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THE CANADA-UNITED STATES REGULATORY REGIME AS THE ROAD TO RECOVERY

Session Chair - Christopher Sands
United States Speaker - Donald B. Cameron, Jr.
Canadian Speaker - James P. McIlroy
Canadian Speaker - Larry L. Herman
Canadian Speaker - J. Michael Robinson, Q.C.
United States Speaker - R. Richard Newcomb

INTRODUCTION

Christopher Sands

MR. SANDS: My name is Christopher Sands, and I am a senior fellow from the Hudson Institute.¹ It is a great honor to not only listen to three days of terrific presentations, but now to be able to moderate what will be the grand finale of the panel. In this panel, we will try to put into perspective some of what you have seen and heard in previous panels. My role is similar to that of William Shatner's in the closing ceremony of the 2010 Vancouver Winter Olympics,² in which he gave a sort of comedic opening, but also set the tone for the rest of the presentations.

As the William Shatner role, I am to set in motion a cavalcade of Canadian Law Institute celebrities: people who have been well involved with this organization for a long time, who are well involved in the issues of Canada-United States law, and who will bring their perspectives to what we have heard as well. Let me briefly introduce the panelists for this final session, who actually need no introductions.

Don Cameron is the practice group leader for the International Trade group at Troutman Sanders LLP in Washington, D.C.³ Next to him is Jim McIlroy, who is counsel on Public Policy at McIlroy & McIlroy in Toronto.⁴

¹ *Christopher Sands*, HUDSON INST., <http://www.hudson.org/sands> (last visited Oct. 1, 2010).

² *Closing Ceremony Brings Upbeat End to Games*, NBC SPORTS (Feb. 28, 2010, 10:52 PM), http://nbcsports.msnbc.com/id/35628342/ns/sports-olympic_sports/.

³ *Donald B. Cameron, Jr.*, TROUTMAN SANDERS LLP, http://www.troutmansanders.com/donald_cameron/ (last visited Oct. 3, 2010).

⁴ *James McIlroy*, MCILOY & MCILOY, INC., <http://www.mcilroy.com/> (last visited Oct. 3, 2010).

Larry Herman is a partner at Cassels, Brock, & Blackwell in Toronto.⁵ Michael Robinson is counsel at Fasken, Martineau, DuMoulin's Toronto office.⁶ Finally, Rick Newcomb is the chairman of the International Trade practice group and a partner at DLA Piper, LLP in Washington, D.C.⁷

I am going to make a few contextual remarks, after which each of these gentlemen will have a chance to comment.

First, as a general observation, one of the rules you learn early on about political economy is that as people become wealthier, they become much more insistent on having a voice in the governance of the transactions that have made them wealthy. That is very logical. You want to have a say in the rules that affect your livelihood, and the wealthier you are, the better you have means to insist and make sure that governance systems respond to you. This is an old human problem with the way we organize ourselves. This was a problem even in the Roman Empire: as Egypt and Byzantium became wealthy, they wanted a say in the politics of Rome.

Those of you who are involved with our Anglo-American tradition here will remember that, while we think of the Magna Carta as a foundational document in law,⁸ it came about because of the wealth of barons against the wealth of kings and the desire to have a say in the way in which the government was run.

As the Thirteen Colonies along the Eastern Seaboard became wealthier and wealthier, they wanted, as Englishmen, seats in Parliament. When they did not get those seats, we had a revolution to change the rules.

Canada stayed loyal to the British Empire, but nevertheless, as the Canadian colonies became wealthier and wealthier, the Canadians insisted in having a voice in the management of the empire. First this insistence was through imperial councils and later in dialogue with Great Britain concerning foreign laws or other issues, including issues of when to go to war.

This problem has been with us for a long time and is very human; it is the same problem we now face in North America between Canada and the United States.

One other brief comment: it is not coincidental that we have seen a great spread of democracy as a means of governance around the world. You will find more and more countries that have democratic or quasi-democratic sys-

⁵ *Lawrence Herman*, CASSELS BROCK & BLACKWELL LLP, http://www.casselsbrock.com/People/Lawrence_Herman (last visited Oct. 3, 2010).

⁶ *J. Michael Robinson*, CAN.-U.S. L. INST., http://cusli.org/about/advisory_board.html (last visited Oct. 1, 2010).

⁷ *Richard Newcomb*, DLA PIPER, LLP, http://www.dlapiper.com/richard_newcomb/ (last visited Oct. 1, 2010).

⁸ *See generally* A. E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* (University Press of Virginia, Rev. ed., 1998) (analyzing the provisions of the Magna Carta and discussing its influence).

tems as we see wealth and prosperity grow from one side of the world to the other. Increasingly, we see the connection between those two factors and globalization. At least for North America, deepening economic integration is moving faster than the governance mechanisms we set up to manage those transaction flows. This is something we have heard again and again in different ways from these panels.

When this happens, as we have seen and heard in the last few days, we fall back on the law to reconcile differing systems of governance to try to allow the flows to continue in the best way possible, which is according to a consistent rule of law. That is why the work of the Canada-United States Law Institute is so essential: at the moment, there is no overarching governance for what is increasingly a shared economy, and we have a lot of work to do sorting out the gaps and differences in our governance systems to allow that integration to continue to deepen.

According to the discussions we have heard so far, I would argue that what we have seen are four types of governance that are coexisting and attempting to give structure to the economic flows that are shaping our integration between the United States and Canada.

The first and most logical place to begin is with federal-to-federal government arrangements. Most notably, these arrangements include the North American Free Trade Agreement (NAFTA),⁹ but also, as we have heard earlier this morning, tax treaties designed to govern the way in which we manage taxation, intellectual property rights, and some of the border security arrangements that do bring us back to federal control of national borders.

Secondly, we see the emergence of an interesting area that came up yesterday in the first panel: state and provincial interactions. These occur particularly in the areas of environmental climate change policy,¹⁰ as in the Western Climate Initiative,¹¹ the Regional Greenhouse Gas Initiative,¹² and other organizations among states and provinces. Others include organizations attempting to deal with carbon trading, not only across the broad region, but also among these different jurisdictions.

A third area is the private-to-private interaction; in other words, businesses that are working together to try to define rules. The most notable example of that involves Underwriters Laboratories and Canadian Standards Association,¹³ which have both tried to create baseline reconciliations of the national

⁹ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

¹⁰ See generally Grant Boyle, *A Review of Emerging GHG Emissions Trading in North America: Fragmentation or Progress?*, 46 ALTA. L. REV. 173 (2008) (discussing provincial, federal, and state climate change initiatives in North America).

¹¹ *Id.* at 185-87.

¹² *Id.* at 183-85.

¹³ See RANDALL W. LUECKE, CAN. STANDARDS ASS'N, UNDERSTANDING PRODUCT

systems that we have for governing engineering and safety standards. These are reconciliations that do not trump what the governments do, but they try to define business with a clear set of operational standards for product safety that will give them the ability to produce a product that works in multiple markets. Instead of superseding government standards, it helps government standards work more effectively by building a bridge between them.

