sectors encouraging lobbying. Multiple jurisdictions compound these difficulties.

Hinton briefly described the well-known advantages and disadvantages of federal systems, and noted that to promote economic growth one can exploit aspects of both competitive and co-operative federalism. *Vertical competition* means the national and state governments directly enter into competition in a single area, either by providing "opt-out" possibilities, or by providing direct service alternatives. *Horizontal competition* comes about by people and businesses being able to move from one jurisdiction to another. Both types of competition can discipline governments to remain inside some boundaries of behaviour. They do not, however, prevent destructive behaviour, such as the provision of subsidies to attract major projects.

Against this backdrop, Hinton noted that Australia and New Zealand created the Closer Economics Relations Trade Agreement (CER) in 1983, to replace the 1966 New Zealand Australia Free Trade Agreement, and it remains the legal framework for most co-operation between the parties. Most recently, in 1998 the Trans-Tasman Mutual Recognition Agreement (TTMRA) was signed, and in 2004 the goal of the CER was extended to achieve, over the long term, a single economic market based on common regulatory frameworks.[18] Australian states are parties to the TTMRA. Hinton noted the importance of horizontal fiscal equalization in Australia to promote more co-operative federalism.

Jurisdictional integration is not complete. There are differences among government rules and these are likely to remain. For example, the legal situation of Aboriginals and Aboriginal rights differs markedly in the two countries. Nevertheless, the relationship between Australia and New Zealand has matured over time and deepened considerably. There is a long-standing history of co-operation and interaction among government officials from both countries.

Co-operation has been driven by a number of common motivations and understanding including:

- a recognition of the significant economic benefits from a single market;
- the promotion and development of markets of national interest;
- achieving better policy outcomes in areas of significance; and
- augmenting influence in international forums.[19]

Mark Steel, Deputy Secretary, Regulatory and Competition Policy, New Zealand Ministry of Economic Development, spoke tellingly from the New Zealand perspective. Steel noted the similarities of Canada relative to the United States and New Zealand relative to Australia. Ratios of relative gross domestic products are similar[20]; the larger country is important as a destination of emigration from the smaller; and investment is extensively and deeply integrated. Australia, however, is considerably less important to New Zealand as an export market (20 percent of exports) than the United States is to Canada.

Steel gave illustrations of Trans-Tasman regulatory co-operation that covered the entire spectrum that Petrie had presented. In other words, co-operation is not at the same level of jurisdictional integration for all sectors. He noted that where it really mattered for New Zealand, the country simply adopted Australian rules unilaterally or unilaterally recognized that compliance with Australian law satisfied New Zealand requirements (e.g., insider trading laws). At the other extreme, Australia and New Zealand jointly own institutions that operate on behalf of both governments.

New Zealand, according to Steel, took a very pragmatic approach to regulatory co-operation with Australia.

- New Zealand *focused on what mattered*, working from a clear understanding of the potential public benefits to be derived from:
  - reduced regulatory impact costs (e.g., achieving better economies of scale);
  - improved regulatory effectiveness (i.e., improved use of scarce government resources to reduce public risks); and
  - achieving particular strategic objectives (e.g., combined voice influencing international standards).
- New Zealand understood the Australian context so it could *propose concrete steps* to Australia's benefit.
- New Zealand *understood its own limits on jurisdictional integration*, where those were, and why they were there.

- New Zealand had a *broad vision of improved regulatory co-operation and creation of a single economic market*, but did not attempt to identify all the steps to achieve it. New Zealand did not plan to the nth degree and did not wait to identify all the risks. It got started because of the importance of regulatory co-operation to New Zealand's prosperity.[21]

As a further commonality with Canada, Steel noted the difficulty New Zealand had in getting the attention of the Australian Commonwealth government or Australian officials.[22]

In the research papers in the compendium volume, Kaili Lévesque's contains the text of the original New Zealand Australia Free Trade Agreement, the CER, and the Trans-Tasman Mutual Recognition Agreement. It should be noted that each agreement is less than three pages in length, yet they engendered what has been acknowledged to be one of the most productive and comprehensive regimes of regulatory co-operation in the world, probably second in depth of integration only to the EU itself. It speaks volumes to Mark Steel's comment that it is *important to get started without waiting to know where exactly one will wind up.*

A strong vision plus a reasonably good, general framework like the CER and TTMRA combined with good processes and political will, may be sufficient to undertake important regulatory co-operation initiatives that benefit the citizenry of both parties. And they may even be superior to detailed, complex documents, because they can be more flexible, more responsive to changing circumstance and priorities, and provide a more stable base to build on and accommodate positive experiences.

4. Building on Lessons Learned

From Current Canadian Co-operation

Kirton and Richardson identified a number of lessons learned for Canadian international regulatory co-operation from the CEC experience, arguing that the CEC was a good platform for future progress in environmental regulatory co-operation. Similarly, Findlay and Telford identified in their assessment of the IJC a number of important elements that need to be present in mechanisms for regulatory co-operation in the environmental area and, arguably, others.

The lesson learned from these papers, in the context of Canada-United States-Mexico regulatory co-operation driven from the top of governments, suggest that demonstrably effective mechanisms include the following.

- A formal vehicle ensures adequate ministerial participation, direction, and support in developing strategic plans and assigning priorities.

- Frameworks or strategic plans are important to facilitate co-ordination and focus the information flow.

