CERT Policy Priorities for the Canada-EU Trade and Investment Agreement

March 2009

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The Canada Europe Roundtable for Business

CERT welcomes the opportunity to respond to the Canada Gazette notice of December 20, 2008 for the Government of Canada's consultations on possible comprehensive economic agreement negotiations with the European Union.

The Canada Europe Roundtable for Business (CERT) is an association of Canadian and European companies founded in 1999 to provide private sector input to the Government of Canada and the European Commission to assist bilateral policy formation. The goal of CERT is the establishment of a bilateral trade and investment relationship that is barrier-free, creating a more dynamic and prosperous transatlantic market. CERT advocates trade liberalization as a means to greater prosperity for Canada and the member states of the European Union (EU).

Participating Organisations

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American European Communities Association
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Bombardier
Canadian Centre for Energy Information
Canadian Manufacturers & Exporters
CD Howe Institute
Conference Board of Canada
Deloitte
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European Aeronautic Defence & Space Company
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Executive Summary

As critical stakeholders and major commercial beneficiaries of the negotiating outcomes, CERT members support the vision outlined at the October 17, 2008 Canada-EU Summit where leaders agreed to '*initiate before the end of the year the steps to obtain the mandates necessary to launch (trade and investment) negotiations as early as possible in 2009'*. Such an agreement can enhance the welfare of our own citizens and drive growth and prosperity. The recommendations outlined in this document represent our members' views on the priority areas for Canada-EU trade and investment negotiations.

According to the outcomes of the joint Canada-EU Closer Economic Partnership Study, wide-ranging trade and investment liberalization could generate commercial gains of more than $40 billion per year. The study also concluded that while tariffs have an impact on bilateral commercial flows, the greatest prosperity gains could be realized by liberalizing trade in services. Non-tariff barriers constitute another significant barrier to progress and should be a focus of Canada-EU negotiations, with a particular emphasis on regulatory cooperation.

Strengthened cooperation matters because while the bilateral trade relationship remains relatively steady, our economies have become increasingly inter-linked from an investment perspective where the majority of barriers arise due to differing regulatory approaches.

The international trading system, however, has evolved. Global value chains as well as increased trade in services and FDI are manifestations of the new reality. Faced with a new generation of trade issues that go beyond goods, multilateral trade negotiations have stalled; regional and bilateral agreements, meanwhile, are proliferating and the EU has been active on this front. Increasingly these agreements have become broad platforms that deal with a diverse set of issues, including regulatory cooperation, public procurement, competition policy, intellectual property, mobility of people, and cooperation in specific areas—such as energy and climate change.[i]

These shifts have opened a window of opportunity for a renewed dialogue on how to move the Canada-EU economic relationship forward. The specific cases in this paper reflect real business issues to be addressed in the scoping exercise. The issues are numerous and cover several sectors, but all represent realistic aims for the Canadian Government and European Commission to strive for in bilateral negotiations.

Canadian sub-federal commitments

CERT applauds the recent joint statement from the Council of the Federation urging negotiations to commence between Canada and the European Union on the development of a new and modern economic partnership.

The involvement of provinces and territories is necessary for the successful conclusion of negotiations and subsequent implementation of an agreement. CERT welcomes the decision by the federal government to commit to a process that enables all provinces and territories to participate directly in the negotiations. Consequently, after a final agreement, provinces and territories should take the necessary measures to ensure the implementation of any commitments they undertake through the negotiation process.

High-Level Industry Advisory Committee

CERT supports International Trade Canada's creation of a high-level industry advisory committee. Once negotiations commence on a Canada-EU trade and investment agreement, more focused industry and professional groups will be required to address the levels of detail required to negotiate outcomes in areas such as labour mobility and competition policy.

Bilateral air services agreement

CERT applauds the successful conclusion of negotiations on a comprehensive Canada-EU air transport agreement. A comprehensive Canada-EU air transport agreement will benefit travellers and shippers by providing more choices in terms of destinations, flights and routes, more direct services, and the potential for lower fares.

The agreement, which is consistent with Canada's Blue Sky policy and current Canadian legislation, will allow for the development of new markets, new services and greater competition.

Market access

In the relationship between Canada and the EU, there are a number of impediments to bilateral trade and investment. Trade transaction costs remain in the range of 2 to 15 per cent of trade transaction value. Tariff elimination combined with measures to expedite the movement of goods across borders would result in significant savings to businesses and consumers.

Tariffs, regardless of the level, constitute a disincentive to trade. Low tariffs can hinder some trade. In other cases, they simply constitute a tax on intra-firm or intra-industry trade. There is a tendency to overemphasise the importance of inter-industry trade, whereas the potential in intra-industry trade is often overlooked. Canada is one of a few countries that does not have preferential access to the EU market. Therefore, it is subject to the EU's full common customs tariff.

Canada and the EU share economies where both inter-industry and intra-industry trade have greater possibilities than previously exhibited as is clearly demonstrated by the considerable investment stocks held by EU companies in Canada and Canadian companies in the EU. The bilateral relationship is well suited for a strong effort to obtain better market access in both directions. A free trade agreement that contains / CERT calls for a comprehensive agenda of tariff reductions covering the broadest scope of sectors possible would be the best possible outcome of such a process.

Average tariffs are often high enough to divert trade. For example, average tariffs on manufactured goods, at 3 per cent (EU) and 1.6 per cent (Canada) may be equivalent to up to one half or a third of industry profit margins. Low industrial tariffs create an unwarranted tax for intra-corporate trade which weakens supply chain efficiencies and the competitiveness of firms relative to companies from countries with an FTA. This affects value-added supply chain formation both within, and between firms.

For Canadian companies, tariff peaks and tariff escalation (on processed agricultural products) are also a concern. Sectors that are particularly affected by tariff peaks include agriculture, agri-food, fish, forest products, textiles, manufacturing, chemicals and mining/metals. In many instances, these tariff barriers make trade in these products prohibitive. The duties alone, particularly in the agriculture, agri-food and fish sectors, are enough to make Canadian products non- competitive. In addition to the sectors noted above, Canadian priorities should also include the removal or accelerated reduction of tariffs on plywood, paper and chemical products.

In the area of forest products, the EU continues to levy duties on imports of coniferous plywood. This is a trade distorting mechanism that prices Canadian plywood out of many European markets. These duties should be addressed in negotiations.

Canada and the European Union have a long history of cooperation in the wine sector. For example, the Canada-EU *Wine and Spirits Agreement* provides a forum for addressing wine-

related policy matters such as the process for phasing-out domestic use of certain geographical indicators. Another issue already solved though this agreement is the Canada-EU dispute on excise tax relief where Canada agreed to reduce or eliminate tariffs on imports of bulk wine, bottled table-wine and sparkling wine. A number of issues remain for the Canadian wine industry, including onerous labelling requirements, domestic European subsidies, and restrictions on additives and preservatives that are approved for use in the EU.