Perhaps the most fascinating area for me, and one that a number of panels mentioned, is the public-private partnership for the governance of these transactions. More panels may have mentioned this, because it is an area of growing concern. The private sector has a good window on what is needed, and the public sector nonetheless has the authority to provide the governance. With their own perspectives, the two work together.

An example of this is food-safety standards where private groups provided supply chain verification for food safety, but the actual testing was done by a government agency.

In addition, the auto industry is one where there needs to be dialogue between the governments and the industry to figure out how to effectively reach goals, especially with respect to the technical challenges of building a car that is green, or building a car that needs to meet certain fuel efficiency standards.

Data protection and privacy is another area where there needs to be a compromise between private parties and government. Companies are doing their best to protect data—obviously for reasons not just of liability, but also out of a concern for their clients and employees—but they are also trying to make sure this can be verified with minimal intrusion by governments in a way that allows them to move data and manage multinational enterprises.

Tax treaties can also fall back on business to help them figure out things like transfer pricing. And, as we heard on the last panel, we have programs like the customs trade partnership for tariffs, partners in protection, and other programs designed to build a partnership between the private sector, which manages security across the supply chain, and the public sector, which has to use that information to expedite the secure passage of goods across our border. And, with new areas, such as “10 plus 2,”¹⁴ for example, we are moving further down this road.

CERTIFICATION MARKS AND THE PRODUCT TESTING AND CERTIFICATION PROCESS 5 (2005), available at http://www.csa-international.org/retailers_specifiers/white_paper_certmarks_retailers.pdf (giving a synopsis of the certification process for retailers).

¹⁴ See U.S. CUSTOMS & BORDER PROTECTION, IMPORTER SECURITY FILING AND ADDITIONAL CARRIER REQUIREMENTS 1-2 (2009), available at http://www.cbp.gov/linkhandler/cgov/newsroom/publications/trade/import_sf_carry.ctt/import_sf_carry.pdf (explaining the new Importer Security Filing and Additional Carrier Requirements rule).

All of this interaction and attempts to establish governance between these two countries to manage a deepening integration raises a couple of broad questions that I think this panel is very well suited to begin to address.

First, remember that the conference title we have been working under here is the “Canada-United States Regulatory Regime: Review, Reform, and Recovery.” Certainly we have discussed reform and recovery, but this also includes how we can facilitate the recovery of some of the best of these two countries’ cooperative traditions to bring about further economic recovery.

This raises some questions for me. First, how can the current law be adapted, extended, and refined to provide adequate governance for today’s integration? What can we do to reform the current laws in their application, administration, and function to make them work better?

Secondly, what role should be played as we move forward to adapt additional governance by the Canadian Parliament, and the United States Congress? Also, what role should state and provincial legislatures play? What role should judiciaries play? We have already heard a little of the judicial contribution in the area of data privacy, and while that may be good, perhaps it is not as good as if the legislature itself had opined. What role should be played by administrative agencies? The EPA,¹⁵ for example, might play the role of a proactive player, establishing emission rules and affecting our future energy development. But there are other areas in which administrative agencies, by providing a framework on their own, might provide the best vehicle. Or perhaps because administrative agencies are less accountable than the legislature would be, it may be inappropriate to proceed on that basis, and we would prefer to see a different debate.

Third, since the realities of integration are most easily experienced in the private sector, how can the private sector initiate public-private partnerships? Is there a way for the private sector, and not just one firm but perhaps many firms in the form of industry associations or forums, to recognize a common problem and begin the process of engaging the public sector in both countries? Could this happen without the program becoming a complicated and bureaucratic process that would require talking to twenty people before proceeding? How can we empower the private sector to initiate? How can the private sector do a better job of initiating the need for reform or even revolution if we need to totally scrap the current system and reform it?

My fourth observation is whether it is possible that the current systems will prove inadequate, even with an increased public-private partnership in rewriting rules, providing new rules, and refining systems? At the extreme end, we can talk about a common governance for this economy—one in which the United States and Canada would somehow work together. We

¹⁵ National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2006).

joke that Canada is the fifty-first state, but it does seem to be a logic that integration points to: the need for common governance. Or perhaps these two countries could establish governance as Europe has it: a North American Governance Panel or North American Commission or Parliament. Are these ideas that were once thought to be at the fanciful and extreme end of the debate finally coming into play, or will we find that even something less than these revolutions could make the system work with two large federal governments managing it? Do we need a big vision as many people in the Canada-United States relationship talked about, or can we incrementally improve the management of this relationship in a manner that will adequately facilitate the deepening integration that we are seeing?

I suppose there is even a broader question. Failing all of this, will the deepening integration that we have seen continue in the future, or have we hit the high point already? The future involves, as some people suggested, greater trade with China and Europe, but diminished trade between Canada and the United States because we have failed to answer these questions adequately. This may be due to a lack of ambition, a failure of nerve to ask tough questions, or maybe it is because we have one of the most convoluted systems of governance; or, as stated by Dr. Fung, maybe we are just the “stupidest people on earth” and therefore cannot resolve these problems on our own.

Now, I have a panel today of individuals who are *not* the stupidest people on earth, but rather some of the smartest. I want to turn now to the panel and ask them to respond to my nonsense or to move on to offer their own comments, looking at this from their expertise and reflecting on the panels that we have had. Thank you very much.

UNITED STATES SPEAKER

*Donald B. Cameron, Jr.**

MR. CAMERON: Following along with Chris' suggestion, I would like to comment on his introduction. This a very ambitious set of ideas. As a trade lawyer, I sometimes ask why the North American Free Trade Agreement (NAFTA) even occurred. NAFTA did not occur because the governments thought that it would develop trade; NAFTA occurred as a follow-up to trade. Basically, the economics forced it to occur. So I am not as skeptical in the long-term. However, over the short-term, I am extremely skeptical in terms of where we are. We have an administration right now that only two weeks ago appointed an undersecretary of commerce for international trade.¹⁶ In addition, there is still no assistant secretary for import administration.¹⁷ How exactly is the Commerce Department going to coordinate with the United States Trade Representative's office to set trade policy when there is no political direction within the Commerce Department?

* Donald B. Cameron, Jr. is recognized with distinction in Chambers Global: The World's Leading Lawyers for Business (since 2007), Chambers USA: America's Leading Lawyers for Business (since 2005), and The International Who's Who of Business Lawyers (since 2006), and has more than three decades of experience representing multinational businesses, foreign governments, foreign trade associations, and United States importers in litigation under United States antidumping, countervailing duty, and safeguards law. He also advises clients from around the globe in international trade disputes and market access issues, and has particular experience defending clients in industry sectors that are politically sensitive. He regularly practices before the U.S. Department of Commerce, the U.S. International Trade Commission, the Office of the U.S. Trade Representative, the U.S. Court of International Trade, and the U.S. Court of Appeals for the Federal Circuit. In addition, he advises clients on World Trade Organization (WTO) proceedings and has participated in WTO Panel and Appellate Body proceedings on behalf of clients and their member governments. He has also defended clients in NAFTA Chapter 19 proceedings and has argued before NAFTA Panels. Mr. Cameron and his partner, Julie Mendoza, also advised the Government of Korea in the successful WTO challenges to the U.S. safeguard actions on line pipe and certain steel products (AB-2001-9 and AB-2003- 3). As counsel for foreign manufacturers, Mr. Cameron has advised and assisted foreign governments in a variety of bilateral and multilateral trade negotiations, most prominent being the steel Voluntary Restraint Arrangements negotiations, bilateral subsidies negotiations, and the OECD shipbuilding negotiations. Mr. Cameron received his J.D. (1974) from Vanderbilt University and B.A. (1971) from Kenyon College. He received his LL.M. (1975) from the Vrije Universiteit, Brussels, Program on International Legal Cooperation in Brussels.

