Regulatory Reform in the United States

Enhancing Market Openness through Regulatory Reform

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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 the United States. 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 the United States* published in 1999. 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 Vera Nicholas-Gervais, Evdokia Moïsé, and Akira Kawamoto of the Trade Directorate in 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 the United States. The report was peer-reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

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Does the national regulatory system allow foreign enterprises to take full advantage of competitive global markets? Reducing regulatory barriers to trade and investment enables countries in an expanding global economy to benefit more fully from comparative advantage and innovation. This means that more market openness increases the benefits that consumers can draw from regulatory reform. Maintaining an open world trading system requires regulatory styles and content that promote global competition and economic integration, avoid trade disputes, and improve trust and mutual confidence across borders. This report offers an assessment of the US performance from these perspectives. However, it does not consider the equally important debate as to whether and how trade and investment affect the pursuit and attainment of legitimate policy objectives.

The generally liberal nature of US trade and investment policies is broadly reflected in the national regulatory system. Active US participation in the multilateral trading system and in a range of other regional and bilateral instruments has largely complemented domestic efforts to achieve higher quality regulation that fulfils legitimate policy objectives without unnecessarily compromising foreign competition in the market. International regulatory co-operation through the US-EU New Transatlantic Agenda and the Trans-Atlantic Business Dialogue (TABD) signal a new sophistication in dealing with the increasingly complex dimensions of effective market access. At the same time, a long US history of pathbreaking deregulation has steadily moved the country towards a highly participatory regulatory style and pro-competitive regulatory content. These trends have reinforced the development and maintenance of open markets for international trade and investment, and market openness has been broadly sustained despite the competitive pressures and social tensions wrought by globalisation.

Nonetheless, further efforts are needed if the US regulatory system is to promote optimal market openness. Although not unique to the US case, particular features of the US regulatory environment continue to cause frictions with trade and investment partners. The complexity of the national regulatory system, the interplay of federal, state and local regulatory activities, and the fact that certain areas of the economy remain heavily regulated present both domestic and foreign firms with formidable challenges regarding regulatory coherence, cost of regulatory compliance, and transparency. Beyond this, subtleties in the ways regulations are designed or implemented sometimes result in *de facto* discrimination against foreign competitors. Extensive social regulations – rules to protect legitimate public interests and societal preferences spanning such areas as the environment, public health, consumer protection, and product and workplace safety -- introduce the greatest potential for this result. This may signal a need for enhanced vetting and scrutiny of proposed rules from a market openness perspective, in addition to the existing system of public review. Such an improvement would ensure that legitimate domestic objectives are successfully achieved without unnecessarily compromising open market policies. Other broad policy areas such as product standards and conformity assessment systems would benefit from exploration of alternatives to third party certification and increased reliance on international standards as the basis of domestic regulation. Finally, particular aspects of substantive sectoral regulation merit renewed assessments of their effects on inward trade and investment.

Improvement of a national regulatory system cannot be successfully undertaken without the broad support of civil society and regulators themselves. Furthermore, legitimate policy objectives cannot be compromised. On this, efforts must be made to effectively communicate the complementary relationship between sound domestic regulation (be it deregulation or more efficient regulation) and international market openness. Efficient regulation successfully supports legitimate domestic objectives but can also be market-opening, accelerating progress towards a more efficient and innovative economy, encouraging greater competitiveness on the part of domestic firms, and yielding greater benefits for US consumers.

1. Market openness and regulation: the policy environment in the United States

The general US policy environment toward international market openness and its evolution in recent years has been primarily shaped by developments at the multilateral, regional and bilateral levels. Active US participation in the GATT and successor WTO and in regional agreements and arrangements such as NAFTA and APEC have together established one of the most open national markets for global trade and investment in the post-war world. Multilateral trade liberalisation has led to historically low tariffs for a broad spectrum of goods in the United States and elsewhere, trade in services has been set on the path of progressive multilateral liberalisation, and US participation in sector-specific initiatives, such as the Information Technology Agreement, has further contributed to a widening and deepening of the liberalisation agenda. Despite what may be a backlash against globalisation in some domestic quarters, this basic policy stance seems set to prevail. The US role in promoting incipient free trade areas such as the Free Trade Area of the Americas and in innovative approaches to deepening existing trade ties through mechanisms such as the Transatlantic Economic Partnership[1] and the Trans-Atlantic Business Dialogue (TABD) appears to reflect an enduring commitment to liberal trade and regulatory policies. While international opinion is strong in its opposition to certain features of US trade policy (notably extraterritorial application of domestic legislation and occasionally aggressive use of domestic trade law provisions to achieve expanded market access in foreign markets), few dispute the leading role that an open US market has played in fostering the steady expansion of world trade.

The country's rank as the world's largest host of foreign direct investment[2] underscores the openness of the US investment regime. Stated US policy is to regulate inward investment activity as little as possible, and there is no single statute governing foreign investment. While a host of federal, state and local laws governing such matters as anti-trust, mergers and acquisitions, wages and social security, export controls, environmental protection, health and safety have a significant impact on investment decisions, most of these are applied in a non-discriminatory fashion. Exceptions to this principle are generally for reasons of national security or prudential considerations.

In part due to the sheer volume of trade and investment activities involving the United States, frictions inevitably arise with global commercial partners. Domestic regulatory issues have often surfaced in this context. On occasion, US trading partners have challenged certain features of US social regulations applied in support of legitimate policy objectives relating to environment, health and safety as unnecessarily trade-restrictive (Box 1), and economic regulations continue to bar meaningful foreign participation in some sectors. However, disputes and prevailing barriers to international market openness should be viewed from the perspective of a largely trade and investment-friendly regulatory environment, and prospects for enhanced market openness through regulatory reform seen in the dynamic setting of achievements to date.

Four main features of the US regulatory system account for its generally positive performance. First, consistent with a strong political tradition of transparency and public accountability, US regulatory procedures are very open. Nothing prevents active foreign participation in regulatory decision-making. In practice, both domestic and foreign firms are afforded ample and non-discriminatory opportunities to shape the regulatory process from proposed to final rule. Foreign firms can and do make active use of these procedures.

Second, in accordance with executive orders and statutorily-driven procedural requirements, most US agencies take a relatively rigorous (if complex) approach to rule-making. Explicit assessments of the effects of proposed rules on international market openness are not formally required in this context. In practice, however, both domestic and foreign firms benefit from an overall adherence to efficient regulation principles and scrutiny of rationales underlying proposed regulations.

Third, while many economic activities are heavily regulated at federal, state, and local levels, existing regulation is on balance trade and investment neutral. In cases where the design and implementation of regulations has raised questions about discriminatory effects on foreign competitors (as has been argued in respect of clean fuel (reformulated gasoline) standards, which was challenged by foreign trading partners under GATT/WTO dispute settlement procedures),[3] US regulators have shown some flexibility in moving to resolve the causes of trade tensions. Domestic avenues exist for foreign firms wishing to challenge adverse trade or investment effects of existing regulations.

Fourth and finally, a long US history of regulatory reform efforts has already yielded considerable benefits for domestic and foreign firms. Economic regulation -- rules that intervene directly in market decisions such as pricing, competition, and market entry or exit -- has been largely dismantled, though significant barriers to trade and investment still apply in some areas. A range of initiatives aimed at improving the quality of domestic regulation has the potential to yield important dividends for foreign and domestic firms alike (see background report on Government Capacity to Assure High Quality Regulation). In addition, ongoing efforts to streamline administrative regulation at both federal and state levels -- "red tape" or government paperwork and administrative formalities faced by individuals and firms -- should benefit foreign traders and investors entering or expanding activities in the US market.

Box 1. **US social regulation and trade**

Social regulations play a key role in the promotion and protection of public interests such as health, safety, and the environment, as well as safeguarding the interests of consumers and vulnerable social groups. Their objectives are legitimate and clearly fall within the realm of national sovereignty. Social regulations do not generally aim at discriminating against particular parties. However, depending on the means chosen to achieve their stated aims, they may vary in efficacy and give rise to unintended side effects. Thus, while certain social regulations may not be expressly discriminatory or trade-restrictive on their face, their design or implementation may introduce *de facto* barriers to trade. As traditional barriers to market openness continue to fall, "behind the border" measures such as these are falling under increased international scrutiny by trading partners. The range of measures which may be taken in connection with standards, conformity assessment, or sanitary and phytosanitary systems in support of domestic objectives relating to product quality, safety, health and environmental protection is a virtually infinite universe, underscoring the importance of ensuring that social regulation does not unnecessarily compromise market openness. The following examples illustrate the trade implications of some US social regulations as seen by selected trading partners.

Environmental Regulations*:* GATT and WTO cases involving US corporate average fuel economy (CAFE) standards and reformulated gasoline provide examples of the trade impacts of environmental regulations. The latter case involved EPA regulations on the composition and emissions effects of gasoline to improve air quality introduced pursuant to the 1990 Amendment to the Clean Air Act (CAA). The CAA required that only "reformulated gasoline" could be sold to consumers in highly polluted areas of the country. In establishing regulations for reformulated gasoline, EPA methodology for determining domestic refiners' baseline was based on quality data and volume records for 1990, while most importers (also foreign refiners) were required to use the statutory baseline set by the EPA. Levels required of foreign refiners were seen as more difficult to achieve than those required of US refiners. Venezuela and Brazil successfully argued in the WTO that these regulations violated the principle of national treatment. In 1997, the EPA issued a final regulation removing the discriminatory element of the regulation.

Application of US environmental laws has also led to direct import restrictions on products such as yellowfin tuna and shrimp.

Health regulations: Health regulations apply to a broad range of products, for example foodstuffs and pharmaceuticals. The 1990 Nutrition Labelling and Education Act requires certain products to be labelled with respect to content, but some trading partners have alleged that the rules differ from international labelling standards established by the Codex Alimentarius. Additional state-level requirements may apply to agriculture and food imports.

Safety regulations: One US trading partner has alleged onerous compliance costs associated with the 1990 Fastener Quality Act (legislation which seeks to deter the introduction of sub-standard industrial fasteners in the United States). While according to the US, neither the law nor its implementing regulations discriminate against non-NAFTA suppliers with respect to laboratory testing, that trading partner alleges that the compliance mechanism of FQA regulations imposes a heavier burden on foreign manufacturers without good reason. The United States maintains that concerns about possible trade disruption were taken into account to the extent possible in drafting implementing regulations for the FQA. However, in August 1998, the President signed into law legislation further delaying implementation of the FQA regulations until 1 June 1999, pending submission to Congress by the Department of Commerce by 1 February 1999 a report on (1) changes in fastener manufacturing practices that have occurred since the enactment of the FQA; (2) a comparison of the FQA to other regulatory programmes that regulate the various categories of fasteners, and an analysis of any duplication that exists among programmes; and (3) any changes in the FQA that may be warranted because of changes reported under (1) and (2). Bilateral mutual recognition negotiations on fasteners have also been launched. Thus, US handling of this case may yet provide a positive example of how trade and regulatory interests can be favourably reconciled.

Plant health regulations: Phytosanitary regulations for fruits and vegetables set by the US Department of Agriculture are viewed by some foreign producers as unnecessarily burdensome. Exporters seeking entry to the US market for commodities with the potential to carry pests or diseases of quarantine significance must cover all USDA expenses in researching and approving quarantine treatments for products and, if market access is gained, shipments of the fruit or vegetable may be subject to an inspection process in both the country of origin and the US port of entry. A stringent USDA import plan contains nine specific safeguards specific to avocados from Mexico to prevent exotic pests from entering the United States, including packing house and port of arrival inspections and limited distribution to certain US states.

Under the Agricultural Marketing Agreement Act, the Secretary of Agriculture can issue grade, size, quality or maturity regulations for certain commodities through domestic marketing orders. These orders are also applicable to comparable import commodities. However, comparable commodities harvested under different growing conditions may not be able to meet these regulations as easily as domestic produce. Imported avocados, dates, grapefruit, limes, tomatoes and oranges are amongst a range of products which have been subject to such regulations in the past. Inspections requirements associated with meat import regulation are also viewed by some exporters as excessively lengthy and costly.

In light of a strong rise in US imports of foreign foodstuffs over the last decade, a recent GAO study recommended that Congress authorise the Food and Drug Administration (FDA) to require that other countries adopt safe practices for fruit, vegetables, fish, and processed foods shipped to the United States, mirroring the authority already exercised by the Department of Agriculture with respect to imported meat and poultry (which has already attracted the attention of some trading partners). President Clinton has called the study "further confirmation" of the need for an earlier Administration proposal to extend this authority to the FDA.

Consumer interest regulations: The American Automobile Labelling Act requires all passenger vehicles and light trucks to bear labels indicating their domestic content percentage of value added in the United States and Canada. The stated aim of the Act is to help consumers make informed purchasing decisions. But some foreign competitors see the law as a *de facto* "Buy American" provision. Other features of the law, such as methodology for calculating US content of cars produced by foreign automakers within the United States, are perceived by some trading partners as expressly discriminatory.

Sources: 1998 Report on the WTO Consistency of Trade Policies by Major Trading Partners (Industrial Structure Council, Japan); EU Sectoral and Trade Barriers Database; US Trade Barriers to Latin American Exports in 1996 (UN Economic Commission for Latin America and the Caribbean); Opening Doors to the World: Canada's International Market Access Priorities – 1998.

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 or excessively burdensome or restrictive conditions. These principles, which have been 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.*

They have been identified by trade policy makers as key to market-oriented, trade and investment-friendly regulation. They reflect the basic principles underpinning the multilateral trading system, concerning 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. Similarly, the OECD country reviews are not concerned with an assessment of trade policies and practices in Member countries.

In sum, this report considers whether and how US regulatory procedures and content affect the quality of market access and presence in the United States. 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. This latter issue has been extensively debated within and beyond the OECD from a range of policy perspectives. To date, however, OECD deliberations have found no evidence to suggest that trade and investment *per se* impact negatively on the pursuit and attainment of domestic policy goals through regulation or other means.[4]

2.1. Transparency, openness of decision making and of appeal procedures

To ensure international market openness, foreign firms and individuals seeking access to a market (or expanding activities in a given market) must have adequate information on new or revised regulations so that they can base their decisions on an accurate assessment of potential costs, risks, and market opportunities. Regulations need to be transparent to foreign traders and investors. Regulatory transparency at both domestic and international levels 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), well-timed opportunities for public comment, and rigorous mechanisms for ensuring that such comments are given due consideration prior to the adoption of a final regulation.[5] Market participants wishing to voice concerns about the application of existing regulations should have appropriate access to appeal procedures. This sub-section discusses the extent to which such objectives are met in the United States and how.

The basic rulemaking process to be followed by all agencies of the US Government is set out in the Administrative Procedures Act (APA).The APA sets a high standard of transparency and opportunity for comment by any interested parties – national or non-national. Foreign traders and investors are thus well positioned to participate actively at various stages of the rulemaking processes.

