

OECD REVIEWS OF REGULATORY REFORM

REGULATORY REFORM IN CANADA

**ENHANCING MARKET OPENNESS THROUGH
REGULATORY REFORM**



ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Pursuant to Article 1 of the Convention signed in Paris on 14th December 1960, and which came into force on 30th September 1961, the Organisation for Economic Co-operation and Development (OECD) shall promote policies designed:

- to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
- to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and
- to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

The original Member countries of the OECD are Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The following countries became Members subsequently through accession at the dates indicated hereafter: Japan (28th April 1964), Finland (28th January 1969), Australia (7th June 1971), New Zealand (29th May 1973), Mexico (18th May 1994), the Czech Republic (21st December 1995), Hungary (7th May 1996), Poland (22nd November 1996), Korea (12th December 1996) and the Slovak Republic (14th December 2000). The Commission of the European Communities takes part in the work of the OECD (Article 13 of the OECD Convention).

Publié en français sous le titre :

AMÉLIORER L'OUVERTURE DES MARCHÉS GRACE A LA RÉFORME DE LA RÉGLEMENTATION

© OECD 2002

Permission to reproduce a portion of this work for non-commercial purposes or classroom use should be obtained through the Centre français d'exploitation du droit de copie (CFC), 20, rue des Grands-Augustins, 75006 Paris, France, tel. (33-1) 44 07 47 70, fax (33-1) 46 34 67 19, for every country except the United States. In the United States permission should be obtained through the Copyright Clearance Center, Customer Service, (508)750-8400, 222 Rosewood Drive, Danvers, MA 01923 USA, or CCC Online: www.copyright.com. All other applications for permission to reproduce or translate all or part of this book should be made to OECD Publications, 2, rue André-Pascal, 75775 Paris Cedex 16, France.

FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *Enhancing Market Openness through Regulatory Reform* analyses the institutional set-up and use of policy instruments in Canada. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in Canada* published in September 2002. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 16 member countries as part of its Regulatory Reform programme. The Programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses relative to the principles endorsed by member countries in the 1997 *OECD Report on Regulatory Reform*.

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness, specific sectors such as telecommunications, and on the domestic macro-economic context.

This report was prepared by Denis Audet, in the Trade Directorate of the OECD. It benefited from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in Canada. The report was peer-reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	5
1. MARKET OPENNESS AND REGULATION: THE POLICY AND ECONOMIC ENVIRONMENT.....	7
2. THE POLICY FRAMEWORK FOR MARKET OPENNESS: THE SIX “EFFICIENT REGULATION” PRINCIPLES	12
2.1 Transparency and openness of decision making and appeal procedures	12
2.2 Measures to ensure non-discrimination	26
2.3 Avoiding unnecessary trade restrictiveness	31
2.4 Use of internationally harmonised measures	38
2.5 Recognition of equivalence of other countries' regulatory measures and results of conformity assessment performed in other countries where appropriate	40
2.6 Application of competition principles from an international perspective.....	43
3. ASSESSING RESULTS IN SELECTED SECTORS	45
3.1 Telecommunications Services.....	46
3.2 Telecommunications Equipment.....	50
3.3 Automobiles and components.....	53
4. CONCLUSIONS AND POLICY OPTIONS FOR REFORM.....	56
4.1 General assessment of current strengths and weaknesses.....	56
4.2 The dynamic view: the pace and direction of change	59
4.3 Policy options for consideration	60

EXECUTIVE SUMMARY

As border barriers to trade fall, the impact of domestic regulations on international trade and investment becomes ever more apparent. While regulations aim to fulfil legitimate policy objectives in important areas such as health, safety and the environment, they may directly or indirectly distort international competition, preventing market participants from taking full advantage of competitive markets. Maintaining an open world trading system requires that regulations do not unnecessarily restrict the flow of goods and services, thereby promoting global competition and avoiding trade disputes. This chapter assesses the extent to which Canadian regulations and practices embrace the six “efficient regulation” principles earlier identified by trade policymakers as key to market-oriented, trade and investment-friendly regulation and explores the role of regulatory reform in enhancing market openness in Canada.

Canada has benefited handsomely from trade and investment liberalisation initiatives and from a 20-year history of regulatory reform marked by efforts to improve the quality and efficiency of regulation while reducing regulatory burden across the system. Attesting to these reforms, Canada is among the OECD’s best performers in terms of economic growth since 1997. Moreover, the United Nations consistently ranks Canada’s quality of life amongst the most enviable in the world. This suggests that there may be much in the Canadian experience to inform good regulatory practice in other OECD countries.

The efficient regulation principles are primarily implemented through the federal Regulatory Policy and its Appendix A on International and Intergovernmental Agreements, which together establish clear benchmarks for federal regulators on how to regulate from the perspective of market openness. Nonetheless, certain challenges must be overcome to maximise the Policy’s potential to ensure market openness, including more systematic monitoring of implementation efforts by federal regulatory authorities. Requiring annual performance reports, for example, would establish a basis for identifying and encouraging best practices from the market openness perspective and contribute to regulators’ skill in recognising and handling trade-related regulatory issues. There may also be scope for the greater involvement of the trade policy community in ensuring these results.

Canada’s long experience with regulatory impact assessment has yielded admirable systemic change in the elaboration of federal regulations and illustrates the depth of the Canadian expertise with preparation of high-quality regulation based on informed public debate and transparent processes. Since 1986, a Regulatory Impact Analysis Statement (RIAS) must accompany all proposed regulations submitted for Cabinet approval. Federal regulatory authorities are required to assess possible impacts on business, trade and competitiveness as part of the overall cost-benefit analysis called for in the RIAS (which is publicly available for all to see and comment upon), but implementation challenges remain in ensuring that effects on inward trade and investment are consistently and thoroughly explored as appropriate.

Although provincial regulatory regimes, processes and practices were beyond the scope of this review, sub-national governments clearly hold a missing piece to the puzzle of regulatory reform in Canada. Despite progress towards implementation of the 1995 Agreement on Internal Trade, more needs to be done to complete existing obligations under the Agreement. The need for improved workable federal-provincial approaches to regulatory co-operation and the broader challenge to create a truly integrated internal market present important opportunities for further enhancing market openness.

Market openness has always been widely acknowledged by the federal government as a central driver of economic growth in Canada, but the prospect of less favourable global economic conditions and the widening productivity gap with the United States call for a new endeavour to deal with the unfinished work of market openness. While important progress has been made towards further market opening across the board, foreign competition in certain key service sectors remains restricted (typically through the use of foreign ownership and control procedures) and regulatory barriers continue to undermine competitive conditions for some foreign firms doing business in Canada. Canada should assess the costs and benefits of maintaining this course with a view to further enhancing market openness and achieving truly contestable markets.

Canada is a world leader in good regulatory practice and dynamic innovator in regulatory reform, including leading edge approaches to public consultation and new forms of international regulatory co-operation. As Canada seeks to respond to growing pressure to regulate in a fast-changing world, opportunities to build on its past experience warrant renewed momentum to ensure that regulatory regimes, processes and practices and open market policies form a mutually complementary whole.

CHAPTER 4: REGULATORY REFORM IN CANADA: ENHANCING MARKET OPENNESS THROUGH REGULATORY REFORM

The globalisation of production and the resulting deeper integration of national markets have reinforced the link between domestic policies and trade liberalisation. As traditional barriers to trade have fallen, the impact of domestic regulations on international trade and investment has become more apparent than ever before. While regulations generally aim at improving the functioning of market economies in a range of fields, such as market competition, business conduct, the labour market, consumer protection, public health and safety or the environment, they may directly or indirectly distort international competition and affect resource allocation and productive efficiency. Thus regulations should be designed in a way that is consistent with an open trading system and that supports strong international competition. This Chapter considers whether and how Canadian regulatory regimes, processes and practices affect market access and presence in Canada. An important reverse scenario – whether and how inward trade and investment affect the fulfilment of legitimate policy objectives reflected in social regulation – is beyond the scope of the present discussion.

As agreed with Canada, this review of regulatory reform covers activities of the federal government only. While only selected references have been made to the provinces throughout this Chapter, readers should be aware that provincial regulation and regulatory practices are highly significant in the Canadian context. Indeed, as one commentator noted in her historical overview of federal regulatory change in Canada, “one of the hidden sides of regulation in Canada is regulation in the provinces”, and “reducing federal-provincial overlap and duplication in the regulatory area has been a central driver of reform.”¹ Though not treated in any detail here, coverage of this dimension would be essential to complete the picture of international market openness and regulation in Canada.

1. MARKET OPENNESS AND REGULATION: THE POLICY AND ECONOMIC ENVIRONMENT

Canada enjoys a reputation as one of the most liberal and transparent markets in the world, and has been consistently ranked by the United Nations as offering an enviable quality of life.² Canada has also won recent recognition as one of the world’s most competitive economies (World Economic Forum, 2001) and has earned additional commentary projecting that it will be the “fourth-best” place in the world to do business between 2001-2005 (Economic Intelligence Unit 2001). While certain aspects of Canada’s trade and investment regime remain highly restrictive, including high import tariffs on certain agricultural products, quantitative restrictions on textiles and clothing imports and foreign ownership restrictions in a range of service sectors, the overall conclusion of the recent WTO review of Canadian trade policy was largely positive (WTO, 2000). Participation in successive rounds of multilateral trade liberalisation has resulted in a substantial lowering of tariffs and increased discipline of non-tariff barriers to trade. The country’s open market orientation is partly reflected in low average import tariffs, which have fallen from 3.7% in 1989 to just 0.9% in 1999, and in steadily rising shares of total merchandise trade as a percentage of GDP -- from 44.3% in 1988 to 77.8% in 2000 (Table 1).

The role of trade as a central driver of economic growth has always been widely acknowledged within government. The Canadian economy recorded its ninth year of growth in 2000, an achievement which has placed Canada amongst the OECD’s best performers since 1997. Economic growth has been spurred by a decade of sustained fiscal, regulatory and trade reform. After four straight years of federal

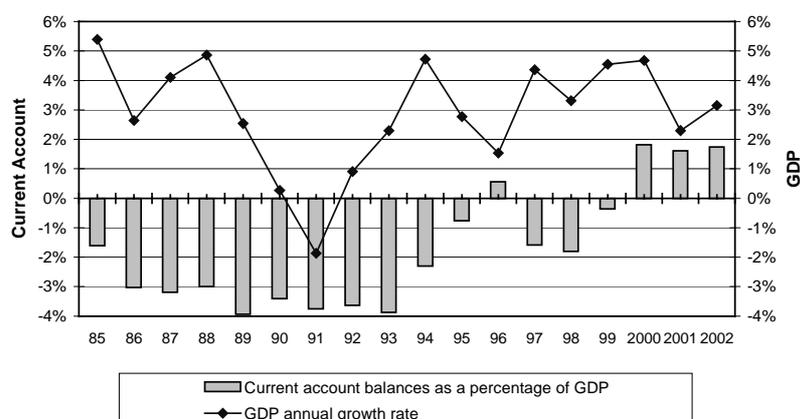
budgetary surpluses, Canada's net public debt stood at an estimated 51.8% of Canada's GDP in early 2001, down from 70.7% in 1995-96 – a performance which has led Canada to claim that it has made more progress in reducing its debt burden than any other G-7 country in recent history. Canada's current account balance also swung from a traditional deficit position to a surplus of \$18.9 billion in 2000, or 1.8% of GDP, a trend expected to continue in 2001-2002 (Chart 1).

Table 1. Merchandise Trade in Canada

Trade as % of GDP	1988	1990	1995	2000
Exports	22.5%	21.2%	31.2%	41.7%
Imports	21.8%	20.4%	28.4%	36.1%
Exports + Imports	44.3%	41.6%	59.6%	77.8%

Source: OECD, Main Economic Indicators and Foreign Trade Statistics

Chart 1. Canada's real GDP growth rates and current account balances



Source: OECD Economic Outlook, June 2001, (Data are estimated for 2001 and projected for 2002)

Canada has a long history of progressive market opening. Participation in multilateral trade negotiations spanning all GATT Rounds has been complemented by the steady pursuit of bilateral and regional trade liberalisation – the so-called “two-track” policy – which has seen Canada commit to an ever-growing network of preferential arrangements throughout the world. Against this backdrop, the bilateral trading relationship with the United States vastly surpasses all other trading relationships; 87.1% of Canadian exports were destined for the US market in 2000 and US goods accounted for about 65% of Canadian imports (Table 2).

Table 2. Regional Composition of Canadian Merchandise Trade (million US\$ and percentages) { TC \f t \l 2 "Table 2. Regional Composition of Canadian Merchandise Trade (million US\$ and percentages)" }

Year	1985	1990	1995	2000
Total Exports	85,575	121,371	180,970	277,552
OECD (30)	91.1%	92.4%	93.1%	95.8%
USA	78.1%	74.4%	79.1%	87.1%
Mexico	0.3%	0.5%	0.4%	0.5%
EU(15)	6.0%	8.7%	6.4%	4.6%
Japan	4.8%	5.8%	4.8%	2.2%
Korea	0.7%	1.1%	1.1%	0.5%
China	1.1%	1.2%	1.3%	0.9%
MERCOSUR	0.6%	0.4%	0.6%	0.3%
Rest of the world	7.2%	6.1%	4.9%	3.0%
Total Imports	75,869	116,731	164,474	239,998
OECD (30)	92.3%	91.0%	90.1%	88.6%
USA	70.8%	64.5%	66.8%	64.4%
Mexico	1.3%	1.3%	2.4%	3.4%
EU(15)	11.5%	12.7%	10.0%	10.3%
Japan	5.9%	7.0%	5.4%	4.7%
Korea	1.5%	1.7%	1.4%	1.4%
China	0.4%	1.0%	2.1%	3.2%
MERCOSUR	0.9%	0.7%	0.5%	0.6%
Rest of the world	6.5%	7.3%	7.3%	7.7%

Source: OECD, Foreign Trade Statistics

Table 3. Product Composition of Canadian Merchandise Trade { TC \f t \l 2 "Table 3. Product Composition of Canadian Merchandise Trade" }

Composition of Trade	Exports		Imports	
	1988	2000	1988	2000
(% of Total)				
Agriculture and Food	9.8%	6.6%	5.9%	5.3%
of which Cereals & Grains	4.4%	1.6%	0.3%	0.3%
Oil & Mineral products	12.5%	14.1%	4.7%	5.9%
of which Oil	9.2%	13.2%	3.9%	5.2%
Semi-manufactured goods	29.2%	18.8%	10.2%	9.7%
of which Wood & Paper	16.7%	11.5%	2.5%	2.8%
Base metals	7.5%	4.4%	3.7%	3.7%
Manufactured Goods	48.6%	60.5%	79.2%	79.2%
of which Machinery	10.9%	16.2%	28.7%	32.5%
Transport Equipment	29.1%	33.4%	33.1%	27.9%
Textiles, Clothing & Footwear	1.3%	1.8%	5.1%	4.1%

Source: OECD, Foreign Trade Statistics

The overwhelming reliance of Canada on the US market has formed the signature thrust of Canadian trade policy: to enhance and secure access south of the border. The historical roots of this objective can be traced as far back as 1854, when the first-ever Canada-USA free trade agreement was signed. Later years saw various attempts to expand trade between the two countries as governments concluded that something more than reliance on GATT was needed in respect of this unique trading relationship. An initial strategy to deepen trade on a sectoral basis was ultimately abandoned in favour of a more broad-based trade agreement, culminating in the 1989 Canada - United States Free Trade Agreement (CUSFTA). The Agreement was superseded in 1994 by the North American Free Trade Agreement (NAFTA), which today remains the central focus of Canadian trade policy and a model for progress on a range of issues in the World Trade Organisation (WTO).

Against the background of trade liberalisation initiatives, Canada's merchandise exports continue to show exceptionally strong growth. Trade in high-tech products has substantially outpaced growth in other categories of merchandise trade, contributing to a fundamental shift in the product composition of Canadian exports over the last decade away from commodity-based exports towards value-added sectors (Table 3). In contrast, the composition of imports has remained roughly stable, with manufactured goods accounting for nearly 80% of total imports. On trade in services, Canada has traditionally been a net importer. Canada's services trade has grown steadily over the last twenty years, but has lagged significantly behind Canada's merchandise trade performance.

Some important qualifications must be made to Canada's broadly positive record of market openness. Distinguishing features of Canada's political economy -- a small domestic market that has sought to safeguard fragile economies of scale across different sectors -- have been inextricably linked to the traditional direction of national regulatory and economic policies in this country. The legacy of Canadian trade and economic policy has included the selective creation of sectoral champions, the success of which often entailed protection of domestic interests (Doern, 1996). Foreign ownership restrictions continue to be maintained in a number of economically significant sectors such as telecommunications services, fishing and (as in most other countries) air transport. Canada has long justified similar restrictions in the "cultural industries" on the grounds of safeguarding its cultural values and national identity. A new policy framework for the financial services sector entered into force in October 2001, bringing sweeping changes to promote efficiency and greater competition, protect and empower consumers, and improve the regulatory framework. A new federal ownership regime applies equally to both domestic and foreign investors, although a minority of provinces maintain foreign ownership limits on some provincially incorporated financial institutions. The new ownership rules are designed to facilitate entry to the banking sector and build on the government's earlier foreign bank branching initiative. This latter initiative permits foreign banks to operate in Canada through branches rather than subsidiaries. However, foreign bank branches are not permitted to take deposits under \$150,000 (defined as retail deposits), effectively limiting their operations to commercial banking and broader lending activities.

Investment policy has been fundamentally reshaped in the last twenty years with the abandonment of systematic review and scrutiny of inward investment in favour of a more liberal regime. Scrutiny of inward investment reached its height in the 1970s under the Foreign Investment Review Agency. Canada still screens significant foreign acquisitions exceeding certain threshold amounts under the *Investment Canada Act*, but there has been a shift in the underlying policy approach towards a regime that seeks to attract and compete for investment. In 2000, new foreign direct investment (FDI) in Canada reached a record high of \$CAN 93.2 billion, highlighting the country's growing attractiveness to foreign investors and thereby providing commensurate benefits to the Canadian economy. Canadian foreign direct investment abroad has also experienced strong growth. In a striking reversal of the situation that prevailed

for decades, the stock of Canadian foreign direct investment abroad has exceeded inward FDI since 1997 as more Canadian firms take advantage of business opportunities abroad (Table 4).

International trade is often described as the lifeblood of the Canadian economy. Indeed, few countries in the world are as dependent on open markets as Canada, with Canadian exports currently accounting for more than 40% of GDP. Still, a certain complacency exists among producer and consumer groups for finishing the work of opening the market to foreign competition. Accordingly, Canada's support for a new round of multilateral trade negotiations has mainly focused on its desire for progress on agriculture.

Table 4. Canadian Investment Position

Portfolio Investment and Foreign Direct Investment						
(\$CAN million)	Inward Stock			Outward Stock		
	1990	1995	2000	1990	1995	2000
FDI	130,932	168,167	291,520	98,402	161,237	301,357
Portfolio	235,198	422,903	496,675	40,194	90,768	212,102
Foreign Direct Investment, Origin and Destination						
FDI	Inward Stock			Outward Stock		
(% of Total FDI)	1990	1995	2000	1990	1995	2000
USA	64.2%	67.2%	63.9%	61.0%	52.4%	51.1%
EU less UK	11.0%	13.0%	20.1%	7.2%	11.2%	10.4%
UK	13.1%	8.4%	6.6%	13.7%	10.2%	8.4%
Japan	4.0%	4.2%	2.9%	0.9%	1.7%	1.8%
Others	7.7%	7.2%	6.5%	17.2%	24.5%	28.3%

Source: Canada's International Investment Position, Statistics Canada 2000

Even as Canada acknowledges the enormous benefits wrought from trade liberalisation to date and declares itself open to new market opening initiatives whether at the multilateral, regional, or bilateral level, the current mood is decidedly less proactive and, with a few exceptions, lacking in urgency. The current trade policy agenda appears to be driven by a new mix of post-Uruguay Round implementation issues and challenges rooted in domestic policies, such as developing a consensus on the precautionary principle and exploring approaches to new regulatory co-operation with other countries.

Canada's current regulatory environment can be traced to a long history of regulatory reform marked by efforts to improve the quality and efficiency of regulation while reducing regulatory burden across the system. In the wake of heavy criticism of regulation in the 1970s, seen then as a leading factor behind runaway inflation and poor economic performance, Canada embarked on what has become a twenty-year experience with regulatory reform. Highlights of this long reform experience included the 1981 Regulation Reference (a series of studies on regulation and its impacts on the Canadian economy), the Nielson Task Force (an enquiry into delivery and efficiency of over 140 different regulatory programmes), and a precedent-setting statement of regulatory policy in 1986 that forms the basis of Canada's regulatory approaches today. A shift in focus from deregulation to regulatory reform and the creation of supportive institutional structures along the way characterised these efforts over time.

Today, all federal regulatory authorities (with the exception of the Canadian Radio-Television and Telecommunications Commission and the Copyright Board) are subject to the Government of Canada *Regulatory Policy*, which aims to ensure that use of the government's regulatory powers results in the greatest net benefit to Canadian society. While not expressly formulated to ensure trade and investment-friendliness, the Policy does require regulators to respect international and intergovernmental (federal-provincial) agreements, including trade agreements. At the same time, trade agreements have been a driver of regulatory reform in Canada, providing needed impetus for pro-competitive change.

Domestic regulation and market openness considerations are today at an important crossroads in Canada. As trade policy reaches behind borders and societies continue to weigh implications for domestic sovereignty, regulators and stakeholders will have an important call to make: whether and how to revisit regulatory reform with fresh urgency, and how to ensure design and delivery that ensures the fulfilment of legitimate policy objectives while upholding Canada's strongly vested interest in open markets.

2. THE POLICY FRAMEWORK FOR MARKET OPENNESS: THE SIX "EFFICIENT REGULATION" PRINCIPLES

An important step in ensuring that regulations do not unnecessarily reduce market openness is to build the "efficient regulation" principles into the domestic regulatory process for social and economic regulations, as well as for administrative practices. "Market openness" here refers to the ability of foreign suppliers to compete in a national market without encountering discriminatory, excessively burdensome or restrictive conditions. These principles, which were described in the 1997 OECD *Report on Regulatory Reform* and developed further in the Trade Committee, are:

- Transparency and openness of decision making;
- Non-discrimination;
- Avoidance of unnecessary trade restrictiveness;
- Use of internationally harmonised measures;
- Recognition of equivalence of other countries' regulatory measures; and
- Application of competition principles.

Trade policy makers have identified these principles as key to market-oriented, trade and investment-friendly regulation. They reflect the basic principles underpinning the multilateral trading system, in respect of which many countries have undertaken certain obligations in the WTO and other contexts. The intention in the OECD country reviews of regulatory reform is not to judge the extent to which any country may have undertaken and lived up to international commitments relating directly or indirectly to these principles, but rather to assess whether and how domestic instruments, procedures and practices give effect to the principles and successfully contribute to market openness.

2.1 Transparency and openness of decision making and appeal procedures

In order to ensure international market openness, the process of creating, enforcing, reviewing or amending regulations must be transparent and open to foreign traders and investors seeking to access a market or expand existing activities within that market. Comprehensive information about laws and regulations should also be readily available, enabling firms to fully understand the environment in which they are operating and base production and investment decisions on informed assessments of potential costs, risks, and opportunities. Transparency also contributes to equality of competitive opportunity and reduces uncertainty for all economic operators, thus enhancing the security and predictability of the market.