- A permanent process involving senior governmental representatives allows for adequate oversight of the co-operative arrangements and for making timely decisions.

- An independent, dedicated secretariat or similar bureaucratic entity effects the necessary co-ordination.

    - The secretariat should have clout based on professionalism and objectivity.

    - While national representation in the secretariat is needed, selecting internationally recognized professionals personally and primarily dedicated to the substantive goals of the organization and regulatory co-operation works well.

- A clear and focused mandate for the secretariat needs to be sufficiently flexible to cope with changes in issues, priorities, and knowledge.

    - Mandates should be ambitious, but not create unrealistic expectations.

    - Mandates should respect jurisdiction and be based on the assumption of national good governance.

    - Mandates should focus on the catalytic role.

    - Mandates should, however, allow some flexibility to address emerging issues without requiring formal accountability changes.

- Sufficient resources consistent with the scope of the mandate and effective implementation are required.

- Processes should be based on a concept of issue-specific tables, to move issues forward for resolution.

    - Where more than two national governments are involved, thoughtful strategies are required to determine whether multilateral or bilateral processes are best to achieve progress in the specific area.

    - While Canada may have specific interests and priorities to advance, all partners in the arrangement have to benefit from the relationship: while overall issues and priorities may be shared, specific work may benefit one more than another, as is appropriate.

- A process involving key civil society and other stakeholders is required to promote transparency and build support for the objectives of regulatory co-operation.

- Regional and sub-national governments can be key players in many sectors. They need to be worked with, respected and, ultimately, brought into the fold.

Co-operation strategies and a framework will often need to address their involvement.

- "Soft power" approaches involve fact-finding and good communication flows within and between governments. Dialogue and opportunities for involvement with key industry and civil society have proven their effectiveness at achieving substantive success, especially when there are substantial differences in international institutional cultures, structures, and practices.

  "Hard power" tools, such as permanent arbitral tribunals can be less effective and may even be counter-productive. The existing powers under the NAEEC, while never used, may have acted as a disincentive for some provinces regarding participation in the NAEEC, because of the potential penalties imposed.

- Direct involvement of organizations external to government in oversight of the co-operative arrangement promotes buy-in, trust, and confidence in the arrangements and their outcomes.

- A significant focus on the management of information flows (most importantly informal flows) broadens and deepens professional relations among government officials, academics, and key stakeholders, to promote consensus, effective co-operation, and a sense of partnership. (North American environmental citizens is the phrase used in the paper.) A clear mechanism needs to exist for reporting progress.

- Mechanisms are needed to engage/co-ordinate across areas of activity (e.g., environment and trade, environment and energy).

- Periodic formal reviews gauge success, the existing mandate and structure, emerging issues/challenges, and new program or policy concepts.

Bruce Doern, through his review of a number of specific instances of Canada-US co-operation, concluded, inter alia, that regulatory co-operation among the three NAFTA countries – driven as a government-wide priority – should accomplish the following.

- Build on the close relations that already exist among regulatory officials.

- Build a culture of co-operation in the regulatory community, recognizing the difference between workaday co-operation and strategic bilateralism; both will go on whatever the level of general regulatory co-operation.

- Have a high-level, stable framework agreement to provide the needed broad vision to guide future detailed work.

- Develop three- to five-year business plans, so concrete goals can be set and progress measured.

Doern, as did Jefferson Hill in his presentation, noted that Canada would have difficulty getting the attention of US decision makers. (See the Trans-Tasman discussion in Section 3 above for more on this issue.) Doern further noted that co-operation requires the will of more than one country, and progress will depend on the nature of broader agendas and electoral cycles at any given time, as well as on the shifting views of the importance of specific trade-offs associated with jurisdictional integration.

Doern also argued that a two-track strategy (one track focused on overall regulatory co-operation and the other on the various sectoral initiatives) would seem appropriate for Canada.

Lessons from Europe

From the presentations by Schmitz, Devereaux, and Jenkinson at the Symposium, and from Schmitz's research paper, a number of EU success factors of relevance for Canada's pursuit of regulatory co-operation can be identified.

The first and foremost lesson is that, despite the difficulties of getting nation states to co-operate and move toward a high-level of jurisdictional integration, it can be done and it will generate significant benefits for citizens, not just in terms of higher standards of living, but also in terms of better consumer and environmental protection. Other important lessons include the following.

- A high level of jurisdictional integration will not come about overnight. A sustained effort will be required. Therefore, significant and sustained political will is needed, fundamentally informed by the recognition that through co-operation all citizens would benefit, including benefits derived from enhanced stability.[23]

- Smaller but significant successes were achieved along the road to a single market (i.e., successes with discernable economic and political pay-offs, such as with coal and steel), which led to a willingness and desire to go further.

- Harmonization is not a realistic objective for most regulatory areas; it takes too long, costs too much, and entails too many detailed rule changes. Significant progress depended on legitimizing the mutual recognition approach. The new approach in the EC involving the promulgation of general directives subsequently adopted and then adapted in each country through consistent but detailed rules (subject to mutual recognition) is proving effective.

- There is a willingness to make progress with some countries and let others fall to the wayside if they did not opt in.

- For Canada, the approach to the internal market and the external market cannot be de-linked for negotiation reasons (one voice needed before the US negotiators) and because the Canadian markets will be distorted and biased in favour of north-south trade if we work to improve NAFTA only.

