CERT priorities for the Canada-EU Trade and Investment Enhancement Agreement (TIEA) – Second Working Paper

March 2006

I. Utilizing regulatory cooperation to achieve growth and prosperity

Framework on regulatory cooperation

The responses of both the EU and the Government of Canada to CERT's 2005 working paper on TIEA priorities have placed a lot of weight on the draft Framework on Regulatory Cooperation. CERT sees two key issues from a trade perspective: 1. avoiding new regulatory barriers; and 2. finding effective ways to deal with disputes when they arise. Both are important, and should be addressed within the draft Framework. CERT views the voluntary nature of the current draft Framework as imposing too few obligations on either party to:

- be transparent in the regulatory development process,
- consult with potentially affected parties, and/or;
- establish processes to resolve disputes through mutual recognition or some other means.

Binding elements of the TIEA

If there is going to be meaningful progress on regulatory cooperation, it is CERT's view that the Regulatory Cooperation Framework needs to be more aggressive and explicit in terms of the commitments both parties agree to undertake. Our September 2005 paper made some useful points in this regard, and we encourage both parties to develop a robust work plan, promote transparency and develop a regulatory framework that allows Canada and the EU to cooperate on each others regulatory processes at the development phase.

It is critical that negotiations be seen to be making progress towards a substantive package of regulatory reforms. CERT requests that the negotiators provide an indication of where binding provisions are to be targeted for inclusion in an eventual agreement. The private sector representatives, including the companies in CERT's membership, with whom we have consulted on priority inputs for TIEA negotiations have expressed their resistance to commit time and resources to this process without a degree of knowledge on what elements of the TIEA will be legally enforceable.

Mutual Recognition Agreements (MRAs)

While we understand concerns regarding the extent to which resources can be made available to negotiate and enforce MRAs, we are unclear as to how an eventual TIEA will contain meaningful, enforceable provisions without their use. CERT does not see a compelling alternative to MRAs, viewing them as a valuable tool with which to work towards regulatory equivalency.

B. Regulatory Cooperation Priorities

Regulatory equivalency

While recognizing issues associated with harmonization in certain areas, even within the EU itself, the TIEA can play a useful role in negotiating a framework to support cooperation and explore possibilities for regulatory equivalency in key areas with prospects to reduce costs to business, while maintaining the ability of the regulatory authorities to safeguard human health and safety. Examples are numerous. One in particular relates to assessment of chemical toxicity. While REACH continues to unfold in the EU, Canada under CEPA has made progress in the screening and categorization of chemicals, as well as in information gathering obligations on industry. Differences between the regimes will be a challenge, and it is in areas like this, where a framework for cooperation, particularly as legislation and regulatory frameworks are being developed, can be particularly helpful. In this particular example, a mutual recognition of scientific assessments, if based on international research standards and guidelines, such as those at the OECD level, could prevent duplicative work having to take place in the other jurisdiction.

Business sees a lot of value in the establishment of exchanges and cooperation prior to the adoption of regulations, as opposed to after their adoption. It is in the elaboration phase where convergence can best be promoted and built into new regulations, and where internationally-recognized guidelines, such as those of the OECD can be best used as a convergence/harmonization factor.

Chemicals

As a broad objective, it would be useful if substances that were “approved” under CEPA and also “approved” under REACH could be seen as eligible to be commercialized in each jurisdiction by being added to the Canadian Domestic Substances List (DSL) or its equivalent under REACH (essentially chemicals that have undergone registration). This approach would work best to the extent that the uses and exposures in the two jurisdictions were similar. In this context, “approved” could take on several forms:

- The simplest would be that “new” chemicals that were successfully notified under CEPA could also be eligible to be marketed in Europe without further registration or notification requirements. The Canadian testing and notification requirements for new chemicals are generally similar to the registration requirements in Europe, although there are technical differences that some will see as important. As in all cases, this approach would work best to the extent that the uses and exposures in the two jurisdictions were similar. This type of recognition would be similar to discussions that are ongoing within the OECD about mutual recognition of assessments that may eventually lead here – but will take a lot of time.