Transparency can be achieved through a variety of means, including systematic publication of proposed rules prior to entry into force, use of electronic means to share information (such as the Internet), dialogue with affected parties, including well-timed opportunities for public consultation and comment, and rigorous mechanisms for ensuring that resulting feedback is given due consideration prior to the adoption of a final regulation. At the same time, parties wishing to voice concerns about the application of *existing* regulations should have appropriate access to appeal procedures. Such approaches introduce opportunities for concerns to be vetted and addressed before they escalate, helping to avoid trade frictions later on. This sub-section explores the extent to which Canada ensures transparency and openness of decision making and appeal procedures in practice. After a brief overview of how regulations are made in Canada (discussed in more detail in Chapter 2) and the transparency of the existing stock of regulation, the analysis focuses on the development of technical regulations and standards and government procurement – two areas in which transparency is essential for ensuring international competition.

2.1.1 *Transparency of federal regulations*

2.1.1.1 Rule-making procedures

The Government of Canada usually announces its ideas for future laws in the Speech from the Throne delivered at the beginning of each session of Parliament, though it may also publicise its ideas through draft bills, discussion papers and press releases. A definitive legislative programme emerges following Cabinet approval of departmental priorities and the annual budget speech. Government bills typically involve the participation of Cabinet, members of Parliament, officials from the sponsoring Department, the Privy Council Office (PCO), the Department of Finance, the Treasury Board Secretariat (TBS), and the Department of Justice.

New legislative proposals are elaborated in a Memorandum to Cabinet (MC) setting out written policy advice to Cabinet.³ As a sponsoring Minister's key tool for building support amongst Cabinet colleagues for a proposed course of action, the MC plays a central role in the Cabinet decision-making process. All MCs consist of a Ministerial Recommendation (an advocacy document in which the responsible Minister introduces the issue and recommendations to Cabinet colleagues) and an Analysis setting out background information and options for consideration. MCs are prepared in accordance with rigorous guidelines and quality control processes overseen by PCO,⁴ and drafting of a bill for consideration by Parliament begins only after Cabinet approval of the MC. Bills are later submitted to scrutiny and debate by the House of Commons and Senate before enactment into law as Acts of Parliament.

Separate procedures exist for the elaboration of secondary, also called delegated legislation. Authority to make regulations must be clearly delegated by an Act of Parliament (made under the Constitution), which sets out the general framework for a regulatory scheme while delegating authority to express the details in regulation to the Governor in Council (GiC), a Minister, or an administrative agency. Enabling acts also place limits on the scope of the regulation-making authority, usually interpreted in practice by each department's legal services personnel and reviewed by the Department of Justice. The *Statutory Instruments Act* and the *Statutory Instruments Regulations*, which set out the basic legal requirements of the federal regulatory process, further supplement this basic framework. The Government of Canada *Regulatory Policy*, a seven-point Cabinet directive overseen by PCO, provides additional guidance to help ensure that use of the government's regulatory powers results in the greatest net benefit to Canadian society. Appendix A to the Policy sets out obligations for regulators with respect to international and intergovernmental agreements, listing specific requirements which apply when developing or changing technical regulations.

The specific steps involved in the regulatory process are identified in the federal government's *Guide to the Regulatory Process: Developing a Regulatory Proposal and Seeking its Approval*. The *Guide* sets out ten discrete steps in the process, from conception and development of a regulation all the way through to Parliamentary review (Box 1). Federal regulatory authorities must also adhere to the Regulatory Process Management Standards (RPMS) set out in Appendix B to the Policy. The RPMS set out detailed guidance on specific issues including the conduct of policy development and analysis, consultation with interested parties, communications with stakeholders, training of regulatory personnel and documentation requirements.

In accordance with these procedures, a sponsoring department or agency launches the regulatory process by embarking on the policymaking process, itself subject to prescribed criteria on analysis of the problem, alternative solutions, costs and benefits, regulatory burden, and consulting across government and with interested stakeholders to build consensus. Only when (and if) regulation is determined to be the policy instrument of choice does the actual conception and development of a regulation begin.

At this stage, a regulatory authority may seek to involve the public in order to prepare the ground for an upcoming regulatory initiative. This "early" notification can be done through a number of official channels, including departmental/agency annual Reports (to Parliament) on Plans and Priorities (RPPs); Departmental Regulatory Plans (which usually take a longer view and are often available on Departments' individual web sites); or a Notice of Intent published in Part I of the *Canada Gazette*.⁵ RPPs in particular can serve as a useful, if sketchy, indication of regulatory and legislative initiatives in the pipeline. A recent Environment Canada's Estimates Report, for example, states the Department's plans to publish the *Vehicle and Engine Emission Regulations* in 2002-03.⁶ Early information about planned regulatory agendas can also be found in departmental literature (published and online) and non-government sources such as trade and professional publications.

This decentralised approach reflects the government's earlier move to devolve wider regulatory planning to the departmental level after attempts to use a centralised forward planning system (including through the use of an annual Federal Regulatory Plan) were found to be inflexible and abandoned. The current approach is still being refined, with a new forward planning system developed by the Regulatory Affairs Division of PCO expected to be in place by fall 2001. While the system's proponents expect it will improve internal planning and consultations amongst regulatory departments, results of this exercise would be for internal government use only. Introduction of such a system cannot therefore be relied upon to improve transparency about upcoming regulatory initiatives either for domestic or foreign firms, but may be helpful in promoting greater coherence between regulatory planning and federal approaches to international issues. Indeed, some observers maintain that the devolution of regulatory planning in Canada is ill-suited to international issue management, including trade negotiations.⁷

Box 1. The Ten Steps of the Federal Regulatory Process for Secondary Legislation

1. Conception and Development of a Regulation.
2. Department Drafting of Regulation, RIAS and Other Supporting Documents.
3. Examination by the Department of Justice (Regulations Section) and the Privy Council Office (Regulatory Affairs and Order-In-Council Secretariat).
4. Ministerial Approval for Pre-Publication.
5. Pre-Publication Review by RAOIC and Special Committee of Council (SCC), a Cabinet Committee.
6. Pre-Publication in Part I of the *Canada Gazette* with Comment Period.
7. Departmental Preparation of Regulatory Proposal for Final Submission to the SCC.
8. Final Review by RAOICs and SCC.
9. Making, Registering and Publishing of the Regulation in Part II of the Canada.
10. Parliamentary Review by the Standing Joint Committee for the Scrutiny of Regulations.

Source: Government of Canada, Guide to the Regulatory Process (April, 2001)

In sum, federal rule-making procedures in Canada are rigorous, transparent and open. Canadian procedures and processes for both primary and secondary legislation are clearly articulated and widely available to players inside and outside government. These procedures are formally entrenched in legal and policy instruments (the Cabinet Directive on Law-Making; the Regulatory Policy; and the Statutory Instruments Act and Regulations), and there is a wealth of supplementary guidance available to regulators designed to encourage respect for these instruments. Implementation and follow-up present a different set of challenges – but the procedures are in place, are well elaborated and hold regulatory authorities to a high standard.

2.1.1.2 Transparency of existing regulations

Transparency and openness of rule-making procedures are essential for optimal market openness, but so is the availability of comprehensive information about the *existing* stock of laws and regulations. Domestic and foreign firms alike must fully understand the regulatory environment in which they are operating, not only to ensure compliance with relevant laws but also to make sound business decisions within that environment. Canada can generally point to an impressive record in promoting transparency of federal laws and regulations, including through state-of-the-art Internet applications (Box 2).

Some domestic business representatives maintain there is room for further improvement on transparency of existing rules, citing difficulties in identifying relevant regulations and understanding how they are interpreted and enforced in practice. A related transparency challenge is presented by overlap between federal and provincial regulations in given areas (e.g. management of hazardous waste). On balance, however, interested parties will find a wealth of easily accessible and up-to-date online information on both primary and secondary legislation, with an abundance of links pointing them in the direction of further resources.

Box 2. Transparency of the Existing Stock of Laws and Regulations in Canada

The Department of Justice maintains a consolidated online inventory of all federal statutes and related regulations (as well as non-statutory regulations and repealed Acts) at www.laws.justice.gc.ca. In addition, web sites maintained by individual departments and agencies often feature their own compendiums of relevant laws and regulations, including DFAIT's Trade Negotiations and Agreements web site⁸ which includes the texts of trade agreements. Such information is usually presented in a highly service-oriented, client-centred way. The Canadian Food Inspection Agency's web site, for example, posts relevant laws; contacts; import control procedures; import requirements; and other transaction-oriented resources.

All federal departments and agencies have an Internet presence, though individual web sites vary in design. The government's recently launched central Internet portal at www.canada.gc.ca serves as the main information and service gateway for all federal departments and agencies. The "Canada Site", as it is commonly known, includes hyperlinks to the home pages of all departmental/agency web sites as well as links to official web sites of Canada's thirteen provinces and territories. Operating in both official languages, the Canada Site also features three main sub-gateways for Canadians, Canadian Business, and Non-Canadians. The "Non-Canadian" and "Canadian Business" areas of the site take the user to a wealth of information on doing business in Canada, including information on taxation, regulations, financing, export/import procedures, and direct links to Canada's extensive network of Canada Business Service Centres.

As with any Internet facility, the challenge for users is getting needed information quickly. "Information overload" is as possible in the e-Government setting as anywhere else on the Web, and the Internet may not always be the fastest way to an answer. Still, domestic and foreign interests alike seem well placed to benefit from Canada's exemplary use of Internet technology, which is yielding important efficiencies within government as well. The *Access to Information Act* also extends the present laws of Canada to provide a right of access to information in records under the control of a government institution, in accordance with the principles that government information should be available to the public and that necessary exceptions to the right of access should be limited and specific.

For the purposes of this review, the term "regulation" also includes less formal forms of regulation. Chapter 2 (Box 2) identifies a wide range of such instruments, including orders, regulations, and licensing decisions by independent federal agencies; policies, guidelines, directives and operating procedures to supplement standards referenced in regulation; and administrative regulations made at lower levels of government. Certain instruments such as administrative guidelines, manuals and internal procedural documents may also have regulatory effects but are not defined as regulations under the *Statutory Instruments Act* and thus escape the same standard of scrutiny – and transparency -- as more formal kinds of regulation. Regulation also includes self-regulation by professional associations in Canada. There is no central repository of these types of measures but information can be sought out on an ad hoc basis.

2.1.1.3 Public consultation

Broad-based consultation with interested stakeholders on regulatory proposals has been a central feature of the Canadian regulatory process since 1986. Prior to that year, there were no standard, government-wide requirements for public consultation, with the result that consultation was essentially *ad hoc* in nature, burdened by longstanding formal routine, or did not take place at all. A major departure from previous practice, the 1986 reforms included adoption of the *Citizen's Code of Regulatory Fairness*, a systematic advance notice and comment process called pre-publication, and a requirement that a Regulatory Impact Analysis Statement (RIAS), including a compulsory section documenting public consultations, accompany all regulatory proposals put forward for approval (Chapter 2 elaborates).

Recent years have seen an unprecedented investment of resources in non-traditional consultation mechanisms, with the initiation of major domestic outreach programmes and moves to a more open and transparent way of doing things. This has fundamentally reshaped the conduct of trade and other policy areas as departments mobilise a more information-oriented approach. Wide consultation both inside and outside government has become steadily entrenched as the new standard in Canadian governance, and today the *Regulatory Policy* and related guidance are replete with references to the role of consultation in rule-making. The “stovepipe” positions of the past have given way to horizontal thinking and interdepartmental dialogue on trade and other policy areas has become the new norm, while stakeholders outside government enjoy more opportunities than ever before for participating in the development of regulatory proposals.

The core requirement to consult in the *Regulatory Policy* refers to Canadians and the need to ensure that they have an opportunity to participate in developing or modifying regulations and regulatory programmes. This basic requirement seems to be more widely interpreted in the RPMS, which requires regulatory authorities proposing new regulatory requirements or changes to existing requirements to carry out timely and thorough consultations with “interested parties”. The RPMS also require regulatory authorities to set out the processes they use to allow interested parties to express opinions and provide input; accommodate stakeholder preferences for particular consultation mechanisms where possible; and to be able to identify and contact interested stakeholders. No distinction is made between domestic and foreign parties in the RPMS or other related guidance, although there is no express encouragement to solicit foreign participation in the consultative process. A second requirement on federal regulators to respect “international and intergovernmental agreements” (elaborated in Appendix A to the *Regulatory Policy*) seeks to ensure that WTO and NAFTA requirements relating to transparency (such as notification) are met.

The Government of Canada’s official vehicle for communicating with the public on planned federal regulatory initiatives is the *Canada Gazette*. The *Canada Gazette* (including archives) is free on the Internet⁹ and print copies are available in most Canadian libraries or on a paid subscription basis for a nominal fee. The *Gazette* consists of three parts: Part I (containing, *inter alia*, proposed regulations from the government and private sector that are required to be published by a federal statute or regulation); Part II (containing regulations as defined in the *Statutory Instruments Act*, and certain other classes of statutory instruments);¹⁰ and Part III (containing most recent Public Acts of Parliament and their enactment proclamations following Royal Assent). Both pre-publication and final publication of all Governor-in-Council regulations in the *Gazette* is subject to the approval of the Special Committee of Council (SCC), a committee of Cabinet. Following SCC approval, a proposed regulation and its accompanying RIAS is pre-published in the *Gazette*, *Part I* with a clearly defined comment period. It may be pre-published for a second time depending on the extent of the changes to the proposed regulation as a result of the comments received. The regulation and revised RIAS (explaining how public comments were handled and any resulting changes to the regulation) is then submitted to SCC for consideration and approval after which it is published in the *Gazette*, *Part II*. Importantly, written guidance to regulators points out that “pre-publication is not a substitute for consultation, and consultation is not a substitute for pre-publication”. The thinking is that consultation with interested stakeholders will increase the likelihood that a proposal will be accepted as the best alternative, while pre-publication is meant as a final opportunity for interested parties to learn about the government’s planned initiative and have an opportunity to comment.¹¹ Exemptions from pre-publication are possible but rare, and in some cases shortened pre-publication periods may be approved instead of an exemption.

Pre-publication of a draft regulation and RIAS in Part I of the *Gazette* (step 6 of the Regulatory Process) with a formal opportunity to comment within a defined period is typically regarded as the single most visible and potentially influential opportunity for the general public and interested stakeholders (whether domestic or foreign) to comment on a draft regulation. In reality, however, a regulation that has

progressed to “pre-publication” in Part I, while not yet a *fait accompli*, is already the product of extensive interdepartmental and outside consultation, making far-reaching changes to the design of the measure less likely at this point. In sum, while Canada’s use of pre-publication procedures is highly commendable and a model for good regulatory practice in many countries, real influence by interested stakeholders in shaping a regulatory outcome is exercised much earlier in the process. This invites questions about the inclusiveness of consultation at the policymaking stage. While the responsibility to monitor regulatory activity and inject views at an appropriate stage in the process largely depends on the capacity, resources, and attentiveness of individual firms, there is a risk that some will be excluded, unheard, or even surprised in the process. Indeed, concerns about the scope and design of consultation – who gets consulted and how – are a common refrain in certain sectors of the domestic business community.¹²

While there is no evidence of exclusion of foreign firms from the more fluid policymaking phase – and while the burden is on stakeholders to identify, follow and seek to influence regulatory initiatives of interest to them – the process in practice appears to be highly accessible with opportunities for both informal and formal involvement at various points in the life cycle of a regulatory proposal. Some firms may also supplement access to traditional consultation avenues through hired government relations lobbyists, all of whom must publicly register their activities. Use of lobbyists may not necessarily indicate a lack of transparency on points of real access to the rule-making process; rather, it may simply reflect a firm’s desire to delegate lobbying efforts to those better acquainted with the Canadian system or better placed to escalate their influence at the political level.

Despite Canada’s exceptionally high standard on public consultation, certain stakeholders point to areas for further improvement. Some in the business community argue that a lack of institutional flexibility to seek changes to *existing* rules effectively undermines their competitiveness in a fast-changing business environment. Others express concerns about consultations on *proposed* rules, such as inclusiveness, relative weighting of comments received, and a certain disillusionment about the ultimate impact of consultation inputs on actual policy outcomes. Though such claims are not new in Canada, they are difficult to substantiate in any detail. What does seem clear is that there may at times be too much of a good thing going on -- some stakeholders, increasingly solicited to participate in consultation efforts, admit to a certain sense of “consultation fatigue”. This may point to a need to better organise, focus or refine existing consultation processes, but does not detract from the fundamental integrity and proven success of Canada’s commitment to consult before acting.

On balance, therefore, public consultation may well represent one of Canada’s most outstanding reforms. Informal and formal avenues for public consultation are now firmly entrenched in the Canadian regulatory system, making Canada an undisputed leader amongst countries which have institutionalised public consultation and accountability in rule-making. A regulation and its accompanying RIAS are made available for public comment once and sometimes twice, providing interested stakeholders with an unparalleled opportunity for active involvement in the process, and regulatory authorities are required to explain how they have handled comments received. Despite these unquestionable strengths, different regulatory authorities continue to enjoy some discretion on actual implementation of the obligation to consult in practice. In addition, although PCO assesses the effectiveness of the *Regulatory Policy* and its implementation on an ongoing basis, there has been no regular, periodic requirement on regulatory departments to explain how they are giving effect to the Policy in practice beyond a one-time reporting requirement on implementation of the RPMS in 1999. The real issue regarding transparency is therefore not a lack of commitment to consult in principle, but rather quality and consistency of implementation in practice across different regulatory departments and agencies. Charges that “no one regulates the regulators” are sometimes advanced in this context.¹³

2.1.1.4 Openness of appeal procedures

Avenues for appeal of existing regulations and administrative actions are sometimes articulated in relevant domestic statutes, though there is no single, across-the-board procedure for challenging an existing federal rule. Accordingly, scope for appeal varies by issue area and procedural approaches as set out in relevant statutory provisions. Certain administrative actions taken by the Minister of Transport may be appealed to the Civil Aviation Tribunal pursuant to the *Aeronautics Act*, for example. The Canadian International Trade Tribunal hears appeals on decisions of the Canada Customs and Revenue Agency made under the *Customs Act*, the *Excise Tax Act*, and the *Special Import Measures Act*. Where such avenues exist, there is no legal distinction between treatment of domestic and foreign firms.

Domestic statutes may also provide for an additional or separate statutory review by the Federal Court of Canada. In addition, the Federal Court has exclusive jurisdiction to hear judicial reviews of decisions by federal boards, commissions, or other tribunals. Cases before the Trial Division are heard by one federally appointed judge, while cases before the Court of Appeal are heard by three. The Federal Court Rules set out procedural guidelines including timeframes for case management. However, neither the Trial Division nor the Court of Appeal is legally required to render a decision within a specific time period.

Despite the availability of specific avenues like these, some domestic business associations maintain that they lack needed flexibility to contest rules in a timely manner, impairing their ability to act quickly and decisively in the face of a regulatory challenge. Nonetheless, recourse to the courts provides important guarantees of due process such as transparency

2.1.2 Transparency in the elaboration of technical regulations

Transparency in the area of technical regulations – mandatory product specifications set in regulation -- is essential for firms facing divergent national regulations on a given product or seeking to clarify applicable requirements as they enter a market. Improved transparency in this area has been a consistent focus of multilateral and regional trade agreements. In particular, foreign parties need sufficient advance notice about new or amended technical regulations and opportunities to comment on draft regulations at an appropriate stage in the regulatory process. How a country gives effect to such considerations is critical for minimising technical barriers to trade.

The making of technical regulations in Canada is subject to the federal *Regulatory Policy* and related procedural requirements set out in its Appendix A (Box 3) and Appendix B (the RPMS). There is no operative distinction between technical regulations and regulations; accordingly, both types are subject to the requirements of the federal regulatory process, including the requirement to conduct a regulatory impact assessment for each proposed regulation or change to an existing regulation.

Appendix A includes specific requirements relating to technical regulations that affect trade, some of which address transparency issues. These disciplines largely mirror or expand upon commitments undertaken by Canada in the WTO TBT Agreement. With regard to notification, federal regulatory authorities are required to pre-publish proposals for new or changed technical regulations in Part I of the *Gazette* for a period of at least 75 days except in urgent circumstances,¹⁴ and “take into account” comments received. This 75-day requirement for technical regulations is more stringent than the standard 30-day pre-publication requirement that applies to other (non-technical) draft regulations. The 75-day rule was intentionally established for consistency with the WTO TBT Committee’s post-Uruguay Round interpretation of the “reasonable time” to be accorded to Members to make written comments on proposed technical regulations that may have a significant effect on trade of other Members as anywhere between 60 and 90 days.

Draft technical regulations, sanitary and phytosanitary measures, and conformity assessment procedures that may have an impact on trade are identified and notified to the WTO¹⁵ by the Standards Council of Canada, which operates Canada's WTO and NAFTA Enquiry Point under contract to the Department of Foreign Affairs and Trade (DFAIT). The SCC Enquiry Point also provides information and responds to foreign enquiries about particular regulations. The Canadian Food Inspection Agency (CFIA) is responsible for co-ordinating implementation of WTO and NAFTA Sanitary and Phytosanitary commitments, including related transparency obligations.

The operational details of this activity are well established. The Enquiry Point reviews Part I of the *Gazette* for newly published regulatory proposals and makes the first call on whether or not to notify a measure to the WTO. This normally occurs within 24 hours of publication in the *Gazette*. The self-described Canadian approach to WTO TBT notifications has been to "over-notify", or take a very liberal perspective on whether a proposed technical regulation may affect trade. Although the Enquiry Point does not have trade policy specialists on staff, it is well-versed on Canada's international trade obligations and DFAIT has traditionally taken a hands-off supervisory role, satisfied that the system is working well. When the Enquiry Point has concerns about the potential trade impact of a regulatory proposal, it would normally raise the issue directly with the regulatory authority concerned. DFAIT will only get involved if the issue cannot be resolved on that level, or on broader questions of policy such as questions of interpretation of the TBT Agreement. Such issues are beyond the scope of the Enquiry Point's mandate and must be referred back to DFAIT for consideration.

The *Regulatory Policy* also requires regulatory authorities to ensure that international agreements are respected and to "take into account" any comments received during the 75-day comment period. A concerted effort has therefore been made to introduce appropriate checks and balances to ensure transparency during the elaboration of technical regulations. In some cases, as for the 75-day rule, Canada has gone beyond its WTO commitments in an attempt to lead by example, and the very existence of Appendix A shows a commitment to give effect to transparency and other important considerations of regulatory activity and technical regulations in particular. In practice, however, challenges remain in implementing the *Regulatory Policy* and raising awareness in the regulatory community about applicable requirements. For example, regulatory authorities are not always aware of the specific 75-day pre-publication requirement for technical regulations affecting trade. DFAIT is currently engaged in efforts to improve this situation in consultation with PCO and through an *ad hoc* interdepartmental working level committee on trade and regulation.

It should be recalled that federal activity in this area represents only part of the regulatory landscape: a large body of technical and food safety regulations is developed and implemented at the provincial level as well. Rule-making procedures vary by province too, introducing another layer of transparency issues for foreign parties seeking access to the Canadian market. While federal authorities claim they are unaware of any foreign complaints about divergent provincial regulations on given products, the potential for adverse impacts on international market openness clearly exists. Internal barriers to trade are certainly seen by some in the domestic business community as highly significant, spurring increasingly calls for full implementation of the Agreement on Internal Trade, including its chapter on technical barriers to inter-provincial trade in agri-food products.¹⁶

Information on provincial and territorial laws and regulations is available on the individual web sites of each jurisdiction. However, this body of law is not well known at the multilateral level. In part, the Canadian record of sub-national notifications in this area reflects the wider failure of WTO Members to date to fully implement Article 3 of the WTO TBT Agreement on the preparation, adoption and application of technical regulations by local government, in particular the notification requirement in Article 3.2 to ensure that technical regulations of local governments "on the level directly below that of the central government in Members" are notified in accordance with the relevant provisions of Article 2. The

Canadian provinces, prolific regulators in their own right, have been largely untouched by this obligation. Of only seven sub-national TBT notifications received by the WTO to date, five have been from Canada. Still, the track record to date shows that the Canadian universe of technical regulation intended for coverage under Article 3 remains essentially “at large” and undisciplined in terms of transparency for interested foreign and domestic parties alike.