Additional Lessons from Trans-Tasman Co-operation

Many of the lessons from the EU applied to Australia-New Zealand regulatory co-operation. The Petrie, Hinton, and Steel presentations, however, provided fresh information.

- Know what you want to achieve; know the trade-offs between government flexibility and economic and government efficiency. Focus; not all sectors are equal in importance.
- Unilateral adoption is a key tool. Where it is important to ensure a single market or where it is not possible to marshal sufficient regulatory resources to do a proper job of regulating oneself, do not hesitate to piggyback (free ride) on countries with greater capacity.
- Federal states have greater difficulties to work through, but these can be overcome. Mutual recognition becomes more important with a larger number of government players.
- Promoting a rational internal market in a federal state is necessary if one's vision is a high level of jurisdictional integration or a largely single market economy with other countries.[24]
- Just do it. Get started. Have a vision but avoid detailed long-term plans. Ensure there are mechanisms to move forward based on experience and changing priorities.
- Where one entity is much smaller than the other, the smaller entity has to take the initiative at most times and deliver a complete package that provides clear net benefits to the dominant player, who cannot have the same level of vested interest in co-operation.[25]

While the exhortation to get started, be flexible, and take risks might seem to contradict Doern's conclusions regarding the need for business plans, that is not the case. Trans-Tasman relationships have been long-standing. The agreements, as noted above, are quite high level and not detailed. They are powered by vision, political will, economic reality, and long-lasting processes focused on improvements. At any time, however, all the governments implicated know their objectives, what they hope to achieve, and why.

Lessons Regarding the Importance of the Internal Market

Schmitz identified factors that, in her view, constrain Canada and need to be addressed.

- Organizational paralysis: Most regulators (federal and provincial) are comfortable as is and like their current scope of responsibilities. They tend to resist significant change.

- US power: To have any hope, Canada needs to be able to go to the table with one voice: the AIT needs strengthening.

- AIT enforcement weaknesses/heterogeneity: The AIT is weak relative to NAFTA, thereby giving preference to foreigners over Canadians in dispute settlement situations.

5. Conclusions: Next Steps

Previous Conclusions

The October 2004 Symposium on Canada-US Regulatory Co-operation led to five key observations/conclusions that need to be revisited in light of this Symposium.

- *There is a strong case for increasing Canada-US or North American regulatory co-operation.* This observation was not challenged during the December 8, 2005 meeting; however, it was recommended that clear, specific examples be developed to demonstrate the gains from regulatory co-operation. Also, we need to consider the dynamic of including Mexico in the discussions, given that a lot of the emphasis has been on Canada and the United States thus far.

- *The political will to move forward exists, but a clear, practical plan is required.* The December 8 meeting raised some questions about the level of political support to move forward, but provided additional insights into elements of a practical plan. The question arises of how to ensure sustained traction on the SPP over the long haul and over several changes of government.

- *The plan should focus on selected priority sectors, taking account of costs and benefits as well as current best practices.* Both the EU and New Zealand-Australia experiences provided lessons regarding a focus on priority sectors. The EU-US example included an estimate of $1 billion in savings to US industry from greater EU-US co-operation on conformity assessment procedures. A number of existing best practice examples were also highlighted in the meeting (e.g., lessons from the CEC and the Great Lakes agreement). Another question to consider is that of performance management, and how we can track progress on regulatory co-operation schemes between the countries to determine where successes lie, and what areas might be best pursued individually.

- *The plan must be supported by sound internal organizational and decision-making structures, and provide a role for parliamentarians.* The meeting presented helpful new research and expert insights into lessons regarding institutional and decision-making structures for effective North American regulatory co-operation. The meeting showed that there are many examples of institutional structures, and that while we must not be afraid to be bold and innovative, we must also not try to reinvent the wheel. Build on what we have

that works, on what has been successful in other jurisdictions, and tailor it to our present circumstances.

- *There is a need for a political strategy that will frame the initiative, and make it saleable to both Canadians and other North Americans.* The final panel discussion provided some specific strategies for making greater headway with the North American regulatory co-operation agenda.

The Basis – The Security and Prosperity Partnership

We are over a decade into the economic / environmental / labour agreements with our NAFTA partners and the partnership needs refreshing. The Security and Prosperity Partnership has been launched with leadership provided by the highest levels of government. Symposium participants indicated this held out the hope of improved regulatory co-operation. As noted above in Section 2, it is expected that the Regulatory Co-operation Framework, to be developed for 2007, will establish the on-going mechanisms for ensuring sustainability, continuity and increasing depth and breadth of co-operation.

The key is to focus on how Canadian experience as well as the experiences of others can help the SPP initiative, and a new Regulatory Co-operation Framework in particular, fulfil its promise at delivering more effective and sustained North American regulatory co-operation.

Elements of a Long-Term Business Plan

International regulatory co-operation had been given impetus by the announcement of a "new partnership" agenda, on November 30, 2004, by Prime Minister Martin and President Bush. They agreed to pursue joint approaches to partnerships, consensus standards, and smarter regulations as part of a Canada-US security, prosperity, and quality of life agenda. This agreement was formally extended to Mexico on March 23, 2005 with the announcement of the trilateral Security and Prosperity Partnership. The SPP committed Canada, the United States, and Mexico to work together to enhance North American regulatory co-operation to promote competitiveness, productivity, and growth, while maintaining high standards for health and safety. As stated above, the SPP is intended to be sustained and renewed over time. The *International Policy Statement* (Canada, 2005c) issued in April 2005 reconfirmed the Government of Canada's commitment to pursue regulatory compatibility within North America under these new partnership agreements.