The path from proposed to final rule affords ample opportunity for such participation. At a minimum, the APA requires that in issuing a substantive rule (as distinguished from a procedural rule or statement of policy), an agency must:

- Publish a *notice of proposed rulemaking* in the *Federal Register*. This notice must set forth the text or the substance of the proposed rule, the legal authority for the rulemaking proceeding, and applicable times and places for public participation. Published proposals also routinely include information on appropriate contacts within regulatory agencies.

- Provide all interested persons – nationals and non-nationals alike -- an opportunity to participate in the rulemaking by providing written data, views, or arguments on a proposed rule. This *public comment process* serves a number of purposes, including giving interested persons an opportunity to provide the agency with information that will enhance the agency's knowledge of the subject matter of the rulemaking. The public comment process also provides interested persons with the opportunity to challenge the factual assumptions on which the agency is proceeding, and to show in what respect such assumptions may be in error.

- Publish a *notice of final rulemaking* at least 30 days before the effective date of the rule. This notice must include a statement of the basis and purpose of the rule and respond to all substantive comments received. Exceptions to the thirty-day rule are provided for in the APA if the rule makes an exemption or relieves a restriction, or if the agency concerned makes and publishes a finding that an earlier effective date is required "for good cause". In general, however, exceptions to the APA are limited and must be justified.

Other APA provisions further enhance transparency and openness of decision-making. For example, each federal agency is required to afford interested persons (again, without regard to nationality) the *right to petition for the issuance, amendment, or repeal of a rule*. Though they retain ultimate discretion in determining whether a request is "meritorious", agencies must by law respond to all such requests. In cases where a request is deemed meritorious, work would commence on developing a proposed rule. The APA also provides for *advance notice of proposed rulemaking*, which allow agencies to seek general comments on issues prior to the development of specific regulatory proposals. This offers important benefits to domestic and foreign firms alike in terms of sequencing: a public comment period available only late in the process (when a proposed rule may have already undergone considerable development) may reduce it to little more than a pro forma step in respect of a virtual *fait accompli* (a concern that has arisen in respect of some other national regulatory regimes).

Beyond the APA, other statutes require additional rulemaking procedures either for specific regulatory areas or in general (see the background report on Government Capacity to Assure High Quality Regulation). The President requires additional procedures. Executive Order (EO) 12866 on Regulatory Planning and Review issued in September 1993 requires all but the independent regulatory agencies to send "significant rules" to the *Office of Management and Budget* (OMB) for review prior to publication in the *Federal Register* as either proposed or final rules (see related discussion in Section 2.3). OMB's Office of Information and Regulatory Affairs (OIRA) reviews all agency proposals to implement or revise Federal regulations and information requirements consistent with the overarching regulatory philosophy set out in EO 12866.

One of the many stated objectives of EO 12866 is to make the regulatory process more accessible and open to the public. Numerous principles embodied in EO 12866 relate to this objective. Although these principles are not inspired from an international perspective, in practice there is no operative distinction in their application as between domestic and foreign firms. Thus, foreign interests enjoy equal standing with domestic interests with respect to key EO transparency procedures including the annual publication of agency Regulatory Plans (including those of independent regulatory agencies) in the biennial *Unified Regulatory Agenda* (see the background report on Government Capacity to Assure High Quality Regulation); submission of views on any aspect of any agency Plan; participation in OIRA conferences convening representatives of businesses, non-governmental organisations, and the public to discuss regulatory issues of common concern; and maintenance by OIRA of a publicly available log containing detailed information pertinent to regulatory actions under review. Foreign competitors interested in US regulatory developments thus have many opportunities to act as informed and potentially influential participants in the regulatory process.

The established vehicle for communication of proposed regulations is the *Federal Register*. An official publication of the US Government, the *Federal Register* is designed to make available to the public all regulations and legal notices issued by Federal agencies and the President. This may include Presidential proclamations and Executive Orders and Federal agency documents having general applicability and legal effect; documents required to be published by act of Congress; and other Federal agency documents of public interest. In addition, entries routinely include information on appropriate contacts within regulatory agencies. The *Federal Register* is published on working days and is available online without charge.

Other electronic means of accessing information on regulations also exist: indeed, the United States makes active use of leading edge technology to communicate information to the public. Dissemination of information in this way typically knows no borders and access to online information is unrestricted and free of charge. Extensive US use of the Internet across a wide range of government agencies and departments – many of which maintain highly informative, user-friendly websites – could prove a powerful tool in enhancing the transparency of regulatory processes and regulations world-wide. Clearly, however, ultimate responsibility for exploiting this possibility lies with users and their ability to effectively navigate such systems. In some cases, "information overload" may inadvertently cloud transparency if key data is not readily accessible.

Information on regulations is also available in the context of implementation of US WTO obligations. Title IV of the Trade Agreements Act of 1979, as amended by the Uruguay Round Agreements Act, or URAA, provides the legal basis on which the WTO Agreement on Technical Barriers to Trade (TBT Agreement) and the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) were implemented in the United States. The US Administration's Statement of Administrative Action sets forth a detailed plan to guide the Executive Branch in implementing the obligations under these agreements. This includes the establishment of "enquiry points" to respond to requests for information as foreseen in the WTO Agreements. Contact information has been provided to the respective WTO Committees and is publicly available. Enquiry points also provide interested parties with more specific regulatory contacts in response to requests received.

Apart from regulatory authorities directly involved, one other government body is directly involved with transparency issues. The Office of the US Trade Representative (or USTR, part of the Executive Office of the President) oversees implementation of transparency provisions relating to US obligations contained in the WTO and other trade agreements. This oversight concerns not only obligations regarding transparency, but also those concerning non-discrimination; national treatment; prohibition of unnecessary obstacles to trade; the use of international standards, recommendations and guidelines; and considerations of equivalence.

USTR plays the lead role in the development of US policy on trade and trade-related investment. An interagency trade policy mechanism was established under the Trade Expansion Act of 1962 to assist USTR with its implementation of these responsibilities.

USTR is not directly concerned with the making of domestic regulations on a day-to-day basis. However, the interagency mechanism it leads is intended to play a co-ordinating role in encouraging government-wide awareness of and respect for international obligations relating to domestic regulatory matters, such as GATT Article III (National Treatment on Internal Taxation and Regulation) and regulatory commitments arising from other WTO Agreements, such as the Technical Barriers to Trade (TBT), Sanitary and Phytosanitary Measures (SPS), and Basic Telecommunications Agreements.

For all its strengths, this essentially legalistic approach to trade policy making may be detracting from a wider opportunity to ensure greater complementarity between trade and domestic policies. In this sense, the broad reach of the interagency trade policy mechanism across different layers of decision-making may present an informal (though perhaps under-utilised) opportunity to infuse domestic regulatory activities with greater attention to market openness considerations. In particular, more active promotion of the efficient regulation principles through the mechanism could help shape a new regulatory culture responsive to the needs of international trade and investment. As currently structured (and with the notable exception of independent regulatory agencies), the mechanism involves a wide range of agencies and policymakers:

- Three tiers of committees develop US Government positions on international trade and trade-related investment issues. The Trade Policy Review Group (TPRG) and the Trade Policy Staff Committee (TPSC), administered and chaired by USTR, are the subcabinet interagency trade policy co-ordination groups central to this process. The TPSC, the first line operating group, is represented by senior civil servants. Supporting the TPSC are more than 60 subcommittees responsible for specialised areas and several task forces charged with particular issues.

- Member agencies of the TPRG and the TPSC include the Departments of Commerce, Agriculture, State, Treasury, Labour, Justice, Defence, Interior, Transportation, Energy, and Health and Human Services, the Environmental Protection Agency, Office of Management and Budget, the Council of Economic Advisers, the International Development Co-operation Agency, the National Economic Council, and the National Security Council. The US International Trade Commission is a non-voting member of the TPSC and an observer at TPRG meetings. Representatives of other agencies may also be invited to attend meetings depending on the specific issues discussed.

- The final, third tier of the interagency trade policy mechanism is the National Economic Council (NEC) chaired by the President. NEC representation includes the Vice President, the Secretaries of State, the Treasury, Agriculture, Commerce, Labour, Housing and Urban Development, Transportation, Energy, the Administrator of the Environmental Protection Agency, the Chair of the Council of Economic Advisers, the Director of OMB, USTR, the National Security Advisor, and the Assistants to the President for Economic Policy, Domestic Policy, and Science and Technology Policy. All executive departments and agencies, whether or not represented on the NEC, co-ordinate economic policy through the NEC.

During interagency review of US trade and trade-related investment policies, advice is generally sought from private sector advisory committees and from Congress. Virtually all issues are developed and formulated through the interagency process, though in some cases USTR advice may differ from that of

the interagency committees. While USTR ultimately assumes responsibility for directing the implementation of policy decisions as they are made, it may delegate this responsibility to other agencies where desirable or appropriate.

A *reverse* interagency mechanism – one which would formalise consultation among the trade policy agencies (including USTR) and other government agencies during the development and formulation of domestic regulations – does not exist. This point is revisited under Section 2.3 on measures to avoid unnecessary trade restrictiveness.

In sum, federal regulatory procedures are highly transparent and open. The United States ranks among top OECD performers in terms of opportunities for public (including foreign) consultation and comment, publication of regulatory measures and notification to international organisations, and use of the Internet (see Figure 1). These strengths, evident in most OECD countries, are closely linked to observance of international trade obligations and strong political traditions for open decision-making processes.

Nonetheless, federal regulatory procedures tell only part of the story. The complexity and reach of subfederal regulation underscores the need to encourage respect for transparency and other efficient regulation principles at state and local levels as well. While GATT Article XXIV:12 requires each WTO Member to "take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory" (an approach reflected also in the WTO TBT Agreement), ultimate responsibility for adherence to transparency and other principles of efficient regulation lies with the subfederal authorities concerned. In practice, the US government has not found it necessary to interpret GATT Article XXIV:12 language. Its self-described approach is to use all reasonable measures, including legal means, to encourage compliance by subfederal authorities. For regulatory matters, the United States interprets existing GATT language to mean it will actively educate and promote such compliance, and it has accepted responsibility at the Federal level on behalf of the states. However, the US position on whether or not existing GATT language requires affirmative action to force subfederal authorities into compliance or to eliminate inconsistent state regulation is less clear.[6] Box 2 in Section 2.2 illustrates the kinds of (discriminatory) subfederal regulatory measures which have created trade and investment frictions in the past.

2.2. Measures to ensure non-discrimination

Application of non-discrimination principles aims to provide effective equality of competitive opportunities 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 promoted when developing and applying regulations is a helpful gauge of a country's overall efforts to promote trade and investment-friendly regulation.

On the other hand, preferential agreements give more favourable treatment to specified countries and are thus inherent departures from the MFN and NT principles. The extent of a country's participation in preferential agreements (which overall can be trade-creating or trade-diverting) is not in itself indicative of a lack of commitment to the principle of non-discrimination. However, in assessing such commitment it is relevant to consider the attitudes of participating countries towards non-members in respect of transparency and the potential for discriminatory effects. Third 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 can introduce potential for discriminatory treatment of third countries (if, for example, standards recognised by partners in a preferential agreement would be difficult to meet by third countries).

Preferential agreements to which the United States is party, including two free trade agreements[7] and a network of bilateral investment agreements (essentially investment protection instruments with partners from the developing countries and transition economies),[8] are managed in a highly transparent manner. Information on such arrangements is readily available to interested non-parties through a variety of avenues. Generally, information on actions to be taken by the United States and requests for comments on proposed actions are published in the *Federal Register*. In addition, information on preferential agreements is typically made available by US government agencies concerned through a variety of means, including press statements, fact sheets, and the Internet. Submission of information to relevant WTO bodies in accordance with WTO obligations establishes another avenue for information, and both of the FTAs to which the United States is party encourage and require transparency through public notice. Collection and publication of relevant data by other international organisations (such as UNCTAD's *Compendium of International Investment Instruments*) further contributes to ensuring the transparency of preferential arrangements. In sum, available evidence points to well-orchestrated and good faith efforts in the United States to share this kind of information as widely as possible.

Importantly, comments by third parties on US preferential agreements are welcomed, either in response to a public request for comment published in the *Federal Register*, in the appropriate forum of the WTO, or on an *ad hoc* basis to the relevant US government agency. At the same time, with the notable exception of relevant international obligations, third countries or foreign firms which consider themselves prejudiced by these agreements enjoy no specific rights of recourse under US law.

There is no overarching requirement in US law or in Presidential policy to incorporate MFN and NT principles into domestic regulations. Here again, USTR is responsible for the implementation of non-discrimination provisions *insofar as obligations stemming from the WTO and other international trade and trade-related investment are concerned*. However, USTR seems too far removed from day-to-day regulatory activities to exert a systematic effect on individual decisions.

Overtly discriminatory regulatory content is fairly exceptional when viewed in a broad, economy-wide context. Existing measures which discriminate against foreign ownership tend to be fairly limited in scope (see discussion in Section 3) and complete or partial deregulation across many sectors of the economy has already generated attendant pro-competitive effects for international market openness. However, enduring exceptions to this general trend remain. Expressly discriminatory (nationality-based) elements in regulatory structures for maritime transport services, domestic air services or trucking cabotage, for example, effectively preclude foreign participation in these sectors.[9]

Other examples may be found of regulations that are inconsistent with the non-discrimination principle. US commitments in the WTO Financial Services Agreement grandfather certain deviations from the non-discrimination principle more generally. For instance, foreign banks are required to register under the Investment Advisers Act of 1940 to engage in securities advisory and investment management services in the United States, while domestic banks are exempt from registration. The registration requirement involves record maintenance, inspections, submission of reports and payment of a fee. Foreign banks cannot be members of the Federal Reserve System, and thus may not vote for directors of a Federal Reserve Bank. Foreign-owned bank subsidiaries are not subject to this measure.[10] Some states require direct branches or agencies of foreign banks to register under securities broker-dealer or investment adviser measures, while bank subsidiaries of foreign banks are exempt from such registration to the same extent as domestic banks incorporated in the state. These limitations do not apply to federally licensed branches or agencies. Some states require direct branches or agencies of foreign banks, but not bank subsidiaries of foreign banks, to register or obtain licenses in order to engage in some banking activities. Some states restrict various commodities transactions by foreign bank branches and agencies, but not by other depository financial institutions. Offers and sales of securities to foreign bank branches and agencies in the some states are subject to registration/disclosure requirements that do not apply if the transaction involves

other financial institutions. Federal and state law do not permit a credit union, savings bank, home loan or thrift business in the United States to be provided through branches of corporations organised under a foreign country's law. In order to accept or maintain domestic retail deposits of less than $100 000, a foreign bank must establish an insured banking subsidiary. This requirement does not apply to a foreign bank branch that was engaged in insured deposit-taking activities on 19 December 1991.

