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### *Chapter 3*

## **USING A SOFT MODE OF GOVERNANCE TO FACILITATE TRADE: REGULATORY CO-OPERATION BETWEEN THE EU AND CANADA**

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### **INTRODUCTION**

The increasing transactions of the flow of goods, money, people, and services across international boundaries lead to interdependence in world politics (Keohane & Nye, 2001). This development has resulted in the establishment of a significant number of international institutions that aim for states to realize their mutual economic interests. In the area of trade, the World Trade Organization (WTO) provides a multilateral regime that regulates international trade relations and lowers trade barriers between its 153 members. Also, there has been a considerable growth in free-trade agreements at the regional and bilateral level since the early 1990s (Oatley, 2004). More than 400 free-trade agreements are expected to be in operation within 2010.<sup>1</sup> The establishment of legally binding agreements is thus the most common way of reducing barriers to trade. However, a new trend is emerging. In contrast to the 'hard bargaining route' that leads to legally binding agreements, the new soft initiatives follow an alternative path to the reduction of trade barriers through voluntary co-operation. While international legal agreements rest on binding rules and often coercive mechanisms to sanction non-compliance<sup>2</sup> (so-called hard law), soft modes of governance feature voluntary co-ordination of action and social incentive structures, for example, 'peer pressure' to promote compliance (so-called soft law) (see e.g., Abbot & Snidal, 2000).

As tariff levels have been progressively reduced through international negotiations, there has been a growth in non-tariff barriers to trade (Grieco, 1990). The new soft instruments are especially directed towards reducing so-called 'red tape', that is, various bureaucratic or legal

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<sup>1</sup> See the WTO homepage at: [http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm), accessed 25 June 2009.

<sup>2</sup> The WTO dispute-settlement system has inter alia an important role in clarifying and enforcing the legal obligation of the various WTO agreements.

issues that can hinder trade, and preventing and reducing trade barriers caused by unnecessary regulatory divergences between markets.

In this chapter, we draw on the relevant literature and use the regulatory co-operation between the EU and Canada as an illustration of the *potential effects, advantages, and challenges of applying soft governance* in a context of trade facilitation. The EU and Canada are at the forefront with regard to applying soft modes of governance, and their co-operation exemplifies how soft instruments work between states at the same level of development of regulatory systems and policies that are not radically different at the outset.

This chapter first provides a short presentation of how various forms of regulatory co-operation can reduce non-tariff barriers to trade. Next, we elaborate on EU-Canada bilateral trade relations, emphasizing the soft mechanisms at play within the EU-Canada regulatory co-operation. We then examine the effects of these measures on facilitating trade before we discuss what lessons the EU-Canada model offers, emphasizing the advantages as well as challenges and limitations of applying a soft approach.

Our main conclusion is that the key advantage of applying a soft mode of governance relates to the adaptability and flexibility of soft regulatory co-operation in contrast to hard-law agreements. Regulatory frameworks provide close contact between regulators at every step of the regulatory process, which represents a clear advantage with respect to resolving trade irritants as they appear and preventing regulatory trade barriers from emerging in the first place. Furthermore, we emphasize the confidence-building effects of soft regulatory co-operation as the main reason why governments would do well to apply a soft mode of governance or in combination with hard-law instruments in order to facilitate trade. However, the limitations of applying soft modes of governance for facilitating trade relate to conditions such as the symmetry of market power for the parties involved, the compatibility of regulatory systems, and the degree of conflict over the trade issue at hand.

The empirical basis of our analysis rests mainly on qualitative data, that is, systematic reviews and analyses of documents, literature and interviews conducted with relevant government officials.<sup>3</sup> The interview data have first and foremost been used for background information and as a means to validate information obtained from relevant written documentation. However, we have applied selected anonymous citations from interviews in the text in order to illustrate certain analytical points. We have also benefited from insights from other studies on different types of instruments of trade facilitation by various authors (Elvestad, 2002; Elvestad & Veggeland, 2005; Veggeland, 2006; Veggeland & Elvestad, 2004).