Also as noted above, the SPP structures are in place and initial priorities have been established – as reflected in the choice of working groups for instance – and there has been some progress made on substantive issues. But what needs to be done to ensure continued success over the long term?

Assuming that the political will is there to make NAFTA/NAAEC/NAALC living and growing arrangements, possible elements for a way forward include the following.

- Set clear goals and a bold vision. The SPP goes some distance in providing this. Indeed, the linking of security and prosperity was a good way to ensure that all the major border pre-occupations of the NAFTA partners were considered.[26] But does it need to be more visible to NAFTA/NAAEC/NAALC regulators, regulatory oversight agencies, and to public stakeholders? Jefferson Hill, in his remarks, stated that in preparing for the Symposium he had difficulty finding American government officials who knew anything about the SPP, especially in the Office of Management and Budget (those responsible for oversight of the American regulatory process); and Symposium participants were unclear how much progress had truly been made.

- Regulatory co-operation initiatives should take full advantage of existing mechanisms and processes and be characterized by openness and transparency. There has been some criticism of the SPP process. For example, the Chair of Canada's National Advisory Committee (NAC) to the CEC observed that the drafters of the SPP did not consult with the CEC when considering the scope of work the SPP intended to accomplish. "The NAC concluded the discussion on the SPP by emphasizing that the main responsibility of activities should lie at the local and provincial level."[27] In that regard, Resolution 29-1 of the 29th Annual Conference of New England Governors and Eastern Canadian Premiers[28] expressed support for the SPP initiative but sought to inform the two national governments of their interest in having input.

  Public information on the inner workings of the SPP on Government of Canada web sites is minimal and very difficult to find. Greater public information will help over the long term to build legitimacy and permit greater co-operation.

  Kirton and Findlay, among others, noted the importance of involving the private sector and civil society. On specific issues, such as improving border traffic flow, it can be expected that a wide range of groups such as the CAN/AM Border Trade Alliance would continue to play a role in the SPP processes. But the level of input from the private sector and civil society organizations, and the public at large, may be insufficient to ensure sustainability of the broad SPP process. Stakeholder engagement and support are critical if regulatory co-operation is to become the long-term project that it needs to be.[29]

- Make greater use of unilateral adoption. Arguably, Canada has not used unilateral adoption sufficiently, even though in many regulatory sectors a majority of Canadian regulation and compliance practices are just copies of American rules and largely based on an American analysis of costs and benefits. Similarly, it is unclear that Canadian processes that mimic the more in-depth work undertaken by American regulators provide cost-effective protection for Canadians against risks.[30] As noted above, the anecdotal evidence is that sufficient differences in rules and conformity assessment

procedures remain that may not be justifiable on the basis of cost and benefits to Canadians.

- Create permanent/standing processes and structures. The SPP structures and processes may not be sufficiently formalized to stand the test of time, particularly with respect to driving continuous improvement in the cost effectiveness of regulatory practices.

- De Mestral had noted that despite the NAFTA legal text, the standing committees envisioned in sections 7 and 9 did not appear to have progressed. This is in stark contrast to the NAAEC where continuous, visible progress had been made – progress that appears to have been driven in large part by the role the CEC played.

- Strong consideration needs to be given to establishing a permanent trilateral quasi-independent commission or institute to drive international regulatory co-operation among the NAFTA partners. Such an organization would not have to be legislated, but it would need to be a legally recognizable entity in order to be resourced. The characteristics of the CEC that have proven to be effective – professional, objective, focused on the good of the publics in all three countries – would be desirable. The "soft power" approach with a focus on fact-finding, knowledge creation, and co-ordination/facilitation may be an effective way to go.

- There is no supra-national governance body or legal entity associated with NAFTA (and as noted above, the CEC has never used its "hard power" abilities to levy sanctions). Such a commission or institute could have many uses beyond just co-ordinating groups working on substantive regulatory co-ordination issues. It could be used by the NAFTA partners to identify and investigate differences in regulatory regimes to determine whether those differences were important, and whether they generated real benefits for citizens. It could even be used to create the "essential requirements" for regulatory programs that the EU has found to be so effective, and perhaps used to determine "equivalency" and thereby facilitate de facto mutual recognition. [31]

  Whatever modality is chosen, the lessons identified above should be taken into account. Moreover, the structures adopted should do the following.

  - Have a pivotal role for the political centre of governments at the ministerial level.

  - Ensure involvement of the main bureaucratic policy co-ordination centres (at least in Canada, if not in all NAFTA partners) responsible for trade, regulatory policy, and policy co-ordination; they need to communicate.

- Ensure adequate cross-communication among the various working parties.

- Build on and strengthen the many institutions and legal frameworks already in place – the TBT and SPS provisions of NAFTA and the WTO agreements, for instance, and existing institutions and processes such as committees and commissions under NAFTA/NAAEC/NAALC or existing, possibly bilateral processes that work well (e.g., in pest management).

- Have balanced multi-national private sector and civil society organizations advisory mechanisms.

- Use less permanent structures to work on priority areas.