Reciprocally, Canadian government control in some provinces of the alcoholic beverage sector creates unfavourable market access conditions for the EU wine and drinks industry.

The agricultural industry, specifically the meat sector, deals with a number of tariff and non-tariff barriers to trade between Canada and the EU, leaving Canada with an agri-food trade deficit at $1.4 billion in 2007. In addition to tariffs and/or tariff rate quotas (TRQ) additional regulatory requirements, including conformity assessment, phytosanitary certificates, and TBTs present Canadian exporters with difficulties exporting to the European market.

Specific technical barriers include the EU's Third Country Meat Directive (a highly prescriptive set of requirements for production plant standards and meat hygiene standards) and the EU's ban on hormones in livestock production. There continues to be a lack of mutual recognition of many food safety standards and inspection processes. Further, many Canadian agricultural products face regulatory barriers that essentially bar them from being exported to the EU, even if no formal ban is in place. For example, Canada used to be a major exporter to the EU countries of many agricultural and agri-food products prior to the Common Agricultural Policy (CAP). This presence has steadily eroded since the CAP's implementation, while European companies are very significant players in the Canadian food and consumer packaged goods industry, both as exporters and investors. Further, the European Union has not met the minimum access commitments for certain agriculture products that was required by the WTO *Agreement on Agriculture*.

On the positive side, the EU's biofuels policy is conducive to imports of vegetable oil from Canada.

We recommend that the Canadian government work with the EU to improve market access opportunities for Canadian agri-food producers. Some specific examples of areas that should be targeted for negotiations include:

- Barriers and onerous regulations, including tariff rate quotas and export subsidies on pork.
- A 20 per cent EU tariff on cooked and peeled shrimp and a 16 per cent tariff on lobster.
- Creation of a fair quota system for the harvest of Northern Atlantic cod
- Improve the EU Tariff Rate Quota (TRQ) regime for imports of bovine meat, including Bison meat.
- Improve the EU TRQ for feed barley and for malting barley.
- Reduce the EU duty rate for horse meat and for edible offal imports.
- Reduce the EU duty rate on pulse imports, including broad beans and horse beans.
- Improve the Canadian TRQ for non-durum wheat.
- At 8%, Canada's sugar tariff is the lowest in the world. The European Union's is at 225%. The result is that Canada's refined sugar has zero access to EU markets.

For EU exporters, there is an industrial (and services) surplus with Canada – especially in transport and chemicals sectors. Canada has low average industrial tariffs but some peak tariffs that render trade prohibitive. Canada has low average industrial tariffs but high peaks in transport equipment (25), Leather (20), other manufactures (18), textiles/apparel (18),

Wood/paper (16), chemicals (16) and minerals/metals (16). These peak tariffs can be serious barriers to trade and are a particular problem for the textiles and clothing industry.

Trade facilitation

The trading community should be regularly consulted on its needs with regards to the development of trade facilitation matters, including the utilization of best practice in modern customs techniques, cooperation in the field of electronic data exchange, balancing security measures with impacts on trade and promotion of the common application of international rules, standards and guidelines.

Varying customs procedures can create trade barriers with the automated systems used, risk criteria used by administrations to determine when to examine goods, VAT levels, and licenses required for food products, differences in certificate of origin requirements and treatment of express shipments. Furthermore, there are a lack of procedures and tribunals to review and correct customs procedures.

Industry would also benefit from mutual recognition in the areas of customs control standards including container security and in each other's trusted shipper programs. Besides decreasing participation costs and administrative burdens, further cooperation will secure supply chains operating between Canada and the EU.

There is a need for a consistent and appealable treatment of goods entering the EU. The EU's administration of various customs laws and regulations, particularly in the area of valuation and classification are a concern. As a result, goods entering one member state may be classified differently than if they entered another member state. The EU's unilateral reclassification of certain goods covered by the WTO's Information Technology Agreement also needs to be addressed. Canada should explore the benefits and costs of aligning its rules of origin to allow compatibility with the Pan-European Cumulation System. Canada and the EU should also implement a mechanism/tool that allows for single entry of customs information.

Trade in services

Currently, the EU is Canada's second largest trading partner for trade in services, in such areas as transportation, travel, insurance, business services, construction and financial services. Canada and the EU could open their respective services markets bilaterally much more than in the WTO context.

There are a number of regulatory barriers in Canada to commercial establishment (foreign ownership caps), for example in the Canadian financial sector, telecommunications sectors and requirements for Canadian media content that act as a disincentive to investment for European companies. The mutual recognition of stock exchange standards and the qualifications of self-regulatory organizations, such as investment dealers, would be a useful development. Another opportunity is in financial information services, a sector where Canadian companies are leading suppliers. As part of a Canada-EU agreement, a goal should be the liberalization of the movement of financial information so that it can be processed outside the home country, enhancing market access opportunities for Canadian suppliers.

There is a lack of mutual recognition for a number of professions. Canada and the EU could substantially liberalize temporary visas for qualified personnel from each other's markets. Increase in mutual recognition of professional qualifications and product and services standards would be a mutually beneficial approach in helping to address skilled labour shortages in Canada and the EU. This will support the development of knowledge bases, increase productivity and assist the development of a common skilled labour market between the EU and Canada. This will require involving both public- and private-sector regulatory bodies in the negotiating process.

Professional services such as legal services and accounting services are not licensed at the EU level but rather at the member-state level, creating a patchwork of regulations. This is no different than the inter-provincial barriers that exist in Canada.

Employment laws in Europe increase the risk of hiring. In professional services, for example, firms would grow more quickly if it were not so expensive to retract as it is in France.

Canada should remove onerous restrictions on length of stay for non-resident executives and residency requirements for boards of directors.

Foreign investment is another important way that services are traded and should be included in a future agreement. In the EU there have been tensions over the interpretation of investment rules and enforcement capacity between the EU governing-body and individual member states. As part of the negotiations, there should be appropriate safeguards in place to make the investment environment, including government procurement, as transparent and fair as possible.

Taxation regulations play a role in investment decisions. Negotiations should address restrictive taxation provisions in efforts to allow capital to flow more freely between Canada and the EU. Further information is available in the taxation section of this paper.

Intellectual Property Rights

Canada and the EU generally offer strong IP protection and enforcement. Canada and the EU are negotiating an Anti-Counterfeiting Trade Agreement (ACTA) with a number of other countries.

The negotiation of a wine and spirits agreement for geographical indications was a positive step for the recognition of various products. Similar sector arrangements of mutual interest should be pursued in this field with a focus on value-added products.

Some European businesses have raised concerns regarding the protection of intellectual property – notably the lack of robust protection for technological protection measures (TPMs) employed by content owners to enable the distribution of content in digital form. In markets where adequate legal protection is provided, there is a greater motivation to introduce new, more diverse, digital offerings to consumers. The introduction of such legislation in Canada might also incorporate appropriate, balanced safe harbours for internet service providers that cooperate with copyright owners in removing infringing material when notified by copyright owners.