¹⁶ See Press Release, Int'l Trade Admin., Francis J. Sanchez Sworn in As Undersecretary of Commerce for International Trade (Mar. 29, 2010), *available at* <http://trade.gov/publications/ita-newsletter/0410/sanchez-sworn-in-0410.asp>.

¹⁷ See Press Release, U.S. Dept. of Commerce, Import Administration Commends the Service of Joseph A. Spetrini (Jan. 11, 2008), *available at* http://trade.gov/press/press_releases/2008/spetrini_011108.asp (Lortentzen has not yet been replaced as Acting Assistant Secretary for Import Administration).

I realize that this is somewhat of an “inside baseball” type of topic, but there are real consequences when there is no political direction. The result is having individual offices that are acting independently with no policy guidance, and consequently you have chaos. When chaos results from the lack of direction, the only thing I can tell our clients is that this is the reason we have courts. And that is not a very satisfactory answer. This is the sort of thing that officials are dealing with right now in Washington.

You talk about legislatures. Think about this in terms of the current political climate. I realize we are talking about an increase in exports. I fully expect there to be an increase in exports, but it is not going to be because of anything that anybody in government is doing about it. There is no DOHA round; that is not going to be concluded. We are not concluding any free trade agreements (FTAs) that would actually have a tangible benefit in terms of increasing our exports. None of that is going to happen; there is no political will within Congress to get that to happen. For this administration—let us be honest—trade is not a priority. It is recovery that is a priority.¹⁸ Exports are important, but exports are going to come because of the private sector. They are not going to come as a result of government. Also, think about what you wish for before you get it. Do we really want trade legislation before this Congress? I would suggest to you that it would be a nightmare. This is not a Republican-Democrat issue; this is the politics of trade. Right now people are scared. And when people are scared, the legislatures do not act in the best interests of the country. This is the reason that you have reactions against FTAs, even if you can actually point to evidence that the FTA, contrary to the great sucking sound that we heard from Ross Perot,¹⁹ will actually give you a \$10 billion dollar export surplus in terms of trade benefit. But, no, we are not going to even touch that, at least until after the mid-term election.

These are simply my thoughts on the subject. I think that in the immediate term, if we are still emerging from a very horrible economic experience, and let us all remember what it was around this time last year when we were talking about the economy. People were still talking about using the word “depression” to describe our economic state of affairs. Say what you will about the economy now, but we are not talking that way about it one year later; that, of course, is a good thing. We have a ways to go, however, before we start getting some real perspective in terms of whether we really want to go to the legislature and do something.

¹⁸ See Michael S. Lewis-Beck & Richard Nadeau, *Obama and the Economy in 2008*, 42 PS: POL. SCI. & POL. 479, 479-83 (2008) (attributing President Obama’s election victory to his economic platform and the voters’ perception of the state of the economy).

¹⁹ David M. Rankin, *Borderline Interest or Identity? American and Canadian Opinion on the North American Free Trade Agreement*, 36 COMP. POL. 331, 346 (2004).

CANADIAN SPEAKER

*James P. McIlroy**

MR. MILLROY: My name is Jim McIlroy. I am an international trade lawyer based in Toronto. I would like to follow on what both Chris and Don mentioned, which is questioning the role of treaties, both generally and in national governments.

I was really struck yesterday morning when Professor Maureen Irish was discussing the North American Free Trade Agreement (NAFTA).²⁰ She described all the provisions on technical barriers to trade and showed us all these provisions containing the word “shall,” indicating an obligation to act. Yet fifteen years later, nothing has happened. We have this tremendous treaty. It has great language in it, but we are still here today talking about regulatory differences. The first question you have to ask is: Why do we care about regulatory differences? Who really cares?

It is we who should care. These differences create barriers to trade; they add costs and burdens, particularly on small and medium size businesses. Technical barriers also decrease the ability of North American companies to compete in the global economy. Before we do something about them, we have to recognize that we always, but erroneously, use the word “technical regulations.” This is not a technical problem, but rather one that involves very emotional debates about national sovereignty. Many people think it is a zero-sum game. If we have common regulations with the United States, that means we have lost. Canada has given up its sovereignty.

The other part of it is that, in addition to this loss of national sovereignty, people think this is a plot by big, bad multinational corporations and that the

* James P. McIlroy’s career in law, international trade, and government spans three decades. He has worked at several leading United States and Canadian law firms. A former senior policy advisor to the Canadian Minister for International Trade and Prime Minister’s Office, Mr. McIlroy helps clients deal with the departments of Finance, Industry, Agriculture, Foreign Affairs and International Trade, the Canada Border Services Agency, and the Canadian International Trade Tribunal. He is active in negotiations and disputes, including the World Trade Organization. Mr. McIlroy speaks and publishes widely, including in the *Journal of World Investment and Trade*. He is bilingual and holds a B.Sc. in political science from Université de Montréal, a Maîtrise from the Sorbonne, and an LL.B. from Osgoode Hall Law School. Mr. McIlroy serves on several boards, including the Canada-United States Law Institute. He has been a member of the Ontario Bar since 1983.

²⁰ Maureen Irish, Professor, Univ. of Windsor Faculty of Law, Presentation at the 2010 Canada-United States Law Institute Henry T. King, Jr. Annual Conference: The Economic Impact of Canada-US Regulatory Convergence from the Canada-US Auto Pact to the North American Free Trade Agreement and Beyond (Apr. 9, 2010), available at http://www.cusli.org/conferences/annual/annual_2010/presentations/Friday%20Session%201%20-%20Irish.pdf.

private sector is taking over the public interest. We, therefore, have to recognize that this is a very loaded debate. If we treat it as just a simple technical debate, we will lose the debate because the unions and others in Canada do not treat this as a technical matter. In Canada, we have something called the Council of Canadians²¹ that claims the sky is falling every time we harmonize Canadian regulations with American regulation. They portray harmonization as something that, by definition, is bad, was forced upon them, or diminished them in some way. Because this is their perception, we have to give it some recognition.

I also want to talk about what I call top-down efforts; for instance, where you have lofty treaties like NAFTA and lofty statements from President Obama,²² Prime Minister Harper,²³ and the president of Mexico.²⁴ In August 2010, they met in Montebello, Canada, and the leaders endorsed a Regulatory Cooperation Framework.²⁵ That was three years ago, but nothing has happened. Therefore, they met again in Guadalajara, Mexico last August and said, "We commend the progress achieved on reducing unnecessary regulatory differences and have instructed our respective ministers to continue this work by building on the previous efforts, developing focused priorities and a specific time line."²⁶ To me, that is simply saying that they talked about this three years ago, and nothing has happened, so they need to try something new.