The federal government is engaged in consultation with the provinces to secure compliance with its international obligations in this area. Its stated domestic strategy is to lead by example in encouraging a broader solution to the sub-national issue in the WTO. In the absence of efforts to address larger outstanding policy issues between federal and provincial regulatory authorities, however, the success of this endeavour and its ultimate impact on WTO trading partners remain uncertain.

Canada has also taken a leadership role in the WTO advancing what it believes to be future challenges relating to technical regulation. The country has been a consistent advocate for possible discussions on Good Regulatory Practice and issues relating to conformity assessment. On this, Canada is taking a broader view of future forms of regulatory co-operation and alternatives to traditional instruments such as MRAs and Suppliers’ Declarations of Conformity (see Section 2.5 on Recognition of Equivalence).

Box 3. Appendix A to the Federal Regulatory Policy

When developing or changing technical regulations, federal regulatory authorities must:

- Ensure that regulatory officials are aware of and take account of obligations agreed to by the Government of Canada, such as the provisions of the World Trade Organisation (WTO) Agreement, the North American Trade Agreement (NAFTA), and other multilateral, regional and bilateral Agreements such as the Safety of Life at Sea Convention of the International Maritime Organisation;
- Ensure that regulatory officials are aware of and take account of their general obligations as laid out in the WTO Technical Barriers to Trade Agreement (TBT) and the Sanitary and Phytosanitary Agreement (SPS); and the NAFTA Articles on Technical Barriers to Trade (Chapter 9) and sanitary and phytosanitary measures (Section B of Chapter Seven); and other multilateral, regional and bilateral Agreements referring to regulations and standards; and
- Adhere to those procedural and substantive obligations agreed to by the Government of Canada through intergovernmental agreements such as the Canadian Agreement on Internal Trade (AIT) Article 405 provisions relating to specific sectors of the economy.

In particular, for technical regulations that affect trade, federal regulatory authorities must:

- *With regard to notification:* pre-publish proposals for new or changed technical regulations in *Canada Gazette, Part I* for a period of at least 75 days, except in urgent circumstances, and take into account comments received;
- *With regard to performance-oriented requirements:* specify, where possible, technical regulatory requirements in terms of performance rather than design or descriptive characteristics; give positive consideration to accepting as equivalent other forms of technical regulatory requirements, if satisfied that they adequately fulfil the objectives of the existing regulations; for TBT, ensure technical regulations treat products from one jurisdiction no less favourably than like products from another; for SPS, ensure measures do not arbitrarily or unjustifiably discriminate where identical or similar conditions prevail; ensure technical regulations are no more restrictive of entry into markets than is necessary;
- *With regard to international standards:* use available international standards, guidelines and recommendations where those standards achieve the regulatory objective;
- *With regard to enforcement:* treat regulates and products from one jurisdiction no less favourably than those from other jurisdictions when assessing conformity to technical regulatory requirements, providing they are in comparable situations;
- *With regard to complaint resolution:* have in place a process to review complaints concerning conformity assessment procedures and must take corrective action when justified.

Source: Government of Canada Regulatory Policy (Appendix A on International and Intergovernmental Agreements)

2.1.3 Transparency in the elaboration of standards

The National Standards System (NSS) is the system for developing, promoting, and implementing standards in Canada. The NSS is overseen by the Standards Council of Canada (SCC), an independent federal Crown corporation charged, in particular, with promoting the efficient and effective operation of the system. The SCC has a staff of about 70 and reports to Parliament through the Minister of Industry.¹⁷ While not directly engaged in the making of standards itself, the SCC accredits Canadian standards development organisations (SDOs) and conformity assessment bodies. There are four accredited SDOs in Canada: the Canadian Standards Association (CSA), the Underwriters' Laboratories of Canada (ULC), the Canadian General Standards Board (part of the federal Department of Public Works and Government Services, and mandated to provide a range of standardisation and conformity assessment services in support of government procurement and other government requirements), and a provincial entity, the *Bureau de normalisation du Québec*. The SCC approves standards developed by accredited SDOs as National Standards, but has no legal authority to ensure that such standards are referenced in federal or provincial regulations. Not all standards developed by SDOs are submitted for approval as National Standards.

Standards are developed in Canada in accordance with international disciplines in this area. To earn accredited status, SDOs must adhere to the SCC's Canadian Procedural Document on Accreditation of Standards-Development Organisations, commonly referred to as CAN-P-1D. CAN-P-1D incorporates both ISO/IEC Guide 59 (Code of Good Practice for Standardisation) and the WTO TBT Code of Good Practice for the Preparation, Adoption, and Application of Standards, adopting the more onerous of commitments in cases of overlap between the two instruments and even going beyond requirements of the WTO Code in certain areas.¹⁸ SDOs must therefore subscribe to specific disciplines on transparency and effective participation in standards-making processes by all interested stakeholders, including foreign parties.

Accredited SDOs generally follow prescribed SCC procedures for the preparation and approval of National Standards of Canada (NSC) when developing new standards. The development of a standard for approval as an NSC is undertaken by an SDO not at its own initiative but rather at the request of industry proponents or, sometimes, regulators.¹⁹ In response to such a request, the SDO must first establish a volunteer technical committee with an appropriate level of expertise in the designated area. In doing so, an SDO must achieve a "balanced matrix committee" allocating a limited number of seats to industry, consumer, regulators, and other interested stakeholders. This commitment to an effective balancing of interests on technical committees helps ensure broad-based consultation, transparency and vetting of draft standards during their elaboration – an approach not always taken in other OECD countries.²⁰ Foreign parties are not normally invited to sit on these technical committees unless the SDO cannot assemble an appropriately qualified Canadian membership (and can justify why this is so). This rarely happens in practice, though interested foreign parties may obtain observer status and will later enjoy the same opportunity as other domestic stakeholders to comment on a draft standard during the (post-committee) public review process.²¹

A technical committee begins its work by reviewing existing standards for possible application, and, if the standard is to be submitted for approval as a National Standard, consistency with or incorporation of appropriate international standards. Decisions are made by consensus, which in the SDO setting means "substantial but not necessarily unanimous" agreement among the parties involved.

Opportunities for comment on a draft standard are open to all interested parties, whether domestic or foreign. Once a technical committee has produced its draft, the SDO publishes a notice to the public inviting review and comments. All draft standards are available for public review online at the SCC's web site, www.scc.ca.

As required by the TBT Annex 3 Code, an SDO must allow at least sixty days for submission of comments by interested parties within and outside Canada, although this period may be shortened for urgent matters involving health, safety, or the environment. All comments received are reviewed by the technical committee, which will either incorporate the comments in the draft standard or identify reasons for not doing so. Parties who have provided comments are entitled to an explanation of how their comments have been handled.

The development of a standard under this process generally takes from one to one and half years. Once finalised, the SDO publishes the standard and makes copies available to interested parties on request. Standards put forward for designation as National Standards of Canada must be published in both English and French, and reviewed and updated by the SDO every five years.

The requirement on SDOs to adhere to international best practice as a condition of accreditation is an important safeguard for transparent, open standards development processes. In practice, however, progress of the four SDOs towards implementation of CAN-P-1D has been uneven and somewhat arbitrary, in part because SDOs have been free to interpret the often exhortatory language of the international instruments without reference to a uniform set of guidelines. This discretion has led to different interpretations amongst the four SDOs on implementation of CAN-P-1D, reducing overall certainty about their respective practices and procedures. A current initiative by the SCC to develop guidelines for the implementation of CAN-P-1D in the form of an “assessment checklist” for evaluating SDOs on compliance with the requirements of the document should go some way towards improving this situation. Specific “audit points” would elaborate key trade-friendly practices such as use and awareness of international standards, development of standards in terms of performance rather than design or descriptive characteristics, and avoidance of discrimination among products on the basis of place of origin. The document, to be published under the reference CAN-P-1020, is nearing completion. SDOs will also be subject to annual surveillance audits and triennial re-assessments by the SCC to maintain accreditation, providing a new sense of continuity to monitoring efforts.

Jurisdictional issues between the federal and provincial governments on standards issues may introduce obstacles to transparency for domestic and foreign stakeholders alike, though pragmatism has avoided problems in practice while allowing legitimate policy objectives to be met. This can be illustrated by the example of electrical safety regulation, for which the provinces and territories have exclusive responsibility. While not legally required to do so, all thirteen jurisdictions rely on the National Standards System and the Canadian Electrical Code for both the technical requirements and conformity assessment aspects of their respective regulatory programs (Box 4). Fortunately for business and consumers, this has resulted in a unified market for electrical products across all provincial and territorial jurisdictions. A similar approach has been pursued in other areas, with the result that many provincial and territorial regulations are based on national building, fire, safety or other codes.

Box 4. Federal/Provincial Co-operation in Regulatory Activity: The Example of Canada's Electrical Safety System

The electrical safety system in Canada provides a useful example of a federal/provincial collaboration in ensuring a harmonised regulatory approach in an area falling under exclusive provincial/territorial jurisdiction, and may provide a model for avoiding unnecessary trade restrictiveness in other areas of exclusive or shared jurisdiction. Efficient regulation in this sector has taken the form of performance and objective-based Codes, which are adopted by way of regulatory reference. This approach is seen to meet the objectives of regulation while allowing the fulfilment of underlying safety objectives relating to electrical products and installations.

In practice, regulatory activity in the ten provinces and three territories is based on nationally accepted standards. Chief Electrical Inspectors in each sub-national jurisdiction typically serve as senior policy and technical decision-makers, and as provincial and territorial representatives on national committees. However, each jurisdiction incorporates the same installation code (the Canadian Electrical Code, Part I) in its regulations.

Provincial regulations also address recognition of certification organisations, and will typically state that no electrical equipment can be used, offered for sale, or otherwise distributed in Canada unless certified by an acceptable (SCC-accredited) certification organisation. Provincial regulators collaborate nationally through the Canadian Advisory Council on Electrical Safety to advise such organisations on the suitability of new electrical products to meet existing codes or standards. They also meet regularly in this forum to share information on the system and on standards, and members participate directly in the standards development process, in turn based on international (IEC) standards

Source: Presentation of the Canadian Advisory Council on Electrical Safety to the Information Technology Symposium (Geneva, July 1999).

Policy initiatives on efficient management of the National Standards System may lead to further streamlining of the Canadian standardisation process and ultimately enhance market openness. A current debate on whether SDOs may in future “self-declare” national standards instead of seeking approval from the SCC (a requirement which some in government believe is redundant) illustrates one area where innovative approaches are being considered from an efficiency perspective. Interestingly in the Canadian context, the only thing that truly distinguishes a national from any other standard developed by an SCC-accredited standards developer is the requirement that the former be published in both official languages.

A new Canadian Standards Strategy launched by the SCC in March 2000 should also contribute to greater transparency of the system generally by clarifying Canadian priorities and objectives. The articulation of key objectives at the international level, including participation in the development of global standards considered important to Canada and harmonisation of standards where appropriate (particularly in the North American context) are important signals for trading partners and foreign firms with an interest in the future direction of Canadian standardisation activities.

2.1.4 Government Procurement

Foreign and domestic participants have legitimate expectations about the appropriate degree of transparency that domestic government procurement procedures should provide. Government procurement procedures tend to be transparent in OECD countries, although the cost of retrieving relevant information can be substantial for small, medium-sized and foreign enterprises. There is a perception that specifications with no obvious relationship to the nature of the contract involved can be used to disqualify bids. Appeal procedures may not be clearly established or may seem so burdensome that contractors will not even consider recourse to them in cases of alleged infringement of procedures.

The Treasury Board Secretariat is the federal department in charge of setting up federal government procurement policies and regulations. Its main policy objectives are that contracting be conducted in a manner that will stand the test of public scrutiny, increase access, encourage competition and reflect fairness. Government procurement practices must also comply with Canada's trade obligations under the WTO Agreement on Government Procurement, the Agreement on Internal Trade (AIT) and various Free Trade Agreements signed by Canada. The Canadian International Trade Tribunal (CITT) deals with appeals, as an independent review body for federal procurement. All relevant aspects of the laws and regulations that govern federal government procurement practices are directly accessible at the Treasury Board Secretariat web site (www.tbs-sct.gc.ca).

More than 100 federal departments, agencies and Crown Corporations engage in procurement activities and thus are subject to Treasury Board's policies and regulations in this area. The government's largest purchasing organisation, Public Works and Government Services Canada (PWGSC), is mandated to buy goods for most departments above specific thresholds, i.e. \$5,000 for goods, \$80,900 for architectural and engineering consulting services, and \$60,000 for construction and maintenance services. Individual departments have authority to buy goods up to a value of \$5,000 directly and to buy most services themselves.

Transparency in disseminating information about purchasing opportunities by the federal government is carried out through several means, including the bulletin "Government Business Opportunities" (GBO) that publishes most tendering opportunities, and two electronic-based information access points: "Contracts Canada", a database of registered suppliers, and "MERX" (www.MERX.cebra.com), an internationally accessible electronic tendering service.

Contracts Canada is an inter-departmental initiative operated by PWGSC to improve supplier and buyer awareness and simplify access to federal government purchasing information. Detailed information about buying opportunities and bidding procedures is electronically available from its web site (www.contractscanada.gc.ca). MERX allows governments and other purchasing organisations to advertise contract opportunities over \$25,000, which can be searched and viewed by prospective suppliers. For \$4.95 a month, subscribers have daily access to more than 1,800 open tender opportunities from the federal government, 10 provincial governments, more than 1,000 municipalities and other public and private sector organisations. Subscribers can request bid documents for a fee established on a cost-recovery basis, and can also view which other companies have requested bid documents for a particular tendering opportunity. Currently, more than 50,000 companies and individuals use MERX to obtain information on posted opportunities.

Recent OECD work on the quantification of the size of government procurement markets in OECD countries shows the relative importance of procurement by sub-central governments which often exceed procurement by central governments.²² It is therefore extremely important that sub-central authorities abide by the principles of transparency and non-discrimination and provide access to clear arbitration procedures. In Canada, provincial governments have considerable economic and social responsibilities and divergent practices can act as considerable barriers to free internal trade. The Agreement on Internal Trade seeks to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and establish an open, efficient and stable domestic market. Chapter Five of the Agreement sets out a framework for public procurement based on the principles of non-discrimination, transparency, openness and ease of access to tender information.²³ In July 1999, progress was achieved, under the AIT framework, towards reducing barriers to inter-provincial trade in respect of procurement by municipalities, academic institutions, social service agencies and hospitals (the MASH sector) as they must carry out procurement in a non-discriminatory and transparent fashion (annual procurement estimated at about \$CAN 20 billion). Through applied uses of electronic-based systems, Canada is among the most advanced countries in providing direct, low-cost

access on a non-discriminatory basis to all prospective suppliers on its bid documentation and procurement opportunities. Purchasing entities thus have a better chance of reaching a wider range of prospective bidders. As a result, they are more likely to obtain needed goods and services under improved competitive conditions, ensuring better prices on behalf of taxpayers.

2.2 *Measures to ensure non-discrimination*

The application of non-discrimination principles in making and implementing regulations aims to provide effective equality of competitive opportunity between like products and services irrespective of country of origin. Thus, the extent to which respect for two core principles of the multilateral trading system – Most-Favoured-Nation (MFN) and National Treatment (NT) – is actively upheld when developing and applying regulations is a helpful gauge of a country’s overall efforts to promote trade and investment-friendly regulation. The following sub-sections examine the Canadian commitment to non-discrimination from a range of perspectives: how respect for non-discrimination principles is promoted in regulatory decision-making; the nature of WTO consultations or dispute settlement involving Canadian measures; the investment regime; preferential trade agreements to which Canada is party; and finally, the openness of the Canadian market to foreign service providers.

2.2.1 *Promoting Non-Discrimination in Domestic Regulation*

As in most other OECD countries, there is no overarching requirement in Canadian law that explicitly ensures the incorporation into domestic regulation of the MFN and national treatment principles. Respect for these principles instead derives from Canada’s commitment to the multilateral trading system and its core principles on non-discrimination. These commitments are implicitly enshrined in the *Regulatory Policy*, which requires federal regulatory authorities to ensure that “international and intergovernmental agreements are respected.” This is the only Canadian instrument in existence to (indirectly) refer to observance of the MFN and NT principles in regulation making. The *Regulatory Policy* covers secondary legislation only. However, the development of primary (e.g. tax) legislation is disciplined by other instruments such as the Cabinet Directive on Law-Making²⁴ and the MC Drafter’s Guide. The latter document, in noting that the Department of Finance has “broader economic, social, commercial, tax, and international policy concerns related to most government programmes and policies”, notes that Finance briefers are to review MCs for these policy linkages as well as for the overall effects of policy changes. MC drafters are also directed to use their own judgement when deciding which groups, interest, and/or issues are likely to have an interest in the issue. An illustrative list of issue areas includes “trade” and “international commitments”.

Responsibility for ensuring that regulations are consistent with Canada’s international trade obligations is in principle shared by three entities: the regulatory authority, DFAIT (which is responsible for co-ordinating the implementation of WTO, NAFTA and other trade agreements by regulatory authorities) and PCO (responsible for implementation of the *Regulatory Policy*). Ultimate responsibility for ensuring that regulations have been developed in accordance with the *Regulatory Policy* lies with the Special Committee of Council, a Cabinet committee.

2.2.2 *WTO/NAFTA Consultations and Disputes Involving Canadian measures*

A number of WTO challenges have been brought against Canadian measures in recent years. At issue in two cases involving alleged violation of Canada’s non-discrimination obligations were measures concerning periodicals (a complaint by the United States concerning three measures related to the sale of imported periodicals in Canada), and certain measures affecting the automotive industry (a complaint by

Japan and the EC on Canada's import regime under the Canada-U.S. Auto Pact). In these two cases, Canada was found to have violated its non-discrimination obligations. Canada has implemented the recommendations and ruling of the WTO Dispute Settlement Body.

The NAFTA Chapter 11 investor-state dispute settlement mechanism has come under increasing scrutiny. The Free Trade Commission (made up of cabinet-level representatives of the NAFTA Parties), after reviewing the operation of proceedings conducted under Chapter 11, sought to clarify and reaffirm the meaning of certain of its provisions in the July 31, 2001 Notes of Interpretation. Five Chapter 11 claims have been brought against Canada. In one case (the S.D. Meyers case), Canada was found to have violated its non-discrimination obligations under Article 1102 of the NAFTA. The MMT case, when a Canadian import ban on the substance (a gasoline additive) imposed for environmental protection purposes was challenged under NAFTA Chapter 11 by the US manufacturer of the product on the grounds that the ban was tantamount to expropriation, galvanised popular debate in Canada on NAFTA Chapter 11. This precedent and a continuing trend towards like-minded use of Chapter 11 provisions by other North American firms²⁵ has led to increasing calls in Canada to "close the loophole".²⁶ Canadian authorities have stated that in any multilateral investment negotiation, Canada "would want to safeguard a government's right to regulate, in the public interest, in 'strategic sectors' such as health, education, environmental protection, and culture."²⁷

2.2.3 Regulation of Investment

Canada is often regarded as having one of the most transparent and liberal investment regimes in the world and in recent years has seen inward foreign direct investment climb to unprecedented levels.²⁸ Foreign investment in Canada has a long history of regulatory involvement, however. Though the dismantling of the Foreign Investment Review Agency years ago signalled a fundamental policy shift from heavy scrutiny of inward investment to a more liberal climate designed to attract and compete for foreign investment, certain aspects of Canadian investment policy still turn on the dynamic of control. This control is achieved through two approaches: notification and review provisions and foreign ownership limitations.

The investment review function still has an important place in Canadian investment policy, and is set out in the *Investment Canada Act* of 1985 and *Regulations Respecting Investment in Canada*.²⁹ The stated purpose of the Act is to provide for the "review" of significant investments in Canada by non-Canadians in order to ensure net benefit to Canada. Depending on the type of business activity involved, the Act is administered by two federal government departments: the Department of Canadian Heritage is responsible for administering the Act for investments falling within prescribed types of business activities relating to Canada's "cultural heritage or national identity",³⁰ while the Department of Industry administers the Act for all other types of business activities.

"Non-Canadians" including any entity that is not controlled or beneficially owned by Canadians, must either file a Notification or an Application for Review of a planned investment unless a specific exemption applies. Notifications by non-Canadians must be filed no later than thirty days after the implementation of the investment each and every time an investor begins a new business activity in Canada and each time the investor acquires control of an existing Canadian business where the establishment or acquisition of control is not a reviewable transaction.

Significant acquisitions are subject to review under the Act. New thresholds for review for WTO foreign investors become effective on January 1 of every year. These thresholds (\$209 million dollars in 2001 for direct investments by WTO members) are usually published in February in Part I of the *Gazette*. Lower review thresholds apply with respect to non-WTO investors and to all investors in respect of businesses involved in the provision of transportation and financial services, as well as cultural businesses

and those related to uranium production. “Notifiable” investments involving cultural businesses related to Canada’s cultural heritage or national identity may be reviewed under certain circumstances. Scope for Ministerial discretion to approve or decline foreign investment on a case-by-case basis remains intact.

Canada maintains longstanding foreign ownership limitations in both federal and provincial laws. At the federal level, these affect the telecommunications services, air transport, and fisheries sectors. Significant restrictions also apply in the “cultural industries”, notably in the broadcasting, book publishing and distribution and film sectors. Such restrictions have long been defended on the grounds of preserving Canadian cultural sovereignty and have been the subject of carve-outs in all Canadian trade agreements to date. Some provinces also maintain foreign ownership limits on some provincially incorporated financial institutions.

Calls to relax investment restrictions in some sectors are growing and are now being tied as a whole to broader economic challenges such as productivity and innovation. This was well illustrated by requests for improved competitive conditions in financial services, which led to a major overhaul of the policy and regulatory framework for the sector with the entry into force in October 2001 of Bill C-8. . Measures were adopted to promote new entry in the sector through lower capital requirements, and a revamped size-based bank structure with revised "widely-held" rules to facilitate strategic alliances and joint ventures. The ownership restrictions under the "widely-held" rules apply equally to domestic and foreign investors in banks and insurance companies. As noted earlier, the only remaining regulatory restrictions on foreign banks require that a foreign bank wishing to operate full retail deposit taking services do so through a subsidiary , an area that is commonly restricted in other countries as well.

In the airline industry as well, there has been some pressure in the aftermath of the Air Canada-Canadian Airlines merger to introduce foreign competition into the domestic industry by according foreign carriers the right to provide service on Canadian routes. There have also been calls for a relaxation of the foreign ownership restrictions in the sector. The five-year legally mandated *Canada Transportation Act* Review released in June 2001 recommended changes to Canada’s air transportation policies, including an increase in the foreign ownership limit from 25% to 49% and the possible negotiation of a Common Aviation Area with Canada’s NAFTA partners. Recent policy changes have since been announced. Among them, the government plans to remove the 15% single shareholder ownership limit that applies to Air Canada to encourage new investment in the carrier, but will maintain the 25% cap on foreign ownership. Though the recent economic slowdown and terrorist attacks on the United States may have to be factored into Canadian policymaking in this area, many economists argue that the underlying economic rationale for the maintenance of restrictions in this area remains questionable from the perspective of both market openness and competition policy. Calls to lift foreign ownership restrictions in telecommunications services are discussed in Section 3.

Some work has been done in Canada to quantify the actual costs and benefits of foreign ownership restrictions to Canadian consumers or to explore possible linkages between the costs of trade and investment-restrictive measures and the widening Canada-US productivity gap. However, the continued relevance of existing restrictions in an economy built on international trade and investment seems to invite ever more pressing reflection at a time when overall performance of the Canadian economy is again under scrutiny and answers to the productivity puzzle are being vigorously pursued.