The EC and Canada have had in place since February 2003 a mutual recognition agreement for Good Manufacturing Practices for pharmaceuticals. This is a positive development and further cooperation in terms of minimizing regulatory hurdles would be welcomed.

Investment in pharmaceutical R&D in Canada could benefit with improvements in patent restoration. Extended patent terms can significantly increase domestic R&D spending in the pharmaceutical industry. Patents are granted for a 20-year patent life from the date of the first filing of the patent application. However, the effective patent term is frequently less than 20 years because patents are often obtained before products are actually marketed. Many factors influence the length of the effective patent term, including the regulatory approval requirements before marketing. New human drug products generally must undergo extensive testing in animals and humans to show that the drugs are both safe and effective before the product is approved for marketing. Consequently, in order to stimulate product development and innovation, extending patent life to compensate patent holders for marketing time lost while developing the product and awaiting government approval is recommended.

Labour mobility

Labour mobility refers to the freedom of workers to practice their occupation wherever opportunities exist. For example, every year approximately 130,000 Canadians relocate to a different province or territory and look for work.

Encouraging the recognition of qualifications between Canada and the EU provides workers with a wider range of opportunities and employers with a broader selection of candidates. Three main barriers that prevent or limit the movement of workers include: residency requirements; practices related to occupational licensing, certification and registration; and differences in occupational standards.

This is particularly significant to the workers in regulated occupations or trades. It means qualifications of workers are to be recognized and accommodated in each other's jurisdictions, and differences in occupational standards are to be reconciled as much as possible. The goal is to see people licensed and registered based primarily on their competency to do the job, not on where they come from.

The Agreement on Internal Trade (AIT), signed in 1994 by the Government of Canada and the provincial and territorial governments, makes it easier for people, investments, and services to move across Canada. Canada will have a national labour market by April 2009, with the signing of a labour mobility agreement between the provinces. Under the agreement anyone qualified in a profession or regulated occupation in one province will be allowed to practise in another province. By September 2009 it is expected that a standard process for evaluating skills and credentials will be in place between the provinces. The EU ensures the effective mobility of workers based on the general principle of eliminating any direct or indirect discrimination based on nationality as regards employment, remuneration and other working conditions, access to accommodation and a worker's right to be joined by his/her family. The EU also provides for implementation of a system matching job vacancies and applications via specialized services cooperating at European level.

Canada and the EU should establish reciprocal provisions to establish a common market for skilled workers. There are numerous trades, professions and government-regulated trades and occupations involving hundreds of regulatory bodies that must, among other things, reach agreement to ensure that qualifications earned in one jurisdiction will be recognized in other jurisdictions.

For the purposes of the current Canada-EU negotiations, a first step should be the removal of labour barriers for skilled workers central to the energy, resource, mining, building and infrastructure sectors, including engineers, architects and trade, including electricians, plumbers, iron workers, welders, millwrights and designers.

To this end, the Government of Canada and European Commission should create a working group comprised of representatives from industry and accreditation agencies from across Canada and the EU in efforts to define the terms and mechanism for creating common skilled labour markets in the aforementioned areas.

A key tenet of the Labour Mobility Chapter should be that any qualified worker in an occupation in a Canadian province or territory and European member state must be granted access to similar employment opportunities in any other Canadian or EU jurisdiction. The discrimination of workers who are foreign nationals as regards working and employment conditions (dismissal and remuneration in particular) because of their nationality should be

prohibited. Workers should enjoy the same social and tax advantages as national workers and the fair treatment of family members and dependants. The process and speed in which work permits are issued should be improved and taxation issues, which pose an indirect impediment to labour mobility, including withholding taxes, should be taken into greater account. Further information on this matter is available in the taxation section of this paper.

Regulatory cooperation

The most restrictive barriers to trade and investment are those related to different regulatory requirements on both sides of the Atlantic. While differing regulatory requirements in Canada and the EU may achieve the same aims – protection of public safety, consumer health and environmental protection – they can give rise to non-tariff barriers with a detrimental effect on our bilateral trade and investment relations.

Simply put, different regulatory outcomes should be avoided from the beginning. Therefore it is necessary that EU and Canadian authorities define mechanisms by which they inform each other at an early stage when formulating legislation or regulatory decisions. These mechanisms should include, among others, regularly scheduled exchanges and contacts of EU and Canadian officials and data sharing between both partners.

This exchange of information at an early stage should be initiated in areas where there is a clear need to work together and where a basis for co-operation exists. Thus, and as a preliminary step, we recommend prioritization of sectors where enhanced co-operation should be developed in the first instance.

Strengthened regulatory co-operation should also support international schemes already in place, such as the implementation of the World Trade Organisation (WTO) Agreements on Technical Barriers to Trade (TBT) and on Sanitary and Phytosanitary Measures (SPS). Also, according to WTO principles, regulatory co-operation should ensure respect for the concepts of "national treatment" and "most favoured nation".

Furthermore, standards and technical regulations should not be used to favour national products and create barriers to trade. The mutual recognition of national standards and regulatory requirements by recognition of each other's conformity assessment procedures will enhance competitiveness at the global level while allowing for differences in national environmental policy objectives. Additionally, an enhanced regulatory dialogue between the EU and Canada should seek a maximum degree of coherence with the co-operation that both, the EU and Canada, have already developed with the US in this area.

A higher involvement of stakeholders, both national and foreign, is essential to improve the quality of new regulations and prevent the adoption of requirements that may result in new trade barriers between the EU and Canada. Accordingly, and in parallel to the current Commission activities in this area, the Canadian administration and the European Commission should develop common "minimum standards of consultation" to be applied on both sides of the Atlantic. These standards should also include information transparency for any meeting between Canadian and European regulatory authorities on specific policy issues and the conclusions of such meetings.

The area of risk assessment and precautionary measures to prevent harm to the environment or the health/safety of consumers constitutes one of the main sources of divergence in regulatory outcomes. A common approach in this area based on the principles of regulatory equivalency[1] and mutual recognition[2] should be guided by core

[1] May be applied when regulations in each territory are different but they have and fulfil a similar objective. In this case, both parties can agree that products conforming to the other party's regulations can be placed on the market in the territory of either party as though it conformed to the rules in force there.

[2] Meaning mutual recognition of conformity assessment of regulated products so that products are tested just once where each importing party is given the authority to test and certify products against the regulatory requirements of the other party, in its own territory and prior to export.

principles. First, any decision must be based on sound science and not be misleading. Second, the communication of information about risk between experts, policy-makers and legislators from both sides of the Atlantic must be improved.

Mutual recognition

Standards and technical regulations should not be used to favour national products and create barriers to trade. When governments regulate for the purposes of protecting domestic environment, health and safety, such measures must ensure that they achieve their policy objectives and are not abused for trade protection purposes. Therefore, when setting national regulations, both governments should be guided by international standards wherever appropriate. More importantly, they must ensure mutual recognition of national standards and regulatory requirements by recognition of each other's conformity assessment procedures through, for example, Mutual Recognition Agreements (MRAs) or other means. This type of policy approach will enhance competitiveness at the global level while allowing for differences in national environmental, public health and consumer safety policy objectives.