The persistence of non-tariff barriers and the important role of regulators in minimizing such barriers have led to the description of regulators as ‘the new diplomats’ (Slaughter, 2004). The issue of regulation has traditionally been a domain of domestic policy-making, but regulation is increasingly becoming trans-national in the sense that it ‘structures, guides and

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<sup>3</sup> Interviews have been conducted with officials from the EU’s delegation to the WTO’s Sanitary and Phytosanitary (SPS) Committee, officials from the European Commission’s Directorate General for Health and Consumer Affairs (DG SANCO), DG Trade, DG Agriculture and DG Enterprise, officials from the Canadian delegation to the WTO’s SPS and Technical Barriers to Trade (TBT) Committees and the Canadian permanent mission to the WTO and to the EU as well as the Treasury Board of Canada Secretariat. Interviews were conducted in October 2005, February, March, and June 2006, and in June and September 2008. Some interviews were conducted over the phone; the others were conducted face-to-face in Geneva and Brussels.

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controls human and social activities and interactions beyond, across and within national territories' (Dejlic & Sahlin-Andersson, 2006:6).

## **TRADE FACILITATION: REDUCING NON-TARIFF BARRIERS TO TRADE (NTMS)**

To use the phrase by Slaughter (2004), interaction between regulators across national borders and the establishment of regulatory co-operation have become part of a 'new world order'.

Non-tariff barriers to trade (NTBs) can be defined as various forms of regulation other than tariffs that affect and distort the trade of goods, services, and factors of production (Beghin, 2008). Inter alia the cost of complying with different product requirements in different markets can be a heavy burden for exporters. However, it may not be desirable or feasible to remove all national differences. Some forms of differences could be 'good heterogeneity' in that it may reflect acceptable and desirable regulatory differences between nations with regard to geography, incomes or tastes, for example. However, regulatory heterogeneity 'driven by protectionist capture, bureaucratic indifference or information failures' may be undesirable (Sykes, 1999:52,57). In relation to the potential ways of dealing with non-tariff barriers to trade, we apply the concept of trade facilitation, defined as the: 'methods and tools used to prevent, reduce or eliminate the transaction costs<sup>4</sup> associated with regulation, enforcement and administration of trade policies' (Staples, 2004:140). Below, we shall give a brief overview of both hard-law and soft law instruments that can be applied to eliminate or reduce unnecessary regulatory burdens and regulatory divergences between markets in order to facilitate trade.

## **HARD INSTRUMENTS TO FACILITATE TRADE**

A wide range of different tools can be used to reduce regulatory divergence (see e.g., Egan, 2001) and thereby to facilitate trade. *Full harmonization* is the elimination of all regulatory differences between markets through binding agreements where options for local deviations are prohibited and compliance is mandatory. The most obvious example is the development of EU law, which takes place within the framework of negotiated treaties between the member states. EU law covers total harmonization between the EU member states on a large number of regulatory areas, such as competition, food safety, and consumer protection. An alternative to total harmonization is *partial harmonization*. With this option, harmonization and mandatory compliance are reserved to trans-border trade, while compliance is optional in local markets.

However, there are other hard-law tools that aim to avoid problems of regulatory divergence while allowing for some regulatory differences, such as *equivalence* and *mutual recognition* (Elvestad, 2002; Veggeland, 2006; Veggeland & Elvestad, 2004). The principle

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<sup>4</sup> Transaction costs are costs associated with making an economic exchange, e.g., costs related to compliance with regulations.

of equivalence allows trade to flow freely even though there may be differences between regulatory systems. More specifically, the determination of *equivalence* means that the parties involved accept that the rules are different as long as it is possible to determine that the rules fulfil some commonly stated objective in a satisfactory way. Thus, the concept of equivalence refers to the 'likeness' (not 'sameness') of different rules with regard to some predetermined parameter. In the EU, the 'mutual-recognition principle' ensures that goods which are lawfully produced in one member state must be accepted for sale in the territory of another member state, even if it is produced in accordance with technical or quality specifications different from those applied by the importing state. The application of the mutual-recognition principle thus guarantees the free movement of certain goods and services without the need to harmonize member states' national legislation. Outside the EU, the principle of mutual recognition is most often applied through so-called Mutual Recognition Agreements (MRAs). MRAs normally include some sort of acceptance of each other's systems of conformity assessment. For instance, signatories could be obliged to recognize certificates issued by each other's conformity-assessment bodies in order to eliminate the need to test products both in the exporting and in the importing country. Hence, mutual recognition 'more or less exempts foreign suppliers from regulations in the importing country, and the attendant cost of compliance' (Sykes, 1999:67).