Let me conclude by discussing a couple of events that occurred over the last few weeks that give me reason to be optimistic. First of all, there was a press release issued by Environment Canada on April 1, 2010 stating, "Canada and the United States announce common standards for regulating greenhouse gas emissions from new vehicles."²⁷ This is a positive development. Importantly, it points out that climate change is going to be driving regulato-

²¹ RAYMOND B. BLAKE, *THE SASK. INST. OF PUB. POLICY, STANDING ON GUARD: CANADIAN IDENTITY, GLOBALIZATION, AND CONTINENTAL INTEGRATION 2* (2004), available at http://www.uregina.ca/sipp/documents/pdf/PPP25_Blake.pdf.

²² Press Release, Gov't of Can., Prime Minister Harper Raises Canadian Concerns on Trilateral Agenda at North. American Leaders Summit (Aug. 21, 2007), available at <http://www.montebello2007.gc.ca/news-eng.html>.

²³ *Id.*

²⁴ *Id.* (Mexico's president, Felipe Calderón, participated in the North American Leaders Summit).

²⁵ *Id.*

²⁶ Press Release, The White House, Office of the Press Sec'y, Joint Statement by North American Leaders (Aug. 10, 2009), available at http://www.whitehouse.gov/the_press_office/Joint-statement-by-North-American-leaders/.

²⁷ Press Release, Env't Can., Canada and the United States Announce Common Standards for Regulating GHG Emissions from New Vehicles (Apr. 1, 2010), available at <http://www.ec.gc.ca/default.asp?lang=En&n=714D9AAE-1&news=B1DDFE4D-5147-46F9-BA97-BA1BDDC3B7A6>.

ry cooperation. It is the big issue—the one that is biting them—and it will be driven by climate change. I think you heard that from both Minister Peterson²⁸ and Governor Blanchard²⁹ at the opening session, when they were asked what the big issue was. The thing that is going to drive the Canada-United States relationship is climate change. It is big, and it will make things happen. As a Canadian, I would rather see climate change driving the bus on the relationship than I would security. I am tired of security. It is all about borders. It is really poisoning the relationship between the two countries, while I think climate change is something we can work on.

The press release said Canada will harmonize its regulations with the mandatory national standards of the United States beginning with the 2011 model year.³⁰ This is important because we have decided we are going to harmonize climate change action on a North American scale. Remember one thing here: this is not NAFTA. This is Canada and the United States. You do not see Mexico here, and you are going to see more and more that this is bilaterally driven.

It is also important that critics are going to say that this is bad. They will think that Canada is aping the Americans, that this is terrible, and that Canadians are merely adopting the American approach, as opposed to cooperating with them. My question is: What really is the American approach? Yesterday, we saw Meera Fickling³¹ show us all of these pieces of legislation swirling around in the United States Congress. Nobody knows what is going to come out of there, and I think that is something we have to watch.

To finish discussion on this press release, I found it fascinating that it came out of California, a mere state, and not out of Washington.³² Then Quebec picked up on it and started pressuring Ottawa.³³ Then the industry,

²⁸ James S. Peterson, Counsel, Fasken Martineau, Presentation at the 2010 Canada-United States Law Institute Henry T. King, Jr. Annual Conference: Economic Recovery in the Canada-United States Relationship (Apr. 8, 2010).

²⁹ James S. Blanchard, Partner, DLA Piper LLP, Presentation at the 2010 Canada-United States Law Institute Henry T. King, Jr. Annual Conference: Economic Recovery in the Canada-United States Relationship (Apr. 8, 2010).

³⁰ *Env't Can.*, *supra* note 27.

³¹ Meera Fickling, Research Analyst, Peterson Inst. for Int'l Econ., Presentation at the 2010 Canada-United States Law Institute Henry T. King, Jr. Annual Conference: The Economic Impact of Canada-US Regulatory Convergence from the Canada-US Auto Pact to the North American Free Trade Agreement and Beyond (Apr. 9, 2010), *available at* http://www.cusli.org/conferences/annual/annual_2010/presentations/Friday%20Session%201%20-%20Fickling.pdf

³² See Cat Lazaroff, *California Law will Limit CO2 Emissions from Cars*, ENV'T NEWS SERVICE (July 22, 2002), <http://www.ens-newswire.com/ens/jul2002/2002-07-22-06.asp>.

³³ See *2006-2012 Climate Change Action Plan Programs*, GOUVERNEMENT DU QUEBEC, http://www.mddep.gouv.qc.ca/changements/plan_action/reglements-en.htm#mesure3 (last visited Oct. 23, 2010).

particularly Ford, began pressing for North American standards.³⁴ What does that tell me? It tells me that this is bottom up. It is industry driven. It is coming out of the states, and it is coming out of the provinces. The respective capitals are not being proactive. The capitals are instead reactive. They are behind the ball on this, and I think they are going to continue to be so.

The second event I want to discuss is something that appeared in the *Canada Gazette*, which is similar to the *United States Register*. The Department of Foreign Affairs and International Trade published a notice on March 20, 2010. The notice was entitled, "Request for Public Comments on Future Areas for North American Regulatory Cooperation."³⁵ North American regulatory "cooperation" is a better buzzword than "harmonization" or "convergence" because it gets away from the idea that harmonization is about the little guy following the big guy. I believe this "regulatory cooperation" has a better ring to it.

What is going on here is a bottom-up exercise. The government is basically saying that it does not know what to do, and it wants the private sector to tell it what to do. It is interesting that Ottawa is encouraging Canadian, American, and Mexican stakeholders to develop joint submissions. What should the private sector be doing? I think private-sector organizations should try to work together and only go to their respective national governments after having already worked out and agreed upon the details. I suspect that is what happened with vehicle emissions. I think the Big Three worked it out, and then went forward.

To finish, I think we are going to see more bottom-up governance, and less top-down attempts from the national governments, Ottawa and Washington. The reason for that is twofold. First, technology is moving way too fast for bureaucrats to keep up with it. They simply cannot keep up. Try to keep up with Dr. Fung. You cannot keep up with him. Second, governments may be broke. They do not have the resources. In addition, they do not have the sectoral industrial expertise. I think what we are going to gradually see is that public service is going to decline. We have already seen wage freezes.³⁶ We are going to see hiring freezes, and we are going to see attrition.

I will just close by saying that the top-down approach does not work. We have had NAFTA for fifteen years. Though we have had announcements of action in the past, we now see the *Gazette* notice saying that bottom-up par-

³⁴ See *Letters in Favor of New EPA Fuel Standards*, ENVTL. DEF. FUND (Sept. 10, 2010), <http://www.edf.org/article.cfm?contentID=11333> (linking letters from various auto manufacturers supporting new fuel standards).

³⁵ *Government Notices: Department of the Environment*, 144 CAN. GAZ., no. 13, Mar. 27, 2010, available at <http://www.gazette.gc.ca/rp-pr/p1/2010/2010-03-27/html/notice-avis-eng.html>.