2.2.4 *Preferential trade agreements*

Preferential agreements give more favourable treatment to partner countries and are thus inherent departures from the MFN and NT principles. However, the extent of a country’s participation in preferential agreements is not necessarily indicative of a lack of commitment to the principle of non-

discrimination. Of more relevance in assessing this commitment is the attitude of participating countries towards non-members on issues like transparency and the potential for discriminatory effects. Non-member countries need access to information about the content and operation of preferential agreements in order to make informed assessments of any impact on their own commercial interests. In addition, substantive approaches to regulatory issues such as standards and conformity assessment may introduce potential for discriminatory treatment of countries outside the agreement if, for example, standards recognised by partners to a preferential agreement would be difficult to meet by non-parties. This section provides a brief overview of Canadian participation in preferential trade agreements and then assesses the Canadian commitment to non-discrimination from these various perspectives.

Canada has long pursued a two-track trade policy of support for the further development of the multilateral trading system and participation in bilateral and regional free trade initiatives around the world. The overwhelming importance of the Canada-US bilateral trading relationship has profoundly influenced the direction and nature of Canadian trade policy, first captured in the Canada-US Free Trade Agreement and later in NAFTA. The pursuit of trade liberalisation in the North American context remains a central feature of Canadian policy. Indeed, the government appears poised to “explore ways of deepening the North American trade and economic partnership, as well as expanding Canada’s bilateral market access to the United States and Mexico”³¹ even as it seeks to implement and undertake newer bilateral trade initiatives beyond North America (a trend that has accelerated since the WTO Ministerial in Seattle). Among these are FTAs with Chile, Costa Rica, and Israel, as well as a growing network of bilateral Foreign Investment Protection and Promotion Agreements, Trade and Investment Co-operation Arrangements, Trade and Economic Co-operation Arrangements, and bilateral Air Services Agreements. Canada is also on the front line of regional free trade initiatives, notably the Free Trade Area of the Americas (FTAA) and Asia Pacific Economic Forum (APEC).

The texts of all preferential trading arrangements involving Canada are available online at DFAIT’s web site. The burden is on users, however, to discern and interpret any actual legal differences across the various instruments. Although there is no dedicated information service designed to help third parties understand the operation of Canada’s preferential agreements per se, in practice there are many formal and informal avenues for doing so. On NAFTA, for example, there is a wealth of academic, legal, and official commentary on the intent and operation of the Agreement; government officials are in principle available to field any requests for interpretation; use can be made of the Enquiry Point where relevant; and WTO Article XXIV and TPRM reviews provide additional venues for addressing specific issues of concern to trading partners. The challenge for a third party therefore lies not in accessing factual information about the content of a given Agreement, but rather in obtaining a definitive interpretation of its operation in practice.

Concerns about the possible discriminatory effects of Canada’s preferential arrangements have been expressed in recent years. One contentious area has been NAFTA rules of origin for automobiles, which in the view of some trading partners apply an overly restrictive definition of North American producers. Proposed changes to NAFTA rules of origin applicable to a range of other products, including alcoholic beverages, esters of glycerol, pearl jewellery, petroleum/topped crude, photocopiers, headphones with microphones, and chassis fitted with engines have recently been published for public comment in the *Canada Gazette*.³² Approaches to regulatory issues may also carry potential for discriminatory effects, and the standards area is particularly prone to abuses in this context. While Canada’s stated objective to pursue harmonisation of standards where appropriate “and especially within North American markets” and related recognition that “NAFTA-related venues are clearly a high priority for Canadian standardisation initiatives” bodes well for the deepening of North American trade ties, it raises the prospect of adverse effects on third countries. The extent to which regional standardisation efforts embrace existing international standards will be a useful indicator of Canada’s overall commitment to non-discrimination.

2.2.5 Trade in services

The overall quality of Canada's market access commitments under the WTO General Agreement on Trade in Services (GATS) and sectoral annexes on Financial Services, Basic Telecommunications, and Movement of Natural Persons reaffirm Canada's status as one of the most open markets in the world. The statistical record broadly supports this. Canada has traditionally run a deficit in trade in services, although the trade balance has been improving in recent years. The value of services imports reached a record high in 1998 and grew at an annual rate of 5.9% during the 1990s.³³

Specific commitments under the GATS and limitations on market access and national treatment are made according to four modes of supply (cross-border, consumption abroad, commercial presence, and presence of natural persons). Assessing the quality of specific commitments thus requires an in-depth examination of the range of activities covered in each sector and applicable exceptions by mode of supply. Crosscutting "horizontal" commitments must also be considered in order to get the full picture.

A detailed examination of these commitments is beyond the scope of this review. However, some broad observations help illustrate the quality of Canadian commitments and effective equality of competitive opportunity accorded to foreign service providers – that is, the extent to which Canadian commitments under the GATS uphold the MFN and NT principles.

One feature of Canada's horizontal commitments is a range of limitations on national treatment arising from provincial measures. Federal laws such as the *Investment Canada Act* (discussed above) and the *Income Tax Act* also restrict market access in some modes. Sector-specific commitments have been made in respect of most service sectors. As is the case in all country schedules, the degree of market openness varies considerably by covered sector. Canada maintains a range of limitations on market access and national treatment in the audio-visual sector, for example, whereas relatively few restrictions apply in the accountancy sector. Canada maintains MFN exemptions with respect to a range of service activities, including in the film, video, and television programming co-production and distribution sectors; banking, trust, insurance and financial services; and air and maritime transport.

In contrast to the GATS, NAFTA Chapter 12 on Cross-Border Trade in Services embodies a negative list (or top-down) approach. This means that chapter disciplines apply to all cross-border services trade with the exception of: (a) measures affecting trade in financial services (subject to sector-specific disciplines in Chapter 14 of the Agreement), telecommunications services (while not exempted from Chapter 12, most substantive obligations pertaining to trade in this sector are found in Chapter 13),³⁴ and air services; and (b) measures specifically excluded from coverage under the Chapter (which constitute the "negative" list). This fundamental architectural difference with the GATS (which is based on a positive list or bottom-up approach, meaning that obligations exist only when members schedule national treatment and market access commitments in their Schedules of Specific Commitments) has far-reaching implications for the effective degree of liberalisation accepted by Canada under the two agreements.

National treatment and MFN are core obligations under the NAFTA, with reservations and exceptions to these and other principles set out in various annexes to the Agreement. These lists include reservations serving to maintain existing non-conforming measures (Annex I); reservations for future measures (Annex II); exceptions to the MFN principle in respect of existing or future international agreements (Annex IV) and miscellaneous liberalisation commitments (Annex VI). While NAFTA goes beyond Canada's GATS commitments, these are not more liberal across the board but only in select sectors. With the clear lines that have been set at the Doha Ministerial for ongoing GATS negotiations, the stage is now set for the initiation of market access negotiations. Canada will continue to be an active player.

2.3 *Avoiding unnecessary trade restrictiveness*

Among the alternatives available for reaching a particular objective, policy makers should favour regulatory measures that have the least restrictive effects on trade. This principle is enshrined in several WTO agreements, and is thus fully applicable in Canada. However, implementing the principle into the domestic regulatory system requires appropriate mechanisms. In this respect, assessing ex ante the impact of planned regulations on trade and investment and consulting trade experts and foreign business can help integrate an international dimension into the rulemaking process and prevent the creation of barriers to trade and investment. Streamlining procedures can also help facilitate access to the market without undermining the legitimate objective of the regulations. This section examines these two avenues and then considers the example of customs procedures, an area in which many countries have endeavoured to simplify procedures with a view to facilitating trade flows.

2.3.1 *Regulatory impact assessment*

The requirement to prepare a Regulatory Impact Analysis Statement (RIAS) was first introduced as part of the federal government's 1986 Regulatory Reform Strategy, making Canada one of the world's most experienced practitioners of regulatory impact analysis. Based on a commitment to smarter, more efficient regulation, the Strategy stressed an overall management approach to "regulating the regulators" with a central oversight function, greater scope for public access and participation in the regulatory process, and a set of principles for rigorous analysis of regulatory proposals. The RIAS was seen as one of several key innovations put forth in this context and has remained an important feature of the Canadian federal regulatory landscape ever since.³⁵ The government also characterises it as the "main tool" used by regulatory authorities to avoid unnecessary trade restrictiveness.

The RIAS is intended to serve as a public accounting of each proposed (or changed) regulation and is structured to address the various elements of the *Regulatory Policy*. The Government's April 2001 *Guide to the Regulatory Process* describes the RIAS as providing "a clear explanation of the regulation, its purpose, the analysis substantiating it and its expected impacts", ranking it "a key decision-making document for ministers and the public."

The preparation of a RIAS is undertaken at the end of a sponsoring department's initial policy analysis after it has been determined that regulation is the best response to a given problem. The resulting document will accompany the regulatory proposal throughout its consideration inside and beyond government. Ministerial approval of a proposed regulation and its accompanying RIAS signals a formal recommendation to the SCC that it be pre-published in Part I of the *Canada Gazette* (including online). Accordingly, the full text of a RIAS and the draft regulation in respect of which it is written are fully available for public scrutiny and comment by all interested parties, whether domestic or foreign. An updated RIAS, containing a summary of any comments received during the public comment period, any actions taken to address those comments, and the rationale for the department's response accompanies a revised regulatory proposal from final review through until publication in Part II of the *Canada Gazette*.

All federal regulatory authorities (with the exception of the Canadian Radio-Television and Telecommunications Commission and the Copyright Board) must prepare a RIAS for each proposed regulation using uniform, government-wide criteria. As currently structured, the RIAS has six required sections: (a) a description of the problem and explanation why regulation is required; (b) a clear, concise description of the regulatory proposal; (c) a summary of alternatives to regulation considered and reasons why regulation was chosen as the instrument of choice; (d) benefits and costs; (e) a summary of consultations undertaken; and (f) an explanation of procedures and resources that will be used for

compliance and enforcement. The RIAS must also include the name and complete contact information for the person responsible in the sponsoring department or agency.

The government has taken a number of steps to ensure that policy officers involved in the regulatory process are well informed about how to produce high-quality RIAs. A considerable body of federal guidance is available to RIAS writers to assist them in the task. The *Guide to the Regulatory Process* contains a detailed description of the content sought under each section, and a *RIAS Writer's Guide* sets out additional detailed guidance for preparation of a high-quality document. Formal training is also available for RIAS writers. Though not strictly mandatory, policy officers are expected to take full advantage of such resources, and the close working relationship between PCO officers and their regulatory interlocutors helps ensure that this is the case.

The RIAS and related supporting machinery are thus well entrenched in the Canadian system, and sustained efforts have been made towards encouraging a government-wide culture of rigorous analysis and accountability for new or changed regulations. The kind of lasting attitudinal shift required of regulators in moving from a command and control regulatory state to an approach more suited to the changing nature of regulation in the 21st century may take longer to gel, but a framework for encouraging a new regulatory culture seems firmly in place.

Challenges remain, however, to ensure optimal use of this tool. Despite a highly trained public service, uneven quality of RIAs is sometimes an issue. One Treasury Board study of the Canadian experience with regulatory impact analysis found, for example, that “relatively little effort [was] expended in estimating benefits”, analyses of indirect cost impacts were “very weak”, and analyses of impacts on small businesses and international competitiveness were “rare”.³⁶ Existing guidance on how to write a RIAS, while quite prescriptive, also leaves considerable discretion for differing interpretations and application in practice. For example, alternatives to regulation which might enhance market openness (e.g. use of voluntary standards or marketable permits to achieve a regulatory objective) may not be consistently explored. Current guidance tells RIAS writers that the effort spent in analysing alternatives should be “proportional to the potential impact of the initiative.” While the proportionality test is seen to be working well, it is unclear how such a directive is interpreted in practice, much less uniformly applied across different regulatory departments and agencies. In addition, enabling legislation sometimes explicitly prescribes that particular issues be addressed through regulation so that even if alternatives exist, regulators do not have the authority to consider them.

Despite these weaknesses, existing requirements for regulatory impact analysis do require regulators to consider the effects of a proposal on trade and investment. Current guidance for RIAS writers states that impact assessment should clearly assess “impacts that may affect a region, business and trade, and competitiveness” and that quantitative measures are “desirable” for assessing direct and indirect economic impacts, such as on employment, operating costs, international trade, global competitiveness, and distribution of income. Additional guidance on cost-benefit analysis requires that regulations minimise impediments to Canada’s competitiveness. To reach this determination, regulators are further encouraged to consider: (a) whether the regulatory proposal would affect imported and domestically produced goods or services in the same manner or degree; (b) whether the proposal would discourage foreign firms or individuals from investing in Canada; (c) whether the choices available to consumers would increase or decrease; and (d) an estimate of costs to consumers by examining the “more important” effects on markets for goods and services that would be directly or indirectly affected by the proposal.

Nonetheless, the potential of the RIAS to adequately capture the trade and investment dimension has yet to be fully exploited. A combination of systemic shortcomings seems to be contributing to this suboptimal result. First, as pointed out in Chapter 2, existing guidance for regulators is dispersed across various sources, which could be usefully centralised for easier access. Second, regulators themselves do

not always have the necessary skills or incentives to thoroughly assess the trade and investment angle, which is only one of several competing criteria they face when drafting a RIAS. This is compounded by the fact that regulators are not usually driven by market openness considerations, and may even resist what they perceive as “supremacy of trade” positions across government. Third, RIASEs which have either failed to address trade and investment altogether or have done a poor job of doing so are not always “caught” later in the process. All of this points to areas where further improvement is required, including better training for RIAS writers, more rigorous oversight at the departmental/agency level in the first instance (which is already going on in some settings) and intensified scrutiny and quality control at PCO.

Beyond RIAS-specific training and support, broader efforts have been made to enhance the overall awareness of regulatory officials about the impacts of regulation. As the designated oversight agency for the Regulatory Policy, PCO is responsible for assessing the effectiveness, implementation, and elaboration of the Policy. In this role, PCO also provides advice to federal regulatory authorities on Policy requirements and develops and supports capacity building to help regulatory authorities comply with the Policy. A PCO-sponsored training programme aimed at raising awareness of the Regulatory Policy amongst regulatory authorities is one example of this commitment. DFAIT, as well as other departments, will typically contribute to the development of PCO guides and training initiatives.

Primary legislation is not subject to requirements of the *Regulatory Policy* or the RIAS requirement. It is, however, disciplined by other instruments such as the *Cabinet Directive on Law-Making*, the *MC Drafter’s Guide*, the *Good Governance Guidelines*, and the *Guide to Making Federal Acts and Regulations*. Major legislative initiatives in the area of taxation are also subject to the additional disciplines of performance measurement and evaluation, the results of which are presented in a Tax Expenditure and Evaluation report published annually by the Department of Finance.³⁷ In *Results for Canadians*,³⁸ the government has set the goal of extending the cycle of planning, measuring, evaluating and reporting on results flowing from all government programmes, policies and initiatives. Major legislative initiatives may still escape the requirements of these instruments.

In sum, Canada’s longstanding use of regulatory impact assessment and sustained efforts to refine the RIAS have helped define some of the best practices in the world for institutionalising accountability in rule-making. While the RIAS might be usefully fine-tuned to ensure greater attention to market openness issues, Canada already has a state-of-the-art instrument in place for doing so. Though subject to different disciplinary guidance, major pieces of primary legislation may still escape rigorous cost-benefit impact analysis or focused consideration of possible impacts on international market openness. Again, however, the existing system of checks and balances appears to provide adequate scope for doing so. Accordingly, building in rigorous and systematic analysis of the trade dimension of legislative proposals where this is not already happening may simply be a matter of optimising use of existing tools. In both cases, ensuring that regulatory or legislative proponents clearly address the market openness dimension in the first instance – and that this does not get lost or overlooked somewhere along the way – is paramount.

2.3.2 *Trade advocacy*

The direct involvement of the trade policy community in the domestic regulatory process is essentially ad hoc in nature. Although extensive interdepartmental consultation is a hallmark of federal governance, there is no systematic filtering or vetting of regulatory proposals by trade officials per se. In practice, DFAIT and other departments active in the conduct of trade policy (notably the Departments of Industry and Finance) are more likely to focus their attention on the “front end” of the regulatory process during the interdepartmental consultation process and less inclined to be involved in the later stages of the process when the actual design of a planned regulation is underway. At this advanced stage, trade policy

bodies would typically become involved only on a case-by-case, “need to know” basis. Thus, it seems, the onus is almost entirely on the regulatory authority concerned to craft a regulation in trade-friendly terms. At a minimum, this would require a clear understanding of relevant international trade obligations, the expertise to recognise and avoid design flaws that could impede market openness, and the willingness to reach beyond fulfilment of purely domestic health, safety, or environmental mandates to embrace trade-friendly approaches to meeting regulatory objectives.

While DFAIT is not closely involved in the step-by-step details of the regulatory process, it is clearly charged with co-ordinating the implementation of WTO, NAFTA and other international trade agreements by federal regulatory authorities. One avenue for encouraging awareness in this context is the Deputy Minister’s Challenge Team on Law-Making and Governance (DMCT), a head of department level group created in 1996 to foster ongoing discussion on regulatory reform and related issues. DMCT follows the law-making process with a view to reviewing key policy processes and their underlying frameworks and suggesting directions for further improvement and future work. As the only high-level group looking at regulatory reform on an ongoing basis, DMCT serves as an important institutional venue to encourage dialogue on law making. A 24-month agenda set by DMCT in the fall of 1999 focuses on horizontal issue management from a regulatory and law-making perspective.

DMCT has fostered debate on a number of key regulatory issues with potentially important implications for market openness. In March 1999, for example, the group focused on instrument choice and alternatives to achieving policy objectives. While observing that some instruments such as government spending had been well used, participants conceded that others, such as law, had been used “without much analysis” and that there was a need to “think more” about instrument choice. Other instruments such as information and incentives (e.g. the EcoLogo from Environment Canada), voluntary standards (such as those developed by the Canadian Chemical Manufacturers Association) and private sector rules (such as railway company rules under the *Railway Safety Act*) were cited as innovative alternatives worth exploring in this context.³⁹

Despite these mechanisms, this implicit reliance on regulatory authorities’ knowledge of and sensitivity to international trade obligations and on discretion to consult DFAIT at an appropriate point in the process seems to introduce potential for an uneven approach. In practice, the adequacy of this approach may have more to do with the quality of working relationships between regulatory officials in line departments and their trade policy contacts than with appropriate exercise of discretion to consult. The process is described as very “collegial”, with the involvement of the trade policy community early on in the (inter-departmental) policy development process providing an opportunity to iron out any possible problems from the trade perspective before a regulation is actually drafted. When asked, the government stated that there were “no examples” of regulations being amended following recommendations by trade policy bodies, a track record which suggests that their earlier involvement in the policy development process is doing the job of averting regulations that could be problematic from the trade perspective. On the other hand, it could also be interpreted to mean that regulatory authorities simply do not seek out or are not receptive to trade views once beyond the policy development stage and embarked upon the actual design of a planned regulation – the real end game for market openness. Whatever the explanation, it is not clear that regulatory officials are making best use of trade expertise in designing regulations at critical points in the evolution of given proposals.

The capacity of the trade policy community to effectively monitor all regulatory activity is also a resource issue. While desirable in principle, any attempt at more systematic monitoring of regulatory initiatives by DFAIT might prove cumbersome and unwieldy in practice. That said, there might be considerable scope for tightening up the existing process. A risk under the current approach is that only high-profile regulatory initiatives will attract the sustained involvement of the trade policy community, leaving a string of less visible but potentially trade-restrictive regulations free of scrutiny.

Another potential obstacle to ensuring least trade restrictiveness in regulatory processes may be more cultural than procedural in nature. Prevailing attitudes seem to support a minimalist approach to the implementation of international trade obligations, including through regulation. In that context, regulations tend to be designed from the perspective of merely meeting international obligations rather than using regulation as a vehicle to foster an expressly pro-competitive, trade and investment-friendly business climate. The possibility of going beyond WTO obligations seems not to have been seriously considered from the regulatory perspective. This invites an intriguing line of enquiry: What if Canada was to cultivate an explicitly trade and investment-friendly regulatory environment and go beyond its international obligations in other spheres of regulatory activity? What might an “obligation-plus”, pro-competitive regulatory climate yield in a country so heavily defined by trade?

2.3.3 *Business simplification initiatives*

Canada has a long history of regulatory reform aimed at reducing “paper” burden on business. Building on these earlier achievements, the federal government has skilfully capitalised on the Internet to offer an impressive array of business simplification initiatives aimed at further reducing administrative burden, particularly on small and medium-sized enterprises. While some of these initiatives have been in place for some time, more recent efforts have been largely driven by the broader Government On-line Initiative, which aims to fully implement “e-government” (electronic service delivery) for businesses and individuals by 2004.

Already, Canada’s record of online information and service delivery is amongst the best in the world, a performance that stands to benefit foreign as well as domestic firms. Organisation of government services and information by theme or type of activity (rather than by responsible department) has been the key approach driving this vision. Users and observers appear to applaud the Initiative: the Canada Site alone experiences some seven million hits each month with 20% originating outside the country,⁴⁰ and a recent independent study of 22 countries ranked Canada first in implementing e-Government.⁴¹

Electronic service delivery is poised to fundamentally change the way business is done in and with Canada. When fully implemented, online service delivery will streamline the business environment in three main ways: *first*, by simplifying and accelerating certain business procedures (for example, it is now possible for firms to federally incorporate online and pay for the transaction in a matter of minutes);⁴² *second*, by supporting businesses in obtaining the information they need quickly and efficiently (including through Industry Canada’s cross-country network of Canada Business Service Centres, mandated “to serve as the primary source of timely and accurate business-related information and referrals on federal programs, services and regulations, without charge in all regions of the country”);⁴³ and *third*, through the introduction of transaction-based services for the importing community, such as the Canadian Food Inspection Agency’s Automated Import Reference System and related tools.⁴⁴

Another Internet-based initiative that deserves highlighting in this context is the Canada Customs and Revenue Agency’s Business Registration On-line (BRO) service, an integrated e-service that allows businesses to register for a range of government programmes in a single online transaction. The BRO service also illustrates successful federal-provincial co-operation on these issues: BRO is run in partnership with the provinces of Nova Scotia and Ontario, with at least three more provinces expected to join the service over the next year. BRO (at www.businessregistration-inscriptionentreprise.gc.ca) allows businesses to register for a Business Number as well as GST/HST, payroll deduction, import/export, and corporate income tax accounts in a single online transaction instead of undertaking the multiple, sequenced transactions that characterised business interaction with government in the past. CCRA points to client satisfaction, increased compliance, a drop from a formerly six-week to 30-minute process, and extended service hours amongst results achieved since introduction of the program. While the lasting success of the

program may ultimately depend on dedicated user base and successful partnering with more provinces, it symbolises an important change in culture and government's readiness to harness the Internet age in service of the business community.

Despite such obvious advances, the capacity of the Internet to streamline administrative procedures does have limits. Online handling of certain issues such as authorisations and permits may not always be appropriate or feasible, pointing to the continued importance of efficient handling of paper flow where paperless approaches are not possible. Importantly, Internet-based initiatives have not overshadowed continued attention in Canada to more traditional service channels. The Government of Canada is committed to using technology to complement, not replace, existing service options, and the principle of choice in providing people with different avenues for dealing with government is an explicit part of the Government Online and other service delivery improvement initiatives. The combined potential of such initiatives to further reduce administrative burden remains to be seen. While high user satisfaction has been closely documented in respect of some Internet initiatives, complaints persist in other areas. Domestic and foreign firms alike continue to complain about burdensome regulatory requirements on issues such as length of approval processes. Others point to additional compliance costs imposed when regulations are retroactive.⁴⁵ While claims of this nature tend to be broadly anecdotal and are thus difficult to substantiate here, it seems clear that a wider, if somewhat amorphous, challenge remains to be addressed in reducing administrative burden on business. The government's recent pledge to "streamline" approvals processes and reduce "regulation and red tape"⁴⁶ may be a move in the right direction, but the very diversity of claims advanced under the banner of regulatory burden in Canada suggest the need for a comprehensive and sustained strategy to achieve lasting change in this area.