Another option is to avoid regulatory divergence by including *references to private, public or intergovernmental standards* instead of including detailed requirements in the national law that could obstruct trade. This practice presupposes the existence of harmonized standards for the area in question, or at least the existence of standards that all trading partners recognize as legitimate. One of the objectives of the so-called new approach of the EU is to make it possible for the EC legislators to concentrate on the 'essential requirements' (e.g., the protection of health and safety) specified in framework directives while European standards bodies draw up the corresponding technical specifications. Thus, basing national regulations on this standard is an effective way of conforming to the essential requirements specified in mandatory directives. Hence, the aim is not total harmonization, but a degree of flexibility that allows regulations to be different as long as they fulfil the essential requirements specified.

## SOFT INSTRUMENTS TO FACILITATE TRADE

Equivalence, mutual recognition, and reference to standards all allow some differences between national regulatory systems to exist. However, these three tools are not soft instruments for facilitating trade, since they are normally used in connection with either binding agreements (equivalence agreements, MRAs) or binding decisions (references to standards in national law) (Howse, 2006:383). As mentioned in the introduction, applying soft-law instruments means that objectives, for instance, regulatory convergence to avoid trade problems are pursued on a voluntary basis without resorting to legislation or negotiations of binding agreements. However, the establishment of soft-law agreements has traditionally been viewed as 'second-best' solutions when the negotiations of hard-law agreements have failed. The prevailing idea is that while the best option is to have hard-law agreements, it is better to have a non-binding agreement than no agreement at all. For

instance, Schäfer suggests this lower status by pointing out that ‘international organisations select soft law less for its effectiveness than for its capacity to foster compromises’ (Schäfer, 2006:194). Furthermore, soft-law arrangements are often viewed as transitional, a mere a step to what should preferably turn into hard law (Mörth, 2004). Nevertheless, other parts of the literature emphasize that the use of soft law ‘avoids some of the costs of hard law and has certain advantages of its own’ (Abbot & Snidal, 2000:423).

In order to understand the nature and potential advantages of soft co-operative instruments, it is necessary to look more closely into the types of social mechanisms involved. Eberlein and Kerwer argue that there is often a lack of in-depth understanding of the procedural mechanism inherent in soft-law instruments (Eberlein & Kerwer, 2004, p. 131). Soft instruments that facilitate trade compose a diverse group of soft law arrangements based on ‘procedures that are voluntary, open, consensual, deliberative and informative’ in nature (Caporaso & Wittenbrinck, 2006, p. 472). The so-called open method of coordination (OMC) of the EU rests inter alia on non-binding objectives and guidelines with specific timetables for achieving goals, qualitative and quantitative indicators, and the use of benchmarks as means of comparing best practices between countries. Furthermore, periodic monitoring, evaluation and peer review are organized as mutual learning processes. A main point is that the transfer of knowledge and the mutual learning inherent in the processes of soft instruments can create a common understanding of problems and solutions (Jacobsson, 2004), and lead to the convergence of goals and instruments (López-Santana, 2006). Hence, by learning from each others different regulatory systems may thus move towards greater compatibility without having to come to binding agreements. In the next sections, we shall explore in more detail the soft mechanisms at play within the regulatory co-operation between the EU and Canada.

## **THE EU-CANADA BILATERAL TRADE RELATIONS: MAIN FEATURES OF THE REGULATORY CO-OPERATION**

The EU and Canada have a long-standing tradition of bilateral co-operation. They have established a large number of co-operative arrangements. The formal economic co-operation between the EU and Canada dates back to 1976 with the conclusion of the ‘Framework Agreement for Commercial and Economic Cooperation’ (European Commission, 2003:3). This agreement was actually the EU’s first co-operative agreement with an industrialised country, and it still provides the principal legal basis for the formal relationship between the EU and Canada.

