CERT Policy Priorities for the Canada-EU Trade and Investment Enhancement Agreement (TIEA)

September 2005

Table of Contents

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 meets three times a year, during the bi-annual Canada-EU Summits and at its annual CEO Roundtable conference.

Participating Organisations

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Canadian Chamber of Commerce
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Conference Board of Canada
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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 December 2002 Canada-EU Summit Canada for the creation of a forward-looking, 21st century agreement focused on regulatory cooperation. 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 Enhancement Agreement (TIEA) negotiations.

CERT welcomes a binding TIEA, with negotiations concluded in a timely fashion. However, more than 50 percent of executives surveyed were not aware of the TIEA. This indicates a need for concerted efforts by governments to increase the profile of the TIEA, to systematically and frequently engage in detailed discussions with the private sector as negotiations proceed, and draw out the relevance of negotiations to the private-sector. The June Niagara-on-the-Lake Summit provided an opportunity to commence with a systematic consultation process with the members of the private-sector who will be the major commercial beneficiaries of the TIEA outcomes.

According to a recent study of Canadian and European company executives conducted by the Conference Board of Canada, 90% of respondents felt that tariffs have a minimal impact on their business. The majority of respondents felt that non-tariff barriers should be the focus of the Canada-EU relationship, with a particular emphasis on regulatory cooperation in formal negotiations.

Enhanced cooperation matters because while the bilateral trade relationship has stayed relatively steady, our economies have becoming increasingly inter-linked from an investment perspective where the majority of barriers arise due to differing regulatory approaches. Canada currently ranks as the third major investor in the EU member states after the US and Japan. In 2003, Canada held 4% of foreign direct investment (FDI) in the EU at an aggregate value of CAD$99.1 billion. This amounts to 23% of Canada's total direct investment abroad. The EU is the second major investor in Canada holding an aggregate value of CAD$94 billion in 2002 and 75% of total FDI in Canada originating from outside of the US. The EU accounts for 27% of total FDI in Canada, with over 1,800 European companies holding investments in Canada.

The specific cases in this paper reflect real business issues to be addressed in the TIEA. The issues are numerous and cover several sectors, but all represent realistic aims for the Canadian Government and European Commission to strive for in TIEA negotiations. CERT urges Canada and the European Union to negotiate a trade and investment enhancement agreement that incorporates all of the recommendations outlined in this paper. The result will be to further promote and strengthen trade and investment within the transatlantic business community, especially in the context of avoiding non-tariff barriers.

CERT Recommendations: A Framework for Increased Prosperity

In the relationship between Canada and the EU, the most restrictive barriers to trade and investment are those related to different regulatory requirements on both sides of the Atlantic. With the aim of strengthening bilateral trade and investment, CERT has developed a number of recommendations to intensify regulatory dialogue between the EU and Canada. The recommendations contained in this document cover the need for a comprehensive political framework and set of actions for deepening Canada-EU trade and investment while promoting innovation, competitiveness and job creation.

In addition to a more focused political process and new approaches to regulatory cooperation, we are looking for important steps towards more open financial markets and the elimination of taxes that dampen competitiveness. In addition, commitments to advancing the economic opportunities inherent in the trade and environment interface and further cooperation on competition policies are priorities for TIEA negotiations. Finally, we offer prescriptions for more open government procurement markets and enhanced cooperation on trade facilitation.

I. Utilizing regulatory equivalency to create growth and prosperity

- Establish regulatory equivalency and mutual recognition as the major priority of the TIEA negotiations by adopting a rolling work programme of priorities and actions for both governments.

II. More efficient capital markets

- Simplify securities regulation by implementing a single Canadian national securities regulator.
- Promote of investor access activity and mutual recognition of stock exchanges as a means to promoting greater efficiency of capital markets for the benefit of investors on both sides of the Atlantic.

III. The elimination of uncompetitive tax policies

- Encourage investment and growth by removing uncompetitive withholding taxes and create an exemption for the tax treatment of personal income received by non-residents from their unincorporated business investments.
- Simplify tax treatment by implementing a common method of taxing foreign source income received from Canada.

IV. Trade and the environment: expanding business opportunities

- Address identified non-tariff barriers by negotiating mutual recognition agreements for certification and testing procedures in relation to the EU's REACH legislation.
- Take steps towards the creation of a bilateral emissions trading framework as a means to meeting Kyoto commitments and ensuring that significant private-sector opportunities can be facilitated.

V. The application of comity on avoiding remedial clashes in competition cases

- Avoid inconsistent demands on business from divergent national law and policy standards by committing to a framework regarding the application of comity principles.