- Define clear roles and responsibilities. There is a need to develop within Canada, and with our NAFTA partners, a framework that sets out clear mandates and roles and responsibilities, establishes well-defined governance structures, and clearly identifies substantive and procedural risks. As well, a system to measure and track progress to allow corrective action and ultimately to identify and measure bottom line outcomes for citizens (i.e., better protection and enhanced well-being) is needed.[32]

- The framework has to be sufficiently flexible, adequately resourced, and periodically reviewed. Performance needs to be actively monitored by the highest authorities.

- Development of a truly substantive *Results and Risk Management Accountability Framework*[33] within Canada and with our NAFTA partners would bring discipline to this effort.

▪ Develop a re-invigorated internal trade strategy to bolster AIT effectiveness through MRAs if possible. Not only is this good in its own right, it is desirable as providing a strong base for Canada's international regulatory co-operation efforts.

  - Schmitz suggested developing a coalition of the willing and using an opt-in approach. Those provinces continuing to opt out would see their residents suffer relative to others as the latter's standard of living increases. Canada might consider some additional areas, following the Australian examples, where the federal government simply offered alternative regimes to provinces and let businesses choose which regime would apply to themselves. This is feasible in some areas. (Current examples include meat and other agricultural product inspection, although it is not optional if the business intends to market inter-provincially.)

- Review the appropriate federal role in the AIT. The Government of Canada could be a more forceful advocate for free-flowing internal commerce.

- In Australia, state governments were signatories to the Trans-Tasman Mutual Recognition Agreement. They play a very active role in the standing working groups that have been created. This is a possible model for making progress in Canada on two fronts simultaneously – federal-provincial/territorial co-operation and North American co-operation. Such an approach could also represent an excellent opportunity for bringing cross-border regional priorities to the table in international discussions/negotiations.[34]

- Encourage all current bottom-up co-operation efforts even if outside priority areas. The SPP is certainly driven from the top of governments, but other co-operation activity should not be discouraged. Departments should try to keep track and report on these efforts, if only to track progress in international regulatory co-operation and determine resource utilization.

- Re-educate regulators, politicians, and the public regarding "public interest tests" and the need for a broad perspective on what are considered costs and benefits (see political strategy below). This could go some distance in building the culture of co-operation envisioned by Doern.

A Political Strategy – a Second Dimension

A strategy to develop and maintain political will was recommended by symposium participants in October 2004. While the December 2005 Symposium was less certain about the depth of political commitment, it was very clear from the participants that such a strategy was critical.

From the experiences in other countries, elements of such a strategy could include the following.

- Be a catalyst. *There is no interest like self-interest.* It was stated pretty frankly at the Symposium that, despite the SPP, to get the attention of American regulatory decision makers, Canadians (and Mexicans) would have to do their homework to be able to hand over to the former clear win-win examples they could then act on with minimal effort and use of political capital.

  The strategy should also provide clear evidence (not just statistics but careful case studies) to demonstrate once again to *all* national publics that closer regulatory co-operation will lead to:

  - an improved standard of living (greater economic efficiency[35]); and

  - improved protection from select risks they care about,[36] through more effective standards and greater regulatory effectiveness.[37]

- New, more effective approaches can be demonstrably useful in areas the public cares about that demand multi-national approaches.[38]

- Areas of clear federal jurisdiction may need to be selected first. Canada and Mexico have more influence internationally via a North American approach. New Zealand recognized this in its decision to work with Australia. It was in New Zealand's interests to simply adopt, in many cases, the Australian approach.

▪ Identify third party allies.[39] As noted above, the support of stakeholders is critical over the long haul. Failure to address this may well lead to problems of legitimacy further down the road. It would also mean difficulty in eliciting stakeholder (not just in Canada) support for initiatives in dealing with other governments, especially in promoting specific cases at the political level. Stakeholders can be very useful in identifying good examples of win-win initiatives that can be shown to other governments. For example, an economic study to demonstrate how an initiative would improve cross-border trade for both sides by lowering transaction costs might be sufficient, but it is always better to show political appointees who in their country will benefit and have them make or at least endorse the pitch.

▪ Have a congressional strategy. Trade is normally a congressional responsibility in the United States. Agreements cannot be approved by the president without prior congressional approval. Many of the current Canada-US irritants are the result of the uniquely American process of having Congress or the Senate tag unrelated items onto legislation but without line-item veto by the president. Any political strategy to improve and maintain international regulatory co-operation needs to take Congress into account.

▪ Demonstrate commitment at the highest levels (at least ministerial if not heads of government) through regular meetings and active monitoring of progress.

  o As Schmitz and others noted, the drive by regulatory organizations for autonomy means that in normal circumstances there will have to be a constant pressure from the top to ensure continuous progress.

  o Commitment must also mean showing commitment to the respective national publics. Periodic reports on progress to the public, to Parliament/Congress, and to interested stakeholders are needed. A lesson in this regard could be taken from Australia and New Zealand.

  o The current progress Reports to Leaders may accomplish this if sustained.