In order to ensure that the Canada-EU relationship continues to grow, CERT seeks acceptance of the principle of mutual recognition of regulatory approaches based on the equivalency of Canada and the EU's respective regulatory systems, as a means to avoiding the formation of non-tariff barriers (NTBs). This includes mutual recognition of national health, safety and environmental standards, certification/verification requirements that determine how compliance with regulations is to be determined, including labelling and similar procedures, conformity assessment procedures and regulatory requirements for goods and services and including trading in securities.

Without a clearly defined strategic approach to bilateral regulatory cooperation, we will not achieve tangible results from the many initiatives currently underway. Therefore, we propose the creation of a robust regulatory cooperation committee.

Regulatory cooperation committee

In assisting negotiations and new approaches to regulatory equivalency, CERT strongly encourages the establishment and regular meetings of the Canada-EC Regulatory Co-operation Committee to provide oversight to the Government of Canada-European Commission Framework on Regulatory Co-operation and Transparency. Joint Committees have played an important role in the establishment of the Veterinary Agreement (1998) and Agreement in Trade on Wines and Spirits Drinks (2003).

CERT believes that governments should use the Canada-EC Regulatory Co-operation Committee to implement regulatory equivalency in bilateral negotiations, including establishing objectives and priorities, sharing information on best cooperative practices (as reflected in the EU "Better Regulation Package" and the Canadian "Smart Regulation Initiative") and driving and coordinating existing sectoral and horizontal dialogues. An annual comparison of the legislative work plans on business relevant issues could also be helpful.

The work programme for the Canada-EC Regulatory Co-operation Committee should focus on steps to improve the level of engagement on regulatory cooperation and avoid the creation of new barriers. CERT recommends that the Committee focus on the following areas:

A. Existing regulatory agreements within a comprehensive Canada-EU agreement

A number of frameworks have been established for cooperation in priority areas, including the 1998 *EU-Canada Trade Initiative (ECTI)* that has identified specific areas where it was felt that

further regulatory cooperation could be achieved. Any Canada-EU agreement should bring this work together under one comprehensive umbrella agreement, including:

- Continue to advance equivalency in commodities covered under the 1998 Canada-EC Veterinary Agreement, particularly with respect to pork. Establish a framework that the Canadian Food Inspection Agency (CFIA) and the EU's Health and Consumer Protection Directorate (SANCO) can utilize in responding to situations where there is a risk to human, animal or plant health.
- Utilize the 2003 Agreement on Trade in Wines and Spirits Drinks to ensure that EU accession will not result in more trade restrictive measures for Canadian products than existed prior to enlargement.
- Additional areas may be targeted under the 1998 Agreement of Mutual Recognition of Conformity Assessments, the 1997 Agreement on Customs Cooperation and Mutual Assistance to Customs Matters and the 1999 Competition Agreement.

B. Improve the level of engagement on regulatory cooperation

- The Committee should report regularly to Leaders at Canada-EU Summit meetings, on progress made on regulatory equivalency in the context of bilateral economic negotiations, remaining obstacles and plans to resolve them.
- Canadian government and European Commission should engage the business community more systematically in the formation and implementation of regulatory developments, including by organizing public listening sessions.
- Create a notification mechanism to indicate planned regulatory policy formulation, which would increase the level of information sharing between the two economies.
- Enhance Canadian federal and provincial cooperation, clarifying issues of jurisdiction that impact on trade and investment policy issues. Increase harmonization and coordination among member states, especially with respect to more recently acceded members, as a means to increasing internal policy coherence and coordination by both parties.
- Initiate and coordinate a staff exchange programme to provide work experience opportunities for Canadian and European experts.

C. Avoid the creation of new barriers

- Create a template for common impact assessments, including cost-benefit analysis, to evaluate the potential effects of proposed regulations.
- Discuss science-based approaches to rule-making, such as risk assessment and risk management, with a view towards highlighting divergences between Canadian and EU regulators across business sectors.
- Obligation to notify on draft legislation. This includes sharing proposed technical or sanitary and phytosanitary regulations, where such measures may have a detrimental effect on bilateral trade and investment.
- Canada and the EU should explore the adoption of a common system of codes and standards such as the International Standards Association (ISO).

D. Increase the involvement of self-governing associations in mutual recognition

- Increase in mutual recognition of professional qualifications and product and services standards as a mutually beneficial approach in helping to address skilled labour shortages in Canada and the EU, as well as supporting the development of knowledge base and increasing overall productivity.

- Target work with regard to exchange of information between Canadian and European technical professions.

E. Coherence with third parties

- Regulatory co-operation should take into account the work being done by both parties with the US.
- Regulatory Cooperation should also take into consideration relevant international initiatives on regulatory practices to which both parties might subscribe, such as those developed in the Organisation for Economic Cooperation and Development (OECD).

Chemicals

To ensure that Canada and the EU do not inadvertently erect non-tariff barriers through the regulation of substances and materials – the proposed agreement should include a defined, consultation process that recognizes the special relationship between the EU and Canada – providing a framework for government and industry to comment and contribute in the process of regulatory classification so that it does not potentially serve as an impediment to trade, investment or the well-being and health of Canadian and European citizens. More specifically related to Regulatory matters is the EU classification of products under the European Union's Registration, Evaluation, Authorization, and Restriction of Chemical substances (REACH) system.

Prior to REACH, there existed the Dangerous Substances Directive (DSD), which was folded into the CLP – Classified Labelling Packaging. All will then be incorporated into REACH in 2010. ATP – Adaptation to Technical Progress is the equivalent to an amendment of the DSD. It has been amended 29 times, and there are concerns with a lack of science based risk assessment driving these amendments that have created trade and market implications which sometimes leads to outright bans on products.

The Canadian chemicals industry has a lot to gain from an agreement with the EU. In 2008, total exports were $19 billion with potential to increase sales with a competitive international trade environment. Packaging and transportation costs will likely increase as a result of these new classifications of 20,000+ chemical substances within REACH.

The current REACH system contributes great uncertainty to businesses as to whether products will be authorized – which could lead to substitution and stigmatization. Such EU regulations could have a substantial impact on the targeted industry, as these regulations may carry a high probability of being picked up by other jurisdictions.

To mitigate these risks: agreements should enable special or privileged exchanges between Canada and the EU on the classification of products and chemical substances, and always be based on scientific rationale and evidence.

Given that the Canadian chemicals industry has the same goals as REACH, we recommend that the federal government work with the EU to find ways to cooperate by achieving the desired goals while avoiding duplicative procedures and potential barriers to trade.

Dispute resolution

CERT supports the implementation of a comprehensive and binding dispute resolution mechanism independent of but in addition to rights and obligations under the WTO applicable to both Parties.