Today, Canada is the EU’s eleventh most important trading partner (in Euros) whereas the EU is Canada’s second most important trading partner after the United States, with a 9.8 per cent share of Canada’s total external trade. Trade with Canada comprised 1.8 per cent of the EU’s total trade with the rest of the world (European Commission, 2008). Trade between the EU and Canada is important for both economies, and thus both parties have a clear interest in minimizing unnecessary trade barriers caused by regulatory differences. However, it took some time before there was the realization of concrete actions in the regulatory area.

In 1996, the EU and Canada entered a new phase in their relationship with the adoption of the ‘Joint Action Plan’. In 1998, the EU-Canada Trade Initiative (ECTI) was established as

a follow-up to the stated goal of enhancing economic and trade relations (European Commission, 2003:6). This initiative addressed a large range of issues, including regulatory ones. In order to identify remaining barriers to bilateral trade and investment, and the appropriate means to remove them, the European Commission and the Canadian government agreed in 2001 to conduct parallel business studies. These studies showed that barriers such as tariffs and quotas only played a minor role in bilateral trade whereas regulatory barriers were the foremost impediments to EU-Canada trade and investment. Thus, the EU and Canada agreed at a summit in December 2002 to intensify their regulatory dialogue and to work towards a new framework in this field.

The two parties subsequently decided to prepare a new plan of action for regulatory co-operation and to re-launch their regulatory dialogue that would also involve representatives for other stakeholders. In May 2003, a 'Joint Action Plan' for regulatory co-operation was adopted at an EU-Canada summit (EU-Canada, 2003). The plan identified measures to implement the political commitment to strengthen the regulatory co-operation between the two parties. These measures included holding a seminar to discuss the need for regulatory co-operation, producing an inventory of existing areas of EU-Canada regulatory co-operation as well as identifying new areas of co-operation, and making a review of relevant regulatory tools. In 2004, the two parties adopted a new regulatory co-operative framework<sup>5</sup> designed to 'promote a more systematic dialogue between EU and Canadian regulators during the early stages of the development of regulatory proposals for all goods' (European Commission, 2004). This voluntary framework is a soft-law document that is not legally binding to the Canadian government, the European Commission or the EU as a whole. The 2004 framework is a comprehensive plan for intensifying the regulatory dialogue and co-operation between the two parties, complemented by a 'Regulatory Cooperation Roadmap' as a means to implement fully the commitments for all the areas included in the framework<sup>6</sup> (EU-Canada, 2007a, 2007b).

**Table 1 EU-Canada arrangements including regulatory co-operation<sup>7</sup>**

The EU-Canada Joint Action Plan (1996)
The EU-Canada Trade Initiative (ECTI) (1998)
The Joint Action Plan on Regulatory Cooperation (2003)
The Framework on Regulatory Cooperation and Transparency (2004)
The EC-Canada Regulatory Cooperation Roadmap (2007)

<sup>5</sup> A confidential arrangement for information-sharing and an implementation plan of co-operative projects were also concluded in relation to the framework document on 'Regulatory Co-operation and Transparency'.

<sup>6</sup> The issues originally covered are chemicals, electrical and electronic equipment and waste (e-waste), organics equivalency, the Canada-EC Veterinary Agreement, pesticides, pharmaceuticals, radiation-emitting devices, chemical contaminants in food, food-allergen labelling, and incident prevention.

<sup>7</sup> There are also several hard-law agreements such as the Agreement on Customs Co-operation and Mutual Assistance (1997), the Agreement on Mutual Recognition of Conformity Assessment (MRA) (1998), the Veterinary Agreement, and the Competition Agreement (both 1999).

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## **The Institutional Set-Up**

In order to create favorable conditions for the implementation of the voluntary framework, the EU and Canada have created an institutional set-up for interaction between policy-makers, regulators, and technical experts at all levels. Regulators have established working groups on issues of common concern in their respective areas of competence, which have been agreed upon voluntarily between the two parties. Further, focused websites, teleconferences, joint seminars and workshops, and different arenas for exchanging and sharing information relevant for regulation-making and strategies of compliance are important. The Canada-EC Regulatory Co-operation Committee established for this purpose regularly follow up the functioning of the framework and progress on identified regulatory projects. This committee discusses horizontal issues, plans seminars on regulatory issues, identifies areas for improvement, disseminates best practices, and facilitates implementation of the framework in areas of mutual concern. The regulatory framework includes a number of tools to prevent and eliminate unnecessary barriers to trade. In the following sections, we shall highlight some of main procedural mechanisms involved.