Appendix A: Agenda of the Symposium

North American Regulatory Co-operation: A Results Agenda

December 8, 2005

9:00-9:15 **Welcome and Opening Remarks**

Jean-Pierre Voyer, *Policy Research Initiative*

9:15-10:15 **Panel 1: Lessons from the European Union**

Chair	**Jean-Pierre Voyer**, *Policy Research Initiative*
Speakers	**Joelle Schmitz,** *Fulbright Scholar*
	Charan Devereaux, *Harvard University*
	Brian Jenkinson, *European Commission*

10:15-10:45 **Discussion**

11:00-12:00 **Panel 2: Lessons from Australia – New Zealand**

Chair	**Neil Yeates**, *Industry Canada*
Speakers	**Murray Petrie,** *The Economics and Strategy Group, New Zealand*
	Mark Steel, *New Zealand Ministry of Economic Development*
	Tony Hinton, *Australian Productivity Commission*

12:00-12:30 **Discussion**

12:30-1:30 **Lunch**

1:30-2:30 **Panel 3: Institutional and Governance Aspects**

Chair	**Bill Jarvis,** ***Environment Canada***
Speakers	**Bruce Doern,** *Carleton University/University of Exeter*
	Rick Findlay, *Pollution Probe*
	John Kirton, *University of Toronto*

2:30-3:00 **Discussion**

3:15-4:15 **Panel 4: Achieving Results**

Chair **George Redling**, *Privy Council Office*

Speakers **Armand de Mestral,** *McGill University*

Jefferson B. Hill, *Jacob and Associates*

Fernando José Salas, *Soles Consulting*

4:15-4:45 **Discussion**

4:45-5:00 **Closing Remarks**

Appendix B: Summary of Research Papers

The PRI commissioned four expert papers on international lessons concerning governance and institutional mechanisms for regulatory co-operation on lessons from the European Union, the Commission for Environmental Co-operation, and the Great Lakes Agreement. Staff members from the PRI prepared a research paper on lessons from the Australia-New Zealand experience with regulatory co-operation. Additionally, the PRI commissioned a paper to review the regulatory co-operation requirements in regulatory policies, processes, and management in developed countries around the world (forthcoming).

Successes and Failures of Regulatory Co-operation in the European Union: Lessons for Canada – US Regulatory Co-operation

Joelle Anne Schmitz

The year 2005 presents Canada with an unusual event horizon. The country faces a window of opportunity analogous to that which birthed the European Union. How Canada responds to the juncture of contemporary opportunity and historical legacy will determine its influence in the new world order, the strength and competitiveness of its economies and, to some degree, the very future of the concept of Canada. Yet, several factors impede the universal application of the European example. This paper compares and contrasts that supremely significant period in European history to the current Canada-United States relationship and seeks to clarify universalities of policy relevance.

The International Joint Commission and the Great Lakes Water Quality Agreement Lessons for Canada – US Regulatory Co-operation

Rick Findlay and Peter Telford

The management of environmental issues is particularly challenging when two or more jurisdictions share responsibility for them. Jurisdiction for the Great Lakes is shared by two federal governments (Canada and the United States), two Canadian provinces (Ontario and Quebec), eight US states (New York, Pennsylvania, Michigan, Ohio, Illinois, Indiana, Wisconsin, and Minnesota), and hundreds of municipal governments. In the Great Lakes, the difficulties are exacerbated by the need to also share responsibility across many different agencies within each country.

This paper examines selected elements of institutional action that have led to successes and failures in managing the transboundary issues of the Great Lakes region. Many of these issues are unique to the region; others are common to many areas in the world where there are shared water systems. All provide valuable lessons for future joint Canada-US efforts in the Great Lakes region and, indeed, in attempts to further Canada-US regulatory co-operation.

The Governance of Effective Regulatory Co-operation: A Framework, Case Studies, and Best Practice

G. Bruce Doern

This paper critically examines issues in the effective governance of regulatory co-operation through the development of a framework for analysis, a review of several Canadian and comparative/international case studies, and through the resulting discussion of possible best practices in different regulatory contexts. In particular, the paper examines four core questions.

1. What principles or purposes are set for regulatory co-operation arrangements?
2. What governance structures do various institutions around the world use to manage regulatory co-operation between jurisdictions?
3. How are priorities set by these governance structures for regulators for each country involved including any possible challenge function with regulators to justify reasons to deviate from co-operation?
4. What do these best practices mean for Canada-US regulatory co-operation?

Also provided is a summary of nine case study co-operative agreements, including an overview of their effectiveness. Analytically, a framework is developed to help show the many different elements of co-operation and governance.

The Commission for Environmental Co-operation: Lessons for Canada-United States Regulatory Co-operation

John Kirton and Sarah Richardson

This study explores ways in which Canada-US regulatory co-operation, now given new impetus by the Security and Prosperity Partnership, might be strengthened in the next three to five years. It does so by examining the performance of an existing trilateral agreement and institution – the North American Agreement on Environmental Co-operation and its Commission for Environmental Co-operation. These trilateral instruments are globally pioneering trade-environment and economy-environment mechanisms designed to forward the goals of economic prosperity through liberalized trade under the North American Free Trade Agreement. Successes and shortcomings of the Commission and how these lessons could be applied to the development of a broad-based governance agreement on regulatory co-operation between Canada and the United States are examined.