³⁶ See *Ontario Pay Freeze Comes With Loophole*, CBC NEWS (Mar. 30, 2010, 8:41 AM), <http://www.cbc.ca/canada/toronto/story/2010/03/29/pay-freeze.html>.

ticipation is demanded. I think nature abhors a vacuum. It is going to happen, but it is not going to come out of us watching Washington, or watching Ottawa. The bottom line is that the private sector is proactive and the public sector is reactive. As an Institute, we should be hitching our wagon to the proactive element. Thank you very much.

CANADIAN SPEAKER

*Larry L. Herman**

MR. HERMAN: What can you say after that and after Chris Sands' incredibly thorough and helpful introduction? If you have not read the paper that Chris composed last year for the Brookings Institution,³⁷ it is in your material, and it is an excellent study covering all of the challenges and possible solutions at the border. Chris and I differ on one important thing that I am going to comment on in a moment, but I commend the excellent work that he has done. In fact, he is one of the most knowledgeable Americans about the Canada-United States relationship that you can find, and it is very gratifying that he is here with us today.

I wanted to summarize some of the discussion over a day and a half. First, there are a lot of regulatory challenges and divergences that are inhibiting the realization of all the benefits that the North American Free Trade Agreement (NAFTA) provides. The free trade agreement is a done deal. The real challenge is to maintain the benefits of that agreement. However, what we are finding is that regulatory differences of certifications, diver-

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³⁷ CHRISTOPHER SANDS, BROOKINGS INST., TOWARD A NEW FRONTIER: IMPROVING THE U.S.-CANADIAN BORDER (2009), available at http://www.brookings.edu/~media/Files/rc/reports/2009/0713_canada_sands/0713_canada_report.pdf.

gences, and approaches to regulation are an inhibiting factor.³⁸ I think that is a given.

We have heard a lot of discussion over the last day and a half that shows where the border, in one way or another, still exists and inhibits free trade between the two countries. That is the first thing.

The second point (and here is where Chris and I differ to some extent, but in a friendly way) is that the challenges have to be addressed on a bilateral basis between Canada and the United States. Chris is an optimist and an idealist, and he believes in a trilateral approach to these things. We have had a long discussion over the various parts of these differences, but I think what we heard today is that Canada and the United States have good reason to solve these issues on a bilateral basis, rather than a trilateral basis. I think that this is the correct approach for border issues, particularly, but for other things as well. Regulatory reform and recovery is what we are talking about, and I believe that has to be done bilaterally.

The third thing that I thought was really fascinating in the discussion over the last day and a half was that the private sector is moving ahead of governments. In other words, we have the private sector determining who is going to be certified for purposes of entering the market. As examples, we have the Canadian Standards Association and Underwriters Laboratories, Inc.³⁹ There are others as well, such as the American Society for the Testing of Materials and the American Society of Mechanical Engineers, both of which are private-sector bodies that certify products.⁴⁰ These products will not be shipped across the border unless they have those private sector specifications certified on the product. This is a fascinating development and one that I think the Institute should observe more closely. This all comes down to the private sector being ahead of the governments.

The final point relates to some of the first three points. Between these two countries, we have NAFTA, a number of political declarations, and a multitude of working arrangements, all recorded in a recent study by the Canada School of Public Service.⁴¹ They pointed out that there are approxi-

³⁸ See generally GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, PETERSON INST. FOR INT'L ECON., *NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES* (2005) (comparing NAFTA's performance against its proposed objectives).

³⁹ LUECKE, *supra* note 13.

⁴⁰ AM. NAT'L STANDARDS INST., *OVERVIEW OF THE U.S. STANDARDIZATION SYSTEM: VOLUNTARY CONSENSUS STANDARDS AND CONFORMITY ASSESSMENT ACTIVITIES*. 5 (2d ed. 2007), available at <http://publicaa.ansi.org/sites/apdl/Documents/News%20and%20Publications/Brochures/U.S.%20Standardization%20System-07.pdf>.

⁴¹ See generally JEFF HEYNEN & JOHN HIGGINBOTHAM, CAN. SCH. OF PUB. SERVICE, *BUILDING CROSS-BORDER LINKS: A COMPENDIUM OF CANADA-US GOVERNMENT COLLABORATION* (Dieudonné Mouafo et al. eds., 2004), available at <http://www.cspss->

mately 360 memorandums of understanding, executive agreements, and treaties and so forth. Very few, however, are overarching agreements. While NAFTA is one, there are only a handful of others between our two countries. This is rather surprising. What I picked up from the discussion is that there is really not an adequate institutional capacity between the two countries to deal with the regulatory issues.

There are, as I said, a lot of working arrangements, but there is no permanent institutional capacity. That we do not have working groups other than NAFTA strikes me as being a great gap in the relationship. We also do not have an overarching structure to deal with the very important issue of regulatory reform. This would not necessarily harmonize reform, but it would at least ensure that trade in goods and services meets the appropriate certifications for both the private and public sectors on both sides of the border.

The lack of an institutional capacity to deal with regulatory barriers to NAFTA benefits is a very large problem. I am not sure whether this is the next big issue, but it certainly is an issue that is emerging from the discussions over the last day and a half, and it definitely needs to be addressed.

CANADIAN SPEAKER

*J. Michael Robinson**

MR. ROBINSON: Thanks, Larry. I propose two words that could solve about one-third of the problem: customs union. This would also save me from having to teach the rules of origin in my North American Free Trade Agreement (NAFTA) course, which rules I never completely understood. I tried to get Johnny Johnson,⁴² who I think is the only Canadian who does understand the rules of origin, to come up and teach the class. But I know from listening to Johnny, even though he is very smart, the students would

efpc.gc.ca/pbp/pub/pdfs/P128_e.pdf.

J. Michael Robinson, Q.C. is counsel in the Toronto office of Canadian national and international law firm, Fasken Martineau DuMoulin LLP. There he advises on international business, trade, and investment law, including Public/Private Partnerships projects for infrastructure in developing countries. Mr. Robinson is also an adjunct professor at Osgoode Hall Law School, of York University, Toronto and an adjunct faculty member at The University of Western Ontario Faculty of Law, London, Ontario. There he teaches international business, trade, and investment law. He publishes and speaks widely in Canada and abroad on private international law subjects and was for over thirty years active at senior committee and executive levels of the Section on Business Law of the International Bar Association (London). Mr. Robinson is a long time participant in the Canada-United States Law Institute and is currently a member of the Executive Committee of its Advisory Board.

⁴² See JON R. JOHNSON, *THE NORTH AMERICAN FREE TRADE AGREEMENT: A COMPREHENSIVE GUIDE* (2004).

never understand him because the rules are all so complicated. But certainly a customs union would eliminate much of the nonsense. I never heard any economist or politician that, after having lived with NAFTA and the Canada Free Trade Agreement,⁴³ could posit any valid reason for which we should not move to a customs union.

I think, for example, that the way Underwriters Laboratories, Inc. (UL)⁴⁴ and the Canadian Standards Association (CSA)⁴⁵ have worked is a demonstration of how things have actually not worked. Why do we still have to put both of these stamps on every toaster that crosses the border? There should be one common set of certifications or stamps, and there should be a new acronym that represents a new, common organization, instead of the distinct United States UL and CSA entities, which should have disappeared nineteen years ago. I do not think there has been much progress at all on that score.