## **Procedures for Information-Sharing and Regulatory Consultations**

EU and Canadian regulators are encouraged to interact and exchange information as early as possible in the regulation-making process. Information and consultation about changes in the regulatory structure in the respective jurisdictions and upcoming legislative issues are especially important. In particular, with regard to the development of regulations and mechanisms of compliance that may have trade implications, for example, proposed technical or sanitary and phytosanitary measures,<sup>8</sup> the framework encourages regulators to consult each other and exchange information throughout all the stages of regulation. It is explicitly stated that the earlier that such exchanges and consultations can take place, the better. The framework even allows the opportunity for regulators to share non-public, sensitive information (cf. 'A Model Confidentiality Arrangement'). Furthermore, regulators are encouraged periodically to exchange information, such as annual work programmes on ongoing or planned regulations. Regulators are encouraged to provide, upon request by their counterparts, copies of proposed regulations and also to allow time for interested parties to provide comments. Hence, the EU and Canada are able to prepare comments and proposals for amendments to the respective regulators. When annual work programmes are exchanged, the framework encourages regulators to supplement the programme with other useful information such as potential benefits and costs and other impacts of the regulatory approach under consideration in order to make the process more transparent.

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<sup>8</sup> In the WTO, these measures are covered by the Agreement on Technical Barriers to Trade (The TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (The SPS Agreement).

## PROCEDURES FOR EXCHANGING EXPERIENCES AND IDENTIFYING BEST PRACTICES

An important part of the framework concentrates on identifying good regulatory practice to promote better regulation. This work also involves exchange of experiences and benchmarking processes in order to identify best practices. The framework, for instance, encourages technical experts and regulators to initiate co-operative research agendas and generally to make an effort to establish a common scientific basis, say, by using similar methods of data collection. Joint reviews, staff exchanges or work-sharing activities are other examples of ways of exchanging experiences. The framework also promotes the practice of regulators' exchanging information on regulatory requirements and on choices of regulatory instruments, and stresses that these practices should take place at the earliest stage possible. By exchanging information on the different approaches to regulation, regulators may better understand the rationale behind regulatory choices and may enhance the examination of the potential for greater regulatory convergence on how to determine both the objectives and the scope of regulations. Furthermore, regulators may be in a better situation to compare methods and assumptions that analyses of regulatory proposals employ. Information about impact assessments and strategies of compliance are part of this understanding, including the potential cost-effectiveness of specific regulatory proposals compared to alternative regulatory requirements and approaches. In this context, the potential for minimizing unnecessary divergences in regulations requires examination as well.

## THE EFFECTS OF REGULATORY CO-OPERATION

Based on the short presentation above, we now discuss how a soft regulatory instrument like the regulatory co-operative framework can contribute to regulatory convergence and reduction of regulatory trade barriers. In more analytical terms, we ask what possible effect the regulatory co-operative framework as an international institution may produce.<sup>9</sup> Inspired by the literature on international governance (see e.g., Haas, Keohane, & Levy, 1993; Young, 2002), we have categorized possible effects into 'The three C's'— increasing governmental *concern*, building national *capacity*, and enhancing the *contractual* environment. In addition, we apply a fourth 'C category' of effects labelled *confidence-building*. Though the term 'confidence-building' is not applied explicitly in the regime's literature, the role of procedures for information, openness, and communication is essential for the reduction of uncertainty and risk between actors in international relations. Keohane (1982) argues that governments contemplating international co-operation need to know their partners, not merely to know about them, in order to achieve international policy coordination (which would include the reduction of non-tariff trade barriers).

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<sup>9</sup> We emphasize that this section is not an attempt to evaluate the effectiveness of the regulatory co-operation between the EU and Canada.