Trans-Tasman Regulatory Co-operation: Lessons for Canada and the United States

Kaili Lévesque, PRI

This paper focuses on the history of the agreements that exist between Australia and New Zealand, the aspects that make them unique, and how they can offer helpful guidance in expanding Canada-US regulatory co-operation. The Trans-Tasman model is of particular relevance to Canada over other governance arrangements such as the European Union, or the United States and the European Union. It is important to the North American reality due, in large part, to the role played by geography in driving co-operation between the two countries, but also due to other fundamental similarities, such as those on the economic social, cultural, and demographic fronts. The Trans-Tasman example also illustrates how important a role can be played by a smaller country, New Zealand, when entering into increased co-operation with its nearest neighbour and largest trading partner, Australia, while also protecting core national political and sovereign interests. Finally, it also illustrates that a strong foundation based on an economic partnership is fundamental to the health and vitality of a co-operative relationship. Put simply, this is a case of two countries with similar demographics, cultures, languages and laws, but with one economy clearly dominant over the other, and yet they were able to achieve success through an incremental and clearly structured approach to co-operation.

Appendix C: Trade Agreement Obligations for Regulators[40]

When developing or changing technical regulations, federal regulatory authorities must

1. ensure that regulatory officials are aware of and take account of obligations agreed to by the Government of Canada, such as the provisions of the World Trade Organization (WTO) Agreement, the North American Trade Agreement (NAFTA), and other multilateral, regional and bilateral Agreements such as the Safety of Life At Sea Convention of the International Maritime Organization;

2. ensure that regulatory officials are aware of and take account of their general obligations as laid out in the WTO Technical Barriers to Trade Agreement (TBT) and the Sanitary and Phytosanitary Agreement (SPS); and the NAFTA Articles on Technical Barriers to Trade (Chapter 9) and sanitary and phytosanitary measures (Section B of Chapter Seven); and other multilateral, regional and bilateral Agreements referring to regulations and standards; and

3. adhere to those procedural and substantive obligations agreed to by the Government of Canada through intergovernmental agreements such as the Canadian Agreement on Internal Trade (AIT) Article 405 provisions relating to specific sectors of the economy.

In particular, for technical regulations that affect trade, federal regulatory authorities must:

4. with regard to notification

   - prepublish proposals for new or changed technical regulations in *Canada Gazette*, *Part I* for a period of at least 75 days, except in urgent circumstances, and take into account comments received;

5. with regard to performance-oriented requirements

   - specify, where possible, technical regulatory requirements in terms of performance rather than design or descriptive characteristics;

   - give positive consideration to accepting as equivalent other forms of technical regulatory requirements, if satisfied that they adequately fulfil the objectives of the existing regulations;

   - for TBT, ensure technical regulations treat products from one jurisdiction no less favourably than like products from another;

- for SPS, ensure measures do not arbitrarily or unjustifiably discriminate where identical or similar conditions prevail;

- ensure technical regulations are no more restrictive of entry into markets than is necessary;

6. with regard to international standards

   - use available international standards, guidelines and recommendations where those standards achieve the regulatory objective;

7. with regard to enforcement

   - treat regulatees and products from one jurisdiction no less favourably than those from other jurisdictions when assessing conformity to technical regulatory requirements, providing they are in comparable situations;

8. with regard to complaint resolution

   - have in place a process to review complaints concerning conformity assessment procedures and must take corrective action when justified.

Notes

[1] A report on that symposium as well as several research documents and the project's Interim Report, *Canada-US Regulatory Co-operation: Charting the Path Forward*, are available on the PRI web site, <www.policyresearch.gc.ca>.

[2] The papers were *Successes and Failures of Regulatory Co-operation in the European Union* by Joelle Anne Schmitz (2005); *The International Joint Commission and the Great Lakes Water Quality Agreement* by Rick Findlay and Peter Telford (2005); *The Governance of Effective Regulatory Co-operation: A Framework, Case Studies and Best Practice* by G. Bruce Doern (2005); *The Commission for Environmental Co-operation* by John Kirton and Sarah Richardson (2005); the *Trans-Tasman Regulatory Co-operation* by Kaili Lévesque (2005). These are available, on request, at <www.policyresearch.gc.ca>. Synopses are attached as Appendix B.

[3] The text in the original 1992 regulatory policy was somewhat more general. Details were added in 1995 to ensure clarity and aid regulatory officials in keeping track of their obligations.

[4] That is to say an approach that focuses on information sharing, persuasion, and public engagement rather than litigation and enforcement (regarding the actions of the respective government signatories).

[5] There is no attempt to harmonize each country's respective laws.

[6] See Schmitz (2005).

[7] EACSR (2004). On page 22, the EACSR recommended that Canada should work with its US and, where appropriate, Mexican counterparts to:

- Achieve compatible standards and regulation in areas that would enhance the efficiency of the Canadian economy and provide high levels of protection for human health and the environment;
- Eliminate regulatory differences and reduce regulatory impediments to an integrated North American market;
- Move toward single review and approval of products and services for all jurisdictions in North America; and
- Build mutual trust and confidence in each other's regulatory processes and decisions through the increased use of independent peer reviews of these regulatory processes, information sharing, shared data collection and risk assessment methods, common decision-making procedures and joint reviews.

[8] The full text of this agreement can be found in Appendix A to Kirton and Richardson (2005).

[9] This is not unique to regulatory co-operation initiatives. All such processes run this risk, because of changing priorities among the parties and the simple fact of personality dynamics.

[10] That is to say cost-effective regulatory rules and practices. The latter in the guise of "red tape," "excess number of approvals," "duplicative conformity assessments," "unnecessary information gathering" and the like is often a worse problem for the private sector than the actual law (i.e., the rules) itself.