Regulatory burden may also be thwarting Canada's efforts to attract inward investment, and some officials openly acknowledge a perception problem amongst prospective foreign investors. Canada, they believe, is seen to be heavily regulated when in fact there is some evidence that the stock and flow of regulation is actually on a downward trend.⁴⁷ Different approaches to counting regulations make it difficult to substantiate this claim, particularly amidst counterclaims that the number of federal regulations is actually on the rise.⁴⁸ The very significant face of provincial regulation and halting implementation of the Agreement on Internal Trade may even constrain the nature of inward investment; many firms establish here not to serve the small Canadian market but rather to gain a foothold into the wider North American market. While largely anecdotal claims about regulatory barriers to effective competition continue to be voiced by certain prospective foreign investors, economists project Canada will be amongst the best places in the world to do business in the coming years.⁴⁹

2.3.4 Trade Facilitation through Customs Procedures

Within an ever-integrated world economy, many sectors are operating on a just-in-time delivery basis and rely on steady stream of imported products to achieve efficiency gains in production. Significant direct cost overruns and production schedule delays are incurred when shipments are held in customs warehouses as a result of inefficiencies in customs procedures. As customs tariffs are generally low within OECD countries, cumbersome customs procedures are increasingly perceived by traders as major trade obstacles and are often seen as non-tariff barriers. Lack of transparency or uneven application of customs regulations and procedures across various ports of entry can encourage traders to engage in port shopping to exploit most favourable conditions. Inconsistency and lack of transparency undermine the trade policy framework and provide competitive advantages to traders that have benefited from more favourable treatment. One of the key challenges for any customs administration is to reconcile the need for high compliance and protection standards with that of assisting stakeholders in reaping the benefits of freer trade and taking advantage of modern technology.

Canada Customs and Revenue Agency (CCRA) is the agency vested with the responsibility to promote compliance with Canada's tax, trade and border legislation and regulations. CCRA is not only responsible for the administration of trade policy measures such as customs tariffs, rules of origin and tariff rate quotas, but also verifies compliance of imported goods with a range of national laws and regulations, including those relating to health and sanitary protection, pornography and weapons. The Agency oversees the administration of all entry ports, including the world's longest land border with one country, the United States, airport, rail and marine vessel clearance sites. Altogether there are approximately 493 port entries in Canada where commercial clearance is permitted. Canadian customs services are available in Canada's both official languages, English and French.

Since early 1990, the gradual introduction of a pre-arrival review system (PARS) has allowed importers to enter into an account security arrangement to transmit electronically their release information to Customs before the goods arrive at borders. During the same period, the Frequent Import Release System (FIRST) was also implemented and allowed frequent importers with a history of voluntary compliance with customs rules and low transaction risk to qualify under pre-arrival processing systems. Since 1996, the Accelerated Commercial Release Operations Support System (ACROSS) programme allows customs releases to be transmitted under the EDI protocol.⁵⁰ The electronic system allows direct and faster interaction between interested parties and Customs officials, thereby removing the need to present paper-based forms and facilitating the movement of legitimate goods.

It is estimated that through the use of electronic declaration forms, two out of three trucks are now electronically released at the primary point of arrival with no requirement that they be referred to a secondary inspection. With some 95% of total transactions now being electronically processed, significant reductions have been achieved in the time required for goods to clear customs, with most processing done within seconds.⁵¹ Under the Customs Action Plan for 2000-2004, efforts are being deployed to use advanced technology to further integrate the concepts of self-assessment, advance information and pre-arrival documentation to streamline the movement of low risk goods and to focus resources on areas of higher and unknown risk.

Access to reliable information about Canada's customs laws and regulation is essential for traders to avoid customs clearance delays and costly temporary storage costs. While in the past trading partners have not openly complained about the lack of transparency of Canadian customs procedures, access to detailed information was made much easier and faster with the development of a comprehensive web site at www.cra-adrc.gc.ca. The web site provides direct access to all relevant laws and administrative bulletins used by CCRA to administer specific regulation, including an on-line automated customs information service. The service offers a guide for small business and detailed information about appeal rights and dispute resolution procedures, and outlines the Agency's integrity and fairness policy. Specific information about rules arising from free trade agreements in force is also available on-line.

The Canada-United States land border and bilateral trading relationship are the world's largest and both countries jointly share responsibility and mutual interest in optimising border crossing facilities and procedures to sustain and promote bilateral trade. Bilateral customs co-operation between the two countries already has a long history, and was reconfirmed in the Canada-United States Shared Border Accord, first signed in 1995 and updated in 2000. Canada is also a member of the World Customs Organisation and participates in several international initiatives aimed at customs simplification and harmonisation procedures that will reduce customs clearance burdens on shippers as well on its own customs administration.

Canadian business organisations contacted in the context of this review had no specific grievances to address to CCRA about how it is fulfilling its mandate, and the level of satisfaction with the efforts made to facilitate customs procedures was high. The tragic events of September 2001 in New York

and Washington greatly impacted border crossing operations, as physical inspection of all shipments entering the United States was temporarily ordered as a safety measure. Kilometres of truck congestion at border points in Canada and the subsequent temporary closure of several automobile manufacturing plants on both sides of the border due to supply disruption were shocking reminders of the enormous costs entailed by business in particular and the economy in general when traditional customs clearance procedures must be enforced. Canada has established an excellent track record in setting up the infrastructure to support and promote electronic transmissions of customs release information and has engaged in other innovative approaches to trade facilitation (Box 5). The main thrust of the Customs Action Plan 2000-2004 is commendable and Canada should continue to invest in advanced technology to support trade facilitation initiatives.

Box 5. Trade Facilitation Initiatives in Canada

In 1998, CCRA developed a trade facilitation initiative in partnership with the Canadian Food Inspection Agency (CFIA) to remove the burdensome irritant of requiring traders to provide import information and data on low risk shipments to more than one authority. This single window electronic interface is credited with increased use of electronic technology on the part of the importing community, decreased paperwork and cost savings for the CFIA and CCRA. The CFIA is striving to extend electronic transmissions for medium and higher risk shipments, which currently necessitate more hands-on approach in conjunction with CCRA.

Under the Canada-United States Shared Border Accord, the two countries jointly offer programmes and services designed to promote international trade; streamline processes for legitimate travellers and commercial goods; provide enhanced protection against drug smuggling and the illegal entrance of people; and reduce costs for both governments. In practical terms, the Commercial Vehicle Processing Centre was developed under this Accord to address delays and congestion that are directly attributable to the lack of documentation preparation in truck traffic. Joint efforts are also underway to promote the development stage of chemical detection and X-ray systems to identify illegal contraband.

2.3.5 Summary

The weight of evidence points to sustained efforts designed to avoid unnecessary trade restrictiveness. Canada's long use of regulatory impact analysis and sophisticated use of up-to-date technology to pursue business simplification and trade facilitation objectives are important indicators of a solid commitment to this principle. While somewhat removed from the day-to-day evolution of specific regulatory proposals, the trade policy community does have important opportunities to weigh in on the process at the earlier policy making stage through the interdepartmental consultation process. Current resource and efficiency considerations suggest that the status quo will prevail. At the same time, the arm's length relationship between trade policy bodies and the real day-to-day business of designing regulations and the government's continued reliance on impact analysis and consultation as its main means to avoid unnecessary trade restrictiveness underscore the importance of achieving consistently high-quality impact assessments with expert attention to the market openness dimension.

2.4 Use of internationally harmonised measures

Compliance with different standards and regulations for like products in different countries can present firms wishing to engage in international trade with significant and sometimes prohibitive costs. This regulatory divergence has prompted strong and persistent calls for reform from the international business community through mechanisms such as the US-EU Trans-Atlantic Business Dialogue and the Canada Europe Roundtable for Business (CERT). When appropriate and feasible, reliance on

internationally harmonised measures (such as international standards) as the basis for domestic regulations can greatly facilitate trade flows. National efforts to encourage the adoption of regulations based on harmonised measures, procedures for monitoring progress in the development and adoption of international standards, and incentives for regulatory authorities to seek out and apply appropriate international standards are thus important indicators of a country's commitment to efficient regulation.

Reliance in Canada on international measures as the basis of national standards and federal regulations is encouraged through several avenues. The *Regulatory Policy* requires federal regulators to "use available international standards, guidelines, and recommendations where those standards achieve the regulatory objective" in respect of technical regulations affecting trade. Departmental regulatory initiatives are increasingly concerned with consistency with international standards and by extension, development of standards that could be incorporated into future international agreements.

A second avenue for promoting the use of international standards is during the development of National Standards of Canada (NSCs) in the first instance. As required by the TBT Annex 3 Code, SDOs are required to examine whether relevant international standards can be adopted or adapted for this purpose. While an estimated 78% of NSCs (based on 2000-2001 data) are based on international standards, SDOs are not required to ensure this result and may in fact face significant constraints in doing so. Existing international standards are not always considered appropriate or stringent enough for Canadian purposes.

A third avenue for promoting use of internationally harmonised measures in Canada is through active Canadian involvement in the development of international standards in global fora. Canadian participation in international voluntary standardisation activities includes representation in over 400 ISO/IEC technical committees and subcommittees. Such involvement must provide for equal access and effective participation by concerned national stakeholders, including regulators – helping to ensure that regulators are already "on board" when referencing resulting international standards in their own Departmental or agency initiatives. This approach to referencing international standards in domestic regulation appears to be yielding promising results in practice: according to the government, federal health and safety regulations "increasingly" refer to standards developed by international bodies. This upward trend may also reflect growing reliance on standards by regulators to achieve regulatory objectives⁵² and rising awareness of the requirements of the *Regulatory Policy*, which requires federal regulatory authorities to use available international standards, guidelines and recommendations when those standards achieve the regulatory objective, while at the same time leaving sufficient discretion to decline to do so.⁵³

Recent TBT notifications by Canada illustrate attempts to base domestic regulations on international standards. These attempts sometimes appear to be more reactive than proactive, however, and motivated more by a desire to harmonise with the United States rather than with the relevant global standard. In some cases, the U.S. standard in question is also consistent with the relevant international standard. The Department of Health's amendment to the *Radiation Emitting Devices Regulations*, for example, replaced the present standard for diagnostic X-ray equipment with a new standard that is compatible with both the relevant international (IEC) and U.S. standard.⁵⁴ In another recent case, the Department of Natural Resources introduced amendments to energy efficiency standards for refrigerators and freezers mirroring U.S. standards that came into effect on July 1, 2001.⁵⁵ A provision in the *Motor Vehicle Safety Act* allowing incorporation of an enactment of a foreign government into Canadian regulations has also been used; a recent amendment to the *Canadian Motor Vehicle Safety Regulations* on passenger car brake systems harmonised Canada Motor Vehicle Safety Standard 135 with the requirements of Federal Motor Vehicle Safety Standard 135 in the United States.⁵⁶

While initiatives to harmonise requirements with trading partners are right-minded forms of forward-looking regulatory co-operation which undoubtedly support existing trade flows in affected products, they also raise the prospect of possible adverse effects on third countries, as earlier mentioned in

Section 2.2.4. The issue of course does not arise when national standards are based on international standards in the first instance, pointing to the continued importance of keeping international standards at the centre of regulatory co-operation wherever and however it is pursued. The challenge for Canada will be to find the right balance between regional standardisation activities, moves towards harmonisation with the United States, and its stated commitment to the use of international standards as the basis of domestic regulation where those standards achieve the regulatory objective.

2.5 Recognition of equivalence of other countries' regulatory measures and results of conformity assessment performed in other countries where appropriate

Despite progress towards the development of global standards in some product areas, most regulated goods remain subject to highly specific and often divergent national rules, effectively preventing manufacturers from selling their products in different countries and enjoying full economies of scale. Harmonisation of regulatory measures between countries is not always appropriate or even necessary. In such cases, countries may seek to recognise each other's substantive regulatory measures as functionally equivalent. A variation on this approach is to recognise as equivalent the results of conformity assessment carried out in each other's jurisdictions, since additional costs often arise when exporters are required to demonstrate compliance of their products with an importing country's rules using testing and certification accepted in that market.

There are no overarching provisions in Canadian law or policy that require regulatory authorities to recognise the equivalence of other countries' regulatory measures. However, the *Regulatory Policy* does encourage regulators to give "positive consideration to accepting as equivalent other forms of technical regulatory requirements, if satisfied that they adequately fulfil the objectives of the existing regulations". There have been some moves towards equivalence, primarily with the United States, but the practice is not widespread, tending instead to be well targeted in those sectors where regulatory systems are already broadly complementary.

Canada's existing government-to-government MRAs (described in Section 2.5.2 below) are generally limited to mutual recognition of conformity assessment and not of substantive regulatory measures per se. Informal views on MRAs have evolved along with changing conditions in markets of key trading partners (for example, moves towards Suppliers' Declaration of Conformity) and the emergence of promising approaches to other forms of regulatory co-operation, such as full harmonisation. Once seen as a panacea for trade barriers arising from standards and technical regulations, the federal government now views MRAs with a more balanced eye. Though certain MRAs are seen to be working well (notably single-sector initiatives such as telecommunications), Canada has fielded fewer requests for new MRAs as the approach comes to be less viewed as the regulatory instrument of choice internationally. Moreover, the resource-intensive nature of MRA negotiation and implementation has led Canada to the view that careful assessment is needed to determine whether MRAs are the most appropriate regulatory tool in particular situations. This in turn has prompted the development of various domestic criteria to be considered in respect of possible new MRA initiatives.⁵⁷

In sum, MRAs are now seen as but one of a range of possible approaches to deepening regulatory co-operation across borders. Amongst key lessons learned in the Canadian experience: MRAs work best in closely integrated sectors already sharing a basic compatibility in regulatory approaches, and the road to full implementation of signed Agreements can be very long. Moreover, MRA activity in Canada is now being pursued in the broader context of international regulatory co-operation and the different approaches available to governments in pursuit of this agenda. In contrast to earlier years, MRAs are increasingly seen

as but one of a possible range of tools for reducing regulatory barriers to trade. Among other areas gaining currency in this changing regulatory culture are accreditation and certification activities, equivalence of substantive regulations and not just conformity assessment procedures, and full or near harmonisation of regulations across borders.

2.5.1 *Mutual recognition in NAFTA*

Mutual recognition of conformity assessment bodies is a key feature of NAFTA disciplines in the standards-related area. Article 908:2 of the NAFTA calls on each Party to “accredit, approve, license, or otherwise recognise conformity assessment bodies in the territory of another Party on terms no less favourable than those accorded to conformity assessment bodies in its territory.” NAFTA partners are also encouraged, “wherever possible”, to accept the results of conformity assessment procedures conducted in the territory of another Party. In addition, NAFTA Article 906 on Compatibility and Equivalence requires Parties, to the “greatest extent practicable” to “make compatible” their respective standards-related measures” and “treat a technical regulation adopted or maintained by an exporting Party as equivalent to its own when the exporting Party demonstrates that its technical regulation adequately fulfils the importing Party’s legitimate objectives.” [

Four subcommittees have been established under the Committee on Standards-Related Measures to promote regulatory co-operation amongst the Parties dealing with land transportation standards; telecommunications standards; automotive standards; and labelling of textile and apparel. Regulatory successes in this context to date have emerged in the form of greatly enhanced understanding between the Parties about the operation of their respective systems.

Building on the basic compatibility of their standards-related systems, Canada and the United States can point to an impressive record of deepening regulatory co-operation at the bilateral level. No formal government-to-government MRAs exist that provide for recognition of each other’s regulatory measures or conformity assessment procedures. Instead (and as discussed in section 2.4), the trend seems to be away from mutual recognition and towards other forms of regulatory co-operation, including moves towards full or partial harmonisation. Regulators from both countries often consult and co-operate in the development of regulatory proposals and programmes in areas of shared interest (e.g. regulation of pesticides, transportation/automotive goods, and telecommunications equipment). In some cases, co-operation has even progressed to the point that regulatory work can be conducted jointly (e.g. review of pesticide registration applications), resulting in more efficient management on both sides of the border. Other innovative mechanisms and approaches are contributing to this growing experience; a memorandum of understanding between the Canadian Standards Association and Underwriter Laboratories of the United States on testing and certification marks for the refrigerant and elevator sectors, for example, and reliance by regulatory authorities in Canada on US practices. For example, the Province of Ontario has adopted sections of the American Society of Mechanical Engineers’ (ASME) Boiler and Pressure Vessels Code, with the result that ASME has accredited and recognised provincial regulators of Ontario (the Technical Standards and Safety Authority) as an Authorised Inspection Agency for its purposes.

In sum, mutual recognition in North America seems to be largely driven, for now, by *ad hoc* Canada-U.S. initiatives at the operational level. The need for a negotiated, government-to-government approach to achieving deeper co-operation in this area to reduce barriers to trade thus appears largely obviated by practical considerations on the ground – a more pragmatic approach to co-operation across borders when it makes sense. While on the one hand the growth of alternative approaches and different forms of co-operative mechanisms risks creating a (non-transparent) web of possibly divergent approaches to regulatory management, it also signals a new outward-oriented policy culture which may ultimately be

well-suited to resolving the important capacity issues faced by all countries, including Canada, in ensuring that imported products meet national requirements.

2.5.2 *Mutual recognition with other trading partners*

Over the past five years, Canada has signed multi-sector bilateral MRAs on conformity assessment with the EU, EEA-EFTA, and Switzerland, MRAs on telecommunications equipment with APEC and CITEL, and a bilateral Mutual Recognition Arrangement⁵⁸ with Korea on Telecommunications, Radio and Information Technology Equipment. Mutual recognition of substantive regulatory measures themselves is far less common, though there have been some related initiatives in that direction. The 1999 Canada-EU Veterinary Agreement, for example, which seeks to facilitate bilateral trade in live animals and animal products, sets out a framework for further simplification of trading conditions through recognition of equivalence of sanitary measures applied by the EU and Canada.

Covered sectors under the EU, EEA-EFTA, and Switzerland MRAs include telecommunications and information technology equipment; electrical safety; electromagnetic interference; medical devices; and good manufacturing practices for pharmaceuticals and recreational craft.⁵⁹ Canadian efforts are currently focused on the successful implementation of these MRAs, which for the most part remain in the confidence-building phase.⁶⁰ These efforts can range from ongoing information exchange to extensive and highly sophisticated mechanisms for joint implementation and review.

Certain federal regulatory agencies engage in extensive mutual recognition activity (or variants thereof) to facilitate trade flows. The CFIA, for example, recognises the food safety, plant and animal health controls of exporting countries through a variety of means, including memoranda of understanding, mutual recognition agreements, and equivalency agreements. The CFIA anticipates that these agreements and arrangements (now numbering about 1500) will grow with the advance of globalisation. The sustainability of this approach and extent to which this vast network of rules will ultimately contribute to market openness remains to be seen.

More recently, ongoing discussions amongst the New World Wine Producers (Argentina, Uruguay, Chile, Australia, New Zealand, South Africa, Canada, and the United States) have led to the initialling of a Mutual Acceptance Agreement (MAA) on wine-making practices across these countries. This Agreement signals a move beyond mutual recognition of conformity assessment alone into the realm of systemic equivalence.

MRAs are not the exclusive domain of governments, and this is true in Canada as well where private sector led initiatives are an important complement to government-to-government MRAs. For example, Canadian conformity assessment bodies (CABs) participate in private sector MRAs such as the IECCE CB scheme for the Safety of Electrical Products. All regulatory authorities within Canada recognise the results of such initiatives. For example, Canadian provinces (which hold regulatory responsibility for electrical safety) accept product certified by Canadian CABs whether this certification is based on tests performed in Canada or by a foreign CAB participating in the IECCE CB scheme.

2.5.3 *International co-operation on accreditation*

Accreditation is a procedure whereby an authoritative third party gives formal recognition that a body or person is competent to carry out specific tasks.⁶¹ Accreditation mechanisms are used to periodically assess and audit the technical competence of laboratories, certification and inspection bodies against published criteria. Accreditation thus seeks to ensure competence of conformity assessment bodies,

essential for the success of mutual recognition. Accordingly, international co-operation on accreditation is seen as an important supporting measure to promote recognition of equivalence in regulatory systems.

The Standards Council of Canada represents Canada in all major international accreditation activities, including the International Laboratory Accreditation Co-operation (ILAC), the International Accreditation Forum (IAF), and CASCO, the ISO Committee on Conformity Assessment responsible for the development of ISO/IEC standards and guides. Regulatory authorities have a voice in this process through participation in the SCC Advisory Committees, which develop the Canadian position in these organisations.

Canadian and foreign conformity assessment bodies are accredited by the SCC. Consistent with practice elsewhere in the world (e.g. the UK), SCC also has the authority to negotiate private sector-led mutual recognition agreements with other national accreditation bodies, with the result that conformity assessment bodies from one country can be recognised on the basis of their accreditation by the partner organisation with which it has such an agreement. Such agreements are typically negotiated on a bilateral basis or in the framework of existing international accreditation fora. The SCC is party to a co-operation agreement (MOU) with its US counterpart ANSI (the American National Standards Institute) in respect of conformity assessment.

2.6 *Application of competition principles from an international perspective*

The benefits of market access may be reduced by regulatory action condoning anti-competitive conduct or by failure to correct anti-competitive private actions that have the same effect. It is therefore important that all regulatory institutions – not just the competition authority -- make it possible for both domestic and foreign firms affected by anti-competitive practices to present their positions effectively. The existence of procedures for hearing and deciding complaints about regulatory or private actions that impair market access and effective competition by foreign firms, the nature of the institutions that hear such complaints, and adherence to deadlines (if they exist) are thus key issues from an international market openness perspective. These issues will be the focus of this sub-section, while a wider discussion of the role of competition policy in the context of regulatory reform can be found in Chapter 3.

Canada's specific competition legislation is set out in the *Competition Act*.⁶² The head of the Competition Bureau, the Commissioner of Competition, is appointed by the federal Cabinet and serves as Canada's chief antitrust enforcement official. The Commissioner has exclusive statutory responsibility for administering and enforcing the Act and is responsible for both civil and criminal investigations. As part of the Department of Industry, the Competition Bureau provides administrative support to the Commissioner with a full time staff of about 250.

Civil reviewable matters are adjudicated by the separate Competition Tribunal, a specialised quasi-judicial body established under the *Competition Tribunal Act*, while criminal anti-competitive matters are referred to the courts through the Attorney General of Canada. The Tribunal is composed of both judges from the Federal Court and non-judicial members, and may only consider a matter on referral by the Commissioner of Competition. Private parties may not initiate proceedings in respect of a reviewable practice that the Commissioner has declined to challenge; however, they may intervene once the Commissioner has initiated a Tribunal proceeding, and may appeal decisions of the Federal Court.

The most visible avenue of choice for an affected firm would thus be to notify the Commissioner of Competition about alleged violations under the *Competition Act*. The Commissioner may then initiate an enquiry if, at his discretion, there are "reasonable and probable grounds" to believe that a provision of the Act has been or is about to be violated, an order has been breached, or there are grounds for the making of

an order under the Act. No distinction is made on the basis of a firm's nationality regarding use of available avenues to pursue complaints of this nature, and there are no limitations on participation by foreign firms. In principle, therefore, domestic and foreign firms alike enjoy equal access to the Canadian institutions that entertain such complaints.

There is no formally specified procedure for the presentation of complaints, and no formal requirement on the Commissioner to provide a response to the complainant firm (although this is generally done). Regardless of its source (domestic or foreign), the substance of a complaint is reviewed by the Commissioner who then conducts a preliminary examination to determine whether the "reasonable and probable grounds" test has been met. The Commissioner appears to enjoy full discretion to make this determination, after which a full enquiry may (or may not) be initiated. Only once a full enquiry is underway can the Commissioner seek an order from a competent court for the use of compulsory investigative powers. Decisions to initiate or discontinue an enquiry are not made public by the Commissioner at the time, although information on the number and general nature of discontinued enquiries is published each year in the Annual Report of the Commissioner of Competition.