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## **Increasing Governmental Concern towards Specific Problems and Relations**

Our first point is that the establishment of a soft regulatory co-operation, like the EU-Canada framework, is worthy of attention in several ways. First and foremost, regulatory co-operative frameworks are strategically useful for drawing attention towards important bilateral relations. For instance, in the case of Canada, the main motivation behind the establishment of the regulatory co-operation was to strengthen its relation to the EU as one of its main trading partners. For Canada, a relatively small actor on the scene of international trade, it is vital to get the attention of large actors such as the EU. In this regard, the soft regulatory framework furnishes the systematic attention that can contribute to engaging and retaining the interest of trading partners. In other words, regulatory co-operative frameworks can be important as an active part of foreign policies to raise the profile of important relationships. Moreover, creating a framework for soft regulatory co-operation can help increase the awareness of the specific problems at hand, in this case, trade impediments caused by regulations. The activities initiated through the EU-Canada Framework, for instance, the mapping of problems caused by non-tariff barriers in their bilateral trade, provide a common base of knowledge that generates awareness of the problem at hand. Furthermore, most government agencies have limited resources available, but the regulatory framework can put pressure on departments to prioritize issues of trade facilitation. According to one of our interviewees, 'It's a question of prioritization. All departments are strapped for resources; they have to select their priorities very carefully, so sometimes you need these dialogues or processes to help focus'. Furthermore, co-operative frameworks may be useful in making sure that the necessary linkages are in place to coordinate the attention of relevant departments in order to facilitate trade. In this respect, the EU-Canada regulatory co-operation is an umbrella framework that fosters those linkages both domestically (between sectoral authorities in Canada and within the EU) and trans-nationally (between Canadian and EU regulators).

## **Building National Capacity to Deal with the Issues at Hand**

The second point is that the regulatory co-operative frameworks can also enhance the problem-solving capacity of the governments involved. The EU-Canada framework establishes inter-organizational networks in order to transfer technical and managerial expertise that could mutually strengthen both parties' regulatory capacity. The learning-processes initiated through the framework, for example, mutual visits, exchange of personnel, seminars and different forms of sharing and exchanging information as well as the identification of best practices may contribute to the improvement of regulatory systems. Also, these processes contribute to enhancing the compatibility between systems, which creates a more favourable environment for minimizing trade barriers caused by regulatory differences. The activities of this framework thus contributes to creating a common understanding of the reasons for regulating, what to regulate, and not least the choice of 'the least trade-restrictive' regulatory tools that may help minimize problems related to regulatory trade barriers. This arrangement can also have cost-savings effects through the exchange of risk assessments, for instance. On the practical level, trade problems may not be a result of

the trade rules themselves, but of the implementation of these measures. Hence, regulatory co-operative framework augments the capacity of regulators to consider all part of the regulatory process from design to compliance and inspection, and can make it easier to prevent and reduce trade problems at the administrative level. On the other hand, administrative issues may need political attention and backing to be solved, which leads us to the third category of effects.

### **Enhancing ‘The Contractual Environment’: Moving Issues Forward**

The third aspect of regulatory co-operation is that it can help facilitate the progression of important issues. The dynamics created by the processes of the regulatory co-operative framework provide a certain momentum that can put pressure on decision-making. Normally we see regulators at the sectoral level are neither trade experts nor trade negotiators. However, it may take high-level political attention and coordination to initiate the necessary discussions. While some trade problems caused by regulations can be prevented and reduced at the administrative level, others are long-standing irritants that are very hard to overcome. One of our interviewees’ points out that, ‘Without political direction, sector departments could have a lot of great conversations, but they won’t have (the) mandate or marching orders to actually solve it’. In relation to the EU and Canada, the ministerial meetings within the framework accompany a tangible pressure on a yearly basis to have something concrete to deliver. In Canada, the Department of Foreign Affairs and International Trade would normally push the sectoral departments to meet some objectives in various areas each year in order to facilitate trade. In this way the regulatory framework can offer high-level support to co-operation and thus give the necessary push to move issues forward.

### **Building Confidence: Preventing and Resolving Problems**

The last category of effects relates to how regulatory co-operative frameworks can produce added value with respect to trade facilitation through confidence-building. The potential for trade facilitation may seem to be greatest for preventing future regulations from becoming regulatory trade barriers, rather than for resolving problems relating to regulations already in place. This perception is understandably due to the fact that the main focus of the regulatory co-operation between the EU and Canada is directed towards forthcoming regulations. Through the regulatory framework the parties give each other information much earlier than what is required of them as members of the WTO. Normally, the notification of new regulations in accordance with WTO rules should take place 60-75 days before it comes into effect. However, as regulatory processes can take three to five years to develop, the hard-law commitment to notify is often more of a formality, a ‘last chance to comment’ since the direction of policy has already been determined, and the regulation is designed and in its final stages of approval. Even though it is possible to modify regulations at this late stage, it is obviously harder than in the early stages of the regulatory process. In many respects it can be easier for the relevant parties to co-operate on forthcoming regulations by talking with each other early in the developmental phase and making sure that regulations are compatible and do not lead to trade barriers in the future. It is important to note that regulatory co-operation is