[11] This approach to regulation might sound similar to the use of performance standards. For a discussion of the latter see, for instance, Martin (1995-96). In the EU case, however, essential requirements are closer to results statements than to measurable performance standards. The use of the latter was considered cutting edge a few years ago, and even now represents only a small portion of North American regulation.

[12] As more than one commentator noted, this political will stemmed from the fundamental motivation to move away from the conditions that led to centuries of intra-European war and devastation.

[13] Enforcement jurisdiction includes both executive and judicial enforcement.

[14] Drawn by Petrie in his presentation at the December 8, 2005 symposium, in part from Goddard (2002).

[15] Areas including for example, product approvals.

[16] Including normal compliance and enforcement actions.

[17] Flexibility does have real value in the face of uncertainty – see for example one of the works cited by Petrie: Kahler (1995).

[18] The appendixes to Lévesque (2005) contain the text of these three agreements.

[19] This concept was actually introduced by Mark Steel, the panellist from New Zealand.

[20] It should be noted, however, that John Kirton had a very different take on this issue. Kirton in his remarks chastized Canadians for being fixated on gross domestic product ratios when thinking of relative power bases among the NAFTA partners. He stressed that Canada needs to understand that it is a superpower when considering what will matter to the world in the 21st century. Canada is almost unique in the world having an abundance of energy resources (oil, sources of electricity), freshwater, and agricultural land.

[21] As an aside, it could be argued that this is an interesting example of the precautionary principle in action. To New Zealand, given the well-known risks to its well-being associated with the status quo, action was warranted despite incomplete knowledge.

[22] In this regard, he noted that the participation of the states of Australia in the agreements was very positive; they provided more potential interlocutors and potential allies.

[23] While motivation in Europe may originate from the desire to move away from the conditions that led to centuries of intra-European war and devastation, that was not the case for Australia and New Zealand. The true test of political will in support of regulatory co-operation is whether a focus can be sustained on the good of the public as a whole, rather than on the views of particular special interest groups, be they private sector, public interest groups, or public sector organizations.

[24] This point also came across very strongly in Schmitz's presentation and her paper. She argued that Canada's Agreement on Internal Trade was weak and ineffective, and really needed bolstering as a precursor to strengthening international regulatory co-operation.

[25] This was also the strongest, clearest message from Jefferson Hill regarding attracting the attention of American decision makers. Give them a deal they can't refuse. The whole purpose of agreements, of course, is to provide mutual net benefits.

[26] In this regard, the SPP agenda is not unlike the suggestion of Schmitz that Canada adopt the market basket approach to negotiations (first proposed by Brittan in the EU context). It will certainly ensure that the pre-occupations of Americans (security), Canadians (trade), and Mexicans (immigration) are discussed together.

[27] See summary notes of the June 20, 2005 meeting of the NAC which can be found at <www.naaec.gc.ca/eng/nac/sr0502_e.htm>.

[28] Held in St. John's, Newfoundland and Labrador in August 2005. See the text of the resolution at <www.releases.gov.nl.ca/releases/2005/exec/resolutions/english/PDF/Security.pdf>.

[29] As noted above, trade liberalization and regulatory co-operation are not really "one shot" or short-term propositions. They should be expected to take decades to mature and deepen. Hence, it is important to get the processes right to allow arrangements to grow and deepen. The commitment versus legitimacy trade-off described in the Petrie analysis can be managed to the benefit of citizens but requires well-designed process and engagement strategies.

[30] See the earlier PRI paper by Griller (2004).

[31] It might be useful to recognize the commission or institute as a standards-setting body by all three NAFTA governments.

[32] While it remains early days in the SPP, the progress report on the first 90 days was largely anecdotal.

[33] This is a Government of Canada tool meant to accompany major departmental or interdepartmental initiatives. Granted, some officials treat such requirements as paper exercises to fulfill obligations to central

agencies. Nevertheless, if taken seriously and done properly, a results and risk management accountability framework can be a key tool for the design and management of this type of complex initiative.

[34] It will have been noticed that many of the most contentious cross-border disputes are exacerbated by congressmen from states near the Canada-US border. Mexico undoubtedly feels the same way about its border issues (migration) with the United States.

[35] And that, of course, includes proper treatment of externalities in the environment and health areas (to pick just two examples).

[36] A very short list of examples would include greenhouse gases, ozone depletion, ground level ozone (smog). Sulphur dioxide pollution, acid precipitation, elimination of polychlorinated biphenyls (PCBs) from the environment, access to life-saving or morbidity-reducing therapeutic products, toy safety, pesticides and other toxic material in food, gun control, security of bank deposits or other investments, or cigarettes (consider cross-border smuggling, different approaches to controlling advertising).

[37] It might have to be acknowledged that Canada can put its scarce regulatory resources to work on better, more effective uses. For example, one could shift resources from duplicative product approval processes to ensuring more stringent monitoring processes for product failures or side-effects (see Griller, 2004).

[38] For example, regional or international approaches are required to address many environmental concerns, security matters, and select criminal matters effectively. These are all cross-border issues that cannot be solved internally by one jurisdiction. The Maginot Line demonstrated that building fences against problems is not only not effective, but can create a false sense of security.

[39] These may be any or all of other orders of government, private sector organizations, and/or civil society organizations.

[40] Taken from the Government of Canada's Regulatory Policy, available at <www.pco-bcp.gc.ca/raoics-srdc>.

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Note: All URLs in this paper were confirmed January 9, 2006.

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