In practice, neither a decision to undertake a full enquiry nor final results of an enquiry can be appealed. The Ministry of Industry may, under subsection 22(4) of the *Competition Act*, review a decision of the Commissioner of Competition to discontinue an inquiry and may, where warranted, instruct the Commissioner to make further inquiry. The Minister cannot, however, override the Commissioner's decision. The government is currently considering allowing private suits to be brought to the Competition Tribunal about civil matters, which would provide a new avenue of recourse for affected parties. In the continued absence of such a solution, foreign firms may rely on dispute settlement provisions in trade agreements to pursue matters set aside by the Commissioner. For example, UPS, a private courier firm, invoked the investor-state dispute settlement procedures provided for in NAFTA Chapter 11. The NAFTA claim was launched subsequent to the Commissioner of Competition's finding that there was no evidence that Canada Post was cross-subsidising Purolator (see discussion in Chapter 3).

The Competition Bureau does not collect information pertaining to the number of complaints by foreign firms alleging impaired market access as a result of anti-competitive behaviour or regulatory action. Any firm, foreign or domestic, may bring alleged violations of the *Competition Act* to the attention of the Commissioner of Competition. The nationality of the firm is not a consideration in the commencement, conduct, or disposition of a case. Inquiries are conducted in private pursuant to section 10(3) of the Act, so that decisions to initiate or discontinue an inquiry are not made public by the Commissioner of Competition. Information on the number and general nature of inquiries discontinued each year is published in the Annual Report of the Commissioner of Competition (available online).

There are no stated exceptions to these procedures for particular types of firms or complainants: the Act applies to all sectors of the economy and all participants in the marketplace and this, as earlier stated, irrespective of the nationality or origin of a good or service. The Act also applies to the commercial activities of provincial and federal government corporations in competition with other persons.

All business activity is subject to the *Competition Act*, but certain exceptions apply. Specific exemptions under the Act include collective bargaining and amateur sport activities, for example. Regulated industries and activities subject to other legislation (such as professional services) and which may be covered by the Regulated Conduct Defence (a legal doctrine which shields conduct from antitrust consequences when required by a national or provincial regulatory programme) are also untouched by the Act. In practice, this means that foreign and domestic complainants need to know about various other avenues of redress if faced with impaired market access in an exempted area they believe is arising as a result of anti-competitive behaviour or regulatory action condoning it. Not all of these exempted business

areas maintain specific procedures regarding the handling of complaints. And even where these may be in place, they may vary in nature, raising potential issues of transparency and ease of access for affected firms.

The RCD applies to certain situations where reliance on the Competition Act becomes impossible due to “operational conflict” with another statutory regulatory regime, meaning that compliance with one piece of legislation would entail unavoidable violation of another.⁶³ In such cases the conduct at issue would be governed by the applicable regulatory regime rather than the Act. The rules respecting the operation of the doctrine apply to all companies doing business in Canada, whether domestic or foreign. Reliance on the RCD is viewed by the government as a “matter of limited application”. In general, such situations are rare and in most cases the regulatory regime and the *Competition Act* are able to co-exist without giving rise to invocation of the RCD.

On balance, there is little hard evidence to point to in establishing Canada’s record of treatment of foreign firms with respect to complaints about regulatory action or private conduct they believe impairs market access. What can be said is that depending on the nature of the conduct at issue, foreign firms enjoy the same access as domestic firms in pursuing complaints in the appropriate venue, be it the Competition Bureau (for issues concerning private conduct) or regulators such as the CRTC (concerning regulatory action that has affected their ability to do business in Canada). The Bureau could still intervene (possibly to the benefit of a foreign firm) in the latter case, but would not be the official point of contact for pursuing complaints of this nature.

The fact that no such complaints appear to have come forward in recent years is not necessarily an indication that issues of this nature do not exist; other factors, e.g. adverse perceptions about whether such recourse will lead to the desired result, may also be at play. At the same time, the Competition Bureau’s stated adherence to its main operating principles, including confidentiality, fairness, predictability, timeliness, and transparency seem to establish a sound basis for treatment of domestic and foreign parties alike. Finally, while independent regulators like the CRTC can and do entertain complaints by firms about regulatory decisions which may be impeding market access, the extent to which regulatory departments (e.g. Environment Canada or the Canadian Food Inspection Agency) can do so is less clear.

The Competition Bureau communicates and co-operates with foreign competition agencies, notably in the EU and US, both on a formal and informal basis. The Bureau has also supported pro-competitive interpretations of Canada’s international trade and investment laws, viewing foreign investment restrictions as barriers to competition and raising concerns about the competitive effects of some trade remedy laws. These points are elaborated in Chapter 3.

3. ASSESSING RESULTS IN SELECTED SECTORS

This section examines the implications for international market openness arising from current Canadian regulations in three sectors: telecommunications services; telecommunications equipment; and automobiles and components. For each sector, an attempt has been made to draw out the effects of sector-specific regulations on international trade and investment and the extent to which the six efficient regulation principles are explicitly or implicitly applied in practice -- noting that certain WTO agreements, notably the TBT Agreement, already contain clear obligations with respect to key areas such as transparency, non-discrimination, and avoidance of unnecessary trade restrictiveness.

Particular attention is paid to product standards and conformity assessment procedures where relevant, including efforts to adopt internationally harmonised product standards; use of product standards by regulators as the basis of regulation; and openness and flexibility of conformity assessment systems. The telecommunications sector is reviewed in detail in Chapter 6.

3.1 Telecommunications Services

The telecommunications service industry is a key sector of the Canadian economy, representing 2.7% of GDP, revenues of \$28.8 billion, 104,600 employees and 5.1% of total capital investment in Canada in 1999. The local market continues to surpass the long distance market in terms of revenues. Responsibility for the sector is shared by Industry Canada, which is responsible for telecommunications policy and international submarine cable licensing under the *Telecommunications Act* and spectrum policy and management under the *Radiocommunication Act*, and the Canadian Radio-Television and Telecommunications Commission (CRTC), the industry regulator. As an independent federal agency with quasi-judicial status, the CRTC has a broad range of powers under the *Telecommunications Act of 1993* to implement government policy objectives and any directions issued by the Cabinet. In keeping with these objectives, CRTC's activities over the past decade have been focused on implementation of a regulatory regime fostering competition in the sector and developing consumer safeguards appropriate to the industry structure.

Telecommunications services have been gradually opened to competition over the past twenty years as a result of successive policy and regulatory initiatives by the federal government and the regulator.⁶⁴ Domestic and Canada-US long distance competition was introduced in 1992, and a framework for local competition was announced in 1997. Another milestone was reached on October 1, 1998 with the opening to competition of the overseas long distance market and the establishment of a new regulatory framework for international services by the CRTC.⁶⁵ In fulfilment of (and sometimes surpassing) commitments taken in the 1997 WTO Agreement on Basic Telecommunications Services,⁶⁶ Canada removed foreign ownership restrictions in the areas of global mobile satellite services and international submarine cables, ended Telesat Canada's monopoly on domestic and trans-border satellite telecommunications facilities and Teleglobe's monopoly on facilities for overseas services, and eliminated traffic routing restrictions that had prevented carriers from routing Canadian long distance traffic through international facilities. Together, these measures have helped complete the introduction of competition in all segments of the telecommunications services market. Competitive entry continues as new, facilities-based entrants and resellers face the former monopolies, Bell and Telus.

Assessing the extent to which the efficient regulation principles are applied in practice in this sector requires a look at a highly specialised and unique regulatory arena. The CRTC is not subject to the requirements of the Regulatory Policy or any of its related guidelines, nor is it required to undertake a RIAS for new regulatory proposals.

The agency does have its own internal rules of procedure made pursuant to the *CRTC Act*, however. The *CRTC Telecommunications Rules of Procedure* (available online together with all other relevant statutes and regulations) set out detailed procedures to be followed by regulated companies in filing applications⁶⁷ as well as various models for interventions "by any interested person or association". As a quasi-judicial tribunal, the CRTC is required to provide appropriate opportunities for public comment before taking final decisions on issues before it.

The CRTC's extensive use of public consultation is a central feature of the Agency's regulatory activity, and foreign interests are free to participate in the process. The CRTC "Public Process" encompasses an elaborate range of consultation mechanisms varying in formality and venue. Information about upcoming Commission consultative processes can be accessed through a number of channels, including the CRTC's web site (www.crtc.gc.ca).

CRTC Decisions can be appealed through three avenues: (a) directly to the CRTC by any party, domestic or foreign; (b) to the Federal Court of Appeal (but only with regard to questions of law or jurisdiction, and not the substance of the decision); or (c) to Cabinet on any basis, including the substance of a decision (see Chapter 6). Government sources indicate that appeals processes have been rarely engaged by non-Canadian carriers. Although "on a few occasions" Canadian affiliates of non-Canadian service providers have initiated review and various applications before the CRTC or filed petitions with Cabinet. Such accounts, together with an absence of any known complaints by non-Canadians about available avenues for intervention, suggest that foreign firms face no significant hurdles either in participating in the regulatory process or in appealing CRTC Decisions – or at the very least are not disadvantaged vis-à-vis their domestic competitors in doing so.

Problems, when they do arise, tend instead to be around questions of process. The CRTC takes a best efforts approach to dealing with applications in a timely manner, for example, and must dispose of tariff applications within 45 business days pursuant to the *Telecommunications Act*. However, this is the only type of application subject to a deadline, and the time taken by CRTC to issue other types of decisions can be relatively long (see Chapter 6). This situation has prompted calls in some industry circles for approval by default – meaning that certain types of applications would be considered granted if no decision was made by a given date. But others reject this approach, arguing that it could ultimately slow things down in some cases. For now, at least, applicants can track the treatment of their applications on the CRTC web site. All of this would appear to support a conclusion that CRTC regulatory procedures are highly transparent and open.

The relationship between the federal government and the CRTC invites a slightly different line of enquiry from the perspective of market openness. Policymaking functions are held by the government, with regulatory responsibilities split between Industry Canada and CRTC. While the CRTC operates at arm's length from government, the length of the arm can vary -- certain provisions of the *Telecommunications Act* build in far-reaching discretionary government powers on a range of issues.

While rarely used in practice, the existence of such powers raises concerns about transparency. For example, s. 10 gives Cabinet the authority to issue directions of "general application on broad policy matters" to the CRTC.⁶⁸ Cabinet may also vary, rescind, or refer back CRTC Telecommunications Decisions (s.12);⁶⁹ may require CRTC to report on any matter under the Act (s.14); and may make regulations to implement various aspects of the Canadian ownership requirements (s.22). The Minister of Industry also enjoys discretionary powers to establish technical standards and require their enforcement by the CRTC; and to appoint persons to inquire into and report on any matter under the Act (s.70).

Licensing procedures applicable to foreign service providers (or Canadian-owned and controlled firms with foreign participation) also provide a useful gauge of the extent to which Canada may seek to avoid unnecessary trade restrictiveness in this sector. Licensing requirements apply in two areas of the telecommunications services market: for use of the radio frequency spectrum and for provision of basic international telecommunications services (BITS) – the rationale in the latter case being that licensing will prevent abuse of dominance in licensee's home markets to gain an unfair competitive advantage in the Canadian market. BITS licenses are issued by the CRTC, while radio spectrum licenses are issued by Industry Canada.⁷⁰ Service standards for the issue of radio licenses are available online and timelines for consideration of applications generally measured in weeks. Award of spectrum licenses can be

significantly longer, depending on the nature of the licensing process undertaken (competitive process or auction)⁷¹ and the complexity of the Canadian ownership and control review associated with the grant of a license. The latter reviews can take anywhere between two to eight months, commencing only (in the case of auctions) after a licensing decision has been rendered.

BITS applicants must be licensed by the CRTC in accordance with established entry procedures. In this case, licensing procedures seem fairly straightforward: applicants must submit an affidavit to the CRTC describing, *inter alia*, ownership structure, list of all agreements with foreign service providers; and class of license sought. Government sources indicate that this approval process typically takes one to two months. Reporting obligations subsequent to the grant of a license do not seem to be overly burdensome, with the exception of an earlier requirement to submit detailed quarterly reports to the CRTC of all international minutes (now rescinded). Chapter 6 recommends that Canada streamline market entry for facility-based international carriers, arguing that there is no reason to differentiate between market players with respect to entry procedures.

Eligibility requirements for the grant of licenses to operate wireless telecommunications networks are set out in regulation pursuant to the *Telecommunication Act* and the *Radiocommunication Act* are applied to all applicants on a non-discriminatory basis. Although the MFN and national treatment principles are not expressly articulated in any CRTC legal instrument, Canadian legislation in the sector has implemented international trade obligations and generally applied a non-discriminatory approach in those sectors which have been opened to competition. Article 27(2) of the *Telecommunications Act*, for example, prohibits a Canadian carrier from unjustly discriminating or giving undue or unreasonable preference toward any person, including itself. An additional requirement that rates charged by Canadian carriers be “just and reasonable” and the fact that interconnection is mandated in Canada combine to ensure non-discriminatory treatment in practice. In Canada’s view, the sole exception to non-discrimination in the sector is in the area of foreign investment.

It is a big exception: significant restrictions on foreign ownership in telecommunications services remain in place. Though these measures were not formally maintained prior to the negotiation of the Canada-USA Free Trade Agreement (two significant Canadian carriers had in fact long been majority-owned and controlled by a US carrier during that period), the lead-up to the signing of the FTA produced a different result. The Policy Framework for Telecommunications announced in July 1987 described Canadian ownership requirements as necessary “to ensure national sovereignty over this vital sector of the Canadian economy and for reasons of national security and economic, social, and cultural well-being”. Canadian ownership and control requirements in telecommunications services were subsequently legislated in 1993 in the *Telecommunications Act*.⁷² Together with the combined effect of the *Canadian Telecommunications Common Carrier Ownership and Control Regulations* which followed, direct and indirect restrictions now cap foreign ownership in Canadian telecommunication firms at 46.7%.⁷³ The effect of these restrictions may severely restrict access to needed capital, crippling some new entrants.⁷⁴

A possible review of foreign ownership restrictions is now before the federal government. In its June 2001 Report, the National Broadband Task Force recommended, *inter alia*, that the government conduct an “urgent review of foreign investment restrictions for telecommunications common carriers and distribution undertakings with a view to determining whether they are currently restricting or are likely to restrict increased industry participation in the competitive deployment of broadband infrastructure in Canada.” This recommendation was made in the context of ensuring that a maximum amount of capital is made available to finance the expansion of broadband access to all Canadians. The Minister of Industry is expected to announce whether or not it will undertake such a review before the end of 2001. In the meantime, the current restrictions continue to attract the attention of trading partners,⁷⁵ and some domestic firms (and the Canadian Council for International Business) have joined calls for their early removal.⁷⁶

Certain practices in the sector have been singled out for criticism as regulatory barriers to trade, but also serve to illustrate how trade frictions can be successfully resolved through regulatory action. One example is contribution charges, or a subsidy paid by all long distance service providers (until recently) to support the provision of affordable residential phone service in high-cost areas. Only long distance carriers were required to pay this contribution, and for the first five years after its introduction new market entrants benefited from contribution discounts aimed at fostering the introduction of long distance competition.⁷⁷ The United States in particular argued that the contribution charges were “unjustifiably high” and that the dominant local service companies benefiting from (and paying into) the subsidy also competed in the long distance market, placing their foreign (long distance only) competitors at an unfair advantage. The CRTC declined to reduce the contribution charges in a 1999 ruling. However, under a new “revenue-based” scheme introduced on January 1, 2001, all Canadian telecommunications service providers (not just long distance service providers) now pay a percentage of their gross telecommunications revenues (4.5% for 2001) into the fund, and service providers with \$10 million or less in revenues are exempted from paying the contribution. These changes have helped reduce the alleged discriminatory effect of the contribution charges on foreign long distance service providers.⁷⁸ Foreign business interests have applauded these changes and other recent CRTC decisions aimed at levelling the playing field between the incumbents and new entrants.⁷⁹

As substantiated in Chapter 6, there has been good progress in Canada towards the development of competition in the telecommunication service sector, but (as is the case for other OECD countries) competition is still insufficient for local telephone service and local access and in the short distance leased line market. Chapter 6 also calls for the elimination of foreign ownership restrictions in the sector, arguing that such restrictions have no place in an open competitive market framework based on the principle of non-discrimination and pointing out that their continued maintenance is likely to hinder the further development of local facilities-based competition and government’s objective to secure ubiquitous broadband access across the country.

Echoing these arguments, certain Canadian affiliates of foreign service providers have identified what they believe to be onerous regulatory barriers to effective competition in this sector. Among those most often cited are *high access costs* (despite significant investment in new facilities, new entrants still need access to former monopoly networks to reach some customers and, with the exception of essential or bottleneck facilities, cannot currently do so at carrier wholesale costs); *cross-subsidisation* (where former monopolies Bell and Telus allegedly use monopoly profits to subsidise price wars in segments of the market where they have to compete with new entrants); *operational barriers* (certain required interactions with Bell and Telus are seen as excessively burdensome); and restricted *access to capital* (the foreign investment restrictions). All of this, they claim, tilts the current regulatory regime heavily in favour of the incumbents and is sending Canada down the path of re-monopolisation.⁸⁰

On balance, however, Canada has achieved a highly competitive market for telecommunications services and a regulatory regime that displays many strengths, including from the market openness perspective. Regulatory procedures and processes fare very well in terms of overall transparency, fairness, and participatory nature. The CRTC’s commitment to the quality and inclusiveness of the Public Process appears solid, though procedural delays encountered with the treatment of some applications (and licenses at Industry Canada) may plague some service providers more than others. While certain provisions of the *Telecommunications Act* provide for the exercise of potentially far-reaching Ministerial powers in this sector (introducing an element of uncertainty for domestic and foreign service providers alike), such powers have rarely been used in practice. Though Canada’s continued reliance on foreign ownership and control restrictions and persistent regulatory barriers faced by certain new entrants detract from this otherwise positive assessment, the Canadian experience clearly has much to inform other OECD countries in their treatment of this sector.

3.2 Telecommunications Equipment

Canada's trade in communication equipment has seen impressive growth in recent years. The value of total imports in 2000 was nearly double 1996 levels, with even stronger growth on the export side (Table 5). This strong performance was due to a number of factors, including the liberalising effects of NAFTA, the 1996 WTO Information Technology Agreement and the continued competitive excellence of Canada's world-class telecommunications equipment industry. Although exports fell dramatically in the first half of 2001 as a result of the wider economic downturn, the telecommunications equipment sector has accounted for much of Canada's stellar trade performance in information and communications technologies (ICT). ICT products represented 9.6% and 17.2% of Canadian merchandise export and imports respectively in 2000, with a substantial trade deficit overall due to high imports of electronic parts and components. The United States is by far Canada's largest export market for ICT goods, and together with the Asia-Pacific region accounting for a substantial share of imports.

Table 5. Canadian Trade in Communication Equipment { TC \f t \l 2 "Table 5. Canadian Trade in Communication Equipment" }

Communication equipment	HS codes	Imports		Exports	
		1996	2000	1996	2000
Telephone equipment					
Telephone sets	85.17.11+19	168,548,717	368,317,963	268,757,811	152,279,013
Switching equipment	85.17.30	213,877,014	114,264,792	113,469,337	1,059,543,703
Other equipment	85.17.80+90	682,712,703	1,650,710,414	1,678,683,913	3,828,858,883
Radio, Telephony, Broadcasting					
Transmission apparatus	85.25.10+20	631,377,516	1,481,610,495	755,687,753	1,855,783,618
Receivers (radio/tel/broad)	85.27	757,485,327	1,013,082,036	20,564,213	124,826,481
Television receivers	85.28	377,556,554	905,961,871	45,505,289	30,755,635
Other equipment	85.29	617,643,007	1,080,676,502	318,809,875	625,641,666
Total		3,449,200,838	6,614,624,073	3,201,478,191	7,677,688,999

Source: OECD Foreign Trade Statistics, Harmonised System of Classification, Rev 2

Telecommunications and radiocommunications apparatus are regulated under the *Radiocommunications Act*, administered by Industry Canada. Wireless telecommunication is regulated under the *Radiocommunication Act* and the *Telecommunications Act* and associated regulations. As a federal regulatory authority, Industry Canada is subject to the requirements of the Regulatory Policy. New draft regulations or changes to existing regulations on telecommunications equipment must therefore meet all requirements of the federal regulatory process, including the special 75-day pre-publication requirement for technical regulations affecting trade. While voluntary standards are sometimes used in lieu of formal regulation (for inside wiring, for example), technical specifications for most tradable products in this sector are set in regulation.

A key consultative mechanism for telecommunication terminal equipment is the Terminal Attachment Program Advisory Committee (TAPAC), an industry forum advising government on telecommunications terminal equipment issues. A creation of Industry Canada, TAPAC's mandate is to recommend to government technical requirements and procedures for the attachment of terminal equipment to the facilities of telecommunications service providers to prevent harm to the network; to identify needs for standards and refer them to standards development organisations as appropriate; and to

advise the Department on “other relevant matters” as appropriate. The Committee includes representatives of provincial governments, telecommunication service providers, equipment supply industry, testing laboratories, user groups and federal government officials assembled in accordance with a balanced “membership matrix” to ensure inclusiveness of affected stakeholders. Membership in TAPAC or its task forces is open “to all organisations directly involved in or materially affected by any form of terminal equipment attachment issues in Canada.”⁸¹ Foreign parties can, and have, participated in TAPAC, sometimes resulting in the addition of regulations permitting a new type of equipment of their suggestion.⁸² Finally, all information about TAPAC’s deliberations and procedures is available on the Internet,⁸³ supplemented by a free electronic notification service for registered subscribers.

Foreign firms seeking information about telecommunications and radiocommunication equipment regulations may do so through a number of avenues. A key resource is Strategis, Industry Canada’s comprehensive web site for business and consumers. Sector-specific information is posted here⁸⁴ once official and includes searchable databases of terminal and radio equipment certified to Canadian requirements. In addition, as required by the regulatory process, all new or changed regulations are “pre-published” in the *Canada Gazette* (with comment period) and notified to the WTO through the SCC Enquiry Point. Comments can be made via the Internet and are collectively displayed at the end of the comment period on Industry Canada’s web site. Pursuant to the *Industry Canada Act*, the Minister of Industry may also fix user fees for some aspects of the regulatory process (e.g. hard copy mailings of certain documents), but must consult before doing so.

Standards-related issues and their potential to restrict trade are of particular importance in this sector given the pace of technological advances in the field, resulting dynamism of constantly-evolving industry standards, and the wide range of products manufactured to standard. Because equipment standards sometimes serve as the basis of regulation in this sector (regulators do not always use standards to regulate), efforts to ensure transparency in their development are just as critical as transparency in the regulatory process.

No special procedures are in place for the development of telecommunications equipment standards, though SDOs must abide by the principles of CAN-P-1D and by reference, the WTO TBT Annex 3 Code. In practice, working documents and information regarding new standards for radiocommunication equipment (or changes to existing standards) are made available through various mechanisms and at different stages of the standards development process, relevant working documents are typically posted on the web sites of the advisory board or association representing interested stakeholders, and can also be made available at the request of other interested parties, including foreign interests. Following an initial round of consultations, provisional standards are published in the *Canada Gazette* with a public comment period ranging from 30-120 days, depending on the complexity of the issue. “Gazetted” standards are publicly available at the Strategis site.⁸⁵

Also worth noting in this context is Section 15 of the *Telecommunications Act*, which allows the Minister of Industry to establish technical standards and require their enforcement by the CRTC. While this authority has never been used to date, any exercise of Section 15 authority in future would require prior consultation with the CRTC and publication in the *Canada Gazette* with public comment period.