There is something I do not think came up, except tangentially, during the last two days, and it is really an important thing in Canada. I would like you to follow it in the press. The huge issue between Canada and the United States in terms of regulation is constitutional competence. In Canada, the Feds do not have it. In the United States, you have it. In Canada, the problem began with a law established by a bunch of law lords of the English Privy Council in 1937,⁴⁶ which was then the highest court of appeals in Canada at the time. These lords, not recognizing a true federalist system, interpreted the Canadian Constitution to say that federal officials can sign and approve all these international treaties, but that if the treaties affect the provinces, all the provinces have to sign them as well. That has been the law in Canada since 1937.

The trade and commerce power, which I know Larry and many others believe could blow that silly case out of the water in the twenty-first century, has not come up until now. The issue came up because it is a federal provincial issue with that famous province, Quebec, and it concerns the Federal Securities Commission.

We are finally getting the nerve to say that we need to have one of these. It is ludicrous to have thirteen jurisdictions covering our securities industry. Changing that has been pronounced as policy by the Feds. Quebec immediately said that this cannot be the case. The Quebec court of appeals has held this practice is unconstitutional.⁴⁷ It held that it would follow the Labor

⁴³ United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. 100-449, 102 Stat. 1851 (1988).

⁴⁴ See UL, <http://www.ul.com/global/eng/pages/> (last visited Jan 3, 2011).

⁴⁵ See CSA INT'L, <http://www.csa-international.org/> (last visited Oct. 23, 2010).

⁴⁶ A.G. for Canada v. A.G. for Ontario, [1937] A.C. 326 (P.C.) (holding that whenever a treaty concerns an area of provincial jurisdiction, the relevant provisions may be implemented only by the provincial legislative assemblies).

⁴⁷ See generally R.E. Sullivan, *Jurisdiction to Negotiate and Implement Free Trade*

Conventions case from the Privy Council in 1937, and that would be the end of the Feds.

In response, the Feds declared that they have the right as the federal government to put the issue to the Supreme Court of Canada instead of to the courts of Quebec.⁴⁸ The Feds may reject the Labor Conventions case, and the Supreme Court of Canada will hold in 2011, or whenever the Court addresses the issue, that the trade and commerce power indeed exists, and that it will trump this ridiculous Labor Conventions case. This will allow continuance with the Canada-United States regulatory compliance, as the Feds would have power to do more things. This will be an important development, so read the coming news on this matter.

Regarding public-private partnerships, we already have one. We are sitting here in it. The Canada-United States Law Institute (CUSLI)⁴⁹ used to involve much more business from Canada and the United States, and it is up to the core group (the people who really appreciate this organization) to get our business clients more involved to continue the drive for regulatory reform, to have the private sector push the government forward. Everybody here is absolutely necessary in moving this effort forward.

With our new co-chairs, we have new ideas and new directions for people who want to involve business. We can all assist these co-chairmen in this unique organization. Truly, there is nothing else between the United States and Canada that is like CUSLI.

We can be the leader in this whole area going forward, but we need all of you to spread the gospel of CUSLI to your clients, your friends, and to business people. We need more people like David Fung, and that is how we get public-private partnerships really rolling along.

Agreements in Canada: Calling the Provincial Bluff, 24 U. W. ONT. L. REV. 63 (1987) (discussing the trade and commerce power).

⁴⁸ See generally *The Canadian Judicial System*, SUPREME CT. CAN., <http://www.scc-csc.gc.ca/court-cour/sys/index-eng.asp> (last modified Jan. 7, 2009).

⁴⁹ CAN.-U.S. L. INST., <http://www.cusli.org/> (last visited Oct. 20, 2010).

UNITED STATES SPEAKER

*R. Richard Newcomb**

* R. Richard Newcomb is a partner based in Washington, D.C. where he is chair of the International Trade practice group. He comes to DLA Piper from Baker Donelson, where he chaired the International group.

Mr. Newcomb has had considerable international experience dealing with target governments, front-line states, like-minded allies, multilateral organizations (the United Nations, the European Union and others), financial and business communities worldwide, and others who are responsible for compliance with asset controls and economic sanctions and embargo programs. He is adept at handling regulatory procedures relating to international transactions, including navigating the requirements of the Committee on Foreign Investment in the United States (CFIUS), the Bank Secrecy Act (and anti-money laundering laws), Export Administration Act, Anti-Boycott compliance, United States customs law, and the relevant portions of the Patriot Act.

From 1987 to 2004, Mr. Newcomb served as director of the Office of Foreign Assets Control (OFAC) of the United States Treasury Department. Throughout his tenure, Mr. Newcomb oversaw the administration and enforcement of thirty-nine economic sanctions programs in furtherance of United States foreign policy and national security goals. His leadership guided the agency through many of the major foreign policy challenges the nation has experienced in the past two decades, from the advent of multilateral sanctions against Iraq in 1990—coupled with a protective blocking of approximately \$50 billion in Kuwaiti assets—to the transformation of the agency after the attacks of September 11, 2001, to track and disrupt terrorist organizations and their financing networks.

In his time at OFAC, Mr. Newcomb was responsible for implementing economic sanctions and asset controls against Burma, Cuba, Iran, Liberia, Libya, Sudan, Zimbabwe, narcotics traffickers in Colombia, and narcotics kingpins and their networks operating worldwide, as well as for maintaining the prohibition against financial transactions with Syria. Other economic sanctions that he implemented and saw through to completion included programs targeting the Taliban, North Korea, Serbia, Angola, Haiti, South Africa, Panama, Vietnam, and Cambodia.

Throughout his time at OFAC, the agency played a significant role within the domestic and the international communities, confirming that economic sanctions can be an effective tool of international diplomacy. The strategies developed under his leadership and supervision for implementing sanctions and targeting terrorists are among the principal tools used today to wage the war on terrorism and terrorist financing.

Prior to his assignment with OFAC, Mr. Newcomb held a number of other positions in the Treasury Department, including director of the Office of Trade and Tariff Affairs and deputy to the assistant secretary (Regulatory, Trade and Tariff Affairs), where he was the principal advisor to the assistant secretary for enforcement on customs, international trade, commercial, and regulatory matters.

President Ronald Reagan awarded him the Presidential Rank Meritorious Executive Award. Both President George H. W. Bush and President Bill Clinton honored him with the Presidential Rank Distinguished Executive Award. He has also received the Department of the Treasury Management Excellence Award and the Albert Gallatin Award. The Department of the Navy awarded him its Superior Public Service Award. During his tenure at OFAC, the American Bar Association Section of International Law and Practice

MR. NEWCOMB: Thank you, all. Being cleanup for this group does pose a challenge, because most of the good points have been made. I was particularly pleased by Jessica's panel about issues relating to the northern border and how it should be governed and, particularly, how it is different from the southern border.

During my lifetime, the United States and Canada have always had what we all thought was a special relationship. However, as in any relationship—whether personal, public, or business—it needs attention and care.