There may also be certain deviations from the principle of non-discrimination which arise from inconsistencies between the US GATS commitments and its preferential commitments made in bilateral or regional trade arrangements such as NAFTA. For instance, with respect to banking and other financial services (excluding insurance), in the US Schedule to the GATS Financial Services Agreement, there is an MFN exception made for broker-dealers registered under US law that have their principal place of business in Canada. Such broker dealers may maintain their required reserves in a bank in Canada subject to the supervision of Canada.[11] Also, for purposes of the Glass-Steagall Act - which provides for certain separation of ownership of banks, trusts, insurance companies and industrial companies - Canadian government securities fall within an exempt category so that Canadian banks may underwrite and trade in such securities without prohibition which would otherwise be the case.

In some cases, social regulations may be designed and implemented in ways which may give rise to discriminatory *effects*. A useful illustration of how this has occurred in the United States was the EPA's CAFE regulation noted earlier in Box 1. CAFE regulations enacted in support of the Energy Policy and Conservation Act of 1975 required automobile manufacturers and importers to achieve specified average fuel economy standards for their entire fleets, but stipulated that these be calculated separately for domestic and imported vehicles. In 1994, a GATT panel established at the request of the European Commission found, *inter alia*, that the separate fleet accounting methodology used for imported vehicles effectively placed large foreign cars at a competitive disadvantage vis-à-vis like domestic products.[12] Explicit attention to the principle of non-discrimination during the design of the CAFE regime may have averted this dispute.

The discriminatory effects of subfederal regulation continue to attract the attention of foreign traders and investors, suggesting a need for more focused efforts at the federal level to ensure respect for non-discrimination and other efficient regulation principles by state and local regulators. Recent illustrative examples of state-level regulation (Box 2) show that discriminatory regulation has been developed in some cases in support of domestic producers or broader social objectives.

Discriminatory elements of the US regulatory regime therefore range from overt (nationality-based) to more subtle regulatory schemes in other policy areas (such as the environment) with the potential to introduce discriminatory effects. Nationality-based restrictions still operative in a number of important sectors (see also discussion in Section 3) have in some cases been in place for long periods, suggesting the need for a comprehensive review of prevailing measures and their economic rationales. As seen in Box 2, subfederal regulation also risks generating discriminatory effects.

Box 2. **Subfederal regulation and market openness**

As discussed in the background report on Government Capacity to Assure High Quality Regulation, US regulation is a complex mix of federal, state and local rules and enforcement procedures. The 50 state governments have legal and regulatory authority in their areas of competence, including all areas not expressly pre-empted by federal legislation, and may delegate this authority to regional, local or municipal governments.

While there has been a marked concentration of regulatory powers at the federal level in recent years, state and local regulation has maintained a significant profile on the international trade and investment agenda. Ensuring transparency of subfederal regulation in the first instance is crucial to international market openness. However, as the following cases illustrate, rigorous attention to ensuring non-discriminatory subfederal regulation is also necessary :

- In a June 1992 case involving both federal and state measures affecting alcoholic and malt beverages, a GATT panel found that foreign (in this case Canadian) producers were effectively discriminated against by certain state regulatory requirements in respect of such issues as listing and delisting policies; beer alcohol content; distribution to points of sale, transport into states by common carriers (as opposed to transportation of a product by a producer or wholesaler in its own vehicle), and licensing fees.[13]

- Government procurement laws at the state and local level contain "Buy American" and "Buy Local" provisions similar to those contained in the federal Buy American Act which accord preferential treatment to domestically and locally produced goods. These provisions are superseded by non-discrimination commitments under the WTO GPA, when applicable (this to the credit of the United States, which was under no obligation to subject its state entities to the GPA). In addition, some states (*e.g.*, California) have recently amended their laws to prevent preferential treatment. However, with state governments accounting for roughly half of all US government purchases, considerable scope remains for discriminatory purchasing practices at the subfederal level.

- State procurement laws can also take on an extraterritorial dimension in support of broader political objectives. In 1996, Massachusetts enacted a law regulating state contracts with companies doing business with or in Burma (Myanmar). According to one trading partner, the state government created a "restricted purchase list" of companies that met a set of "negative criteria" stipulated in the law. In principle, countries so identified would be barred from bidding on state contracts or, when allowed to bid, subject to less favourable terms than those available to non-listed companies. On 4 November 1998, the US District Court found the Law to be unconstitutional as it impinged on the exclusive authority of the federal government to regulate foreign affairs.

Sources: GATT Basic Instruments and Selected Documents; 1998 Report on the WTO Consistency of Trade Policies by Major Trading Partners (Industrial Structure Council, Japan).

2.3. Measures to avoid unnecessary trade restrictiveness

To attain a particular regulatory objective, policy makers should seek regulations that are not more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Examples of this approach would be to use performance-based rather than design standards as the basis of a technical regulation, or to consider taxes or tradable permits in lieu of regulations to achieve the same legitimate policy goal. At the procedural level, effective adherence to this principle entails consideration of the extent to which specific provisions require or encourage regulators to avoid unnecessary trade restrictiveness (and the rationale for any exceptions), how the impact of new regulations on international trade and investment is assessed, the extent to which trade policy bodies as well as foreign traders and investors are consulted in the regulatory process, and means for ensuring access by foreign parties to dispute settlement.

In the United States, the principal tool for measuring the effects of proposed federal regulations is the regulatory impact analysis, or RIA (see related discussion in the background report on Government Capacity to Assure High Quality Regulation). For "significant" regulatory actions (defined as having an annual effect on the economy of $100 million or more or adversely affecting in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities), agencies must generally provide to OIRA the following additional information:

- an assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, environmental protection, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;

– an assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment and competitiveness) health, safety, and the natural environment, together with, to the extent feasible, a quantification of those costs; and

– an assessment of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

Thus, there is no specific provision requiring an assessment of the impact of proposed regulatory measures on inward trade and investment. In principle, nothing would bar a discussion of effects on market openness in the context of broad economic effects outlined above with respect to covered "significant" rules. However, were they to occur at all and in the absence of any other guidance, it seems reasonable to expect that such discussions would more likely relate to effects on outward trade and investment (as US firms often charge that regulatory burdens detract from their global competitiveness) than on market openness concerns.

In practice, therefore, information concerning the potential impact of a proposed rule on inward trade and investment is most likely to surface during the public comment phase. As seen earlier, this comment period is open to both foreign and domestic parties. Still, in the absence of a formalised requirement to assess the impact of a proposed regulation on inward trade and investment, the onus is on foreign firms to make their concerns known. Their capacity to do so effectively is thus closely linked to the transparency issue.

It should be recalled here that the RIA mechanism does not cover the rulemaking activities of the independent federal regulators. As seen earlier, the APA sets out detailed rulemaking procedures to be followed by all federal government agencies – including the independent regulators. But only Executive Branch agencies are subject to additional rule-making provisions like the RIA required by the President.

The APA does not formally require or encourage an assessment of the impact of proposed rules on international trade and investment and lacks the broad "economic effects" language present in the RIA under which such an analysis could theoretically occur. While this incongruity might be perceived as a procedural shortcoming, it does not necessarily imply that the independent federal regulators are less attuned to the possible impact of proposed rules on trade and investment than might be otherwise be the case in an RIA setting. In practice, APA-governed rulemaking in sectors characterised by international trade and investment activity (such as the telecommunications sector) may reflect a greater sensitivity to trade and investment impacts than might be the case through a broader regulatory oversight function, if only due to the active role played by foreign parties in shaping the process.

OMB and USTR consult informally when questions arise with respect to the WTO legality of proposed regulations, and may also do so before a regulation goes forward for publication in draft in the Federal Register. In such instances, OMB, USTR and the regulatory authority concerned seek to ensure that proposed regulatory measures are in line with US obligations under the WTO and other trade agreements. In addition, Title IV of the Trade Agreements Act of 1979 (19 USC 2532) (as amended by the URAA) specifically prohibits US agencies from using standards, technical regulations or conformity assessment procedures, including sanitary and phytosanitary measures, as unnecessary obstacles to trade. Under US law, unnecessary obstacles to trade are not created if the demonstrable purpose of the standards-

related activity is to achieve a legitimate domestic objective (*e.g.*, protection of health or safety) and if such activity does not operate to exclude imported products which fully meet those legitimate objectives. Section 402 specifically obliges agencies to ensure that imported products are treated no less favourably than like domestic or other imported products.

However, proposed regulatory measures with no immediately obvious implications for international obligations would normally escape such scrutiny. OMB staff members are not trained to assess the trade effects of proposed regulations. USTR is neither mandated nor adequately staffed to review the possible adverse effects on inward trade and trade-related investment of proposed regulations which, while they may be WTO-consistent on their face, may carry potential to introduce *de facto* discriminatory effects on some other level. Thus, responsibility for drawing out the possible impact of proposed rules on inward trade and investment ultimately lies with the regulators themselves and is overseen by foreign competitors, who may only be in a position to identify the trade-restrictive effects of a given regulation once the damage has occurred and trade frictions have arisen. In such cases, an ounce of prevention may well be worth more than a pound of cure.

Recalling the nature of some well-known trade frictions involving US regulations, it becomes clear that what was called into question was not a given domestic policy or its underlying objectives, but the fact that these policies or objectives could have been achieved just as or even more efficiently by using less trade-restrictive means. For example, CAFE standards were challenged on the grounds of the method for calculating fuel efficiency of foreign manufacturers; similarly, concerns with respect to the regulation of tuna harvesting related *inter alia* to the method for calculating the average incidental taking rate of foreign fleets.

In sum, the collective foreign experience with US domestic regulation and trade suggests that more could be done to ensure that the impact of proposed regulations on international market openness is systematically assessed in accordance with transparent, uniform criteria. Under the current system, USTR may only be consulted on an *ad hoc* basis, if at all, during regulatory decision-making on issues which may appear to have no direct implications for international trade obligations. Some government agencies may also take a "do-it-yourself" approach, conducting their own assessments of the trade effects of proposed regulations without soliciting input from USTR. At the same time, the magnitude of the problem – and the resources that would be required to redress it – need to be seen in perspective. Many domestic regulations that reflect societal values and preferences (*e.g.*, speed limits and drinking age) have no implications for international trade in goods or services and are therefore of no interest here. Nonetheless, the range of policy areas that *do* carry this potential seems sufficiently broad to warrant a more formalised vetting of proposed rules from a market openness perspective.

2.4. Measures to encourage use of internationally harmonised measures

Compliance with different standards and regulations for like products often presents firms wishing to engage in international trade with significant and sometimes prohibitive costs. Thus, when appropriate and feasible, reliance on internationally harmonised measures (such as global standards) as the basis of domestic regulations can readily facilitate expanded 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.

In the United States standardisation and conformity assessment activities are decentralised with a mixture of public and private responsibilities and participants. The standards development process is mostly industry-led, operating on a private, voluntary basis, but including government participation. The Federal government on the other hand develops regulations, sets some standards, procures products and provides technical expertise to a host of standards committees. Technical experts from industry and government come together to support the activities of more than 600 private standards-setting bodies. The American National Standards Institute (ANSI), a federation of industry, standard setting bodies and government agencies, serves as an "umbrella" organisation. ANSI has adhered to the TBT Code of Good Practice on behalf of its Member organisations and is the recognised US member body to ISO, IEC, the Pacific Area Standards Congress (PASC) and the Pan American Standards Commission (COPANT).

US government policy with respect to standardisation, as expressed in the National Technology Transfer and Advancement Act (NTTA) of 1995 and guidance issued by OMB pursuant to that Law directs Federal agencies to participate in voluntary standards development activities and to use voluntary consensus standards in lieu of purely government standards except where inconsistent with law or otherwise impractical. This is in recognition that many voluntary consensus standards are appropriate or adaptable for the Government's procurement and regulatory purposes.

Standardisation activities under the NTTA are co-ordinated by the National Institute of Standards and Technology (NIST). NIST is an agency of the US Department of Commerce's Technology Administration and its primary mission is to develop and apply technology, measurements and standards in co-operation with industry. The NTTA Act requires NIST to co-ordinate activities with other federal agencies to achieve greater reliance on voluntary standards and conformity assessment bodies with lessened dependence on in-house standards. Co-ordination takes place through the Interagency Committee on Standards Policy (ICSP).

NIST prerogatives are exercised through a host of services, including : the Office of Standards Services (OSS), which formulates and implements standards-related policies and procedures and provides representation to domestic and international organisations and federal agencies concerned with standardisation, product testing, certification, laboratory accreditation, and other forms of conformity assessment; the National Voluntary Laboratory Accreditation Programme (NVLAP), which provides third-party accreditation of testing and calibration laboratories; or the National Center for Standards and Certification Information (NCSCI), which is a central repository for standards-related information in the United States. NCSCI provides access to standards, technical regulations, and related documents published by US and foreign governments as well as by domestic, foreign, and international private-sector standards organisations. It also serves as the US enquiry point under the TBT Agreement and NAFTA. All proposed US government rules (mandatory technical requirements or conformity assessment systems), including proposed revisions, are published in the Federal Register by the responsible Federal agency. NCSCI staff regularly review the Register to identify those proposed regulations that might potentially affect trade and notify them to the WTO.

For WTO Members, a broad requirement to use international standards as the basis of domestic regulations stems only from adherence to multilaterally-agreed trade rules. However, departures from this basic obligation are permitted. Article 2.4 of the WTO TBT Agreement requires Members to use relevant international standards (or relevant parts of them) as a basis for their technical regulations "except when they would be an ineffective or inappropriate means for the fulfilment of legitimate objectives pursued". A parallel orientation in Article 3 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) requires Members to base their sanitary or phytosanitary measures on international standards, guidelines, or recommendations, where they exist, although Members may introduce or maintain measures based on more stringent standards under certain narrowly-defined conditions.

Accordingly, Title IV of the Trade Agreements Act of 1979, as amended by the URAA, calls upon agencies to take into consideration international standards and, when appropriate, to base their standards on international ones. In co-operation and co-ordination with relevant agencies, USTR is responsible for monitoring US compliance with WTO and any other international obligations relating to the use of internationally harmonised standards and certification procedures, and for responding to complaints by foreign governments on perceived violations of all obligations flowing from such agreements.

National defence, human health and safety, environmental protection, or technological considerations, and other rationales such as protection of animal or plant life or health or worker safety are amongst recognised exceptions which may justify departures from international standards and certification procedures as the basis of domestic regulations. The extent of US invocation of such exceptions in practice -- or conversely, the extent of US reliance on international standards as the basis of domestic regulations – is difficult to discern in the absence of systematic efforts to monitor the adoption of internationally harmonised standards and certification procedures.

The United States has fostered the emergence of a host of significant leading standards widely used in the global market. In such settings, US standards tend to serve as *de facto* international standards. However, the extent of US adherence to existing international standards is less clear. Some trading partners allege a relatively low use of international standards in the United States as a cause of trade frictions. The European Commission, for example, points to "the relatively low use, or even awareness, of standards set by international standardising bodies" in the United States and further alleges that although a "significant number of US standards are claimed to be 'technically equivalent' to international ones, and some are indeed widely used internationally, very few international standards are directly adopted" and that in some cases, "US standards are in direct contradiction to them."[14] The United States rejects such charges as based on an excessively narrow definition of international standards and international standards bodies, a problem compounded in its view by the scarcity of factual data on adoption and use of international standards (see previous paragraph).