- A more ambitious approach would be to also seek equivalency for some existing substances (i.e. those not treated as new per above) under the Canadian categorization and screening approach and REACH. This would be somewhat more complicated. REACH will effectively require a registration and assessment of chemicals over a certain tonnage (between one tonne and ten tones, the debate rages). Canada, on the other hand, has looked at all of the chemicals on our commercialization list (DSL) and subjected them to a screen (called categorization)

that looks at potential for exposure and certain inherent properties (inherent toxicity, bioaccumulation and persistence). Substances that do not have these properties, although not judged specifically to be "safe" are judged to not need further assessment unless new information arises or an assessment is triggered by one of 7 specified other means (or feeders as they are referred to – i.e. another country assesses the substance an it is substantially restricted). Effectively there will have been a first cut at saying approximately 18,000 of the 23,000 chemicals on the DSL should continue to be in commerce without further attention or concern based on information presently at hand. So, what could this mean for regulatory equivalency? Two options;

- For the other approximately 5,000 chemicals that categorization identifies as warranting further assessment, as these are assessed and to the extent issues requiring management are not identified, it would be appropriate for this assessment to be seen as equivalent to registration enabling the chemicals to be marketed in Europe.

- Chemicals that do not trigger any of the categorization criteria requiring an assessment could also be seen as warranting being able to be marketed and seen as equivalent to registration in Europe.

    I. In the above context, both new and existing chemicals could be seen as being able to qualify for commercialization in Europe based on Canadian categorization and assessment.

2. A less ambitious objective for the discussions could be to ensure that Canada and Europe agree to provide information on each other's assessments of chemicals when a company wanted to commercialize a chemical in both jurisdictions. Canada, under Section 316(c) (see below) has such a provision allowing sharing of such information. REACH has a similar clause known as the "Canada clause" which was modeled after the Canadian provisions.

3. It always should be remembered that the bigger prize is regulatory equivalency is with the US and any opportunities to work these issues on a tri-lateral, instead of a bi-lateral, basis should be encouraged.

Section 316 (1) Information may be disclosed – parts (c) and (d):

- under an agreement or arrangement between the Government of Canada or any of its institutions and any other government in Canada, the government of a foreign state or an international organization or any of its institutions, or between the Minister and any other minister of the Crown in right of Canada, where

    I. the purpose of the agreement or arrangement is the administration or enforcement of a law, and;

    II. the government, international organization, institution or other minister undertakes to keep the information confidential.

- under an agreement or arrangement between the Government of Canada and the government of a foreign state or an international organization, where the government or organization undertakes to keep the information confidential

Regulatory approvals - agricultural biotechnology products

CERT recommends that the EU and Canada work diligently to ensure that a scientific, timely, rules-based regulatory review and approval system exist for agricultural biotechnology products. Central to this is the completion of approval procedures with undue delay, as determined by WTO guidelines. Prior to regulation, CERT recommends that consideration be given to all tools to accomplish objectives, including voluntary measures by industry.

CERT recommends that the following four principles form the basis for future cooperation between Canada and the EU within the regulatory cooperation framework of the TIEA:

1. Science-based risk assessment

Proper scientific evidence should be utilized in evaluating the risks to human health or the environment in the regulatory approvals process. Regulatory authorities should work diligently to establish principles that are agreed upon in advance by both EU and Canadian regulators and reflecting current advances in scientific knowledge.

2. Timely review process

Regulatory reviews should occur within a reasonable time-frame and without undue delay to achieve defined and measurable goals. Regulatory reviews that are initiated in both the EU and Canada concurrently should be completed at approximately the same time, based on pre-agreed criteria established between responsible regulatory authorities. This level of predictability is essential if business is to continue to innovate and bring products to markets in a timely and cost-effective manner. It is essential that regulatory agencies should be provided with adequate resources to assess and enable new technology undergoing approvals.