Technical regulations in this sector take the form of technical specifications, which may incorporate voluntary standards developed by industry and other stakeholders. In response to an identified need for a new specification, government policy requires Industry Canada to first determine the availability and suitability of an international standard, regional, or national standard, in that order. The industry is closely involved in the development of standards and has been promoting reliance on international (primarily ITU) standards. In reality, however, most Canadian specifications tend to be expressed in terms of regional, North American standards (such as those developed by the US-based Telecommunications

Industry Association) simply because available international standards are not suitable for Canadian purposes. North American and European networks use different (non-interchangeable) standards, and terminal equipment manufacturers have to build to connect to one of the two networks. In addition, the pace of technological change in this sector is such that there is often a significant lag time between the emergence of a new technology and the development of a relevant international standard, with the result that international standards tend to be used for older technology. In sum, though Canada participates in the development of international standards for telecommunications equipment, the extent of actual reliance on such measures appears to be rather low in practice.

Imports of telecommunications and radiocommunication equipment into Canada are currently regulated through the use of technical specifications, marking requirements, and certification requirements where applicable. As required by the *Telecommunications* and *Radiocommunication Acts*, all telecommunications or radiocommunication equipment must be tested, and certified in some cases, with a clear, blanket prohibition in the legislation against the importation of equipment which does not meet the relevant technical specifications, marking, or certification requirements.⁸⁶ How these requirements are implemented in practice offers an opportunity to assess avoidance of unnecessary trade restrictiveness.

Technical Acceptance Certification Standards setting out minimum requirements for type of approval are developed for various types of radiocommunication equipment. The Radio Advisory Board of Canada provides industry advice to Industry Canada in the development of these standards, and all proposed certification standards are published in the *Canada Gazette* for public comment. All certification standards are available online.⁸⁷

Where they exist, mutual recognition arrangements in this sector help streamline conformity assessment (certification) processes. Canada has concluded MRAs on telecommunications equipment with the European Community, Switzerland, the EEA-EFTA states (Norway, Iceland, and Liechtenstein), Korea, APEC member economies, and the Inter-American Telecommunications Commission (CITEL) member states. The operational impact of these agreements depends on the “phase” of the applicable MRA: in Phase I, testing to Canadian standards may be done by Industry Canada’s Certification and Engineering Bureau, by accredited Canadian Laboratories, or by foreign laboratories designated by their respective authorities. In Phase II of MRA implementation (to be implemented in the near future), Canada’s MRA partners will be able to designate Certification Bodies that can certify foreign product for compliance with Canadian requirements, without Canada’s direct involvement.

As a result of impending Phase II implementation (and the adoption in many countries of different approaches to declarations of conformity), more and more conformity assessment functions will either be performed by manufacturers themselves or by organisations outside of Canada. This has led Industry Canada to conclude that it will need to be much more active than it has been in what it calls “market surveillance activities.” Implementation of a new Importation Monitoring Programme for radio and telecommunications equipment is now underway following public consultations involving the importing community and other interested stakeholders.⁸⁸ The Programme is based on a bi-level “managed risk” approach to monitoring imports that would be escalated only if non-compliance detected in imported product under the “First Approach” persists. Comments received during public consultation revealed a preference for the First Approach, with the heavier scrutiny and trade implied by the Second Approach serving as a reserve for now.

The more targeted nature of the Importation Monitoring Approach (which focuses on high-risk shipments rather than imposing new documentation requirements on all imports) was expressly designed with a view to avoiding unnecessary trade restrictiveness. At least until the events of September 11, 2001, the tendency had been to implement the new approach in a way that favoured movement of goods across the border – for example, by allow provision of required information after release of goods into Canada

instead of at or before time of release. Canada's continuing experience with the Importation Monitoring scheme and its impact (if any) on the importing community and foreign manufacturers remains to be seen, and may offer a useful test case to trade-friendly approaches to MRA and post-MRA implementation.

Canada has evaluated the merits of moving to a self-declaration approach as an alternative approach to certification, and a registration process based on a declaration of conformity is expected to take effect in Canada by early 2002 for terminal attachment equipment only.⁸⁹ A declaration of conformity approach requiring testing by designated/recognised testing laboratories will be implemented. This will ensure a higher level of scrutiny and is considered to be more appropriate in Canada than other approaches to declarations of conformity.⁹⁰

On balance, existing consultative mechanisms, approaches to standards development, and a wealth of related online material suggest there have been reasonable efforts to ensure transparency and openness of decision-making in the telecommunications equipment sector. While the sector exhibits an uneasy relationship with the concept of internationally-harmonised measures, the significant resources that have gone into the pursuit of sector-specific MRAs and recent move towards declarations of conformity demonstrate a sustained will to minimise unnecessary trade restrictiveness and embrace more efficient ways of doing things. The creation of the Telecommunications Apparatus Regulations (pre-published with an accompanying RIAS in Part I of the *Canada Gazette* of September 29, 2001) is also expected to facilitate MRA implementation by requiring all distributors, vendors, and importers of all telecommunications apparatus to comply with Canadian standards. The stated aim of these new regulations, which are being developed, with the support of international MRA partners, is to create a more level playing field in the market.

3.3 *Automobiles and components*

Due to the historic dynamism of global economic activity in the sector and traditionally interventionist policies of some governments aimed at protecting domestic automotive industries, trade tensions related to domestic regulatory issues in general and standards and certification procedures in particular have long figured on bilateral and regional trade agendas. This reflects the fact that automobiles remain among the most highly regulated products in the world, primarily for reasons relating to safety, energy conservation and the environment. Divergent national approaches to the achievement of legitimate domestic objectives in these key policy areas are therefore likely to remain a significant source of trade tension as global demand for automobiles continues to rise.

Canada's production of motor vehicles exceeded three million units for the first time in 1999, up by more than 54% from the production level achieved in 1990. The vitality of Canadian production contradicts initial fears that the Canadian automotive industry could not compete with low-wage production in Mexico under NAFTA freer trade conditions. Between 1994 and 2000, more than \$CAN 27 billion was invested in new capital expenditure in the Canadian automotive industry reflecting the general economic expansion in North America and advantageous competitive conditions. Among the factors that contribute to the attractiveness of Canada for the automotive industry are: proximity to the core North American markets, high quality transportation infrastructure, world class technology, high labour productivity, low labour costs relative to the USA, and subdued inflation despite the depreciated Canadian dollar. Table 6 shows that Canada has generated an increasing trade balance surplus in the automotive sector throughout the 1990s.

The overall trade balance figure masks some basic underlying trends, however, with a structural deficit in parts trade and a huge surplus in assembled vehicles that more than offsets the parts deficit. Canada's only export destination, the United States, largely reflects the deep integration of the North American automobile market. Throughout the 1990s, the percentage of total exports destined to the United States remained basically stable at around 97%. In the same period, import shares from the United States and Mexico both increased with an offsetting decline in the Japanese import share.

Table 6. Canadian Automotive Trade, 1990-2000 { TC \f t \l 2 "Table 6. Canadian Automotive Trade, 1990-2000" }

Automotive Trade	1990	1995	1999	2000
	Value of Total Exports and Imports (Millions of \$CAN)			
Total Exports	32,067	58,784	86,572	86,858
Total Imports	26,458	54,165	59,895	61,854
Trade Balance	5,609	4,619	26,677	25,004
	Shares of Total Trade (% of Total)			
Exports by destination				
USA	97.4%	94.8%	97.8%	97.4%
Imports by Origins				
USA	76.3%	83.8%	82.0%	79.2%
Mexico	1.6%	4.8%	4.0%	5.7%
Japan	14.2%	6.3%	7.6%	8.2%
Others	7.9%	5.1%	6.4%	6.9%

Source: Canadian statistics, HS 87, www.strategis.gc.ca

An integrated automobile market has been historically encouraged between Canada and the United States, and harmonisation of technical requirements and certification procedures were major elements of the Auto Pact of 1965. Since then, the CUSFTA (1989) and the NAFTA (1994) have both contributed to a consolidation of the harmonisation process, and NAFTA brought Mexico into the integrated North American automobile market. Today, the majority of technical requirements and certification procedures for passenger cars are harmonised between Canada and the USA, and Mexican technical requirements and certification procedures are, by virtue of NAFTA provisions, subject to a market and regulatory environment leading towards deeper harmonisation in the automobile sector.⁹¹

Transport Canada promulgates and enforces Federal road safety and motor vehicle regulations, mainly pursuant to the *Motor Vehicle Safety Act*. Environmental regulations are promulgated and enforced by Environment Canada, mainly under the *Canada Environmental Protection Act* (CEPA). Following consultations, draft regulations are published in the *Canada Gazette* together with the required regulatory impact assessment before final publication. Conformity of technical standards, both safety and environmental, is based on a self-certification system by manufacturers. Safety and environment are shared responsibilities between the federal government and the provinces.

It is estimated that the overwhelming majority of safety and environmental regulations are harmonised between Canada and the USA for road vehicles. The process of harmonisation of standards is facilitated under the *Motor Vehicle Safety Act* by recourse to the legislative technique found only in the motor vehicle legislation and entitled “technical standards documents” (TSD). The TSD is a very specific type of standards document dealing with enactments of a foreign government. TSDs are subject to mandatory regulatory process requirements, including consultation and publication, but amendments to them are not subject to consultation requirements. However, there are a number of safeguards built into the elaboration process for TSD amendments, including a review mechanism and a six-month grace period for complying with a TSD. At the outset, the TSD and TSD amendment processes enable faster harmonisation of automobile-related standards with standards of foreign countries. Reflecting the integrated automobile market in North America, the TSD procedure has been extensively used in respect of regulations in force in the USA. To date, no known complaints have emerged about any adverse uses of this legislative technique.

Notwithstanding the relative importance of its integration within the North American automotive market, Canada has demonstrated interest in pursuing multilateral initiatives designed to minimise regulatory heterogeneity in the sector and acceded to the 1998 Global Agreement (Box 6). The development of global technical regulations is expected to result in closer harmonisation of North American regulations with those of other countries and regions. Regulations developed under the Global Technical Regulations will be considered as a basis for certification of motor vehicles to be sold in Canada as they become available. At the present time, there are no global technical regulations developed and listed in the Compendium of Candidates or established in the Global Registry.

Box 6. Global Technical Regulations for Wheeled Vehicles

In recent years, support was voiced for strengthening the legal and administrative capacity of the 1958 Agreement of Working Party 29 of the United Nations - Economic Commission for Europe (UN-ECE) as the principal body for common development of technical standards and regulatory requirements for motor vehicles. A new Agreement was concluded in June 1998 on Global Technical Regulations for Wheeled Vehicles, which will facilitate the full participation of countries operating either the type-approval or the self-declaration systems of conformity of standards. The UN-ECE Global Agreement is entitled “Agreement concerning the establishment of global technical regulations for wheeled vehicles, equipment and parts, which can be fitted and/or be used on wheeled vehicles”. The 1998 Agreement opens up the possibility of establishing “global technical regulations” proposed by its contracting parties and approved by consensus. The new Agreement entered into force on 25 August 2000. As of October 2001, its contracting parties were: Canada, China, the EU, Finland, France, Germany, Hungary, Italy, Japan, the Republic of Korea, the Russian Federation, South Africa, Turkey, the United Kingdom and the United States.

With about 90% of total imports originating from NAFTA partners, the Canadian import tariff on passenger vehicles applies on a small fraction of total imports, originating mainly from Japan, the European Union, and Korea. The import tariff on passenger vehicles has been steadily declining from 17,5% in 1968 to 9,2% in 1994 and 6,1% in 2001 as a result of Uruguay Round tariff reduction commitments. Vehicle imports from the USA that meet the NAFTA rules of origin enter Canada on a duty-free basis. Imports from Mexico that satisfy the NAFTA rules of origin are still subject to a 1.8% duty in 2001 and will be duty-free in 2003 in accordance with the agreed NAFTA schedule of tariff reductions.

Some provisions of the Auto Pact, grandfathered in NAFTA, were found to be inconsistent with Canada’s WTO obligations in early 2000 under dispute settlement procedures requested by Japan and the European Commission. These provisions allowed certain vehicle manufacturers, who were members of the Auto Pact, to import into Canada vehicles on a duty-free basis subject to performance requirements on production-to-sales ratios and minimum commitments on value-added content. In particular, Japanese

vehicle manufacturers that had significantly invested in Canada complained that they did not benefit from the tariff exemption as the vehicle manufacturers grandfathered under the Auto Pact.

Canada removed the production-to-sales ratios from the Motor Vehicles Tariff Order (MVTO) in September 2000 and repealed the MVTO in its entirety in February 2001 to fully comply with its WTO obligations. The vehicle manufacturers that formerly benefited from the Auto Pact status are now paying the 6.1% duty on their non-NAFTA originating vehicle imports. In assessing the likely impact of these legislative changes, Canada came to the conclusion that the Auto Pact performance requirements had been largely overtaken by events and in effect were not constraining manufacturers. While Canada has decided against any unilateral tariff reductions for motor vehicles, Canada is however prepared to consider tariff reductions in the context of multilateral trade negotiations.

In moving from CUSFTA to NAFTA, the definition of regional content was redefined in finer detail and higher levels of regional content were prescribed for conferring the duty-free status for intra-regional trade. NAFTA's automotive rules of origin provide that at least 50% of a light vehicle's net cost (excluding cost of royalties, sales promotion, packaging and shipping, and limiting the cost of interest) must be of value originating in North America for the period 1994-97. In 1998, this value increased to 56% and in 2002 it will reach 62.5%. All other vehicles must meet a requirement of 50% for the 1994-97 period, 55% between 1998 and 2001 and 60% thereafter. The higher level of regional content acts as an incentive for manufacturers to source inputs from regional suppliers and thus disfavors inputs from third countries. Determining the regional content of engines, transmission and other parts requiring multiple components can become burdensome for manufacturers in complying with the regulations and can also represent complex tasks for Customs officials for verification purposes.

Canada's core competitive advantages in the automotive sector greatly hinge on free market conditions and efficient transportation and border infrastructure to meet the requirements of just-in-time delivery and production. Against the prospects of less favourable world-wide economic expansion and substantial excess production capacity in the automotive sector throughout North America and the world, Canada should strongly resist ill-advised calls for trade protection to shield domestic production. It should also play an active role in multilateral fora to work towards freer market access in the automotive sector world-wide.

4. CONCLUSIONS AND POLICY OPTIONS FOR REFORM

4.1 *General assessment of current strengths and weaknesses*

The picture that emerges for Canada is broadly positive, but certain weaknesses must be addressed if the country is to capitalise on gains to date and lessons learned during its long experience with market openness and regulatory reform. This section assesses Canada's current strengths and weaknesses in enhancing market openness through regulatory reform with a view to clarifying policy options for the way ahead. The analysis takes as its point of departure a ready acknowledgement of Canada's solid achievements to date in embracing the efficient regulation principles. Canada's track record is worth emulating in many respects and there is much in the Canadian experience to inform good regulatory practice in other OECD countries. While Canada currently faces important opportunities to address certain systemic shortcomings, identified weaknesses in the country's regulatory regimes, processes, and practices need to be understood in the broader context of its success stories. The critical analysis and related policy recommendations that follow are invitations to regulatory authorities and trade policy makers alike to forge ahead in setting a bold regulatory agenda at a time when the economic gains of the last decade may be tempting complacency.

The six efficient regulation principles that formed the basis of this review are not expressly codified in Canadian law, but there have been good attempts to promote their expression in practice. This has been achieved primarily through the federal *Regulatory Policy* and its Appendix A on International and Intergovernmental Agreements, which together establish clear benchmarks for federal regulators on how to regulate from the perspective of market openness. Directly or indirectly, in full or in part, the Regulatory Policy addresses all six efficient regulation principles. The Policy applies to secondary legislation only but primary legislation is disciplined by a range of other instruments, albeit with less focussed attention to the trade dimension.

The Policy and wealth of related guidance available to federal regulators leave little doubt about the seriousness with which the regulatory process is approached in Canada and the conceptual strengths of the prescribed framework within which it is supposed to unfold. Regulatory processes are on balance highly *transparent and open*. Procedural requirements to consult both inside and outside government, the heavy investment of resources in new approaches to consultation with stakeholders, the requirement to pre-publish draft regulations with clearly-defined opportunities for public comment – all of this combines to create a highly favourable impression about accessibility and transparency of regulatory activity across government. Technical regulations and standards are developed in accordance with state-of-the-art international disciplines, all of which have been explicitly transposed in domestic policy instruments. Harnessing of the Internet in support of transparency and consultative procedures has further enhanced this performance. Despite this impressive track record, some business groups continue to express certain concerns about how consultations are undertaken and run. Still others complain about a lack of transparency and institutional flexibility for challenging existing regulations or interpretations thereof. At the same time, however, many stakeholders also admit to an element of “consultation fatigue” arising from extensive solicitation by government to participate in the rule-making process. On balance, workable solutions to any shortcomings would seem to be within reach, and could undoubtedly be achieved through improved government-to-business dialogue on mutual expectations around the consultation process and greater clarity on what needs to be addressed and how.

Certain measures, including foreign ownership and control restrictions in a range of (primarily service) sectors and regulatory barriers affecting the ability of foreign firms to compete on a level playing field with domestic firms, e.g. in telecommunications services detract from Canada’s generally positive record on *non-discrimination*. Canadian participation in preferential trade agreements and heavy orientation towards NAFTA has traditionally complemented multilateral trade liberalisation efforts, and to date this mutual complementarity seems largely unchallenged. Nonetheless, Canadian approaches and attitudes towards transparency of existing and emerging regional trade agreements (NAFTA and FTAA), avoidance of discriminatory effects through mechanisms such as rules of origin, and deepening of regulatory ties (notably through regional standardisation activities) will provide important opportunities for assessing Canada’s commitment to ensuring non-discrimination in practice.

Canada’s long experience with regulatory impact analysis illustrates a commitment to the pursuit of high-quality regulation and informed public debate and decision-making. Federal regulators are clearly directed to assess possible impacts on business, trade and competitiveness as part of their overall cost-benefit analysis, the results of which are widely available to interested parties. Given the Government’s self-stated reliance on regulatory impact assessment as its principal tool for *avoiding unnecessary trade restrictiveness*, however, more effective use should be made of the regulation-making process to explicitly assess impacts on international market openness. The effectiveness of this tool in avoiding unnecessary trade restrictiveness also depends on regulatory culture, the degree to which regulatory authorities engage on market openness generally, and their collective expertise in avoiding unnecessary trade restrictiveness and designing trade-friendly regulation. Regulatory authorities must have the requisite awareness, skills and commitment to meeting legitimate policy objectives without unduly compromising market openness. Optimising use of the RIAS from a market openness perspective can only heighten the effectiveness of

other initiatives aimed at ensuring respect for this efficient regulation principle, including impressive achievements in the areas of business simplification and trade facilitation. All levers need to be pulling in the same direction.

Canada has gained experience and learned lessons from its use of *mutual recognition* approaches, and is taking innovative approaches towards other forms of regulatory co-operation, such as regulatory harmonisation with the United States. Such initiatives may yield important advances for market openness, but with the strong caveat that they not create potential for discriminatory effects on non-participating countries. Canada's record of reliance on and participation in the development of *internationally-harmonised measures* such as international standards seems reasonably strong (recalling that an estimated 78% of National Standards are based on international standards), though practical constraints may inhibit their wider expression in practice in some sectors.

A consistent record of *application of competition principles from an international perspective* in practice is difficult to establish, mainly because there does not appear to be a documented foreign caseload to illustrate this, but the institutional mechanisms and approaches for observing this principle seem to be in place. Foreign firms have access to the same avenues as domestic firms in pursuing complaints, but may also face some of the same obstacles they may encounter, including timely treatment of complaints and a lack of transparency around initial determinations.

Broader systemic and regulatory management issues must also be addressed if Canada is to enhance market openness through regulatory reform. If the Regulatory Policy is worth emulating in most respects, it is undermined in practice by lack of consistent implementation by regulators. Several procedural shortcomings come to the fore here: regulators continue to enjoy considerable discretion on how they implement the requirements of the Policy, resulting in a patchwork of individual regulatory practice by department; there is either a lack of awareness about the requirements of the Policy itself or a lack of knowledge about how to meet them; regulatory impact analysis, though required, varies in quality and does not consistently weigh implications for market openness; there is no ongoing requirement on how the Policy is being implemented in practice. The combined effect of these weaknesses may ultimately undermine competitive conditions for domestic and foreign firms alike. As a result of their own study of the RIA process and the RPMS reviews, regulatory departments and PCO are introducing measures that will address many of these shortcomings.

Persistent and sometimes wide-ranging regulatory differences across Canada's provinces and territories are viewed by domestic business groups as highly significant barriers to internal trade. The entry into force of the Agreement on Internal Trade in 1995 was widely heralded as an important step in the right direction, but lagging progress towards implementation of the Agreement has damaged prospects for a near-term solution to inter-provincial barriers to trade and the creation of an integrated internal market. Many of these barriers are regulatory in nature. The extent to which these domestic grievances are shared by foreign firms is unclear, but may be affecting investment decisions and distorting trade flows. In the meantime, Canada continues to face what it itself calls an "image" problem as a place to invest, with conflicting views about the actual extent of cumulative regulatory burden on business being advanced by different sides. This sends a mixed message to potential investors, even as Canada continues its world-wide bid for investment and pursues initiatives aimed at reducing administrative burden on business. Finally, while provincial regulatory practices were beyond the scope of this paper, sub-national governments clearly hold a missing piece to the puzzle of regulatory reform in Canada. The need to identify workable federal-provincial approaches to regulatory co-operation and the broader challenge to achieve domestic harmonisation of trade policy present important opportunities for enhancing market openness.

The extent to which Canada's legislative framework is fostering a pro-competitive regulatory environment is somewhat unclear, and certain aspects may be hindering Canada's pursuit of greater market openness. Although the WTO and other trade agreements have served as important drivers of regulatory reform on this issue, current design features of Canadian legislation may be inhibiting their implementation in practice. For example, many current legislative frameworks do not include authority for the development of performance-based regulation – an important tool for avoiding unnecessary trade restrictiveness. Regulators are thus faced with the obligation to use performance-based requirements as the basis of domestic regulation wherever possible, but lack the legal authority to do this in practice. As a result, major pieces of legislation, such as the *Food and Drugs Act*, often constrain regulators to adhere to the command-and-control, prescriptive style of regulation and perpetuate an old-style approach ill-suited to the dynamics of good regulatory practice in general and trade and investment-friendliness in particular. And even where there have been moves to build more flexibility into regulatory compliance (an approach once embraced but ultimately defeated in the proposal for a *Regulatory Efficiency Act*), the power of special interest groups to dissuade government from trusting business to “do the right thing” to achieve a regulatory objective risks paralysing government's intentions in this area.

Relatedly, regulators may not be fully versed in the range of tools available to them to design trade-friendly regulation, such as using international standards as the basis of domestic regulations and the different methods that exist, e.g. incorporation by reference, for incorporating them into law. There also appears to be scope for greater consideration of alternatives to regulation (see related discussion in Chapter 2). There are no real incentives for regulators to do this, particularly where regulations may be generating revenues, and certain legislation sometimes prevents regulators from exploring alternatives to regulation altogether. Finally, there seems to be scope for greater and possibly more formalised involvement of the trade policy community in vetting draft regulations from the perspective of market openness. As things stand now, the trade policy community relies mainly on informal contacts to bring its expertise to bear.

The Canadian Government should take further steps to deal with the new challenges arising from a globalised economy for the benefits of Canadians. Trade agreements are an important driver of regulatory reform, but observance of their disciplines defines the floor, not the ceiling, of what governments must do to enhance market openness through regulatory reform. They can opt to do more, yet the prevailing attitude in Canada may be best described as a minimalist approach. Regulators are encouraged to do what is necessary to ensure compliance with international trade obligations – no less, but certainly no more. The case for going further – embracing an expressly pro-competitive regulatory framework which goes beyond existing trade obligations – seems particularly compelling in a country which has everything to gain from open markets.