US trading partners are also concerned by what is perceived as an extremely complex combination of public and private, federal and sub-federal responsibilities, lacking a single co-ordination agent[15] (see also Section 3 below). They further criticise the considerable latitude available to private organisations providing quality assurance, such as the Underwriters Laboratories, to impose -- and modify frequently and unpredictably -- the use of non-harmonised standards.[16]

World-wide acceptance of pioneer US product technology, standards and technical specifications may also have induced a disinterest on the part of certain US industry groups and standards setting bodies in international standardisation activities. As a result, some international standards have been developed without adequate US input or representation, creating concerns within the US administration about the consequences of this situation for US competitiveness.[17] In other cases, however, US industry has been actively engaged in global standardisation work, including in a leadership capacity.[18]

Fears that reliance on internationally harmonised measures may somehow lead to a lowering of domestic regulatory standards -- or impatience with the generally slow pace of international standard-setting activities -- may also be contributing to the situation. As provided for in WTO rules, there may also be legitimate reasons for departures from given international standards. Nonetheless, a lack of understanding on US policies and practices in this area suggests that much would be gained from a clarification of the extent to which international standards are in fact reflected in domestic regulations and a systematic assessment of the reasons for departures from this general principle.

2.5. Recognition of equivalence of other countries' regulatory measures

The pursuit of internationally harmonised measures may not always be possible, necessary or even desirable. In such cases, efforts should be made in order to ensure that cross-country disparities in regulatory measures and duplicative conformity assessment systems do not act as barriers to trade. Recognising the equivalence of trading partners' regulatory measures or the results of conformity assessment performed in other countries are two promising avenues for achieving this result. In practice, both avenues are being pursued in the United States in various ways. Recognising certification given to foreign products by foreign laboratories is one example. Such recognition can be accorded unilaterally, but also through the mechanism of a Mutual Recognition Agreement (MRA) between trading partners. Another example arises when certification operates through self-declaration of conformity by manufacturers; in this case, recognition of equivalence means that declarations of conformity by foreign manufacturers are also accepted: foreign (as well as domestic) producers can assess the conformity of their product with requirements set in a given market as they deem appropriate and will be treated the same way by regulatory authorities. The latter may then test products on the market under established procedures and take necessary measures as warranted, regardless of the origin of products.

US WTO obligations again provide the chief context for the recognition of equivalence of other countries' regulatory measures and conformity assessment results. Title IV of the Trade Agreements Act of 1979, as amended by the URAA, is the legal basis for US implementation of the WTO TBT and SPS Agreements. Both Agreements expressly encourage Members to recognise other countries' technical regulations, SPS measures and results of conformity assessment procedures as equivalent, though in all cases Members retain ultimate discretion in deciding whether a satisfactory basis exists for doing so.[19] Section 492 of Subtitle F of the URAA (on International Standard-Setting Activities) contains specific provisions concerning equivalence determinations for sanitary and phytosanitary measures. USTR has overall responsibility for monitoring US compliance with these and other obligations under its trade agreements, in co-operation and co-ordination with relevant agencies, and for responding to complaints received from foreign governments concerning perceived violations of such obligations.

Determinations of equivalence of other countries' regulatory measures rest with the US regulatory authority concerned. In general, however, regulatory authorities would only recognise as equivalent those regulatory measures which afford the same level of regulatory protection as that established by US law. Individual regulators have wide discretion in deciding this issue and are not held to any broad-based criteria on how such determinations should be made. Irrespective of this shortcoming, however, US efforts to recognise trading partners regulatory measures as equivalent appear to be highly sporadic and generally reactive (in the face of related trade frictions) in nature. This may be attributable in part to the technical complexities of the task itself: establishing credible grounds for determinations of equivalence may itself be a resource-intensive, time-consuming and politically sensitive process. However, there may also be untapped potential for a more concerted, government-wide effort on this front, perhaps involving the business community. For example, TABD calls for the development of functionally equivalent standards in the automotive sector (see Box 4) may help foster greater adherence to this efficient regulation principle.

A number of US agencies permit the recognition of the results of conformity assessment regardless of the geographic location of the conformity assessment body (*e.g.*, via accreditation and/or recognition programmes which accept applications on a non-discriminatory basis).

A comprehensive list of regulatory measures and results of conformity assessment performed in other countries which are partially or fully recognised as equivalent by US regulatory bodies is not available. However, two concrete examples illustrate how the approach is applied in practice:

- The US Department of Transportation (DOT) recognises a declaration of conformity by manufacturers (or importers) of motor vehicles and motor vehicle equipment. Under US law, manufacturers are required to certify that their products comply with all applicable Federal Motor Vehicle Safety Standards (FMVSS). This certification is in the form of a permanent label affixed to the product. This label is required for all vehicles and equipment covered by the FMVSS, and must be present if a vehicle or equipment covered by the FMVSS is to enter the United States. For purposes of enforcement, DOT's National Highway Traffic Safety Administration (NHTSA) may test the vehicle or equipment for compliance with one or more of the FMVSS after the product is on the market. If the product fails the test, and either the manufacturer or NHTSA determines that the product, in fact, does not comply, the manufacturer must notify the product's owner and remedy the non-compliance at no cost to the owner. Additional penalties may also apply. A manufacturer outside the United States who offers its product for importation into the United States must submit itself to the jurisdiction of US Federal courts by designating an agent in the United States to receive legal papers on behalf of the manufacturer.

- The US Department of Labour Occupational Safety and Health Administration (OSHA) maintains a programme to ensure the safety of products used in the workplace. Under this programme, certain products (including electrical equipment) need to be certified by a "nationally recognised testing laboratory" (NRTL). Such a facility need not be geographically located in the United States to qualify as an NRTL. To obtain this status, a candidate facility must apply to OSHA and provide information on the relevant test standards for which it wishes to be recognised. OSHA then makes a determination as to whether these test standards are appropriate under its regulations (Part 1910 of Title 29 of the Code of Federal Regulations).

The United States also pursues recognition of other countries' regulations and conformity assessment procedures through negotiated MRAs at bilateral and regional levels. The US-EC MRA signed on 18 May 1998, for example, provides a broad framework for recognition of conformity assessment procedures and specific procedures to be followed in six areas (telecommunications equipment; electromagnetic compatibility; electrical safety; recreational craft; pharmaceutical good manufacturing practice; and medical devices). Similar initiatives are being pursued with Canada (for example, on fish inspection systems).

A basis for achieving greater compatibility of conformity assessment procedures and moving towards mutual recognition of test results has also been established in some regional trade agreements. Chapter 9 of NAFTA requires partner countries to "accredit, approve, license or otherwise recognise conformity assessment bodies in the territory of another Party" on a national treatment basis without requiring the negotiation of an additional agreement.[20] In addition, Parties are to give "sympathetic consideration" to requests by another to negotiate agreements for the mutual recognition of the results of another Party's conformity assessment procedures.[21] Sector-specific advances in the area of conformity assessment have also been made. For telecommunications equipment, Parties agreed to adopt as part of their conformity assessment procedures "provisions necessary to accept the test results from laboratories or testing facilities in the territory of another Party for tests performed in accordance with the accepting Party's standards-related measures and procedures.[22] Such provisions still leave scope for differing interpretations and resulting trade frictions. But they are promising steps in the right direction in an area fraught with potential for dispute.

Possible approaches to recognition of results of conformity assessment procedures are under consideration in APEC. Current discussions are addressing potential arrangements in such areas as electrical safety, electronic equipment, and telecommunications equipment. If and when agreed, such

arrangements would be open to participation by individual APEC economies. Recognition of standards and conformity assessment issues are also on the agenda of other incipient regional economic integration agreements in which the United States is involved, notably the FTAA. Existing and incipient trade agreements thus continue to foster regulatory reform efforts in the United States and partner countries.

Beyond MRAs, the United States is also engaged in efforts to enhance market openness through other approaches to international co-operation on regulatory issues. Among the stated objectives of the EU-US Transatlantic Economic Partnership announced in May 1998 are the improvement of regulatory co-operation in such areas as manufactured goods; agriculture, including biotechnology; services; industrial tariffs; global electronic commerce; intellectual property rights; investment; government procurement; and competition and improvement of the efficiency and effectiveness of regulatory procedures such as standards, testing and certification.

The US business community has played an important role in prompting regulatory reform in this area. Working in tandem through the TABD, the US and European business communities have helped move their respective governments to act on regulatory barriers to trade, particular those posed by standards and conformity assessment issues. Based on its performance to date, the organisation of the TABD along sectoral and thematic lines (Box 3) seems to offer a useful formula for rapid and highly focused progress on regulatory issues. Identification of barriers encountered on the front lines of industry followed by pragmatic, business-developed approaches to reducing or eliminating such barriers has already yielded tangible results for traders and investors (such as the EU-US MRA). The challenge is to further extend and embrace this new paradigm for regulatory reform while ensuring that results achieved promote wider reduction of barriers at the multilateral level.

Box 3. **The Trans-Atlantic Business Dialogue: A business-driven approach to regulatory reform**

The TABD was launched in Seville, Spain in November 1995 as part of the EU-US New Transatlantic Agenda. Its principal aim was to boost transatlantic trade and investment opportunities through the removal of costly inefficiencies caused by excessive regulation, duplicative product testing, redundant standards certification, and heterogeneous standards. The TABD is a unique, informal process for enhanced co-operation between the business community and governments of the United States and the European Union. CEOs and business associations work closely with government officials to develop joint policy recommendations for consideration by the European Commission and the US Administration. The TABD is co-chaired by two senior business executives from the EU and US, with about thirty working groups addressing a range of sectoral and horizontal issues. By mid-1998 the US and EU administrations had taken concrete action towards the implementation of one-third of the TABD recommendations, supported, *inter alia*, by the creation of a US Government interagency group on the implementation of TABD recommendations (a similar group having been created by the European Commission). The TABD expects as much as half of its recommendations to be implemented by December 1998.

More specifically, in the field of standards and conformity assessment, TABD's Transatlantic Advisory Committee on Standards, Certification, and Regulatory Policy (TACS) addresses issues in an open-ended set of goods and services sectors. Sixteen different sectors (among them aerospace, agri-biotech, automobiles, chemicals, and telecommunications services) are currently on the agenda, though new issues may be introduced on the basis of EU-US industry consensus. The TACS advocates a new transatlantic regulatory model for products based on the principle "approved once, accepted everywhere". Among instruments recommended by TACS to achieve this principle are MRAs for standards testing (to eliminate duplicative procedural requirements); greater acceptance in specific sectors of Manufacturer's Declarations of Conformity to standards and technical regulations; harmonisation of certain technical standards and regulations; increased transparency and regulatory co-operation between EU and US governments; and the use of performance-based standards rather than design specifications.

Source: TABD Website; TABD 1998 Mid-Year Report presented at the May 1998 EU-US Summit.

In sum, the United States has made limited progress towards broader recognition of equivalence of trading partners' regulatory measures and results of conformity assessment procedures. Taken together, unilateral approaches such as DOT's self-declaration of conformity with safety standards (for the automotive sector), occasional negotiation of bilateral MRAs in specific sectors, and pursuit of possible mechanisms for recognition of the results of conformity assessment procedures within the context of regional agreements suggest that US policy is moving in the right direction on this issue. Nonetheless, efforts in this area need to be intensified and accelerated. Heterogeneous or redundant standards and duplicative conformity assessment requirements continue to burden US trading relationships with extra and sometimes prohibitive costs. These issues, more acute in some sectors than others, are revisited in Section III.

2.6. Application of competition principles from an international perspective

The benefits of market access may be reduced by regulatory action condoning anticompetitive conduct or by failure to correct anticompetitive private actions that have the same effect. It is therefore important that regulatory institutions 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.

Three main procedural avenues are open to foreign firms wishing to advance complaints against alleged anticompetitive regulatory or private actions: (1) judicial review of regulatory action; (2) the filing of a private lawsuit under the Clayton Act and any other relevant laws, such as state antitrust or "business torts" laws; and (3) provision of information and request for assistance from US antitrust authorities (the Department of Justice and the Federal Trade Commission). In some cases, federal regulatory agencies may also entertain complaints about the behaviour of regulated entities in accordance with other statutory administrative procedures.

At the federal level, most final agency decisions are subject to judicial review under the APA (5 U.S.C. Sections 701 et seq.) and/or the specific terms of the agency's Congressional mandate. Courts may overturn agency action over matters of both law and fact, although the court review is not typically a de novo decision, and the agency's action does receive a degree of deference which may vary in different regulatory settings. For the most part, aggrieved foreign persons generally enjoy rights similar to aggrieved domestic persons to obtain such judicial review, though in practice foreign persons may find it more difficult to assert standing to complain due to the more indirect or remote effect that agency actions may have on their business or property. Agency rules may contain deadlines for decisions and time limits for filing appeals tend to be fairly short. The Courts, however, are usually not subject to any particular time limits, introducing a potential for protracted proceedings. A four-year statute of limitations for commencement of private antitrust complaints applies, and federal court rules contain certain time limits as well.

Under US law, persons injured in their business or property are entitled to obtain trebled money damages and/or injunctive relief for antitrust violations. These rights are very well established and frequently used. Neither the antitrust laws nor federal court rules contain discriminatory provisions against foreign plaintiffs seeking to conduct, or actually conducting, business in the United States.[23] Similarly, the Department of Justice and the FTC do not discriminate on the basis of nationality in their enforcement activities.

An exception, however, is the special legislation that ensures that joint ventures for research, development, and production (even between horizontal competitors) will not be judged by the *per se* standard, but instead by the multi-factor rule of reason.[24] The law also provides for a reduction in potential liability in private law suits to single damages, if parties file their joint venture plans with the enforcement agencies. This legislation may have different impacts on foreign parties and ventures than it does on US ones while the US authority has not been aware of any complaint from firms or of cases where the legislation had actual impact on joint venture parties. The guarantee of single-damages exposure for production activities only apply if: (1) the principal facilities are located in the United States; *and* (2) each person who controls any party to the joint venture is a US person, or comes from a country whose antitrust laws relating to production joint ventures provide national treatment for US persons.[25]

Often, domestic or foreign persons adversely affected by the behaviour of regulated enterprises may be able to obtain redress from the relevant regulatory body. Judicial remedies under state competition laws or state laws on breaches of contract or business torts may also be available. US authorities are unaware of any significant exceptions to these procedures, or significant market access complaints advanced by foreign persons in the last three years.

A particular setting for concern is the exertion or extension of market power by a regulated or protected monopolist into another market. The substantive problem, sometimes called "regulatory abuse," is addressed by US antitrust laws about monopolisation, as well as by US regulatory laws applied to particular markets. Foreign firms and trade could be implicated in two ways. First, an incumbent domestic regulated monopolist might gain an unfair advantage over foreign products or firms in an unregulated domestic market. Or, an incumbent foreign regulated monopolist might use the resources afforded by its protection at home to gain an unfair advantage in another country.