I was a law enforcement official in the United States government on September 11, and I can speak firsthand of the shock that it caused within the federal government. Also, as a resident on the northern border in New York, I can tell you that the border has certainly thickened.

By way of an anecdote, in my current position and my previous position, I traveled an awful lot, and I have gone through customs in many countries. One of the border crossings I fear the most is the border crossing in northern New York, coming from Canada into the United States. It is usually the longest, the hardest, and most controversial crossing, but it should not be that way.

I quote Tina Turner and my favorite song of hers in which she says, "We can make this nice and rough, or we can make this nice and easy."⁵⁰ I think United States customs has made things a little rougher than need be, and things need to be examined to realize how they can be made easier. I only say that as an anecdote.

There are many issues discussed here: trade barriers, border security, regulatory harmonization, cooperation, traffic, regulatory challenges, and the use of the Great Lakes. Though these are all great and important issues, I think there is one of attitude that needs to be seriously challenged. I suspect both countries need to understand that this special relationship could deteriorate significantly if serious steps are not taken soon to develop political leadership. I am very pleased about Jim Peterson⁵¹ and Jim Blanchard,⁵² and the possibility that our deliberations can resonate back in Washington where some of the views expressed here can be brought forth in a coherent package and delivered both to the legislature and to the executive branch. I know for a fact that if the White House would decide that we are going to make this

presented the agency with its Award for Outstanding International Law Office. When Mr. Newcomb departed the Treasury Department, he was awarded The Treasury Medal by Secretary John Snow "in recognition of singular accomplishments and leadership."

⁵⁰ IKE & TINA TURNER, *Proud Mary, on WORKIN' TOGETHER* (Liberty Records 1970).

⁵¹ See *Executive Committee and Advisory Board*, CAN.-U.S. L. INST., http://cusli.org/about/advisory_board.html (last visited Oct. 20, 2010) (listing James Peterson and James Blanchard as co-chairs of the Canada-United States Law Institute's Executive Committee).

⁵² *Id.*

nice and easy, it would become nice and easy. But that is a decision that actually needs to be made.

Regarding Don's comments about political appointments and having communication with the heads of the various departments and agencies, I think that a customs union is a very good idea. In addition, issues like global warming and others could be joint projects that we could work on.

I am struck by how others can make this easy. Mike and I were talking yesterday about travel to China. Every time you go through customs in China, you get the opportunity to provide instant feedback: they ask how you were treated, and for your assessment of the level of courtesy that was shown.⁵³ While traveling there, I have been treated with dignity, professionalism, and courtesy. I think that is the challenge that law enforcement officials at the border and the executive branch need to understand in this very special relationship, which could be helped a great deal by making things a little easier at the border.

The Canada-United States border is the longest undefended border in the world, although it does not seem that way anymore.⁵⁴ I think we need to recognize this as a serious issue and see what positive steps can be taken to address it. There are legitimate law enforcement issues, but the law enforcement issues should not interfere with all the other very serious issues that are on our plate and on our agenda. Thank you.

DISCUSSION FOLLOWING THE REMARKS OF DONALD CAMERON,
JAMES MCILROY, LARRY HERMAN, J. MICHAEL ROBINSON, AND
R. RICHARD NEWCOMB

MR. SANDS: Thank you very much, Rick. We will now take a few questions as I turn the time over to the audience.

MR. CRANE: David Crane. We heard the positive side of public-private partnership from David Fung when he portrayed business as trying to solve problems, and the initiative of this seemed to be very helpful. However, so much of what we can see is business trying to prevent problems from being solved. If you look at the history of automotive fuel efficiency over the last decade, the automotive industry used the courts to try to argue that California had no jurisdiction to regulate this.⁵⁵ The lobbyists went to Congress back-

⁵³ See generally CHINA OUTBOUND TOURISM RES. INST., <http://www.china-outbound.com/> (last visited Nov. 4, 2010).

⁵⁴ See *Canadian Marketing Regions*, U.S. COM. SERVICE CAN., <http://www.buyusa.gov/canada/en/canadianregionalprofiles.html> (last visited Oct. 20, 2010); see also Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 30 MICH. J. INT'L L. 809, 828 (2009).

⁵⁵ BRENT YACOBUCCI & ROBERT BAMBERGER, CONG. RESEARCH SERV., RL33413, *AUTOMOBILE AND LIGHT TRUCK FUEL ECONOMY: THE CAFE STANDARDS 13* (2007), available

wards and forwards for a change in fuel efficiency standards, and this is an example of how, more often than not, the private sector is a barrier to solutions. We better be careful about how we phrase all this.

I remember when they were trying to develop new guidelines for what was considered to be a healthy diet in the World Health Organization.⁵⁶ The biggest problem in this process was the United States and its emphasis on sugar consumption. The sugar industry had lobbied hard, and the United States continually tried to increase levels of sugar consumption.⁵⁷ This is just one example. Another example might involve leaded gas. Yes, the private sector can do things to solve problems, but in so many instances, it is actually part of the problem.

MR. CAMERON: I think that everything you say is quite valid, but I would add one thing. Regarding the fuel example, we constantly see in trade the entrenched interests of individuals who want to keep what they have. It is just the nature of trade and the process. That is the dynamic of trade. Taking your example of fuel efficiency, exactly what happened? The entrenched interests in this industry fought fuel efficiency for years, and the Asian producers actually began making changes accordingly. As a result, what happened? What happened was that the government was behind the most efficient producers, and “ate the lunch” of the non-efficient producers who wanted to use government barriers to keep things the way they were. Therefore, even when trying to use government barriers to maintain the status quo, it does not always work out.

MR. SANDS: What other questions do we have?

MS. LECROY: I was glad that you mentioned the notice regarding NAFTA regulatory cooperation. Is the Institute planning on submitting something before the May 26, 2010 deadline identifying opportunities to reduce barriers in a range of issues, including technical regulations, assessment procedures, industrial and agricultural products, and sanitary and phytosanitary measures based on this conference?

MR. MCILROY: Yes, the purpose of this panel is to get specific. The questions and the answers that we have had throughout the last day and a half are going to end up in concrete recommendations. We discussed this process that has been launched by the Department of Foreign Affairs and International Trade,⁵⁸ and we will be forwarding our recommendations to the Depart-

at <http://fpc.state.gov/documents/organization/82504.pdf>.

⁵⁶ See Sarah Boseley, *Political Context of the World Health Organization: Sugar Industry Threatens to Scupper the WHO*, 33 INT’L J. HEALTH SERV. 833, 831-33 (2003) (discussing the United States sugar industry’s lobbying efforts and threats to the World Health Organization regarding its 2003 report on guidelines for healthy eating).

⁵⁷ *Id.*

⁵⁸ FOREIGN AFF. & INT’L TRADE CAN., <http://www.international.gc.ca/international/index.aspx>. (last modified Jan. 4, 2011).

ment under the banner of the Canada-United States Law Institute. I want to thank not only the panels, but also the questions that elicited very, very clear recommendations from many of the panelists.