In addition, CERT recommends that Canada and the EU consider the establishment of a streamlined dispute resolution process specifically to address the issue of non-tariff barriers, particularly in the area of phytosanitary issues and technical barriers to trade. Increasingly, as note in the section on regulatory cooperation, regulatory issues are among the most intractable barriers to trade. These issues are often difficult to resolve, and the time involved to seek resolution can result in products being effectively eliminated from the European, and to a lesser extent, Canadian market. It is our view that given the potential for damage to trade from such NTBs, that a Canada-EU agreement should contain as a priority a comprehensive and effective dispute settlement mechanism to quickly and on a priority basis, resolve measures alleged to create non-tariff barriers to trade (NTBs).

Various models for such a mechanism could be explored and we would be pleased to work with the government to consider options in this regard. Any such mechanism should be permanent, independent, and be subject to quick timelines.

Procurement

In the 1996 Joint Action plan and ECTI, Canada and the EU made commitments to increase openness of government procurement markets. However, little progress has been made in this area to date, with particular barriers remaining at the level of individual EU member states and Canadian provincial governments.

Canadian and European companies are global leaders in a range of sectors including infrastructure, civil works, transportation, aerospace, defence, energy, electricity generation, distribution and transmission, water, etc, which are largely governed by public procurement rules and procedures. Given the economic weight of public procurement - which amounts to 15-20% of GDP in OECD countries and to 30% in non-OECD countries – further opening of public procurement markets in Canada, the EU and indeed in third countries is encouraged.

CERT supports a fair and open bilateral procurement arrangement that includes broader reciprocal access to public procurement markets. Open procurement markets will have the added effect of enabling the formation of value-added supply chains.

It should further be recognized that sole sourcing hampers companies from investing or expanding their operations and passing on additional work to domestic partners. Open competition potentially creates new and more varied work, including in the area of R&D.

Procurement policies that require products to receive approval from specific certification schemes serve as a non-tariff market barrier. CERT supports procurement policies that are inclusive, non-discriminatory, and containing no unnecessary barriers to trade.

Often, technical standards and industrial norms that have evolved over the years may not simply be abolished or 'eliminated'. In such cases, a bilateral procurement policy should seek harmonization of the prevalent standards, where applicable and possible. Canada and the EU may wish to consider the creation of a joint committee to look at these specific matters on a regular basis.

Capital markets

Non-tariff barriers to securities trading are embedded in the differing regulations in both the Canadian and EU markets, and in the provincial and national markets. The free movement of

capital with equal access to capital markets is fundamental to achieving a barrier free Canada-EU market.

The inclusion of financial services frameworks in negotiations would remove unnecessary intermediaries in the cross-border trading of securities, concentrate liquidity in home markets for listed companies, simplify access to foreign capital for issuing companies and access to foreign securities by investors, lower the costs now associated with trans-border trading between Canada and the EU and increased trading volumes. We suggest a number of areas where Canada and the EU could lead in promoting stronger and more efficient capital markets, including:

- The Canadian Federal Government's initiative to create a single national securities regulator, with provincial participation on its board and regional offices to deal with the local issues;
- Facilitation of cross-border electronic access to stock exchanges without compromising investor protection and further collaboration on training programs for banks, insurance and securities regulators and supervisors;
- Coherence with the US. Freer Canadian access to U.S. securities markets on the basis of mutual recognition or alternative accommodations would make Canada a more attractive destination for European capital market participants wishing to establish a North American base, especially in the energy sector, but in other sectors as well.
- Consideration should be given to how parallel trans-Atlantic and North American initiatives currently underway or under consideration can work compatibly in efforts to reduce the costs associated with trans-border trading that are to the detriment of investors and issuers alike, and to the overall efficiency of Canadian and European capital markets.

There are many operational rules varying in detail between Canada and the EU that add compliance costs without materially enhancing investor protection. Examples of these differences are found in areas such as trade confirmation and account statement requirements, books and records requirements, anti-money laundering requirements, and regulatory examination requirements. CERT recommends that the following provisions be addressed in future negotiations:

- Retail and institutional investors from each country should have unfettered access to acquire or sell securities in either country as long as they follow the regulations in the other country. They should be treated as domestic investors would be treated.

- Members of self regulatory organizations (investment dealers) should be able to do business in each country without the onerous duplication of fixed costs necessitated by residency requirements. For example, a member of the NASD could do business in Canada by becoming a member of the Investment Dealers Association of Canada (IDA), without having to have physical presence in Canada. This could mean that:

    - National investment dealers associations be mutually recognized; or

    - An EU-registered dealer could apply to be, and be accepted as, an IDA member without establishing a physical presence in Canada, and vice-versa.

- Exchanges from each country should be free to do business in the other country in trading services, listings, and data, either through mutual recognition of their exchange status in the other jurisdiction or some other device of comparable effect.

- Securities regulators should be mutually recognized by each other's governments.

- Freer trading in securities between Canada and the EU, based on the principle of mutual recognition of stock exchanges, should be accommodated through bilateral

negotiations. By mutual recognition we mean the acceptance by each exchange and jurisdiction of the regulations, rules, reporting and other requirements of all the other participating exchanges and jurisdictions related to the operation of securities markets so as to facilitate free trading in equity, debt and other securities.

Investment

CERT supports the inclusion of a comprehensive investment chapter/agreement within the context of Canada-EU negotiations. This should include alignment of foreign takeover regulation and practices and employment laws, where possible, in the context of a bilateral negotiation.

Industry-specific regulations shelter domestic firms from competition, ultimately resulting in higher prices for consumers, reduced choice, and slower access to technology on the part of industry. Among countries within the Organization for Economic Cooperation and Development (OECD), Canada ranks 25th out of 29 nations in terms of openness to foreign business, joining other countries with heavy restrictions such as Iceland and Mexico. The countries most open to foreign business activity tend to be European, led by Belgium.

Foreign investment measures can limit opportunities for Canadian and European firms competing in a global economy to attract expertise, strengthen their networks, and pursue new business opportunities. The removal of unnecessary foreign ownership restrictions should be targeted for negotiations. Foreign Investment Protection Agreements (FIPAs), many of which have already been signed between Canada and a number of EU member states, should be signed with all members of the EU.

Taxation issues also play a factor with respect to investment. Bilateral tax treaties should be negotiated and/or updated. Key provisions that need to be addressed within such an agreement would include: the elimination of double taxation provisions to allow for the free flow of capital between Canada and the EU; elimination or at least the reduction of withholding taxes on dividends, interest and royalties; personal tax exemptions on unincorporated business income received by non-residents; and, a common method of taxing foreign source income.

Taxation

Taxes significantly affect capital flows between the EU and Canada. To avoid double taxation of income, Canada and EU members have negotiated bilateral tax treaties whereby each country may tax income at source. Residents of each country are then either exempt or are taxed on income received from treaty partners with a credit given for the source-based corporate income and withholding taxes paid in the treaty country. However, despite the existing treaties, businesses and investors often face greater tax distortions that interfere with their cross-border investments than they do compared to their domestic investments.