In the first case, the US regulated monopolist might use resources that its protection affords it to achieve unfair advantages over its suppliers and its potential competitors in markets where it lacks formal protection. Where the concern is with the effects in the United States arising from the extension or exertion of market power from one regulated market to another non-regulated market, the US antitrust and other regulatory laws might apply to sanction that conduct. Particular applications would depend on the scope of regulatory authority, or of any antitrust immunity (for further discussion, see background report on The Role of Competition Policy in Regulatory Reform). However, there may well be disputes about whether a particular conduct falls within a regulatory agency's authority to grant immunity from antitrust liability. These "regulatory abuse" scenarios are arising frequently in domestic US energy and telecommunications regulation. It may be that foreign firms and trade are also involved, but the United States indicated that it did not have comprehensive data about significant complaints by foreign firms during the past three years concerning the situations described above.

In the second case, the regulated monopolist is a foreign firm, and its regulated market is a foreign market. In principle, US substantive antitrust law about "regulatory abuse" would apply if there were effects in the US market. But in this setting, some technical exemptions could apply. For example, US courts might not apply the law to the actions of foreign state owned enterprises that are not engaging in a commercial activity; or to actions that are compelled (rather than merely sanctioned or encouraged) by a foreign government. In general though, if the foreign monopolist is exerting or extending its market power into the US market, it would not be insulated from US legal sanction. The United States indicated that it did not have comprehensive data about significant complaints during the past three years concerning regulatory or antitrust treatment of foreign firms with monopoly power in the situations described above. It is worth noting, however, that in the telecommunications sector several major US service suppliers have been very supportive of the provisions in the GATS and the Reference Paper to the WTO Basic Telecommunications Agreement relating to the abuse by a monopoly service supplier of its monopoly position outside the scope of its monopoly rights.

Whether the concern with the exertion or extension of market power from a regulated market to a non-regulated market is with respect to a foreign or domestic firm, the procedures available for hearing and deciding complaints would be as described above. However, because foreign persons, even when they have a significant US commercial nexus, often have the location of the pertinent conduct abroad, a variety of additional considerations may militate against taking action. There may be questions of jurisdiction, international comity, appropriate choice of forum or the practical effectiveness of efforts to obtain evidence or order relief.

On balance, US regulatory procedures for initiating and advancing complaints about alleged anti-competitive regulatory or private actions are broadly satisfactory from the perspective of international market openness. However, the issues raised in the preceding paragraphs may benefit from further consideration.

3. Assessing results in selected sectors

This section examines the implications for international market openness arising from US regulations currently in place for four sectors (two manufacturing and two service sectors): telecommunications equipment; telecommunications services; automobiles and components; and electricity (generation and access to transmission grid). 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. Particular attention is paid to product standards and conformity assessment procedures, where relevant. Other issues addressed here include efforts to adopt internationally harmonised product standards, use of voluntary product standards by regulatory authorities, and openness and flexibility of conformity assessment systems. In many respects, multilateral disciplines, notably the WTO TBT Agreement, provide a sound basis for reducing trade tensions by encouraging respect for fundamental principles of efficient regulation such as transparency, non-discrimination, and avoidance of unnecessary trade restrictiveness.

3.1. Telecommunications equipment

The US market for telecommunications equipment is the largest in the world and, since the AT&T divestiture, one of the most open. Competition between domestic and foreign suppliers is intense, with imports accounting for over 20 per cent of the market in recent years. Current industry trends such as liberalisation of telecommunications services markets, consolidation through mergers, acquisitions, and strategic alliances, and the convergence of digital and communications technologies are driving a further globalisation of the sector, presenting foreign suppliers with opportunities for expanded trade in the US and other markets.

The 1984 break-up of AT&T fostered a number of pro-competitive developments in the market for telecommunications equipment. First, the Department of Justice broke off equipment manufacturing from the Regional Bell Operating Companies (RBOCs) on the grounds that if monopoly local exchange carriers had equipment-producing subsidiaries, rate-of-return regulation would give them an artificially large incentive to meet their needs in-house rather than looking to other (possible foreign) suppliers. Second, the 1984 divestiture gave rise to a competitive long-distance services market. This in turn promoted a more open equipment market with several purchasers seeking to realise lower costs, greater market share, and deeper profits through competitive procurement.

The positive performance of US telecommunications equipment markets, including from the market openness perspective, has been most readily apparent in the area of terminal equipment (also called customer premise equipment -- *e.g.*, phone sets, fax machines and modems). This is largely attributable to specific FCC decisions (the First Order and Second Order Registration Programmes) which have granted customers freedom to connect their own terminal equipment. These decisions essentially precluded incumbent carriers from arbitrarily deciding which equipment could be connected to their networks, thus loosening their hold on exclusive purchasing patterns. A surge in imports resulted as many US firms globalised their manufacturing bases.

The performance of the network equipment market (*e.g.*, switches and transmission equipment) from the perspective of market openness has been less clear-cut. One trading partner, for example, has claimed that its prospective exporters are burdened by heavy costs of compliance with US equipment standards (including environmental and safety standards); significant delays in obtaining required certification by US-based bodies; and difficulties in getting listed as potential suppliers by large network equipment users, notably AT&T and the RBOCs.[26] However, the FCC maintains that US carriers have procured significant amounts of equipment, including network switches, from foreign firms.

The focal point for US regulatory activities in the sector is the FCC's Office of Engineering and Technology (OET). As for all other independent federal agencies, administrative procedures are governed by the APA, and OMB's regulatory oversight activities do not extend to proposed rules for the sector. Mirroring the APA's principal strengths, regulatory procedures for telecommunications equipment are broadly trade-friendly, scoring high in terms of key principles such as transparency and openness of decision-making. Like other Commission bureaux, OET has made exemplary use of the Internet in support of such goals. For example, all FCC Rules and Regulations under OET responsibility are available on-line; an on-line Equipment Authorisation Database allows applicants to electronically file applications for equipment authorisation and to check their status; and a "Frequently Asked Questions" site clearly outlines procedures for importation of electronic equipment and radio transmitters, linking users to relevant provisions in the Code of Federal Regulations.

The regulatory framework for telecommunication equipment is broadly trade and investment-friendly. Measures stemming from international trade obligations, notably those under WTO TBT Agreement, require or encourage explicit recognition of non-discrimination (MFN and NT) principles; the avoidance of unnecessary trade restrictiveness; and encourage the use of internationally harmonised standards and certification procedures wherever possible and appropriate[27] (though a broad range of exceptions relating to issues such as national defence, technological considerations, or "other legitimate domestic objectives" may result in a departure from this general stance in this as in other sectors). Efforts have been made towards recognition of the "functional equivalence" of regulatory measures in other countries as well as recognition of the results of conformity assessment procedures carried out in other countries. The signature in May 1998 of an MRA with the European Union on conformity assessment covering telecommunications equipment and electromagnetic compatibility is one illustration of this trend. In addition, recent efforts by the FCC to move a growing number of products to suppliers' self-declarations of compliance and consequent reductions in the number of products still requiring explicit FCC authorisations prior to marketing or importation should go a considerable distance to improving market openness.

Regulatory content for the sector is by nature complex, reflecting the technical sophistication of telecommunications networks and the radio spectrum. However, a wide range of technical standards applicable to individual types of equipment and additional requirements for FCC-issued equipment authorisations for certain products are neither discriminatory nor excessively burdensome in comparison with most other countries' regulatory frameworks.

Standards-setting for the sector is an essentially industry-driven process which is open and transparent in nature. Compliance with FCC-defined product standards relating to issues such as safety and technical compatibility with US systems are also of central importance in gaining entry to the US market.[28] Here, differences between US and other national regulations on telecommunications equipment and the related need for conformity assessment continue to introduce scope for trade friction.

Concerns of this nature appear to be largely borne out by some US trading partners. Prevailing cross-country divergence in product standards, costs of certification procedures relating to certain US Federal and State standards applicable to the sector (including environmental and safety standards)[29] and delays in approval processes are recurrent themes in this context. Moreover, rapid technological progress in the sector has fostered a surge in industry-driven standards development here as elsewhere in the world. In light of the potential for increasing trade tension, this argues for more attention to the use of existing international standards as the basis of domestic regulations as well as more vigorous participation in the development of new, flexible international standards capable of embracing improvements in US as well as foreign technology. At the same time, this approach may not always be workable, as when the industry-driven process leads to multiple standards rather than a unique single standard. In such cases, US practice is to enable the market to decide what standards to implement and allow industry to determine support for equipment based on particular standards.

Much of this points to the fundamental issue, from a market openness perspective, of a pro-competitive, open and transparent setting for standard-making activities. As earlier noted, sectoral regulation is a mix of industry and government-defined standards. However, recent steps taken in response to the Telecommunications Act of 1996 suggest that the US regulator may be moving away from its role as standard-setter towards an enhanced advisory role to industry. For example, the United States is seeking to propose a framework intended to encourage competition for manufactured products through the increased availability of network and planning information and fair and open forums for establishing equipment standards and for certifying equipment in the industry setting.

Procurement of telecommunications equipment is another area which has been prone to trade friction, with at least one trading partner alleging that opportunities for foreign suppliers are restricted by historical purchasing patterns between US telecommunications companies and domestic suppliers and by adherence of rural telephone co-operatives to “Buy America” requirements for purchases of telecommunications equipment.[30]

Regulatory barriers to trade in telecommunications (terminal) equipment have been or are currently being addressed in a number of regional trade fora involving the United States and may provide useful models for enhanced market openness. NAFTA, for example, sets clearly-defined parameters on standards-related measures relating to attachment of terminal or other equipment to public telecommunications transport networks, including those measures relating to the use of testing and measuring equipment for conformity assessment procedures.[31] In APEC, guidelines have been adopted for a regional harmonisation of telecommunications equipment certification procedures, and sector-specific standards and regulatory policy issues are being explored in both the TABD and FTAA settings. Concrete progress towards enhanced US market openness for the trading partners concerned and its possible impact on third countries in still difficult to discern. However, the transparency of these efforts, the global reach of the key issues, and continued dynamism of telecommunications equipment markets around the world suggest that initiatives such as these are likely to yield a wider model for market-opening regulatory reform. The successful negotiation (at US instigation) of the Information Technology Agreement has led on to negotiations on ITA II and seems likely to yield important dividends in improving regulatory style and content for the sector.

In sum, the regulatory style in this sector is fairly well-adapted to the requirements of international market openness. Regulatory decision-making procedures are highly transparent and open and inroads have been made towards recognising the equivalence of trading partners' regulatory measures and conformity assessment systems at bilateral and regional levels. Other initiatives, notably recent FCC moves to "graduate" more products to self-declarations of compliance, are particularly encouraging in light of significant costs and delays sometimes associated with third-party certification procedures. More systematic consultation between the regulator and trade policy bodies could help ensure that new regulations, when required, are modelled after the efficient regulation principles. Where possible, greater reliance on international equipment standards as the basis of domestic regulation and deeper commitment to the development of global standards may alleviate trade friction (though as noted in the section on the use of internationally harmonised measures definitional and interpretative differences cloud this issue). In the longer term, however, a more promising avenue may lie in broader support for transparent industry-driven standards-making processes open to all interested players, domestic or foreign.

3.2. Telecommunications services

Progressive liberalisation of the US market for telecommunications services over time has earned this sector a strong historical record of international market openness. Certain US service sectors such as domestic long distance, international value added network services, and the IMTS switched resale (basic telephony) market have been open to foreign participation for years. More recently, important policy developments at national and international levels have dramatically altered the competitive landscape for telecommunications services and further improved prospects for enhanced market openness in the sector. At the national level, the *Foreign Carrier Entry Order* issued by the FCC in November 1995 ushered in a new regulatory philosophy on foreign participation in the US telecommunications market. But the defining event in shaping the current US regulatory regime for foreign participation in the telecommunications services market was the successful conclusion in February 1997 of the WTO agreement on basic telecommunications. With its entry into force on 5 February 1998, the agreement set telecommunications services on the path of progressive liberalisation and pro-competitive regulatory reform in 72 signatory countries, including the United States and most of the world's major trading nations. The United States made significant market-opening commitments in the agreement and joined 64 other WTO Members in subscribing to a Reference Paper on Pro-Competitive Regulatory Principles.[32] The FCC acted quickly to give concrete effect to the agreement through the creation of a new regulatory framework for international telecommunications.

Substantive regulation and market openness in the sector are thus best understood from pre and post-WTO agreement perspectives. Pre-WTO, foreign participation in the market was regulated on the basis of the *Foreign Carrier Entry Order*. The Order had three main objectives: (a) to promote effective competition in the US telecommunications services market, particularly the market for international telecommunications services; (b) to prevent anticompetitive conduct in the provision of international service facilities; and (c) to encourage foreign governments to open their own communications markets. This latter objective was pursued through application of a reciprocity-based "effective competitive opportunities" (ECO) test[33] as part of an overall public interest analysis for authorisations relating to the provision of international telecommunications services under Section 214 of the Communications Act, indirect foreign ownership of common carrier radio licenses under Section 310(b)(4) of the Act, and cable landing licenses. Foreign companies could pass the ECO test by showing with respect to a given service that the foreign market had no legal or practical barriers to entry. The ECO policy ordinarily required several months to process each application by a foreign carrier to provide service in the US market.

New FCC rules introduced in anticipation of the entry into force of the WTO agreement took effect on 9 February 1998. The *Foreign Participation Order* significantly liberalised treatment of foreign telecommunications carriers and investors from countries that are signatories to the WTO agreement. A key outcome of this process was the removal of the ECO test in favour of an open entry standard for carriers from WTO Member countries. Open entry standard means that these carriers benefit from a rebuttable presumption that applications for Section 214 authority do not introduce concerns that would justify denial of an application on competitive grounds. The same presumption is now made in respect of applications for cable landing licenses and applications to exceed the 25 per cent foreign ownership benchmark in a common carrier radio licensee.

However, the revised rules retain certain safeguards designed to prevent foreign carriers with market power from distorting competition in the US market and maintain the Commission's authority to deny or condition such entry if required by the public interest. How might such a determination be made? First, while benefiting from the presumption in favour of entry on a "streamlined" basis (see discussion of streamlined procedures below), carriers from WTO countries may still be restricted from providing facilities-based service to their affiliated markets if this would result in a very high risk to competition on that route. Second, a US-licensed carrier may not provide facilities-based service to a country in which it has an affiliate unless its foreign affiliate offers US carriers settlement rates at a certain level (see discussion on benchmark settlement rates below). Finally, a license may still be denied if there are national security, law enforcement, and foreign policy and/or trade concerns raised by the Executive Branch.[34] The FCC therefore retains discretionary power to decline licenses for reasons which may be unrelated to anticompetitive conduct in the international telecommunications services market.[35] Some foreign carriers interviewed for this project expressed concern that this leveraging of licenses in support of US objectives in other policy areas may have a chilling effect on license applications by other prospective competitors, eroding prospects for enhanced foreign participation in the sector.