not a part of the classic ‘paradigm’ of trade negotiation where problems are addressed head on. Even though issues on the agenda relate to trade irritants, the parties do not sit down at the table and negotiate resolutions; trade negotiators from other forums tend to participate in this kind of bargaining. Instead, the activities of trade facilitation take place on the technical administrative level and assume a more co-operative tone. One of our interviewees emphasized that the regulatory co-operation ‘is a bit of a different creature than hard-nose negotiations. It is more a positive dialogue to get people thinking along similar lines and to facilitate resolution in these issues.’

Furthermore, the networks that are established through regulatory co-operation reflect a long-term investment in relationship between different systems. Through soft modes of co-operation, the parties may be able to understand the strengths and weaknesses of their own regulatory system in contrast to other systems. The co-operation may also make it easier to monitor each other’s regulatory policies, including the quality and performance of regulations, thereby making regulatory activities more transparent. This monitoring can, in turn, make it easier to hold governments accountable for regulations that have the most adverse effects on trade. One of our interviewees pointed out that, ‘A network of regulators is very handy; you know who to call, who to talk to about a trade issue, to get information, to get a response about trade irritants. That is important from a practical perspective’. However, equally important is the opportunity to understand the foundation and rationale behind the counterparts’ regulations better and to be able to respond by accommodating one’s own interests in the process, which could help prevent problems from arising in the first place.

### **ADVANTAGES AND CHALLENGES OF APPLYING A SOFT MODE OF GOVERNANCE TO FACILITATE TRADE**

The EU-Canada co-operative framework illustrates how trading partners can establish comprehensive, systematic, and strategic frameworks for regulatory co-operation by applying a soft mode of governance. A regulatory co-operative framework may provide political support as well as a structure for continuous contact between regulators that can significantly facilitate trade. Instead of dealing with problems related to regulatory trade barriers ad hoc, the parties have made a long-term investment in an institutional framework for promoting regulatory convergence on a voluntary basis.

The key asset of applying a soft mode of governance seems to relate to the procedural nature of these kinds of instruments and the adaptability and flexibility soft co-operative procedures provide. The benefits of close and systematic contact between operative personnel across borders has, for example, been emphasized by Keohane (1982:163) who argues that: ‘...intergovernmental relationships characterized by ongoing communication among working-level officials, “unauthorized” as well as authorized, are inherently more conducive to information-exchange and agreements than are traditional relationships between internally coherent bureaucracies that effectively control their communication with the external world’. The main challenges with implementing hard-law instruments like equivalence and mutual recognition agreements relate not only to the highly resource-demanding negotiations, but especially to the problem of implementing and maintaining the final agreements in practice. This latter consequence arises from the fact that problems of regulatory divergence and

administrative burden are most often highly technical issues that cannot be settled once and for all. Thus, the networks that soft regulatory co-operation provides can enable governments to adjust to regulatory changes and to solve practical problems in a flexible way through regular contact with their counterparts in other countries. This is also one of the main reasons why the EU has more or less ‘gone off MRAs’ and has put their efforts into regulatory dialogues instead. Hence, through soft regulatory co-operation, lower levels can deal with trade irritants, and there is a higher probability of avoiding trade conflicts stemming regulatory differences. However, it is important to stress that regulatory dialogues between trading partners does not necessarily produce revolutionary results, that is, the removal of all trade-distorting differences between regulatory systems. Yet, they can produce incremental improvements that are of great value on the practical level. Nevertheless, there are important challenges and limitations with regard to applying soft regulatory co-operation to facilitate trade.