For now, trade and regulatory policy in Canada seem at a critical crossroads. With much of the work of reducing traditional trade barriers (border measures) behind them and social regulation emerging as what some in Canada consider the “focus of the future”, Canada and its trading partners will be increasingly engaged on the kinds of behind the border measures that determine quality of market access. Approaches to pursuing legitimate policy objectives in key areas such as food safety and environmental protection will be critical tests of Canada's continuing commitment to the efficient regulation principles. Ensuring coherence and mutual complementarity of trade and regulatory regimes, processes and practices must be the new decision-making paradigm in Canada as elsewhere.

4.2 *The dynamic view: the pace and direction of change*

The pursuit of trade liberalisation and commitment to the rules-based multilateral trading system over the years have served Canada well. Together with the progressive widening and deepening of preferential trade agreements, particularly NAFTA, moves towards greater market openness have paved

the way for a steady expansion of two-way trade and investment. Adjustment costs experienced by some domestic industries in the wake of trade liberalisation have been lower than initially anticipated, and the *bilan* has been decidedly positive: Canada has benefited handsomely from market openness, and has effectively channelled the gains from trade in support of its high standard of living and the kinds of social policies and programs that, for many, define in part what it is to be Canadian. Open markets have always been seen by Canadian policymakers as the means to an end – a ticket to prosperity, a driver of economic growth. While many in Canada argue about the means to the end, few would contest that open market policies have largely delivered on this promise.

Despite these very significant gains, a renewed endeavour is necessary to deal with the unfinished work of market openness. Foreign competition in certain key sectors, such as telecommunications services and air transport, remains tightly restricted. There seems to be no real urgency around pursuing this agenda. For example, while there has been some pressure to ease foreign ownership restrictions in the air transport sector, Canada, like most other countries, has chosen to maintain these restrictions. In Canada's view, international progress in easing foreign ownership restrictions in the sector has been at a pace acceptable to the countries involved. Against this backdrop, Canada's support for a new round of multilateral trade negotiations has focused primarily on agriculture, the sole issue on which it is a true demandeur at this time.

Canada's long experience with regulatory reform has unfolded with less visible impact and public engagement than trade liberalisation initiatives. Efforts to improve the quality of regulatory proposals and streamline regulation have yielded results in many areas over the years, but the cumulative gains from this experience seem not to have been clearly articulated by government or readily grasped by regulatees or the public at large. A sense of regulatory reform fatigue has taken hold in recent years, deepened by what may be a creeping complacency or lack of political will, or tools, to restart the process on a note that would resonate with both business and citizens – this, ironically, at a time when public awareness and interest in regulatory issues appears to be on the rise and pressure to regulate (mainly from civil society groups) is growing. And as pointed out in Chapter 2, the apparent absence of any significant public concerns (if not tacit support) about the course of regulatory reform in Canada to date is a substantial asset on which Canada has yet to capitalise.

Against this backdrop, cracks in Canada's economic performance are beginning to appear, notably the widening productivity gap with the United States. The unfinished business of trade liberalisation and loss of momentum on broader regulatory reform loom large in this context, and must be revisited if broader efforts to arrest adverse economic trends are to be successful. At this advanced stage of the Canadian experience with both policy areas, the opportunity to ensure overall coherence between trade policy and regulation while pursuing an expressly pro-competitive regulatory environment should not be missed. The concluding section seeks to draw this out in specific policy recommendations.

4.3 *Policy options for consideration*

This section identifies possible avenues for enhancing market openness through regulatory reform for consideration by the Government of Canada. The following recommendations are based on the analysis presented in this paper and the specific policy recommendations set out in the 1997 OECD Report to Ministers on Regulatory Reform, which drew on international consensus on good regulatory practices and on the collective experience of OECD countries.

1. *Develop a strategy to ensure greater coherence between trade and regulatory policy, in particular by identifying elements of an expressly pro-competitive regulatory framework*

Domestic business groups continue to maintain that the existing regulatory framework does not fully support competitive business behaviour. Specific concerns around adequacy and inclusiveness of consultation, avenues for appeal of existing regulation, and analysis of cumulative regulatory burden on business need to be squarely addressed. Elements of a pro-competitive regulatory framework should be implemented on a non-discriminatory basis.

2. *Continue to work toward opening up the market to foreign competition and remove regulatory barriers to competition between domestic and foreign firms*

Review foreign ownership restrictions by sector with a view to clarifying the costs and benefits for their continued maintenance. Available evidence points to the mounting costs of maintaining protectionist policies (mainly in certain service sectors) and in some cases the case for further liberalisation is being led by domestic business itself. Costs to consumers, on the other hand, have not been systematically quantified, nor has any possible link between protectionist policies and the productivity gap been explored.

3. *Require annual reports from federal regulatory authorities describing implementation of Appendix A of the Regulatory Policy*

There is currently no systematic monitoring of implementation of Appendix A (Obligations for Regulators with respect to International and Intergovernmental Agreements) or the Policy generally by federal regulators, rendering these important tools largely under-utilised in practice. Requiring annual performance reports would establish a basis for identifying and encouraging best practices from the market openness perspective and contribute to regulators' skill in recognising and handling trade-related regulatory issues. Regulatory authorities could submit such reports to PCO or DMCT.

4. *Improve quality control of RIASes and provide clear guidance to regulators for the development of trade and investment-friendly regulations*

Current guidance for regulatory impact analysis requires RIAS writers to assess possible impacts on trade and investment in addition to other competing criteria. However, uneven quality of RIASes at source and inadequate quality control as they advance unchallenged through the system strongly suggest that the market openness dimension is not being consistently and thoroughly explored. While pre-publication in the *Canada Gazette* may serve as the ultimate check and balance to catch any such failures, this should not absolve regulatory authorities of the duty to fulfil existing requirements to the very best of their ability. Where this ability is lacking, training initiatives should close the gap. Regulators should also have clear information on how to craft regulations in trade-friendly terms, including through the use of standards, and have incentives to develop creative, viable alternatives to regulation.

5. *Undertake an across-the-board legislative renewal to ensure regulators have scope and authority to develop pro-competitive, trade and investment-friendly regulation*

This should begin with an update of legislative frameworks to allow scope for designing regulations in terms of performance rather than design or descriptive characteristics wherever appropriate and create scope for consideration of regulatory alternatives where this does not already exist.

6. *Develop a forward-looking government-wide strategy for regulatory co-operation with other countries*

Regulatory co-operation initiatives (including harmonisation efforts where appropriate) are currently unfolding in the absence of a government-wide strategy on ultimate objectives at both domestic and international levels. A checklist of trade-friendly criteria should apply to the pursuit of such initiatives to minimise potential for discriminatory effects on non-participating countries and ensure that such efforts are consistent with a broader strategy.

7. *Accelerate implementation of the Agreement on Internal Trade*

While substantial progress has been made towards implementing the AIT, much remains to be done to complete existing obligations under the Agreement. Lagging implementation in some areas is undermining business and possibly investor confidence. Concerted political leadership will be required to re-establish momentum in implementing this Agreement as a matter of priority to achieve an integrated internal market in Canada.

8. *Broaden institutions and mechanisms for further federal-provincial co-operation on trade and regulatory issues*

An initial focus could be the challenges presented by standards-related issues and possible approaches to reducing barriers to trade and investment while fulfilling health and safety objectives. Existing federal-provincial consultative mechanisms could be used to engage relevant players in this policy dialogue.

NOTES

- ¹ See “A Historical Perspective on Regulatory Reform: Institutions and ideas after the Regulation Reference” by Margaret M. Hill, Ph.D., Strategic Directions and Policy Co-ordination, Environment Canada, May 6, 1998.
- ² See UNDP’s Human Development Report 2001, available at www.undp.org/hdr2001. The ranking relies on a composite measure that includes life expectancy, educational enrolment, adult literacy and income per person.
- ³ MCs may also be prepared in a range of other scenarios, including at the direction of the Prime Minister or by Cabinet decision, in response to requests or recommendations from Parliamentary committees, or in cases where a policy or program initiative may require a Cabinet decision before action.
- ⁴ See *Memoranda to Cabinet: A Drafter’s Guide* (June 2000).
- ⁵ The Notice of Intent is optional. While intended to solicit public views during the “early stages of problem definition”, it does not preclude the need for later pre-publication of a draft regulation in Part I of the *Canada Gazette* or for general consultation with stakeholders during the development of the related policy and regulation itself.
- ⁶ See “Planned Regulatory Initiatives” at page 88 of Environment Canada’s 2001-2002 RPP.
- ⁷ Meeting with members of the Canadian academic community (June 2001).
- ⁸ See www.dfait-maeci.gc.ca/tna-nac.
- ⁹ The *Canada Gazette* can be accessed at www.canada.gc.ca/gazette/gazette_e.html.
- ¹⁰ Certain regulations and classes of regulations are exempted from publication in Part II by section 15 of the *Statutory Instruments Regulations* made pursuant to section 20 of the *Statutory Instruments Act*.
- ¹¹ See Part C of the *Guide to the Regulatory Process* (April 2001)
- ¹² Interviews with members of Canadian business groups, June 2001.
- ¹³ Meetings with domestic business associations (June 2001).
- ¹⁴ “Urgent circumstances” would typically mean urgent problems of safety, health, environmental protection or national security. The concept is addressed in Article 2.10 of the WTO TBT Agreement, Annex B of the WTO SPS Agreement, and Article 909.4 of the NAFTA.
- ¹⁵ Notifications to the WTO are made available to other Members on the WTO’s Document Online Service.
- ¹⁶ Meeting with domestic business associations (June 2001).

17 While operating at arm's length from the federal government, 50% of the SCC's activities are government-funded.

18 See, for example, NAFTA Article 909(d) which requires Parties to "allow other Parties and interested persons to make comments in writing and shall, on request, discuss the comments and take the comments and the results of the discussion into account."

19 Because they are often closest to the combined needs of interested stakeholders, however, SDOs are sometimes well placed to lay the groundwork for the development of a new standard. In maintaining the Canadian Electrical Code, for example, the CSA may be the first to identify the need for new work in a given area.

20 In the United States, for example, some SDOs prepare standards in-house and only then distribute them for wider comment by interested stakeholders.

21 Foreign firms serving on voluntary standards committees in their own countries may also hear about and contribute to efforts underway in Canada through this avenue.

22 OECD document entitled: Government Procurement: A Synthesis [TD/TC/WP(2001)17/FINAL].

23 The Third Protocol of Amendment to the AIT added a new annex dealing specifically with procurement by municipalities and their organisations, school boards and publicly funded academic, health and social service entities. The provisions of Chapter Five apply to most procurement where the value of the procurement exceeds specific thresholds for the federal, provincial and territorial governments, i.e. \$25,000 for goods, \$100,000 for services and \$100,000 for construction projects. For municipalities and other publicly funded organisations, the thresholds are set at \$100,000 for goods and services and \$250,000 for construction projects. .

24 The Cabinet Directive on Law-Making does require quality standards for the preparation of bills, but these standards are not subject to scrutiny by any official body.

25 For example, Methanex, a Canadian firm producing methanol (a component of the gasoline additive MTBE), has disputed California's right to ban MTBE and has demanded compensation from the U.S. Government. See also related discussion in Canada's WTO TPRM report in WT/TPR/S/78 at page 14.

26 See, for example, "A big hole in NAFTA" by Chantal Blouin in the *Ottawa Citizen* of September 11, 2001. Capturing the mood of many on the issue, Blouin wrote that "many companies see Chapter 11 as an excellent way to fight environmental regulations or other government actions that impose costs on them," and that this is a "perversion of the intended use of investor-state provisions."

27 See the 2000 WTO TPRM Report on Canada (WT/TPR/S/78) at page 14.

28 FDI in Canada reached a record \$36.1 billion in 1999, representing a 47% increase over 1998 levels, bringing the stock of FDI in Canadian enterprises to an estimated \$240 billion. The United States accounted for most the growth in 1999, driven by mergers and acquisitions activity in the finance, insurance, machinery, and transportation equipment sectors. See DFAIT Performance Report for the period ending March 31, 2000.

29 SOR/85-611.

30 The *Investment Canada Act* defines a cultural business as a business carrying on any of the following activities: (a) the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form, other than the sole activity of printing or typesetting of books, magazines, periodicals or newspapers; (b) the production, distribution, sale or exhibition of film or video recordings;

(c) the production, distribution, sale or exhibition of audio or video music recordings; (d) the publication, distribution or sale of music in print or machine readable form; or (e) radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services.

31 See DFAIT *Report on Plans and Priorities* for 2001-2001 (Estimates Reports).

32 These amendments are scheduled to enter into force on January 1, 2002.

33 See Industry Canada's "Trade in Services: Canada in a Global Context" at www.strategis.ic.gc.ca.

34 Article 1307 of the NAFTA provides that in the event of an inconsistency between Chapter 13 and any other chapter, the provisions of Chapter 13 shall prevail.

35 See "Managing Regulation: Policy, Practice and Prognosis", Public Policy Forum, February 2000.

36 See "Regulatory Reform Through Regulatory Impact Analysis: The Canadian Experience" at www.tbs-sct.gc.ca/pubs_pol/dcgpubs/manbetseries/vol114-1_e.html

37 The reports are accessible at www.fin.gc.ca/toce/2001/taxexp_e.html.

38 The text can be found at www.tbs-sct-gc.ca/res_can/dwnld/rc_bro_dwn_e.html.

39 Presentation to the Deputy Minister's Challenge Team on Instrument Choice, March 25, 1999.

40 Statistic provided by the Government of Canada. No further breakdown on the nature of foreign enquiries is available at this time.

41 See the 2001 Report "eGovernment Leadership: Rhetoric vs Reality – Closing the Gap" by Accenture, a global management and technology consulting organisation. Accenture attributed Canada's "number one position in eGovernment leadership for 2001" to the federal government's "commitment to break open the traditional departmental approach to online service delivery and instead place the needs of citizens and businesses at the core."

42 This service is offered by the Corporations Directorate of Industry Canada at www.strategis.ic.gc.ca/corporations. Citing results to date, the department has indicated a "high satisfaction level" amongst users of over 86% and has met "service turnaround times" of "In by 13h00, out by 17h00" in 100% of on-line applications.

43 The CBSC partners with 36 federal departments and agencies and maintains formal agreements or other partnering arrangements with 10 provinces and 3 Territories. The CBSC web site www.BusinessGateway.ca features a comprehensive front page menu on topics such as business start-up; taxation; financing; exporting/importing; selling to government/tenders; and regulation.

44 AIRS, a searchable database of import requirements, went online in 2000 at www.airs-sari.agr.ca/. The system leads users through applicable regulations and policies to information on all CFIA import requirements for specific products. The system is not currently in use for other regulated imports. Other automated CFIA systems currently being used by importers include Electronic Data Interchange Release (enabling importers and brokers to submit import transactions for review and automated decisions by both CFIA and the Canada Customs and Revenue Agency; the Import Control Tracking System (which tracks the location, status, and final decision on each imported commodity within a shipment); and a Permit Management System (addressing a range of special import arrangements in addition to standard permits and licenses handled by the existing Import Permit System).

45 Regulations usually come into force when they are registered by the Clerk of the Privy Council. Registration takes place after they are “made” (approved by the regulation-making authority, usually by an executive order). Some enabling acts contain authority to make regulations that apply retroactively before the regulation is made. However, such enabling acts are highly exceptional and the Charter of Rights and Freedom prevents people from being punished for conduct that was not an offence at the time it was done or omitted.

46 See “Tobin Plans to Slash Red Tape” in the *National Post* of September 8, 2001.

47 See for example “Regulations: More or Less?” in the *Hillwatch Bulletin* of September 2001.

48 See for example “What Deregulation? The Legal Avalanche Continues” by Pierre Lemieux in the *National Post* of July 5, 2001.

49 Canada ranked fourth out of 60 countries surveyed by the Economist Intelligence Unit in its 2001 projections on best places in the world to conduct business from 2001-2005.

50 The computerised system is based on the United Nations Electronic Data Interchange Protocol and harmonised data-set (UN/EDIFACT), and enables users to submit their import and/or export declarations to Customs authorities and receive customs permissions through electronic exchange.

51 See, page 6 of the Canadian submission to the WTO in October 2000 [G/C/W/238].

52 As explained in Industry Canada’s *Standards Systems: A Guide for Canadian Regulators*, standards have become key determinants of economic competitiveness and a useful addition to a regulator’s toolbox. Positive effects include efficiency of resource allocation, technical efficiency, and interchangeability and compatibility of products.

53 Seized with regulators’ inconsistent record on this issue, some in government have sought to encourage regulators to use standards as the basis of regulation as a way to meet the consultation and consensus-building requirements of the Regulatory Policy. Given the broad-based consultation that goes into the development of a National Standard of Canada, they argue, referencing standards in domestic regulation would help regulators meet the requirements of regulatory impact assessment.

54 TBT notification C99.14. Prior to the amendment, imported equipment was undergoing unnecessary modification in order to comply with an outdated Canadian standard. As Canada imports virtually all of its diagnostic X-ray equipment, this was resulting in significantly increased costs to Canadian consumers.

55 TBT Notification C00.20.

56 TBT Notification C00.8.

57 Key considerations which have been identified in this context include: clear demonstration of the tangible trade and regulatory benefits to be gained from the conclusion of an MRA; assessment of alternative regulatory tools; support from jurisdictional partners and stakeholders; the need for a basic underlying compatibility in the regulatory systems of potential contracting parties; and the availability of sufficient resources to ensure effective MRA negotiation and implementation.

58 There is a legal distinction in between the terms Agreement and Arrangement. In Canada, an Agreement is a legally binding instrument under international law which has the force of a treaty and is ratified by the executive power. In contrast, an Arrangement is a non-legally binding international instrument done under the authority of the Minister of Foreign Affairs.

59 With the exception of recreational craft, the Swiss MRA features the same coverage as the EU and EEA-EFTA MRAs. The Recreational Craft Annex of the Canada-EU MRA came into operation effective October 1, 2001.

60 The pharmaceutical Good Manufacturing Practices and Electromagnetic Compatibility annexes of the Canada-Switzerland MRA entered into effect on June 1, 2000. The Canadian and Swiss pharmaceutical systems are recognised as fully equivalent in terms of Good Manufacturing Practices .

61 ISO/IEC Guide 2, EN45020

62 The *Competition Act* is available online at www.laws.justice.gc.ca/en/C-34/index.html.

63 The RCD applies to the conduct reached by criminal laws, but it is unclear whether it applies to civil reviewable items.

64 The CRTC was established by Parliament in 1968 as an independent public authority constituted under the *Canadian Radio-television and Telecommunications Commission Act*, and reports to Parliament through the Minister of Canadian Heritage. The CRTC regulates both the broadcasting and telecommunications industries.

65 The CRTC's landmark Telecom Decision 98-17 of October 1, 1998 established a new regulatory regime for the provision of international telecommunications services, giving effect to and in some cases exceeding Canada's WTO commitments. The new regime established a licensing system for providers of basic international services and eliminated international traffic routing rules, under which calls to overseas destinations had to be routed through Teleglobe's facilities. As a result, service providers are now free to route international calls through competing networks of their choice, including those serving the United States. Restrictions on routing of calls within Canada were also eliminated.

66 The Agreement entered into force on February 5, 1998.

67 Applications can also be filed electronically with all required forms available on the CRTC's web site.

68 Before using this power, the Minister must consult with the CRTC, lay the order before each House of Parliament, and publish the order in the *Canada Gazette* with an opportunity for public comment.

69 The power to review CRTC Telecoms Decisions has existed since 1976 but has been rarely used; according to the Government of Canada, 22 times in 25 years out of a total of over 26,000 CRTC Decisions.

70 Chapter 6 argues that it would be more efficient in the context of future streamlining of regulations to transfer spectrum licensing functions to the CRTC.

71 A competitive licensing process may be initiated when there is more demand than radiofrequency spectrum available. Any such process is preceded by a full public consultation which seeks to ensure that potential bidders have best available information prior to initiating the licensing process. An example of the public process followed with respect to a competitive licensing application can be found at Industry Canada's www.strategis.ic.gc.ca/SSG/sf01714e.html.

72 Pursuant to section 16 of the Act, Canadian carriers must have at least 80% of their voting shares owned by Canadians and not less than 80% of the members of their board of directors must be Canadians. Canadian carriers must be controlled in fact by Canadians at all times.

73 Pursuant to section 16 of the Telecommunications Act, Canadian carriers must have at least 80% of their voting shares owned by Canadians and not less than 80% of the members of their board of directors must

be Canadians. Under the Regulations, investor companies in Canadian carriers will be treated as Canadian if at least 66 2/3% of their voting shares are held by Canadians.

74 The restrictions do not apply to resellers (i.e. non facilities-based service providers), although changes in the concept of a reseller since passage of the Act may be eroding this exemption in practice.

75 See, for example, the U.S. *National Trade Report on Foreign Trade Barriers* (2000).

76 See, for example, “Rogers Cable chief wants foreign ownership rules eased”, in the *Ottawa Citizen* of October 23, 2001. The CEO of Canada’s largest cable TV operator maintains that the current foreign ownership limits weakened the industry’s ability to finance investments and hurt company stock.

77 Responses to OECD Telecoms Questionnaire (page 6).

78 Contribution collected has declined from about \$3 billion in 1993 to approximately \$1 billion in 2001, and is expected to decline further (to about \$300 million) in 2002. Responses to OECD Telecoms Questionnaire (page 12).

79 For example, the CRTC reduced the amounts Telus and Bell charge competitive carriers to lease network facilities when doing so is required to complete connections with customers.

80 See “Can Competition in Telecom in Canada Survive?”, speech by Harry Truderang, President, AT&T Canada, to the Calgary Chamber of Commerce, June 14, 2001.

81 The text of the TAPAC mandate and procedures are available online at www.scc.ca/forum98/tapac/dispatch.cgi. A user must register to use this forum.

82 This was the case, for example, with Paradyne, a telecommunications equipment manufacturer wholly based and operating in the United States.

83 At <http://www.scc.ca/forum98/tapac/dispatch.cgi>.

84 At www.strategis.ic.gc.ca/SSG/sf01841e.html.

85 At www.strategis.ic.gc.ca/sc_mrksv/spectrum/engdoc/spect1.html.

86 Section 69.2 of the *Telecommunications Act* states that “no person shall distribute, lease, offer for sale, sell or import any telecommunications apparatus for which a technical acceptance certificate is required under this Act, otherwise than in accordance with such a certificate.”

87 At www.strategis.ic.gc.ca/SSG/sf01347e.html#Standards.

88 The initial proposal appeared in *Canada Gazette* Notice No. SMSE-017-01 (Public Discussion on Proposed Importation Monitoring scheme for radio and telecommunications equipment) of June 19, 2001.

89 The initial proposal to do so was made available for public comment by all interested parties in *Canada Gazette* Notice No. SMSE-016-01 (Public Discussion on Simplifications to the Conformity Assessment Process for Telecommunications Terminal Equipment) of April 24, 2001.

90 A Supplier Declaration of Conformity (SdoC) may take different approaches ranging from a simple declaration of the supplier or manufacturer following a test for regulatory compliance which could be prepared in house or by a private, unaccredited lab, to a more rigorous approach requiring testing to be carried out by an accredited or government recognized lab. But testing is required in all cases.

⁹¹

Under NAFTA, the general provisions of Articles 904 and 908 apply to all standards-related measures taken in relation to goods, including automotive products. Essentially, each Party maintains its right to establish a level of external protection considered as appropriate, and each Party shall promote the compatibility of standards or conformity assessment procedures with that of other Parties. Pursuant to Article 913.5, an Automotive Standards Council was established to facilitate, inter alia, the attainment of compatibility among national standards-related measures of its Parties. Four working groups were established in May 1996 for resolving identified standards issues.