On the procedural side, concerns about market openness have related primarily to the length of time required to process license applications by prospective international service providers. Improvements in US processing procedures, notably the FCC's undertaking to act within a set timeframe on Section 214 applications, should contribute to enhanced market openness. With its adoption of the new foreign participation rules, the FCC stated that it would act within 90 days on all Section 214 applications except those that raise issues of "extraordinary complexity".[36] US authorities expect that "almost all" applications will be granted within this 90-day period.[37] In addition, the Commission expanded its streamlined processing rules under which, absent any objections, a license may be presumed granted after 35 days. According to the FCC, practically all Section 214 applications qualify under streamlining procedures,[38] with over 200 Section 214 and 310(*b*)4 authorisations processed under the rules in the period 1 January – 15 May 1998.[39] Foreign and domestic carriers alike have benefited from streamlined treatment: recent examples of foreign beneficiaries include an application by Japan's NTTA Communications to operate as facilities-based and resale carrier to Japan and an application by Canada's Teleglobe Inc. for the transfer of control of Excel Communications to Teleglobe. Still, US authorities note that some applications will generate significant public comment or raise issues of first impression, in which cases 90 days may be insufficient to render a decision.[40] The degree to which such applications may languish at the hands of the regulatory authorities thus remains of considerable concern to affected carriers.

More specific concerns sometimes arise regarding regulatory treatment of foreign-affiliated carriers. Licenses granted under Section 214 enable a foreign carrier to use its own facilities (*e.g.*, its own cable circuits) or engage in resale of existing US carrier facilities in order to provide a service. On facilities use, many telecommunications regulators around the world grant global licenses. The FCC's rules provide that applicants from WTO countries may file an application to provide global facilities-based and/or switched resale services and receive "streamlined processing". Applications for global facilities-based service by applicants that are affiliated with a foreign telecommunications carrier that possesses market

power in such countries will receive streamlined processing only if the application includes certification that the applicant will comply with the FCC's dominant carrier safeguards on routes where it has such affiliations.[41] Applications for global switched resale service by carriers from WTO countries are eligible for streamlined processing without restriction. Applicants for facilities-based and switched resale service with affiliates with market power in non-WTO countries will receive authorisation to provide service on the affiliated route only to the extent that the foreign market satisfies the FCC's ECO test. In the experience of one foreign-affiliated carrier with geographically far-flung operations around the world (many of which are located in non-WTO countries where "monopoly" models prevail), such licensing criteria have proven particularly onerous. In one illustrative case, the same carrier processing a Section 214 application for a global calling card service based in the United Kingdom dropped a number of desired destination countries from its application in order to meet licensing criteria, with attendant consequences vis-à-vis competing calling card schemes.

International settlement rates (per-minute rates paid by carriers to terminate international traffic at its domestic destination) have also emerged as a market access issue from the perspective of foreign carriers seeking to serve the US market. The United States has been a world leader in seeking reform of the existing system of international settlement rates and continues to work with other countries in the ITU towards a multilateral consensus on lowering accounting rates. However, in the continuing absence of such a consensus, US handling of the issue has fostered tension with foreign competitors. Much of this turns on the FCC *Benchmark Order*, which would require US carriers to reduce the settlement rates they pay to foreign carriers and impose certain conditions on participation in the US market aimed at "reducing the incentives and ability of a foreign carrier to act anticompetitively to the detriment of US consumers."[42] Thus, facilities-based licenses to serve markets in which a licensee's affiliate possesses market power would not be activated until the affiliated foreign carrier agrees with US carriers to *benchmark settlement rates* linked to the level of economic development in a terminating country. Under the proposed matrix, target benchmark rates of 15, 19 and 23 cents per minute would apply to high, medium and low-income countries respectively.

Moreover, foreign-affiliated carriers with Section 214 authorisations granted prior to 1 January 1998 are effectively exempted from the benchmark settlement rate condition insofar as the Order applies only to *new* market entrants. A later adjustment to the Order requiring US carriers to adopt the benchmark rates by a date certain has been extended indefinitely. Thus, depending on their particular circumstances, foreign-affiliated carriers seeking to launch new facilities-based services may find themselves at a competitive disadvantage vis-à-vis established foreign and domestic entities. Leasing existing services in accordance with the international simple resale rule is one alternative for carriers so affected, but a much more costly one. And additional conditions would apply in such a scenario: no carrier may lease a private line circuit and provide international switched services until 50 per cent of all traffic on the route is based on benchmark settlement rates or the foreign country offers resale opportunities equivalent to those available in the United States. As discussed above, however, all carriers from WTO countries are eligible for streamlined global authorisation to provide switched resale service.

Sectoral regulatory procedures reflect a high-level commitment to openness and transparency.[43] Based on APA requirements, FCC administrative procedures are very open and regulations highly transparent. In addition, certain sector-specific procedures aimed at regulatory streamlining mentioned above may ultimately yield benefits for both domestic and foreign carriers. For example, Section 11 of the Communications Act, as amended, requires the FCC to review all of its regulations applicable to providers of telecommunications service in every even-numbered year, beginning in 1998, to determine whether the regulations are no longer in the public interest due to meaningful economic competition between providers of the service and whether such regulations should be repealed or modified. As part of this process, the FCC has proposed to grant blanket authority to provide international services and to reform its international settlements policy. Section 202(h) of the Telecommunications Act of 1996 also requires the

Commission to review its broadcast ownership rules biennially as part of the review conducted pursuant to Section 11. The FCC has determined that the first biennial regulatory review "presents an excellent opportunity for a serious top-to-bottom examination of all the Commission's regulations, not just those statutorily required to be reviewed."[44] Domestic and foreign carriers alike should benefit from this exercise.

The picture that emerges is largely positive, but some issues continue to require attention. Regulatory style and content for the sector is highly pro-competitive in tone and intent, and pivotal developments in domestic and international policies for the sector are making a decisive and irreversible contribution to enhanced market openness in the US as in other markets. National policies for the sector reflect clear leadership qualities in moving national and global telecommunications markets towards greater competition. FCC regulatory procedures are exemplary in terms of transparency and openness of decision-making. Nonetheless, several types of regulatory barriers that may be undermining optimal market openness in the United States have been identified. To recall some earlier examples, specific regulatory practices such as current US international settlements policy may be overly burdensome or generate discriminatory effects for some foreign carriers; and the preservation of regulatory discretion to deny licenses on the basis of anticompetitive safeguards, public interest factors, or (for non-WTO Members) the ECO test may be contributing to an air of uncertainty about prospects for enhanced foreign participation in the US market. The extent to which these various powers will be exercised in practice, however, remains to be seen.

3.3. Automobiles and components

Concerns about market openness and domestic regulation of automotive industries around the world are not new. 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. This is true with respect to many countries, including the United States.

US regulatory content for the sector is a hybrid of safety and environmental requirements. A motor vehicle destined for the US market must meet an array of US regulatory requirements stemming from two different Executive agencies. The Department of Transportation's National Highway Traffic and Safety Administration (NHTSA) promulgates and enforces federal safety standards, while the formulation and enforcement of motor vehicle emission standards fall under the jurisdiction of the Environmental Protection Agency (EPA).

NHTSA issues safety standards for new motor vehicles and new motor vehicle equipment. Vehicles and components manufactured or imported for sale in the United States must comply with all applicable safety standards.

As seen earlier, conformity with NHTSA safety standards is based on self-certification by vehicle manufacturers. Under this approach, automobile manufacturers must certify compliance of their products with all applicable standards. Though NHTSA seeks to ensure the integrity of the system by conducting annual compliance investigations to verify the compliance of motor vehicle equipment with safety performance requirements of relevant regulations. However, this would normally only occur in the case of a suspected product failure, and the primary onus to report alleged safety problems rests with consumers.

This system contrasts with the type-approval system[45] used elsewhere in the world, notably in the European Union, Japan, Australia and Korea. Self-certification is widely viewed as less burdensome than formal inspection by third parties, and may be a model for possible application in other sectors (*e.g.*, telecommunications equipment).

Conformity with motor vehicle emission standards is based on certification granted by the EPA (Office of Mobile Source Regulations). The central statutory authority for EPA regulatory action is the Clean Air Act of 1970, legislation which established the first specific responsibilities for government and private industry to reduce emissions from vehicles and other pollution sources. Amendments to the Act introduced in 1990 strengthened components of the earlier law (for example, exhaust standards for cars, buses, and trucks were tightened, and Inspection and Maintenance programmes expanded to include more areas and allow for more stringent testing) and introduced new concepts for reducing motor vehicle-related air pollution. And for the first time, fuel, along with vehicle technology, was treated as a potential source of emission reductions. Many of the 1990 amendments have already been phased in. Others, designed to encourage production of clean fuels and vehicles (including clean-fuel fleet programmes to be introduced in certain in certain "non-attainment" cities and the California Pilot Programme) are still to be fully implemented.

US environmental regulation specific to the automotive sector has not always proven trade-friendly. As earlier noted in this report, GATT/WTO cases brought in respect of reformulated gasoline and corporate average fuel economy standards revealed that certain elements of both regimes effectively discriminated against foreign manufacturers. Similarly, the European Commission maintains that aspects of the operation of other measures applicable to the sector, such as the luxury and gas guzzler taxes, discriminate against foreign manufacturers, especially where they have an effect equivalent to technical rules. The policy objectives underlying such regimes were never in question. In such cases, the trade-restrictive impact of the rules in question may have been averted through wider advance consultation with the trade policy community without compromising the achievement of environmental objectives.

Trade frictions arising from heterogeneous or redundant standards and conformity assessment procedures have sparked less international profile. But it is precisely this kind of low-level, pervasive irritant that continues to penalise foreign suppliers active in the US market (though this is not a problem unique to the US regulatory scheme) To its credit, the United States has actively participated in activities aimed at ensuring greater uniformity of automotive standards, notably the UN-ECE and TABD processes (Box 4). However, standards applied at the state level, such as the Californian Low Emission Vehicles regulation, still retain the potential to generate trade friction.

Sector-specific labelling requirements may also compromise market openness by implicitly encouraging consumers to "buy American". The American Automobile Labelling Act (discussed earlier in Box 1) requires all new passenger cars and light trucks sold in the United States to bear a label indicating the percentage of US or Canadian content. Though not formally discriminatory, the law has attracted the attention of foreign trading partners who see it as an effective prompt to US consumers to act on their local content preferences.

Organisation of distribution in the sector is broadly consistent with an open market philosophy. In contrast to some other markets where exclusive dealerships are the norm, multiple franchise sites are common in the United States, with the Big Three domestic producers (GM, Ford and Chrysler) and some Japanese manufacturers marketing several vehicle makes on the same premises. Much of the regulation of motor vehicle franchising in the United States takes place at the State, rather than the Federal, level. In contrast to Europe and Japan, all sales in the United States must pass through dealers and manufacturers are not permitted to undertake direct selling. As in many OECD countries, the automobile distribution system responds to local market demands and probably does not represent one of the major barriers to market openness.

In contrast to the other three sectors examined in this section, regulatory processes for automobiles and components are subject to OMB oversight. Thus, in addition to meeting APA requirements, proposed rules for the sector are subject to additional vetting in accordance with OMB procedures. Sector-specific regulatory practices also apply. For example, 49 CFR sets out detailed procedural rules (Part 551), rules regarding petitions for rule-making, defect and non-compliance orders (Part 552) and rulemaking procedures (Part 553). Many NHTSA and EPA rulemaking activities are conducted on-line.

Box 4. **Towards greater regulatory harmonisation in the automotive sector**

The United Nations Economic Commission for Europe (UN-ECE) has played a central role in moving the automotive sector towards international harmonisation of motor vehicle safety and environmental regulations and co-ordination of vehicle safety and environmental research. A specialised ECE body, the Working Party on the Construction of Vehicles (commonly referred to as WP 29) has become a *de facto* global forum for the international harmonisation of technical standards for motor vehicle regulations. WP 29 brings together regulators and non-governmental organisations representing manufacturers of vehicles and parts, consumers and other stakeholders from a wide range of countries, including the United States.

It was the United States which proposed the opening of WP 29 to world-wide membership. The effective transition from a regional to a global forum has created the only intergovernmental venue for development and harmonisation of environmental and safety requirements applicable to vehicles, engines, and engine-powered equipment.

Related initiatives underway in the TABD provide useful insights into possible future directions in pro-competitive regulatory reform in the sector. TABD partners have identified four priorities in this context: (a) commitment by the European Union and the United States to engage in one common process of international harmonisation (represented by the June 1988 agreement on a mechanism for established Global Technical Regulations); (b) expeditious response to US automaker petitions before the NHTSA for the development of functionally equivalent standards (with the EU to take corresponding action); (c) commitment by EU and US governments not to introduce future automotive regulations without prior consultation, with a view to harmonising such regulations; and (d) pursuance of multilateral discussions beyond TABD (*e.g*,. a trilateral working group comprising experts from the European Automobile Manufacturers Association (ACEA), the American Automobile Manufacturers Association (AAMA) and the Japan Automobile Manufacturer Association (JAMA) has since been established and is developing a joint industry workplan for advancing global standards).

On balance, US automotive regulation has the potential for greater trade and investment friendliness. Important progress has been made to this end on both domestic and international levels. Traditional US reliance on self-certification by vehicle manufacturers with respect to safety standards, complemented by active US participation in moves towards global harmonisation of environmental and safety requirements, are positive factors in favour of market openness (though the latter initiative is not likely to yield speedy results). Still, particularly for so heavily regulated a sector, more could be done in the short to medium term to foster greater market openness. For example, in the absence of global standards, there may be a case for greater recognition of other countries' technical standards as functionally equivalent. The design and implementation of environmental regulation affecting the sector could be improved through more formal advance consultation with the trade policy community. And finally, continued commitment to the TABD process could spur important progress on "front-line" issues, allowing an incremental approach to lasting regulatory reform in this sector.

3.4. Electricity

Progressive deregulation of the US electricity sector aimed at promoting further wholesale competition and introducing retail competition has had important implications for foreign firms seeking to enter or expand access in the US market. Regulatory reform efforts (see background report on Regulatory Reform in the Telecommunications Industry) have involved both federal and state regulators, with wholesale and retail power markets falling under federal and state jurisdiction respectively.

At the wholesale level, industry restructuring has been implemented by the independent federal regulator, the Federal Energy Regulatory Commission (FERC). Sweeping changes for the industry were introduced in 1996. On April 24 of that year, FERC issued two orders which fundamentally altered the competitive landscape for the wholesale industry. The first was *Order 888* on "Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities." Entry into force of this rule (on 9 July 1996), *inter alia*, effectively required all FERC-jurisdictional utilities that own, control, or operate transmission facilities to provide non-discriminatory open access transmission services. The second of the two rules, *Order 889*, entitled Open Access SameTime Information Systems and Standards of Conduct (OASIS), required utilities to develop an Internet-based bulletin board system to provide information on the availability of transportation capacity on transmission lines. FERC views implementation of these two open access rules as the single greatest transformation of the industry since the passage of the Federal Power Act in 1935. The Commission has estimated that these initiatives will save consumers between US$3.8 and $5.4 billion annually and will also pave the way for state retail access or customer choice initiatives (approximately three quarters of the states have either implemented or are actively considering retail competition).