3. Rules-based review

CERT recommends that a clear, transparent and predictable system for regulatory approvals for products both in Canada and the EU being reinforced in the TIEA regulatory framework. This includes regulatory oversight that is:

- Based on performance targets and well-defined objectives
- Flexible on how to achieve those objectives
- These principles should also be subjected to regular review and, where necessary, eliminated or modified to serve their intended purpose.
- Avoid duplication and overlap where possible
- Assess cumulative impact of regulation before implementation
- Apply resources proportionate to risk
- Seek the least costly approach to achieve objectives

4. Transparency

Reviews process should be made open and transparent and based on sound scientific measure that are know in advance of the submission. At all stages from product submission to finals approvals, regulators should seek to:

- Build public understanding of regulatory measures and compliance requirements

- Communicate how and why decisions are made
- Provide information to public while respecting intellectual property rights and confidential business information
- Provide predictability to those being regulated
- Provide rationale for new policy and regulations as well as feedback following consultation
- Public reporting on performance
- Clearly define results; decision making process
- Conduct regular assessments of regulatory programs based on results

Regulatory cooperation - other issues

Companies operating in Canada and the EU with expatriates in both jurisdictions face a number of added costs to business due to a range of issues with respect to lack of regulatory convergence and cooperation. In several areas such as taxation, healthcare, and public pension systems, the costs to business to overcome lack of compatibility of systems are large. An example of where cooperation has worked is the Quebec public pension plan system which applies to France. CERT has also put forth further recommendations for inclusion of bilateral tax provisions in the TIEA, outlined in section III in this paper.

With regards to the EU request for further information within the Security and Prosperity Partnership of NAFTA, CERT's understanding was that reference was made in relation to what is currently being worked-on in the context of border security. It was in this light that we forwarded information on Science and Technology cooperation on "streamlining the secure movement of low risk traffic across our shared borders". As was correctly identified, this work pertains primarily to the movement of goods across land frontiers, although certain concepts are relevant to all cross border flows – concepts currently being dealt with at the World Customs Organization (WCO), which we consider to be the most appropriate venue for discussions on these issues. For further information, please refer to our comments under "Creating on ongoing process for the facilitation of trade" in Section VII of this paper.

II. More efficient capital markets

CERT's belief at the outset of the TIEA process was that both Canadian and European capital markets would benefit from mutual recognition of stock exchange standards and the qualifications of self-regulatory organizations in two ways.

One is that it would remove the need for one extra player at either end of the trading process, both simplifying the process and reducing the cost of trans-Atlantic trading. This is especially important at the retail level. At the institutional level, major firms tend to have offices on both sides of the ocean or are prepared to spend the money needed to do work-arounds. In the short term, CERT feels that this would produce incremental increases in trans-Atlantic trading volumes involving Canada and Europe, and would provide a basis in an international agreement for building greater increases in volumes.

The second is that it would provide to the United States a successful model of mutual recognition in action. Access to the United States market is a shared objective for both

Canada and Europe -- indeed, access to the U.S. market is more important to each of Canada and Europe than access to each other. Access to the U.S. on the basic of mutual recognition has always been problematic. The U.S. SEC has been consistently negative. Providing an example of other markets that are prepared to venture into this area could force the U.S. to re-evaluate the usefulness of such an approach.

The alternative to mutual recognition is harmonization or, more practically, acceptance by Canada and/or Europe of the U.S. approach as embodied in Sarbanes-Oxley, U.S. GAAP and the legislative basis of American securities regulation. CERT continues to believe that acceptance of the rules-based U.S. approach is not acceptable to either Canada or Europe and harmonization is fundamentally unachievable because of, one, the incredible complexity of matters to be harmonized and, two, the fact that what would have to be harmonized is constantly changing at different rates in the United States and in other markets as needs, regulatory interpretation, judicial decisions and legislative perceptions change. Sarbanes-Oxley is, in itself, an example of what can happen -- one country effectively decided it needed to legislate in ways that bore no relationship to existing cross-border patterns of market and regulatory activity, thereby negating a great deal of effort that had been made on trans-Atlantic harmonization. A cross-border system based on mutual recognition would not have had to confront the extraordinary disruption that Sarbanes-Oxley produced.

In sum, then, mutual recognition offers a possibility of progress toward reducing barriers to cross-border trading in securities. CERT feels that harmonization, given the problems outlined above, offers virtually no possibility of such progress.