VI. Opening government procurement markets

- Create a bilateral framework to ensure green procurement policies are applied in a non-discriminatory manner that is fully transparent, voluntary, and inclusive, and according to proper and sufficient scientific evidence.

VII. Creating an ongoing process for facilitating trade

- Regular consultation with the trading community on its needs with regards to the development of trade facilitation matters, to prevent trade barriers that arise from differing customs procedures and applications.

VIII. The WTO Doha Development Round

- CERT encourages governments to redouble efforts, including further utilizing the support of the private-sector to build support for a successful conclusion of the Doha Round in 2006.
- Support for an ambitious WTO outcome that provides greater access for NAMA goods, increased liberalization on services and reduction of agricultural subsidies

I. Utilizing regulatory cooperation to create growth and prosperity

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 call for a prioritisation of sectors where enhanced co-operation should be developed in the first place. The specific sectors identified in this document should form the initial list in this case.

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 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.

[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.

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. 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 following:

A. A robust Canada-EC Regulatory Co-operation Committee

In assisting the TIEA 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 TIEA 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, avoid the creation of new barriers and seek a maximum degree of coherence with the US. CERT recommends that the Committee focus on the following areas:

1. <u>Improve the level of engagement on regulatory cooperation</u>

- The Committee should report regularly to Leaders at Canada-EU Summit meetings, on progress made on regulatory equivalency in the context of TIEA negotiations, remaining obstacles and plans to resolve them.
- Canadian government and European Commission 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. and or the EU, increase harmonisation and coordination among member states, especially with respect to newly 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.

2. 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 on the transatlantic market.
- 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.
- Share proposed technical or sanitary and phytosanitary regulations, where such measures may have a detrimental effect on bilateral trade and investment.

3. 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 national engineering associations.

4. Seek a maximum degree of coherence with the US

- Regulatory co-operation should take into account the work being done between the EU and the US, which in April 2002 approved a set of "Guidelines on Regulatory Co-operation and Transparency".
- 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).

B. Regulatory Cooperation Priorities

Regulatory issues feature prominently in our recommendations covering competition policy, financial services and trade and the environment. In TIEA negotiations, we urge adoptions of our priorities in the following areas:

1. More efficient capital markets

- The establishment of a single Canadian securities regulator
- Align efforts with those of the North American Security and Prosperity Partnership's objectives and approaches in efforts to remove impediments to free trading in securities.
- Facilitate free investor access and mutual recognition of stock exchanges as a means to promoting greater efficiency of capital markets.

2. Trade and the environment

- Formulate and apply regulations in a manner that is inclusive, non-discriminatory, and containing no unnecessary barriers to avoid new environmental non-tariff barriers to trade.
- Take steps towards a bilateral emissions trading framework as a means to meeting Kyoto commitments and ensuring that significant private-sector opportunities can be facilitated.

3. The application of comity on avoiding remedial clashes in competition cases

- Avoid inconsistent demands on business from divergent national law and policy standards by committing to a framework regarding the application of comity principles.

C. Build on existing regulatory agreements within a comprehensive TIEA

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. The TIEA should bring this work together under one comprehensive umbrella agreement, providing more formalized mechanism for dialogue and for the development of mutual understanding related to the intersection between trade and investment policies.

A number of the sectoral bilateral agreements that have also been established within the framework of ECTI should be targeted for further consideration within the TIEA negotiations.

- 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 the1998 Agreement of Mutual Recognition of Conformity Assessments and the 1997 Agreement on Customs Cooperation and Mutual Assistance to Customs Matters provides further opportunities to develop specific issues for closer cooperation.

II. More efficient 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 framework in the TIEA 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. Furthermore, such an agreement presents an opportunity to wedge the financial services sector into the broader global negotiations that, presumably, will one day occur.

CERT supports the European Parliament's investment services directive based on implementing a passport system to create a single financial market. The language of a Canada-EU financial services framework agreement negotiated within the TIEA should be as consistent as possible with the European Parliament's legislation approving the investment services directive.

In the following recommendations, we suggest a number of areas where Canada and the EU could lead in promoting stronger and more efficient capital markets.

A. Single Canadian securities regulator

The single most important problem faced by Canadian capital markets is a fragmented regulatory system, with 13 provincial and territorial regulators.

CERT recommends:

- Implementation of the recommendations outlined in the Wise Persons' Committee Report to Review the Structure of Securities Regulation Committee on December 17, 2003 for a single national regulatory agency, with provincial participation on its board and regional offices to deal with the local issues.

B. Coherence with the US

Since the inception of the TIEA process, new opportunities have arisen to produce freer trade in financial services in North America, notably through the Security and Prosperity Partnership established in March 2005 at the Canada-Mexico-U.S. summit in Waco, Texas.