A. Removal of withholding taxes

The most prominent barrier to cross-border investments is withholding taxes on dividends, interest, rents and royalties paid to non-residents. These withholding taxes act as barriers to foreign direct investment and portfolio flows to the extent that these taxes are not credited against tax liabilities assessed by the resident country.

Canada maintains withholding taxes on non-resident income based on historically being a capital importer. Today, as a capital exporting country, Canada has significant investments in the EU and many European companies have substantial investments in Canada. Unlike recent

negotiations between EU member states and some other partners, greater efforts are needed to reduce withholding taxes on dividends, interest and royalties between Canada and EU member countries. For example, the U.S. has negotiated zero withholding taxes on dividends (paid by companies that are more than 80% owned by a non-resident parent). Australia and the United Kingdom having also negotiated zero withholding taxes on interest income with 21 countries. Recently, Japan has achieved a similar result.

While EU countries have largely eliminated withholding taxes among member states, examples remain, such as from the UK to Ireland and from Denmark to the Netherlands. Canadian businesses also have difficulties in complying with EU rules, creating a barrier to Canadian investors into the EU, creating a barrier to Canadian investors into the EU.

CERT recommends the reduction of withholding taxes on dividends, interest and royalties between Canada and EU member countries.

B. Treatment of personal income

Another uncompetitive tax policy is the tax treatment of personal income received by non-residents from their unincorporated business investments. Non-resident investors should be provided with the similar treatment regarding exemptions under their personal tax that can affect personal and business income received from abroad (i.e. limited liability partnerships).

For example, under Canadian law, if a person is not a resident of Canada, they pay taxes on business income according to Canada's personal income tax rate schedule. However, non-residents are not entitled to these exemptions. Therefore, non-resident income is fully subject to taxation rates beginning at 20% and rising to more than 40%. These high tax levels dissuade limited partnership investments from European countries, most notably, Germany and Switzerland. In many cases taxes on unincorporated business income received by non-residents may not be fully credited, in part due to the fact that the non-resident lives in a lower-taxed country, or that such income might be exempt from taxation by the non-residents home country. The United Kingdom, Denmark and Germany provide at least some personal tax exemption to non-residents. This attracts trade and foreign investment, especially investments from abroad through limited partnerships and should be implemented at some level in Canada and all EU member states. CERT recommends that Canada and EU member states should implement personal tax exemptions on unincorporated business income received by non-residents.

C. Simplifying tax treatment

Differences in the tax treatment of foreign income among EU members create a high degree of complexity for Canadian investors who must comply with differing taxation rules among EU member states. Separate tax administrations in Europe increase the business costs for Canadian and other foreign investors in the EU. Furthermore, the complexity of differing tax schedules in EU member countries also imposes costs on corporate re-organizations in the EU. Recent discussions amongst EU members on the harmonization of the corporate income tax base is a positive step in improving compliance with the European tax systems. These discussions should include a review of policies that could improve the taxation of cross-border investments entering Europe from Canada and other countries. A common method of taxing foreign source income received from Canada is recommended.

As part of their harmonization exercise, CERT recommends that EU member states should, as a longer term goal implement a common method of taxing foreign source income by exempting income received from member states. A similar approach should be implemented for foreign income received from outside the EU. A single, pan-European tax auditor would also be beneficial.

Trade and environment

Canada and the EU can set new standards in bilateral cooperation in addressing the challenges and opportunities presented within the trade and environment interface. Environmental regulations should be designed to achieve environmental objectives while promoting transatlantic commerce. Negotiations should ensure that the use of environmental measures is not done in a manner to disguise unjustified and discriminatory non-tariff barriers to trade.

Environmental standards should be developed and used in a fully transparent, non-discriminatory fashion and according to proper and sufficient scientific evidence. There is nothing inherent in the trade and environment interface and debate that prohibit Canada and the EU from pursuing a formalized and liberalized trade agreement. The policy/regulatory environment plays a critical role, however, in determining the extent to which benefits from commercial expansion under trade arrangements/agreements will be fully realized.

A number of fundamental policy/regulatory issues must be taken into account as Canada and the EU discuss ways in which they can foster the bilateral commercial relationship. CERT recommendations focus on approaches that should be pursued by both governments to ensure that the trade and environment policy agendas unfold in a way that is mutually supportive. These include:

- Canada and the EU negotiations to build on the Canada-EU regulatory cooperation framework for promoting bilateral cooperation on approaches to regulatory governance, advancing good regulatory practices and facilitating trade and investment.

- In adopting regulations under a bilateral agreement, Canada and the EU should consistently strive to take a transparent approach that avoids any potential for abuse for trade protection purposes.

- Canada and the EU should consider full life cycle approaches in designing policy/regulations to ensure that regulations adopted do not result in unintentional negative environmental or trade impacts, and truly support the environmental goals they are intended to achieve. Efforts to further develop international standards and best practices in terms of life cycle analysis should be supported.

- Canada and the EU should capitalize on various opportunities to enhance regulatory cooperation, and encourage efforts to reduce technical barriers to trade, including efforts such as the Mutual Recognition Agreement - Conformity Assessment 1998.

- Canada and the EU should avoid unilateral trade barriers and bans justified by extreme interpretations of the "precautionary approach" and work towards broad guiding principles to support consistent, credible and predictable policy and regulatory decision-making when applying the precautionary approach.

- In developing government procurement standards related to sustainability, Canada and the EU should commit to processes that are transparent, non-discriminatory, criteria-based and science-based. For example, this has been a particular issue within the forest sector, as EU member states have been developing government procurement policies for forest products in recent years, with processes that have not always met the above criteria. Given the prevalence of these standards for forest products in particular, it is recommended that the Canada EU agreement include the establishment of a joint committee with the mandate to review the existing standards for sustainability practices within the forest products globally, to identify standards which are suitable for inclusion in governments' green procurement policies, and to review and update the standards on a regular and timely basis.

- Canada and the EU should avoid trade restrictions based on process and production methods and use the opportunity created by the Doha Round negotiations to clarify the relationship between trade rights and Multilateral Environmental Agreements (MEAs), particularly those that include trade measures for non-compliance.

- Interpretation and implementation of agreements such as the WTO SPS and TBT should emphasize and strengthen the fundamental principles of sound scientific understanding and cooperation, risk assessment and management, and non-discrimination.

- Canada and the EU should seek to improve rules regarding multi-criteria ecolabeling schemes and support work aimed at grappling with such issues, such as the WTO Committee on Trade and Environment. Canada and the EU should ensure that any eco-labeling schemes in their respective jurisdictions embody transparency as a way to enhance the environmental benefits, while minimizing any potentially adverse and discriminatory impacts on trade. The proliferation of multi-criteria eco-labeling programs is of concern to the business community in that they can become unfair and discriminatory barriers to trade. CERT believes that eco-labeling programs should be developed and operated according to a set of principles, as outlined in **Appendix I**.