**Table 2. Potential benefits and challenges of soft regulatory co-operation**

<b>Benefits:</b>	<b>Challenges:</b>
Provides systematic attention	Incompatibility of regulatory systems
Creates internal and external linkages	Asymmetrical power relations between partners
Enhances problems-solving capacities	Lack of interest
Promotes common understanding of problems and solutions	Lack of resources
Provides momentum to move issues forward	High degree of conflict – ‘malignant problems’
Builds confidence and trust	
Prevents and resolves problems	

First, differences in administrative systems and traditions may represent a challenge to regulatory co-operation. Shaffer, for example, points out that the significant institutional asymmetries between the United States’ and EC’s regulatory systems and cultures create a major challenge for transatlantic regulatory co-operation (Shaffer, 2002:30). In contrast, the regulatory systems of the EU and Canada are more similar at the outset which makes it much easier to produce positive results in trade facilitation.

Even though the EU and Canada give priority to regulatory co-operation with their most important trading partners, they are also interested in increased regulatory convergence with emerging markets, which may have rather different regulatory systems. This factor leads to the important question of symmetry and asymmetry in market power. The relationship between, say, the EU and the USA is a relation between two major actors in global trade, thus both parties have market power to ‘impose’ its regulatory system on other states – if not on each other. Countries with less market power, on the other hand, are more likely to align their regulatory systems to the requirements of the markets they depend on voluntarily. However, such efforts may be difficult and costly for countries with a regulatory system highly divergent from the systems of large markets, for example, developing countries. Hence, in cases of asymmetrical market power, regulatory co-operation may be lacking reciprocity and mutual learning.

Other types of challenges relate to ensuring that there are sufficient political commitment and resources to move the work of facilitating trade forward. The EU-Canada regulatory framework has benefited from strong political support, which is a precondition for

establishing and maintaining a vital regulatory dialogue. However, there have been some challenges on capturing the interests of some regulators and making them play along with the programme of the larger framework, instead of following their own agenda. One of our interviewees emphasized that, ‘some of the regulators don’t see the utility. Their main concern is resources to facilitate their co-operation, but we don’t have anything to offer – other than good intentions’. There may be, then, a need to consider how resources can best be allocated and channelled in order to strengthen incentives.

Applying soft modes of co-operation also has limitations in particular with regard to cases of severe trade conflicts, which can only be solved by trade negotiators in other types of forums. It is clear from the presentation above that applying a soft mode of governance to facilitate trade is applying ‘a different kind of logic’ than the hard bargaining logic of traditional trade negotiations. The focus is not on resolving trade conflicts but on building the confidence between regulators and regulatory system that could prevent problems from arising and ensure greater regulatory compatibility in the long run.

In conclusion, we emphasize the importance of continuously maintaining and nourishing trust and confidence between regulators in order to avoid inertia and deadlock in trade relations. This point also finds support in the comprehensive literature on trust within and between organizations, which views trust as an important mechanism for policy co-ordination (for an overview see e.g., Lane & Bachmann, 1998), which is vital for achieving regulatory convergence. For instance, if the parties exchange inspection reports and one of the parties find that the quality or thoroughness of inspections or the resulting report is not acceptable, then one ‘might cease to rely on the foreign partner’s inspections and resume or increase its inspections in that country’ (Horton, 1998:713). Hence, an important key to success lies in achieving and maintaining a high level of trust and confidence throughout the entire regulatory process. Trust and confidence, therefore, are essential for the initiation of new regulations, for the inspection and control of agreed solutions, and for the changing and amending of regulations.

The confidence-building effects of soft co-operation are the main reason why governments should apply regulatory co-operation to facilitate trade, either as a soft mode of governance alone or in combination with hard-law instruments. Soft instruments may function as separate means for increasing regulatory compatibility, but they could also constitute a first step towards negotiating binding agreements<sup>10</sup> or help to maintain and implement hard-law agreements. Soft modes of governance for facilitating trade are an important part of the ‘trade facilitation tool package’, where several tools may be applied simultaneously to supplement and support each other.

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<sup>10</sup> The regulatory co-operative framework has been creating favorable conditions for the establishment of hard-law agreements, such as a hard-law regulatory co-operation agreement in connection with the negotiation of a ‘Trade and Investment Enhancement Agreement’ (TIEA). However, TIEA negotiations halted in May 2006 after a joint decision by the EU and Canada to await the results of the ongoing WTO negotiations.

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