The summit communiqué commits the three governments to work together to lower costs by ensuring compatibility of regulations and standards and eliminating redundant testing and certification requirements, to strengthen regulatory co-operation to minimize barriers and to explore new approaches to enhance North American competitiveness and to work towards:

> "… the freer flow of capital and the efficient provision of financial services throughout North America (e.g., facilitate cross-border electronic access to stock exchanges without compromising investor protection, further collaboration on training programs for banks, insurance and securities regulators and supervisors …."

CERT supports this initiative and believes that 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.

CERT recommends:

- Canadian and European negotiators engaged in the TIEA process should, where relevant, align with the North American Security and Prosperity Partnership's objectives and approaches in efforts to remove impediments to free trading in securities between Canada and the EU and to reduce the costs of capital formation in both territories.
- Consideration should be given to how these parallel trans-Atlantic and North American initiatives 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.

C. Tackle obstacles to growth and greater efficiency

Consistent with the Security and Prosperity Partnership, we believe the EU should be accommodated in a manner that reflects the particular impediments it faces or imposes on its NAFTA partner countries. In particular, 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 the context of TIEA 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:

    - mutual recognition of national investment dealers associations; 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 European Union, based on the principle of mutual recognition of stock exchanges, should be accommodated through the Trade and Investment Enhancement Agreement (TIEA). 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.

III. Eliminating uncompetitive tax policies

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:

- 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:

- 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:

- 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.
- Create a single, pan-European tax auditor.

IV. Trade and environment: expanding business opportunities

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 regulation should be designed to promote transatlantic commerce, while achieving environmental objectives. TIEA 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. The agreement should create a framework that prevents future NTB's from developing, an example being the EU requirement that green lumber be heat treated to destroy pinewood nematode, effectively stopping Canadian exports of green lumber to the EU.

Environmental standards should be developed and used in a fully transparent, non-discriminatory fashion and according to proper and sufficient scientific evidence. The CERT working paper, "*The Role of Trade and Environment in a Canada- EU Context: Strengthening Canada-EU Trade Relationships*" provides a more detailed discussion on the trade and environment interface.

A. Non-tariff barriers

CERT recommends that the following regulatory barriers to trade and investment be included as priorities in TIEA negotiations:

- Mutual recognition of environmental standards and protection measures between Canada and the EU as a means to preventing future NTB's that could develop and have significant outcomes.

- Given that chemical safety issues for the Canadian industry are comprehensively addressed domestically in the Government of Canada's Canadian Environmental Protection Act (CEPA), CERT recommends that the Government of Canada and European Commission agree to mutual recognition of other countries national equivalents to REACH (i.e. CEPA).

- Extend the derogation for Canadian organic producers past December 2005, until such time as Canada develops a mandatory certification scheme in order to facilitate equivalency negotiations with the EU on organic produce.

B. Climate change and emissions trading

CERT believes that both Canada and the EU should redouble their efforts to ensure that the issue of climate change is addressed globally. It is essential that: 1. the Carbon economy not be geographically fragmented at its starting point; and, 2. emissions trading is not implemented in national/regional schemes that distort a competitive global market that is required if industry is to implement efficient actions to reduce Green House Gases (GHG).

Discussion on this issue within TIEA should be broadly identified as climate change policies, and not only emissions trading. Many companies are heavily focused on controlling and reducing GHG emissions, while allowing growth and development, and not simply just to trade CO2 allocations.

V. Comity principles for minimizing complexity, conflict and barriers in competition cases

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.

The TIEA presents 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. Recently, Canada's Commissioner of Competition Sheridan Scott suggested that competition authorities "should act with moderation and constraint when proposed enforcement action conflicts with another state's action, when there is a significantly greater nexus with that jurisdiction and our concerns will be dealt with" citing three recent cases in which commitments made, by a party or parties, to a foreign enforcement agency addressed Canadian competition concerns.[3]. As with any other international law or policy, comity's effectiveness necessitate reciprocity in both principle and action by enforcement agencies.

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[3] *See* Sheridan Scott, Commissioner of Competition, Competition Bureau, *"C" is for Competition: How we get things done in a globalized business world,* Insight Conference, Montreal, Quebec, June 17, 2005, ***available at*** http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1867&lg=e.

TIEA 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 I.

- CERT recommends that the Government of Canada and the European Commission, with respect to their competition policies, commit to a framework regarding the application of comity in avoiding remedial clashes in competition cases.