CERT continues to believe, therefore, that providing such an example of mutual recognition at work would serve the ends of both Canada and Europe, and that mutual recognition would benefit both Canadian and European capital markets. CERT feels that the attempts of European officials to instead resume their attempts to convince U.S. officials to allow European trading screens in U.S. brokerages is not likely to succeed.

III. The elimination of uncompetitive tax policies

Along with regulations, taxes influence the cross-border flows of investment between Canada and the EU. The EU as a body does not have the authority to deal with Canada-EU tax issues since tax policy is left to the Member States in their bi-lateral treaty obligations with Canada. Some multilateral tax questions may be dealt with such as the effect of subsidies on trade but that has been at the WTO level (such as challenges to the US FISC program tax incentives that interfered with trade).

Nonetheless, the EU is interested in assisting its Members States to improve their bilateral tax treaties with Canada. Canadian authorities would also find that a richer understanding of bilateral treaty arrangements with the EU would be worthwhile to consider as part of an overall strategy to enhance investment flows across the Atlantic.

It has therefore been suggested that CERT undertake a study to determine the best practices in bilateral treaties to encourage the free flow of capital between Canada and the EU member states. Tax treaties that deal with anti-avoidance and double taxation of income have been central to the determination of efficient and fair taxes as they affect cross-border capital flows. CERT will consult with various businesses to determine these best practices in relation to the following issues:

- Permanent establishment rules.
- Withholding taxes on interest, dividends, royalties and other income.
- Personal taxation of income earned by non-residents.
- Other matters related to cross-border investments between the EU member states and Canada.

The conclusions reached by the study will be subject to review by Canadian and relevant EU authorities in June 2006.

IV. Trade and environment: expanding business opportunities

Non-tariff barriers

As per the TBT Agreement and the preamble to the Doha Declaration, CERT understands that governments have the right to adopt measures to protect human, animal or plant life and the environment at the level they consider appropriate. This is provided that these measures do not cause arbitrary or unjustifiable discrimination or constitute a disguised restriction to international trade – in other words, provided that these measures do not create unnecessary non-tariff barriers (NTB's). This point is central to the recommendations put forth on NTB's in CERT's September 2005 working paper. CERT continues to recommend that the draft Framework on Regulatory Cooperation should contain meaningful provisions that seek to prevent future NTB's from developing. In our view, this is an area where the TIEA can demonstrate relevance to the private-sector and facilitate an increase in bilateral trade and investment.

Central to this, environmental standards should be developed and used in a fully transparent, non-discriminatory fashion and according to proper and sufficient scientific evidence. An example is the prevention of non-inclusive procurement policies, notably, but not limited to, those based on discriminatory environmental measures. This is consistent with our comments under "Utilizing regulatory cooperation to achieve growth and prosperity".

CERT feels that certain measures can become non-tariff barriers if they are developed without consultation in a non-transparent manner. CERT recommends that the TIEA Framework for Regulatory Cooperation contain provisions that will ensure that regulatory formation in both Canada and the EU is transparent and provides an opportunity for advance input by those with economic stake in the issue at hand. Specifically, this would include allowing Canada and the EU to respond to each others proposed regulation at the development phase.

Linking EU-Canada ETS (emissions trading system)

We believe that an enhanced and direct dialogue involving the respective Environment and Trade authorities will prove of direct benefit to the development of the Carbon market in the EU and Canada. We do not believe that DG Environment is in anyway opposed to the principle of linkage toward the objective of a single carbon price. We therefore suggest that DG Environment would welcome participation in discussion of the trade dimensions involved in the construction of these linkages at the earliest opportunity. The integrity of the respective trading systems must of course in the end

remain the responsibility of the Environment authorities, but the involvement of Trade authorities may facilitate the connection of the markets.

Regarding your request for business initiatives or voluntary frameworks that might be useful to encourage better consumer ownership of the climate problem, we draw you attention to the more than 120 companies from Canada, Europe and across the globe that have gathered under the leadership of the International Emissions Trading Association to work for:

- the development of an active, global greenhouse gas market, consistent across national boundaries and involving all flexibility mechanisms: the Clean Development Mechanism, Joint Implementation and emissions trading;

- the creation of systems and instruments that will ensure effective business participation.