MS. LECROY: I would like to comment on the better-sounding tone of the North American Free Trade Agreement (NAFTA) regulatory cooperation that you all pointed out. I know that you keep mentioning a customs union. There have been a number of papers written on this that perhaps might warrant a reading. One paper was the 2005 policy research initiative paper, which discussed policy implications of the Canada-United States customs union.⁵⁹ Also, there was a first-prize-winning paper that has an extensive bibliography including NAFTA essays by Elizabeth Coback, and a paper from Daniel Goldfarb and others on this issue.⁶⁰ I think something which you all might want to take a look at is having regulatory cooperation rather than a customs union.

MR. HERMAN: The idea of a customs union has been around for a long time. In fact, it was one of the elements addressed during the original Free Trade Agreement negotiations in the early and mid 1980s.⁶¹ One of the problems we need to address regarding institutional capacity with a customs union is that it means the creation of a common external tariff that someone has to enforce. The institutional difficulty is that with common external affairs, there are still different enforcement agencies within the countries that employ the external affairs. In this case, both Ottawa and Washington have their own enforcement agencies that might apply rules and affairs in a certain way that is not shared with the other capital. Ultimately, you come to the difficulties of not having a binational institutional mechanism that would regulate and enforce the common tariff. That has been one of the conceptual challenges with the idea of a customs union. It is a good idea, and I think one we should continue to look at, but there are those practical barriers.

MR. MCILROY: I wanted to add on to that. As a trade lawyer, I found that when I would travel to Ottawa, I would maintain a certain position advocating the revocation of the tariff on the Canadian side. I had a client that uses certain goods as an input, and it would reduce their manufacturing costs, and so that was my position. In addition, there was no one in Canada making that product. I found that the tariff was there because the industry in Canada

⁵⁹ BILL DYMOND, THE CENTRE FOR TRADE POLICY & L., POLICY IMPLICATIONS OF A CAN.-U.S. CUSTOMS UNION (2005), available at http://www.policyresearch.gc.ca/doclib/DP_NAL_policy-implications_200506_e.pdf.

⁶⁰ See Elizabeth Cobbett, *Deeper North American Integration? Putting the Horse Back Before the Cart*, FOREIGN AFF. & INT'L TRADE CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/cobbett.aspx?lang=en>. (last modified Jan. 2, 2009).

⁶¹ See DANIELLE GOLDFARB, C.D. HOWE INST., THE ROAD TO A CAN.-U.S. CUSTOMS UNION 2 (2003), available at http://www.cdhowe.org/pdf/commentary_184.pdf.

existed over fifty years ago, but had since dissipated, discontinuing manufacturing of that product.⁶² But this was a hard sell, and, inevitably, there always seemed to be one company that emerged from nowhere and would say, “If you get rid of that tariff, we are going to have to close the plant, and it will kill this small village.” Thus, the tariff remained.

Something changed in the last year or two in Canada whereby the Department of Finance recently unilaterally disarmed on an array of tariff items.⁶³ They said having tariffs on inputs is not in the national interest. I think a customs union is going to develop because a lot of tariffs are coming off items simply because, in both Canada and the United States, we do not make many of these items any more. A lot of manufacturing is gone. I think we are moving in that direction.

Nevertheless, I do agree with you, that we have to develop a good buzz word for what we are doing here, because the other side has captured the debate on this. This is all about sovereignty and these “horrible” corporations trying to subvert the public interest. We have to take the debate back.

MR. FUNG: I would just like to comment on the issue of the recent decision by the Canadian Ministry of Finance eliminating the duty for imports of productive machinery and manufacturing inputs.⁶⁴ Canadian manufacturers and exporters have taken a major step in supporting that. Some of us who were leading the Canadian Manufacturers and Exporters (CME) took a hit in the process.⁶⁵ Some of our members wondered what we were doing.

I am here today to urge my American friends to stay away from protectionism. Protectionism will lead to nothing more than a repeat of what happened to the United Kingdom after World War II. There is no future in protectionism. As a neighbor to our American friends, we are so intertwined in terms of our economy. I believe there is absolutely no reason for any American to feel they cannot compete in the world. We need to hold hands together and conquer the world.

MR. SANDS: Excellent. I turn it over to Dan for final comments. Thank you very much.

MR. UJCZO: Thank you, Chris, for facilitating that session. Thank you also to our executive committee members Rick Newcomb, Michael Robin-

⁶² See generally Alla Lileeva, *Trade Liberalization and Productivity Dynamics: Evidence from Canada*, 41 CAN. J. ECON. 360 (2008).

⁶³ See generally DEP'T FIN., CANADA'S ECONOMIC ACTION PLAN YEAR 2, BUDGET 2010: LEADING THE WAY ON JOBS AND GROWTH (Mar. 4, 2010), available at <http://www.budget.gc.ca/2010/pdf/budget-planbudgetaire-eng.pdf>.

⁶⁴ *Id.* at 9.

⁶⁵ See *Board of Directors*, CAN. MANUFACTURERS & EXPORTERS, <http://www.cme-mec.ca/english/about-cme/board-of-directors.html> (last visited Oct. 21, 2010) (listing David T. Fung as “Immediate Past Chair”).

son, Larry Herman, Jim McIlroy, and Don Cameron, as well as Dick Cunningham⁶⁶ and Selma Lussenburg⁶⁷ who could not be here this morning.

I had the privilege in my career to essentially be raised not only by Henry, but also by these individuals seated here during my experiences with the Canada-United States Law Institute. Whenever we have an executive committee meeting to plan for this session, the first fifteen minutes of every meeting consists of these individuals sitting around and discussing what is happening in the state of affairs. That is the pleasure that we have as an Institute during our annual conference.

With that, on behalf of the Canada-United States Law Institute, I offer our heart-felt appreciation to all of our speakers and panelists not only today, but throughout this conference. As we were reviewing some of the same-day transcripts, we were discovering how incredible the record already is. In just a brief review, we have discovered several golden nuggets that were pulled out of these transcripts and the information that has been provided here.

I also extend our appreciation to our two founding institutions, The University of Western Ontario Faculty of Law⁶⁸ and Case Western Reserve University School of Law,⁶⁹ and to the faculty and staff that have participated in these proceedings.

I extend our heart-felt appreciation to our administrative team under the direction of our assistant team, Crystal Taylor as well as Nancy Pratt, our assistant director, Alice Simon and Jared Gregory, as well as Tim Lynch, who has been handling our audio-visual throughout the week, and our court reporters from Mizanin Service.⁷⁰ Also, as I said in the past, this conference really does not happen without the free labor, which comes in the form of our students who have been here and have been taking notes throughout the proceedings. I would like to thank all of them for their hard work.

In conclusion, this is the end of the conference and the start of a new beginning. I thank all of you, particularly those of you who are here on a sunny Saturday afternoon in Cleveland, Ohio. I now hereby declare this conference adjourned. Thank you.

⁶⁶ See *Executive Committee and Advisory Board*, *supra* note 51.

⁶⁷ *Id.*

⁶⁸ *About the Institute: Founding Institutions & National Directors*, CAN.-U.S. L. INST., http://www.cusli.org/about/founding_institutions.html (last visited Oct. 20, 2010).

⁶⁹ *Id.*

⁷⁰ MIZANIN REPORTING SERVICE, <http://www.mizanin.com/> (last visited Oct. 23, 2010).