- Canada and the EU should strongly support elements in the WTO GATS negotiations and the Doha Round covering market access that will foster further reductions in the trade of both environmental goods and services.

- Canada and the EU should support the strengthening of existing global environmental governance structures as the best approach to ensure environmental progress in a way that does not jeopardize trade objectives, and recognizes that the trading system (WTO) is not mandated nor qualified to preside over issues related to domestic environmental standards.

- Canada and the EU should avoid subsidies that distort trade flows while resulting in environmental damage, and commit to reducing existing subsidies in conjunction with their international trading partners.

- In the longer term, Canada and the EU should explore the potential to include emissions trading as one of the key discussion points as part of bilateral negotiations.

Competition policy

The Canadian Competition Commission should be wary of entering into an agreement that emulates the actions of the EU with respect to size and market dominance alone. Canadian companies can be dominant in their domestic market, yet still be relatively small players on the world stage. This is particularly important given the importance of exporters to the Canadian economy.

A. Comity principles for minimizing complexity, conflict and barriers

The globalization of commerce, together with the growing number of jurisdictions enforcing competition and other regulatory laws, increases the likelihood that businesses will be confronted with inconsistent demands from divergent national law and policy standards. This creates inefficiencies and uncertainty, undermines progress towards a true global trading area and imposes significant costs on businesses, governments and society at large.

Comity -- the deference given by one agency or tribunal of one nation to an act or decision of another -- has long been recognized as a methodology for avoiding or resolving conflicts between different jurisdictions. The application of comity principles not only minimizes enforcement clashes in the short term, but contributes to the longer-term objectives of procedural and substantive convergence. For over 100 years, public international law has recognized comity as a methodology to resolve clashes between states resulting from a decision of one state that has effects in another. Jurisdictions apply international comity principles in many substantive areas of law (e.g., insolvency, regulatory and environmental) to ensure that complex cross-border enforcement problems are resolved in a manner that balances the policy and enforcement concerns of the states involved. Traditional comity requires no change in a jurisdiction's domestic laws; rather, it relates to the degree of deference given by a domestic agency to an act or decision of a foreign government. Comity considerations only apply after an authority determines that it has jurisdiction, and dictates when and how that jurisdiction should be exercised.

In the area of competition law and policy, Canada and EU have embodied comity principles in their bilateral competition cooperation agreements; however the promise of these agreements can be significantly advanced. This is important not only for the relationship between Canada and the EU, but will provide a strong example for other nations so that their competition law regimes will be administered in a manner consistent with an open and efficient world trading system. This enhanced comity would recognize that cooperation among enforcement agencies should have as its goal not only efficient competition enforcement but also an efficient international trading system. In particular, businesses undertaking transactions or investments in a global environment need certainty and the ability to rely on a remedy imposed by a competition authority, particularly when that remedy potentially affects its operations worldwide. On a macro scale, uncertainty adversely impacts economic investment and growth; on a micro scale, it deters corporate willingness to cooperate with competition agencies, to take advantage of leniency or amnesty programs, and to negotiate and agree to remedies.

Negotiations present a tremendous opportunity for Canada and the EU to show leadership through the adoption of a framework of principles that would govern not only the trans-border resolution of competition cases but be potentially applicable to other regulatory matters where divergent outcomes could affect trade and investment. As with any other international law or policy, comity's effectiveness necessitates reciprocity in both principle and action by enforcement agencies.
A bilateral agreement could build on the 1995 Revised Recommendation of the OECD Council - *Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade* – which recognizes "the need … to give effect to the principles of international law and comity and *to use moderation and self-restraint in the interest of co-operation in the field of anticompetitive practices*." That Recommendation provides that a country should *(i)* notify other countries when its competition law enforcement proceedings may have an effect on their important interests, *(ii)* give full and sympathetic consideration to possible ways of fulfilling its enforcement needs without harming those interests, and *(iii)* endeavour to find a mutually acceptable solution in light of the respective interests involved. In this regard, a preliminary draft of a possible framework is attached as **Appendix II**.

Science and Technology

The EU and Canada should cooperate on technological development in the field of low carbon and energy efficiency technologies in the energy, transport and manufacturing sectors. The EU and Canada could further cooperate in the area of civil nuclear power development. The alignment of Canadian and EU carbon abatement policies in the medium to longer term is encouraged. This could include linking emissions trading schemes, technical and financial mechanisms to create a common carbon market.

Conclusion

While Canada-EU trade and investment relations confirm that the relationship is seen as a positive one, more must be done to ensure that market access conditions are improved and that the trade and investment dampening effect of diverging regulatory outcomes is avoided. By adopting the recommendations outlined in this document, Canada-EU negotiations can help ensure the prosperity of our respective economies, notably through increases in bilateral business investment and the jobs, skills and innovation that this brings.

Increasing cooperation between Canada and the EU will also entail increasing internal policy coherence and coordination by both parties. For Canada, it will mean enhancing federal and provincial cooperation, clarifying issues of jurisdiction that impact on trade and investment policy issues. Similarly, for the EU, it will entail increased harmonization and coordination among member states, especially with respect to newly acceded members.

A comprehensive economic agreement is a vitally important initiative, especially during these turbulent economic times. We strongly support efforts by the Government of Canada and the European Union to take the necessary measures the launch official negotiations in May and to conclude a substantive agreement.

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Appendix I: Development and operation of eco-labeling programs

The members of CERT believe that eco-labeling programs should be developed and operated according to the following principles:

1. Eco-labeling should be based on information that is truthful, supported by data and not misleading. It should also be voluntary and Canada and the European Union should encourage other countries' eco-labeling programs to be voluntary as well.

2. Eco-labeling programs should distinguish between products on the basis of their environmental attributes and not, directly or indirectly, on the basis of their country of origin. Eco-labeling programs should not create unnecessary trade restrictions.

3. All government-sponsored or government-recognized eco-labeling programs should be subject to the WTO Agreement on Technical Barriers to Trade (TBT) and its Code of Good Practice*. The fundamental provisions of the TBT require that measures be transparent, non-discriminatory, and no more trade-restrictive than necessary to fulfill a legitimate objective.

4. Governments should recognize only those eco-labeling programs that take into consideration the life-cycle of the product and are based on scientific methodology. However, if governments choose to award an environmental label that is based on a single criterion, life-cycle impacts should be considered to ensure that the granting of the label has an overall positive impact on the environment.

5. The government's of Canada and the European Union should encourage and support the use of international standards and criteria for eco-labeling programs, including ISO 14020 (General Principles) and 14024 (Eco-labeling Programs).

6. Governments should encourage to the maximum extent possible mutual recognition and equivalency among eco-labeling programs (i.e. those programs that are consistent with ISO 14024), subject to maintaining the environmental effectiveness of the program.

*Under the TBT Agreement, measures that are mandatory are called technical regulations and those that are voluntary are called standards. They fall under different provisions of the TBT Agreement: eco-labeling schemes that are mandatory would come under articles 2 and 3 of the TBT Agreement: voluntary eco-labeling programs would fall under article 4 and annex 3 (Code of Good Practice) of the Agreement. The provisions relating to the conformity assessment procedures of eco-labeling programs are articles 5,6,7,8 and 9 of the Agreement.