This emerging competitive market for wholesale power service has in principle created important new opportunities for existing and potential foreign entrants to the US electricity market. In practice, however, the manner of implementation of Order 888 has led to trade friction.

The Canadian experience is particularly instructive in illustrating why such tensions have arisen. While ordering all FERC-jurisdictional utilities (essentially investor-owned utilities, or IOUs) to provide open wholesale access, Order 888 also empowered individual utilities to deny such access where reciprocity was not available.[46] Such reciprocity may be required as a condition of access to the open US wholesale market both of certain *domestic* utilities beyond FERC jurisdiction and of Canadian utilities seeking access to the US wholesale market. In practice, some utilities have exercised this authority while others have not, thus creating an uneven and unpredictable situation. The US regulator however views the requirement to be inherently non-discriminatory as between domestic and foreign utilities and therefore consistent with the national treatment obligation contained in Chapter 6 of NAFTA.

Implementation of the Order 888 reciprocity test has impacted Canadian utilities in different ways. For provincial utilities in Manitoba, Quebec, and British Colombia, where energy exports represent a core business, domestically-generated power is highly competitive, and wholesale loads are negligible (so that providing open access to transmission lines was not viewed as exerting much, if any, competitive pressure on existing market share), compliance with the FERC reciprocity requirement proved the chosen course for accessing the US wholesale market.

For another provincial utility, however – Ontario Hydro – the reciprocity issue has played out very differently. Due to fundamental differences in the Ontario industry structure, the province was not in a position to comply with the reciprocity requirement,[47] resulting in denial of its bid for open access to the US wholesale market. Ontario Hydro has subsequently challenged FERC's authority to order open access as a condition of Canadian participation in the US market, an issue which is before US courts. In the meantime, Ontario Hydro has claimed that US border utilities have been able to exert market power over it by refusing to sell transmission services.

Given a prevailing divergence of views on the issue, State legislative proposals that would feature similarly-applied reciprocity requirements for the retail market are also of concern to Canada. A number of US states are currently studying or have already implemented retail competition (*e.g.*, California and Massachusetts). Policy directions taken by US states on this matter would also have potential implications for federal regulatory action. FERC cannot order retail access; however, once mandated by a state, the "unbundled" transmission tariff used to supply retail load falls within FERC jurisdiction.

Speculation about the future direction of FERC's authority has also fostered international concerns about regulatory sovereignty. Initiatives that could give FERC oversight of transmission reliability standards currently set by the North American Electric Reliability Council (a voluntary organisation of transmission-owning utilities utility) and assessment of penalties for non-compliance with reliability rules;[48] involvement in merger conditions and formation of mandatory independent system operators (ISOs, or entities independent of market participants that control operations of a transmission system in a non-discriminatory manner) have all been cited in this context.[49]

Thus, the regulatory path chosen to implement a pro-competitive vision for the US wholesale market appears to be significantly undermining international market openness in the sector. In principle, Order 888 set the scene for enhanced foreign competition in the sector. In practice, however, the means may be thwarting the end. In particular, FERC's delegation of authority to IOUs to require reciprocity of certain domestic (and foreign) utilities as a condition of access to the open US wholesale market has effectively negated prospects for predictable, consistent access by the latter (except those who opted, at little or no competitive cost to themselves, to comply with the reciprocity requirement). Viewed from this perspective, claims that the reciprocity requirement is non-discriminatory (however framed) are likely to meet with further objections by some trading partners. Revoking or redesigning this feature of the regulatory framework to remove its discriminatory element and avoiding its emulation at the state (retail) level may prove essential steps towards smoother trade relations.

Certain sector-specific restrictions on *foreign investment* continue to apply. Such restrictions typically turn on nationality requirements and are thus expressly discriminatory. The Federal Power Act, for example, limits licenses for any construction, operation, or maintenance of facilities for the development, transmission, and use of power on Federal land to US citizens and US companies. The Geothermal Steam Act limits leases to US citizens and companies for the development of geothermal steam and associated resources on Federal lands. The Atomic Energy Act of 1954 (42 U.S.C. Sections 2011 et seq.) stipulates that a license is required for any person in the United States to transfer, manufacture, produce, use or import any facilities that produce or use nuclear materials. Such licenses may not be issued to any entity known or believed to be owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. Grant of a license is also prohibited in respect of production or utilisation facilities for such uses as medical therapy or research and development activities to any corporation or other entity owned, controlled, or dominated by one of the foreign persons described earlier. Under corporate organisation requirements of the Ocean Thermal Energy Conversion Act of 1980, only US citizens may obtain a license to own, construct or operate an ocean thermal energy conversion (OTEC) facility located in US territorial waters or connected to the United States by pipeline or cable; or a moving OTEC plant ship wherever located. Among other nationality requirements regarding corporate organisation, the law contains a reciprocity provision for plant ships. Finally, an additional foreign utilities are subject to ownership restrictions under the Public Utility Holding Companies Act (PUCHA) of 1935.[50] Various legislative initiatives on electric power legislation and PUCHA reform do not appear to contemplate any changes to this.

These types of sector-specific restrictions may be based on legitimate public policy objectives relating to such issues as security of supply and national security rather than on overtly discriminatory trade or investment rationales. Whether or not such legitimate domestic objectives can be met through less restrictive means, however, seems a fair question.

4. Conclusions and policy options for reform

4.1. General assessment of current strengths and weaknesses

US regulatory procedures meet a high standard from the perspective of international market openness. An analysis of the OECD indicators questionnaire on market openness undertaken as part of the OECD Project on Regulatory Reform found the United States to be well ahead of the OECD average with respect to all but two of the efficient regulation principles (see Figure 1 below).

While not all of the six efficient regulation principles examined in this report are expressly codified in US administrative and regulatory oversight procedures to the same degree, the weight of available evidence suggests that they are given ample expression in practice. This is most clearly the case for transparency and openness of decision-making. Continued impetus behind pro-competitive reform in given sectors, regulatory streamlining efforts, and the search for greater analytical rigour in assessing the costs, benefits, and effects of proposed regulations are all contributing to the steady, progressive enhancement of US market openness. At the same time, US market openness might be further enhanced by finding ways to ensure that awareness of and respect for the efficient regulation principles is firmly embedded across all levels of regulatory activity. Further efforts should particularly be made with respect to non-discrimination, avoidance of unnecessary trade restrictiveness, recognition of equivalence of other countries' regulations and conformity assessment systems, and reliance on internationally harmonised standards as the basis of domestic regulations. As the six principles reflect fundamental tenets of the multilateral trading system, it is clear that there is a strong mutual relationship between progress in multilateral liberalisation and domestic efforts to achieve quality regulation.

In general, US regulatory reform initiatives have been highly receptive to concerns voiced by both domestic and foreign business communities. The potential for this result seems highest in situations where there are formalised mechanisms for business-to-government and business-to-business dialogue, such as the TABD. Working through this latter mechanism, EU and US firms have been instrumental in shaping the bilateral agenda for regulatory co-operation – drawing out particular difficulties encountered with incompatible or duplicative regulatory policies, developing agreed approaches for resolving underlying problems, and presenting them for consideration to their governments.

Substantive regulation in the US is on balance trade and investment-friendly. However, the nature of some trade frictions suggests that the design of certain regulations may introduce potential for unnecessarily restrictive trade effects. In the case of a GATT complaint brought by the European Union in respect of US CAFE standards, for example, environmental protection objectives underlying the regime might have been met using less trade-restrictive means (such as a tax on motor fuel) while at the same time ensuring superior fulfilment of domestic policy objectives.[51]

Why do domestic regulations often surface as trade irritants? Failure to arrest potentially problematic regulations before they become *faits accomplis* appears to be more a result of benign neglect than passive tolerance of potentially restrictive domestic regulation. One explanation is that consultative and institutional links between trade and regulatory agencies may not be completely adequate. With the necessary resources, trade and trade-related agencies (notably USTR) would play a positive role in vetting proposed regulations from the perspective of market openness. In practice, however, many regulatory bodies harbour suspicion towards the trade policy community, fearing that the latter cannot be an effective advocate for the country's regulatory interests and that trade involvement in domestic regulatory activities may somehow lead to a lowering of standards. A resulting reticence across regulatory agencies to openly share information with the trade policy community on domestic regulations in-the-making clearly creates broad potential for regulatory jeopardy from a market openness perspective.

This suspicion largely reflects widely shared concerns in American society that, in the context of trade liberalisation, competitiveness factors could inhibit the ability of the US to maintain high standards over the longer term. However, several studies conducted in the OECD[52] suggest that trade liberalisation can be viewed as a positive agent for improvement in the context of social policies, except where, in the absence of effective social policies, increased economic activity generated from trade liberalisation might exacerbate existing problems. It may thus be useful to undertake efforts in order to share more widely this evidence among regulators and public opinion alike.

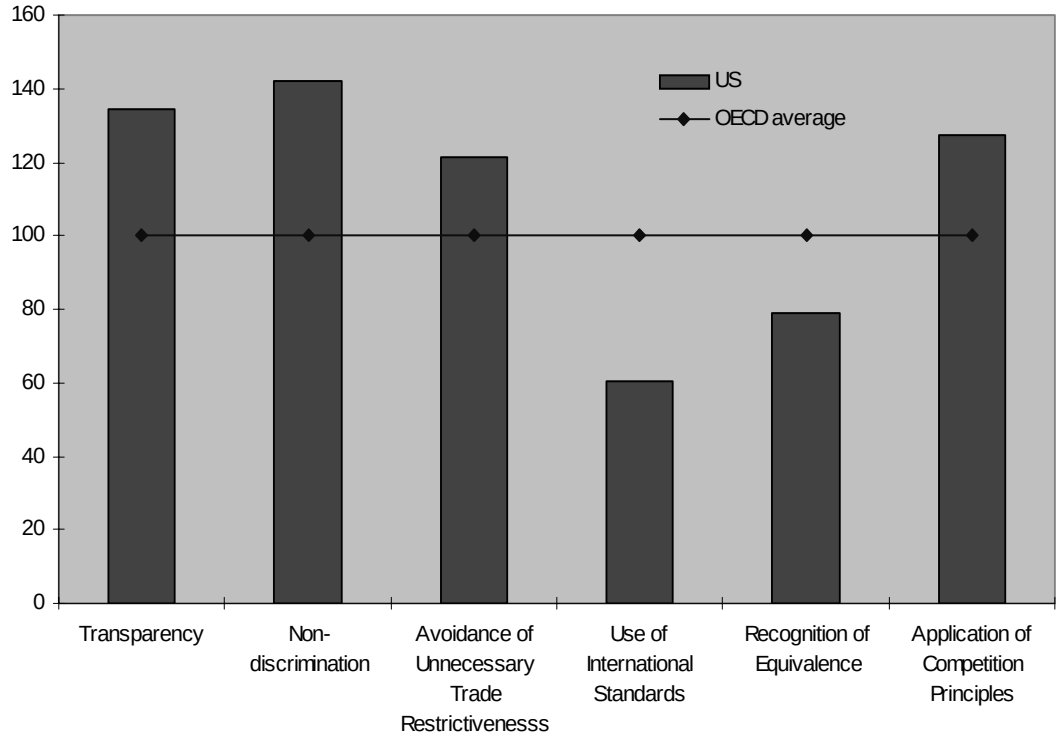
In some cases, complexity or opacity of regulatory content may adversely affect both domestic and foreign firms. The experiences of some US firms are illuminating in this regard. In response to a GAO study on federal regulatory burden, selected US companies cited a number of concerns including adverse effects on competitiveness; high costs of compliance; the unreasonableness or inflexibility of certain regulations; excessive paperwork; the unclear nature of certain regulatory requirements; overly severe regulatory penalties; a "gotcha" enforcement approach; and duplicative or poorly co-ordinated regulations.[53] Company experiences with the US regulatory regime undoubtedly vary by firm and industry, and such concerns should not be interpreted as representative of the collective experience of the US business community. Nonetheless, it seems plausible that foreign traders and investors may be encountering some or all of these types of difficulties when seeking to enter or expand activities in the US market.

As the discussion under Section 3 revealed, certain features of extant regulatory regimes in given sectors are also problematic. While foreign traders and investors generally enjoy high-standard, non-discriminatory treatment in terms of access to and participation in regulatory administrative procedures, the experience of some foreign firms suggests that certain substantive regulations either expressly or inadvertently place them at a competitive disadvantage vis-à-vis domestic competitors. This is true to varying degrees in each of the sectors examined in this report. Relatedly, while continued efforts in support of pro-competitive regulatory reform in some of these same sectors are to be encouraged, other candidates for sectoral deregulation (such as domestic air services) remain unaddressed to date.

Generic issues related to *product standards and conformity assessment procedures* also warrant further attention, although notable progress has already been achieved at bilateral, regional and multilateral levels. Heterogeneous manufacturing standards and duplicative certification procedures between the United States and some trading partners continue to dampen potential for trade flows. Moves towards regulatory harmonisation or mutual recognition of standards or conformity assessment procedures are promising steps, though the substantial commitments of time and resources required for such initiatives risk eroding institutional and political support for their continued pursuit. Increased US reliance on alternatives to third party certification and on the use of international standards as the basis of domestic regulations may provide additional opportunities for lowering regulatory barriers to trade, though such approaches may not always be appropriate.[54] More focused participation in the further development of international standards where appropriate and feasible may also reduce regulatory conflict and help find wider multilateral solutions. On another level, the complexity of US standardisation and conformity assessment activities presents difficulties for *both* domestic and foreign firms, so that measures to streamline the US system generally would yield important improvements from a market openness perspective as well.

The issue of subfederal (state and local) regulation will require careful monitoring to ensure optimal market openness. In accordance with WTO obligations, the federal government must take "reasonable measures" to ensure compliance by regional and local governments with international obligations.[55] However, this approach is not airtight in ensuring optimal regulatory coherence and respect for principles of efficient regulation. Transparency and openness of decision-making at the subfederal level is critical in this regard.

Figure 1. The trade-friendly index of the US regulatory system (OECD average = 100)



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

Globalisation has dramatically altered the world paradigm for the conduct of international trade and investment, creating new competitive pressures in the United States and elsewhere. At the same time, the progressive dismantling or lowering of traditional barriers to trade and increased relevance of "behind the border" measures to effective market access and presence has exposed national regulatory regimes to a degree of unprecedented international scrutiny by trade and investment partners, with the result that regulation is no longer (if ever it was) a purely "domestic" affair. Trade and investment policy communities have generally kept pace with these twin phenomena. However, a degree of regulatory catch-up is required. Concrete steps to increase awareness of and effective adherence to the efficient regulation principles and deepen international co-operation on regulatory issues are encouraging trends in this context. Overcoming systemic intransigence and fostering a new regulatory culture will be pivotal to these efforts.