VI. Opening government procurement markets

In the 1996 Joint Action plan and ECTI, Canada and the EU made commitments to increase openness of government procurement markets to each other. 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 businesses continue to face barriers to procurement markets for specific sectors, including telecommunications equipment and services, transportation equipment and electric utilities. Further, many EU member states are developing green procurement policies. CERT supports green procurement policies that are inclusive, non-discriminatory, and containing no unnecessary barriers to trade. However, non-inclusive procurement policies that require products receive approval from specific certification schemes serve as a market barrier for products.

In efforts to increase cooperation on government procurement and further open these markets for the commercial benefit that increased competition and cost savings will bring to of both Canada and the EU, CERT recommends:

- The creation of a bilateral framework to ensure green procurement policies are applied in a non-discriminatory manner. CERT views the recent precedent established in the UK with their national government's system for defining "legal" and "sustainable" sources of wood as a positive example of a policy developed in a fully transparent, voluntary, and inclusive manner, and according to proper and sufficient scientific evidence.
- That Canada and the EU continue to work together in the WTO Government Procurement Working Group, and undertake further negotiations under the TIEA to ensure that WTO commitments on government procurement are fulfilled to the full extent.

VII. Creating an on-going process for facilitating trade

Canada and the EU should make use of the 1997 Customs Cooperation Agreement and relevant international organisations (such as the WTO, World Customs Organization (WCO), the United Nations (UN) and the United Nations Conference on Trade and Development (UNCAD) to further facilitate trade. Specifically, the trading community should be regularly consulted on its needs with regards to the development of trade facilitation matters, including the utilisation 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.

VIII. The WTO Doha Development Round

Given its focus on regulatory cooperation and non-tariff barriers to bilateral trade and investment, the TIEA constitutes a WTO+ type initiative. While CERT continues to support multilateral trade negotiations in the WTO, we feel that Canada and the EU can set a new standard for international cooperation in reducing barriers to trade and investment between nations with the TIEA. The "Doha round" of WTO negotiations that was launched in 2001 is crucial to the long-term health of the global economy. The Doha declaration represents a significant step forward for continuing liberalization on trade matters and a vote of confidence in a rules-based system of international trade. While much has been accomplished in Geneva since the Doha Ministerial in November 2001, there is a growing sense of public pessimism surrounding the talks. CERT is confident that the Canadian and EU officials involved in DDA negotiations will redouble their efforts to ensure the December 2005 Hong Kong Ministerial meeting lays the groundwork for successful conclusion of negotiations in 2006.

CERT recommends:

- Ambitious negotiating agenda on NAMA (non-agricultural market access) and services
- Open lines of communication between Canada and EU on key issues at the HK meeting
- Reduction/removal of domestic and export agricultural subsidies

IX. Conclusion

While Canada-EU trade and investment relations confirms that the relationship is seen as a positive one with relatively few barriers, more must be done to ensure that the relationship continues to grow and that the trade and investment dampening effect of diverging regulatory outcomes is avoided. By adopting the recommendations outlined in this document, the TIEA 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 harmonisation and coordination among member states, especially with respect to newly acceded members.

Institutionalized cooperation between Canada and the EU is not new. A number of frameworks have been established for cooperation in priority areas, and work has steadily progressed over the years. The TIEA should bring this work together under one comprehensive umbrella agreement, providing more formalized mechanism for dialogue and for the development of mutual understanding related to the intersection between trade and investment policies, on the one, hand and areas of domestic policy and regulation on the other. The liberalization of traditional barriers to market access such as tariffs should be left to the WTO.

Notably, although both Canada and the EU may initiate dispute settlement proceedings against each other under the WTO, they do not have not formal bilateral mechanism for resolving disputes. Differing from a formal undertaking such as the WTO, the nature of how the TIEA could be used to resolve differences will likely be quite different, providing a forum for the clarification of understanding and negotiation of specific issues, rather than the formal arbitration process to resolve differences.

Of concern is a business lack of knowledge of the TIEA. Companies in Canada and Europe have not been educated on either government's initiatives to enhance trade and investment and often do not see a light at the end of the tunnel in terms of reducing non-tariff barriers. More needs to be done to communicate the benefit of TIEA negotiations to the private sector.

Finally, negotiation of the TIEA needs to take into account the individual relationships of both parties with the United States. Canada's economy is closely integrated into the North American market, including a large number of common standards and regulations, a point emphasized by the common stance of Canada and the US towards EU trade barriers. However, the EU has also entered into regulatory cooperation frameworks with the US. Canada-EU economic cooperation needs to continue finding common goals and objectives between the two parties, basing decisions on international standards that will also be acceptable for trading partners in the multilateral arena.

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Annex I: 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.[4] 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.[5] 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

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.

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[4] 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.

[5] 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.

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.[6] 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.[7] 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

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

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[6] 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.

[7] 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.

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