The TBT Agreement is based on the following four principles to minimize unnecessary obstacles to trade that might result from the preparation, adoption and application of technical regulations, standards and procedures for conformity assessment.

- Non-discrimination (national treatment and most-favoured-nation treatment);
- Avoidance of unnecessary barriers to trade;
- Use of international standards where appropriate for local needs, accepting equivalent standards and mutual recognition; and
- Creation of a very high degree of transparency by prior notifications, affording opportunity for comments and consultations, as well as establishing enquiry points. The TBT Code of Good Practice for voluntary standards provides similar provisions on transparency such as the obligations to notify, provide copies of work programs on draft standards, allow a period of at least 60 days for the submission of comments by interested parties, afford opportunity for consultation, make objective efforts to solve any problem and publish adopted standards.

Central governments are responsible for the compliance of standardizing bodies with the provisions of the Code of Good Practice and should take "such measures as may be available to them" to ensure that local governments and non-governmental standardizing bodies accept and comply with the Code's provisions. A WTO Member can be challenged in the WTO by another Member if the latter can establish that benefit accruing to it under the TBT has been nullified or impaired as a result of the failure of the other party to carry out its obligations under the Agreement.

Appendix II: Template regarding the application of comity on avoiding remedial clashes in competition cases

The following is a preliminary outline of a template which sets out fixed and variable factors which may be relevant to considering the degree to which comity principles should be applied by competition agencies in avoiding inconsistent enforcement action.[3] The objective is to provide a list of factors or a template for examining what is meant by "moderation and restraint" or similar language in co-operation agreements.

This template applies to both criminal and non-criminal conduct (e.g. price-fixing and abuse of dominance/mergers). To the extent that the conduct involved is criminal, the application of comity principles may be more limited especially as between legal systems which have criminal as opposed to administrative penalties. Enhancing the application of comity in this context is a measure that should eventually lead to greater convergence in competition laws at both the bilateral and multilateral level. The summary that follows is only a top-line and needs to be "fleshed out":

A. Fixed Considerations

1. Legislative Differences

Comity principles do not purport to interfere with a nation's sovereignty.[4] Differences in enforcement approaches may arise as a result of significant substantive differences in the relevant legislation to be applied in a given case.

For example, statutory differences in the approach to efficiencies in the context of merger review may result in different enforcement outcomes. Similarly, industrial policy objectives incorporated in competition law statutes may dictate different results.

2. Differences in Legal Norms/Process

[3] The International Competition Network's (ICN) Guiding Principles for Merger Notification and Review recommend that "Jurisdictions reviewing the same transaction should engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs." See http://www.internationalcompetitionnetwork.org/icnnpguidingprin.htm. Similarly, the ICN's Recommended Practices for Merger Notification Procedures recommend interagency coordination of review of mergers that may raise competitive issues of common concern with the objective of "fostering efficient merger review, effective merger enforcement, and consistent, or at least non-conflicting, outcomes in the coordinating jurisdictions as well as reducing duplication and unnecessary burdens for parties and agencies." See http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf.

[4] The principle that jurisdictions are sovereign with respect to the application of their own laws to mergers in #1 of the eight Guiding Principles for Merger Notification and Review endorsed by the ICN. See http://www.internationalcompetitionnetwork.org/icnnpguidingprin.htm.

Comity may not apply to the same extent where a different enforcement approach is the result of differences in legal and procedural norms, such as rules relating to the admission of evidence or state action exceptions arising from case decisions.

3. Fundamental Factual Differences

In any given case, the enforcement decision is premised on the relevant facts. There may be fundamental factual differences among jurisdictions which lead to different enforcement outcomes. For example in the context of a merger review, it may be that concentration levels are higher in one jurisdiction or there are unique barriers to entry which lead to a different enforcement conclusion. Also, market effects may be significantly different as viewed in any objective context.

4. International Treaties

A particular provision of an international treaty or agreement which is adopted by that jurisdiction may limit enforcement discretion.

B. Variable Considerations

1. Nexus

The application of comity principles suggests that the jurisdiction with the closest nexus may be best positioned to take the lead in developing the appropriate enforcement response to the conduct in issue.[5] How this nexus is defined remains to be determined – perhaps by an additional list of factors. In any event, this jurisdiction's views should be given greater weight.

2. Locus (or possibly a subset of Nexus)

Comity principles suggest that the jurisdiction which is the primary location of the business engaging in the conduct at issue may want to take the "lead" in developing the appropriate enforcement response.[6] Regardless of the "lead", the jurisdiction where the merging parties may be based may have a particular interest in the matter and its views may have additional weight in avoiding clashes.

3. Effects (or possibly a subset of Nexus)

The jurisdiction which has experienced or will experience the greatest effects of the conduct may have particular weight accorded to it in developing the appropriate enforcement response to the conduct in issue.

4. Initiating Enforcement Agency

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[5] The first of the ICN's Recommended Practices for Merger Notification Procedures recommends that in exercising that sovereignty, jurisdiction should be asserted only with respect to those transactions that have an appropriate nexus with the reviewing jurisdiction. See http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf.

[6] The ICN Recommended Practices for Merger Notification Procedures provide that merger "Notification should not be required unless the transaction is likely to have a significant, direct and immediate economic effect within the jurisdiction concerned. This criterion may be satisfied if each of at least two parties to the transaction has significant local activities. Alternatively, this criterion may be satisfied if the acquired business has a significant direct or indirect presence on the local territory, such as local assets or sales in or into the jurisdiction concerned." See http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf.

The status of the investigation by the initiating enforcement authority should be considered in determining the application of comity principles. If one authority has been far ahead of others, that should be considered.

5. Type of Investigation

The degree to which there has been involvement of third parties and entities interested/affected by the conduct in the course of the investigation should also be a factor in comity considerations. For example, have there been full rights for submissions, examinations and cross-examinations? Have the proceedings been open or relatively open to the public?

6. Existing Decisions

Any existing decisions by an enforcement agency or court in the same or a related trans-border matter, if the result of an adversarial process and especially if applicable on a trans-border basis, should be given significant weight in determining any enforcement action by other jurisdictions. This may be especially so if the result of consideration of the matter on a basis outlined in "5" above.

7. Implications for Affected Party/Parties

The implications of multiple or inconsistent remedies for the company(ies) involved should be considered in determining the appropriate application of comity principles. For example, where inconsistent remedies may have a chilling effect on global trade or innovation, there would be a stronger case for the application of comity principles.

8. History of Relations

The history of relations between enforcement agencies that are engaged in a particular matter should facilitate the consideration and application of comity principles.

9. Additional Factors: for discussion

[i] See, *e.g.* John Whalley, "Recent Regional Agreements: Why so many, so fast, so different and where are they headed?" *CIGI Working Paper #9*, September 2006.