Under IETA's guidance as a member of CERT, we have put forth a series of recommendations in our September 2005 paper that outline the value of including emissions trading in TIEA negotiations, with specific reference to the trade dimension. Linking the EU and Canada emission trading markets is highly desirable for a number of reasons:

- A linkage between the two emission trading regimes will create a market with a larger number of participants, increasing the diversity of control costs and increasing the overall liquidity of the market. This will further contribute to reducing the overall cost of compliance in the two systems while improving the overall economic efficiencies of both emission-trading systems as well.
- Linking of the two programs will provide internationally competing companies in both the EU and Canada a wider regulatory framework with a single price of carbon.
- This will further induce amongst the EU and Canada a need to foster international cooperation on common trade and economic policies, as well as contribute to a multilateral approach on future climate change policies.
- Finally a EU-Canada linkage on emissions trading will not only promote technology transfer and sustainable development, as well by creating a larger global market this should help attract other countries such as US, Australia, India, China, Brazil and South Africa to join in towards the development of the global GHG market.

Businesses in the EU and Canada have consistently requested a clear, predictable, transparent and enforceable regulatory framework within which to trade carbon credits. We feel it is the responsibility of government to ensure that this occurs. In our view, utilizing a variety of voluntary initiatives to encourage business ownership of the issue is not an area in which the TIEA's efforts are best directed.

Additionally, we feel strongly that linking the EU and Canada emission trading markets is a highly effective means of ensuring that the pressing issue of climate change is addressed in a sustainable and cost-effective manner.

VII. Creating an ongoing process for facilitating trade

CERT supports the work currently being undertaken on trade facilitation in the World Customs Organization. We recommend alignment with the WCO Framework of Standards to Secure and Facilitate Global Trade initiative. Any bilateral initiatives that fail to achieve reasonable uniformity in security programmes would create counterproductive, costly and inefficient effects by subjecting traders to many different and conflicting or redundant national approaches.

Also essential to the success of the WCO's work is the full participation of the business community, which generates the trade, movement of goods and most of the economic growth of national economies. By sending a strong commitment to the goals of the WCO, the EU and Canada can attract the interest and support of the private sector, enhancing the relevance of the TIEA negotiations to the private sector.

This would include including standards that are flexible enough to address the great diversity amongst supply chain structures, individual supply chain links, and transportation modes, while at the same time ensuring that the standards do not create competitive distortions. Equally important, the applied standard must be proportionate to the assessed risk and not impose unnecessarily high costs throughout the supply chain. It should be noted that the International Chamber of Commerce strongly supports utilizing the WCO's Framework of Standards to Secure and Facilitate Global Trade a basis for the creation of a robust worldwide process of mutual recognition on security and trade facilitation.

The TIEA should also closely monitor current WTO negotiations on trade facilitation which stem from the need to clarify and improve existing WTO disciplines on freedom of transit, fees and formalities associated with border transactions, and transparency of trade regulations. This ongoing work is expected to culminate in an agreement as part of the Doha Round of negotiations. It is hoped that it will produce a number of disciplines which will be helpful for exporters and importers.

About the Canada Europe Roundtable for Business

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).

CERT members meet during the bi-annual Canada-EU Summits and on the occasions of its thematic Executive Roundtables.

Participating Organizations

Alcan
American European Communities Association
Bombardier
Canadian Chamber of Commerce
CD Howe Institute
Conference Board of Canada
Direct Energy (Centrica plc)
European Aeronautic Defence & Space Company
Fleishmann Hillard International
Fraser, Milner, Casgrain LLP
Golder Associates
International Emissions Trading Association
Monsanto Canada
North American Carbon Inc.
Rabobank Nederlands
Siemens Power AG
Suez-Tractebel
Aecon Group Ltd.
Blake, Cassels & Graydon LLP
Canadian Centre for Energy Info.
Canadian Manufacturers & Exporters
CGI Inc.
Deloitte
Dundee Securities Corporation
EU Chamber of Commerce in Toronto
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