The progressive dismantling of economic regulation in the United States has already yielded significant opportunities for foreign traders and investors, though further progress in major sectors such as telecommunications and electricity remains to be achieved. At the same time, the shift in focus to social regulation and the extent of its current reach at federal, state and local levels present new challenges for ensuring that the pursuit of legitimate domestic objectives relating to health, safety and the environment do not unnecessarily restrict trade and investment flows.

In terms of transparency and overall regulatory coherence, the co-ordination of federal regulatory reform with efforts at the state and local levels is also likely to become increasingly relevant from the perspective of international market openness. Enhancing market openness at one but not other levels, particularly in areas of overlapping jurisdiction, risks mitigating the effectiveness of continued reform efforts.

Increased reliance on input from domestic and foreign business communities, as already occurs in the TABD context, is an encouraging trend. A business-driven approach to market-opening regulatory reform has allowed early identification of issues of material concern to industry and joint development of possible solutions to sectoral and cross-cutting issues. TABD successes to date suggest that for certain types of regulatory barriers, this kind of business-government dialogue may be a more effective driver of regulatory reform than traditional government-to-government negotiations.

As prior experience has shown, continued multilateral liberalisation of trade and investment should bolster future regulatory reform efforts. Conversely, any backsliding in the face of protectionist pressures could wreak havoc on regulatory achievements to date.

4.3. Potential benefits and costs of further regulatory reform

Market-opening regulation promises to promote the flow of goods, services, investment and technology between the United States and global commercial partners. And expanded trade and investment flows generate important consumer benefits (greater choice and lower prices), raise the standards of performance of domestic firms (through the impetus of greater competition), and boost GDP.

The need for all governments to address market failures through sound regulatory action is an undisputed sovereign prerogative. Nonetheless, ill-conceived, excessively restrictive or burdensome regulation exacts a heavy price on commercial activity, domestic or foreign, and places a disproportionately heavy burden on small and medium-sized enterprises. Foreign firms established in the US market face the same regulatory burden as domestic firms. Heavy compliance costs may also adversely affect the competitiveness of domestic firms, including those which use foreign inputs. In either scenario, opportunities for expanded trade and investment (and US consumer gains) which might have otherwise occurred in the absence of regulatory handicap are simply foregone.

US regulators have themselves recognised the potential gains to be won from market-opening regulatory reform in some sectors. In telecommunications services, for example, the FCC has openly stated its expectation that "competitive forces will soon result in higher quality, lower priced, more innovative service offerings".[56]

Trade and investment friendly regulation need not undermine the promotion and achievement of legitimate US policy objectives. High-quality regulation can be trade-neutral or market-opening, coupling consumer gains from enhanced market openness with more efficient realisation of domestic objectives in key areas such as the environment, health and safety. But it is doubtful that this can be achieved in the absence of purposeful, government-wide adherence to the principles of efficient regulation. Avoiding the

potentially restrictive effects of domestic regulation through more focused, systematic attention to these principles -- as might be achieved through the creation of an interagency consultative mechanism involving USTR and other trade policy bodies -- would therefore generate important efficiency benefits for US consumers and the broader economy.

4.4. Policy options for consideration

Future reforms should:

- ***Continue to foster good regulatory practices already instituted in areas such as transparency and openness of decision-making.*** The United States sets an enviable standard in providing scope for participation by foreign governments and firms in regulatory processes through strict adherence to codified procedures and innovative use of the Internet.

- ***Increase the responsiveness of the US regulatory system to the needs of international trade and investment.*** Adjustments in regulatory procedures are required to formalise consideration of international market openness considerations in the regulatory decision-making process and minimise the potential for trade friction. At a minimum, this should include systematic reviews of proposed regulations with a view to identifying and minimising their potentially restrictive effects on international market openness. This could be achieved, for example, through the creation of an interagency mechanism to review proposed economic, social, and administrative regulations with input from USTR and/or other agencies involved in the trade policy process. Alternatively, it may be possible to adjust the mandate and operation of the *existing* interagency trade policy mechanism to meet this objective. Such a mechanism should address rulemaking by both executive agencies and independent regulators. Closer consultation with foreign trade and investment partners as well as the international business community might also be contemplated in this context.

- ***Require explicit assessments of the effects of proposed rules on inward trade and investment as part of the Regulatory Impact Analysis (RIA) and rule-making activities of the independent regulators.*** The criteria for such assessments should be based on the six efficient regulation principles.

- ***Heighten awareness of and encourage respect for the OECD efficient regulation principles in subfederal (state and local) regulatory activities affecting international trade and investment.*** The creation of new institutional bridges or adjustment of existing consultative mechanisms could be foreseen in this context.

- ***Seek to ensure that bilateral or regional approaches to regulatory co-operation are designed and implemented in ways which will encourage broader multilateral application.*** Mutual recognition of regulations or of conformity assessment procedures, increased use of industry-developed standards in lieu of national regulatory measures, and other approaches to intergovernmental regulatory co-operation offer promising avenues for the lowering of regulatory barriers to trade and investment. At the same time, consideration should be given to ways which will enhance prospects for adherence by third country competitors. As a counterpart to this:

- ***Continue to promote pro-competitive regulatory reform in the WTO context.*** The WTO TBT, SPS and Basic Telecommunications Agreements are prime examples of how trade agreements can complement domestic regulatory reform efforts. Concerted efforts should be made to advance liberal regulatory philosophies and practices in all WTO countries.

- ***Build on the TABD model to encourage the continued involvement of the US and international business communities in domestic regulatory reform efforts.*** Informal business-driven processes such as this have proven valuable catalysts for market-opening regulatory reform across a range of particular sectors and horizontal issues. Wider government-to-business partnering on regulatory issues holds strong potential for pragmatic, result-oriented reform attuned to evolving business realities.

- ***Intensify efforts to use existing international standards and to participate more actively in the development of internationally harmonised standards as the basis of domestic regulations.*** A useful point of departure would be to systematically assess the extent to which regulators currently rely on international standards and to explore rationales for departures from this practice.

- ***Review existing sectoral restrictions on foreign investment with a view to preparing the ground for their early removal.***

- ***Conduct periodic reviews of existing sectoral regulation from a market openness perspective with reference to the six efficient regulation principles.*** FCC biennial regulatory reviews might provide a useful model for such an exercise.

4.5. Managing regulatory reform

The steady pursuit and successful implementation of international trade and investment agreements can be a catalyst for domestic regulatory reform. Once achieved, such agreements lock in policy commitments to regulatory reform regarding both generic and sector-specific themes and provide transparent benchmarks by which to gauge progress towards reform objectives.

At the same time, lag times between fast-changing competitive conditions and government-negotiated outcomes can be significant, pointing to the need to supplement these activities with domestically-driven efforts to achieve and maintain optimal market openness. In some cases, identifying and addressing recurrent patterns of trade friction through more focused, systematic application of the efficient regulation principles may dramatically reduce the scope for trade conflicts in the first instance. This alone should generate important gains to government in terms of encouraging optimal allocation of time and (limited) resources to pursue given policy objectives, be it at the multilateral, regional or bilateral level. And when regulatory styles and content succeed in averting trade disputes altogether, net gains accrue to both US consumers and global economic welfare.

In order for this undertaking to be successful, however, a public relations campaign may be necessary to educate regulators, legislators, the public, and consumer and special interest groups about the ultimate costs to American consumers and firms of regulatory barriers to international market openness. At a minimum, such a campaign should convey three main messages: first, that regulatory reform does not necessarily mean deregulation. Like all other governments, the United States will continue to establish levels of protection for health, safety and the environment it deems to be appropriate. The challenge is to eliminate inefficient regulation that fuels higher prices without offering any additional protection to the public it is designed to protect. A second major message should be that regulatory reform can be market-opening, with no adverse effects on the fulfilment of legitimate policy objectives. Domestic and foreign firms alike will be required to adhere to the level of regulatory protection deemed appropriate by US authorities. Third and finally, domestic constituencies should understand that market-opening, pro-competitive regulatory reform ultimately serves US interests. By removing obstacles to greater efficiency and innovation, easing the regulatory burden on domestic and foreign firms alike will contribute to the enhanced competitiveness of US firms abroad while stimulating greater global competition. American consumers will thus be well-positioned to draw optimal benefits from regulatory reform.

NOTES

1. Among the stated objectives of the (EU-US) Transatlantic Economic Partnership announced in May 1998 are the improvement of *regulatory co-operation* in such areas as manufactured goods; agriculture, including biotechnology; services; industrial tariffs; global electronic commerce; intellectual property rights; investment; government procurement; and competition and improvement of the *efficiency and effectiveness of regulatory procedures* such as standards, testing and certification.

2. US FDI inflows increased in 1995 by more than 21 per cent over the previous year, reaching $60 billion, twice the size of inflows to the United Kingdom, the second most important FDI recipient amongst developed countries. See World Investment Report 1996 (UNCTAD 1996).

3. See "Trouble for Us and Trouble for Them: Social Regulations as Trade Barriers" by David Vogel in Comparative Disadvantages? Social Regulations and the Global Economy, edited by Pietro S. Nivola, Brookings Institution Press, Washington, D.C. (1997).

4. See, in particular OECD (1998), "Open Markets Matter. The benefits of Trade and Investment Liberalisation", Paris, OECD (1994), "The Environmental Effects of Trade", Paris and the OECD (1995), Report on Trade and Environment to the OECD Council at Ministerial level.

5. See related discussion in OECD (1997), "Regulatory Quality and Public Sector Reform", *The OECD Report on Regulatory Reform, Volume II: Thematic Studies*, Chapter 2, Paris.

6. It should be noted however that on occasion, inconsistency with GATT provisions has been used by US courts to invalidate state laws on the basis of the supremacy clause.

7. NAFTA and the US-Israel Free Trade Agreement. The United States also grants unilateral preferences to a number of developing countries under the Andean Trade Preferences Act, the Caribbean Basin Initiative and more generally under the Generalised System of Preferences.

8. US bilateral investment agreements take three basic forms: treaties of Friendship, Commerce and Navigation (FCNs); Bilateral Investment Treaties (BITs); and Overseas Private Investment Corporation (OPIC) agreements. Both the FCNs and BITs establish rights and obligations of the signing parties concerning the treatment of investment. 47 FCNs are currently in force. Since the inception of the BIT programme in the early 1980s, the United States has signed BITs with nearly 40 countries. US activity on BITs remains high, with twelve agreements concluded in the period January 1994-June 1996. See description of US Foreign Investment Regime prepared by the APEC Committee on Trade and Investment and World Investment Report: Investment, Trade and International Policy Arrangements (UNCTAD 1996).

9. Significant and expressly discriminatory barriers to market entry continue to characterise the US regulatory structure for both sectors. The regulatory structure for US maritime transport activities features well-known trade irritants such as Section 19 of the Merchant Marine Act of 1920 (the "Jones Act") which mandates retaliatory measures against actions by foreign governments deemed to violate the interests of US shipping. The Public Law Lifting the Ban on the Export of Alaskan Oil of 1995 provides that Alaskan crude oil shall only be transported by a vessel under the laws of the United States and owned by a US citizen with a US crew on board. In the domestic aviation sector, the Federal Aviation Act of 1958, as amended and recodified in 49 U.S.C. Subtitle VII, Part A, stipulates that only air carriers that are citizens of the United States may operate aircraft in domestic air service (cabotage) and may provide international scheduled and non-scheduled air service as US air carriers. US citizens enjoy blanket authority to engage in indirect air transportation activities such as air freight forwarding and charter activities. Non-US citizens seeking to conduct such activities must, however, obtain authority from the Department of Transportation (DOT). Applications for such authority may be rejected on grounds related to the failure of effective reciprocity or if the Department determines that it is in the "public interest" to do so. In the absence of any other visible criteria to encourage pro-competitive treatment of such applications, the degree of discretionary power underlying reliance on either test appears distinctly at odds with an open market

philosophy. Finally, "foreign civil aircraft" – defined as aircraft of foreign registry or aircraft of US registry that are owned, controlled, or operated by persons who are not citizens or permanent residents of the United States – also require DOT authority to conduct speciality air services in US territory.

10. United States of America Schedule of Specific Commitments Supplement 3, GATS/SC/90/Suppl.3.

11. United States of America List of Article II (MFN) Exemptions Supplement 3, GATS/EL/90/Suppl.3.

12. See article by David Vogel, *op. cit*.

13. See United States: Measures Affecting Alcoholic and Malt Beverages, Report by the Panel adopted on June 1992 in Basic Instruments and Selected Documents (39S/206).

14. See EC Sectoral and Trade Barriers Database.

15. According to the UN Trade Barriers to Latin American Exports in 1996 [Washington Office of the UN Economic Commission for Latin America and the Caribbean (ECLAC)] "a vast maze of standards and regulations makes exporting to the United States a daunting task. The complexity of the system can be partly attributed to the three separate tiers of regulations that exist: federal, state and local. These regulations are often inconsistent between jurisdictions, or needlessly overlap. It is estimated that more than 44,000 federal, state and local authorities enforce 89,000 standards for products within their jurisdictions. These structural barriers, although unintentional, still create major hurdles for foreign firms attempting to enter the US market.

16. See EC Sectoral and Trade Barriers Database.

17. See Speech of Belinda Collins, Acting Director, OSS, NIST before the Committee on Science, Space and Technology on "International Standards and US Exports: Keys to Competitiveness or Barriers to Trade".

18. Examples are the US computer and telecommunications equipment industries, which have actively participated in international standardisation work at the ISO, IEC, and their joint technical committee (JTC 1) on information technology.

19. See TBT Articles 2.7 and 6.1 and SPS Article 4.

20. NAFTA Article 908(2).

21. NAFTA Article 908(6).

22. NAFTA Article 1304(6).

23. See Laker Airways v. Sabena Belgian World Airways, 731 F.2d 909 (D.C. Cir. 1984).

24. See National Co-operative Research and Production Act of 1993 (NCRPA) 15 U.S.C. § 4301-06 (1994).

25. The legislative history of the NCRPA provides that a venture can utilise or place significant production and production support facilities outside the United States as long as they are "ancillary in nature". The legislative history further provides that all international agreements and other binding obligations between the United States and another country that provide national treatment satisfy the national treatment requirements of the law.

26. See Annex to Section 6, Recent Examples of Product Standards Related Barriers to Market Access of Telecommunications Equipment in OECD (1997), "Product Standards, Conformity Assessment, and

Regulatory Reform" in *The OECD Report on Regulatory Reform: Volume 1: Sectoral Studies*, Chapter 6, Paris.

27. The main intergovernmental standardisation body for telecommunications is the International Telecommunications Union (ITU). ITU develops standards covering safety, network security, interoperability of services, interconnectivity of networks, and performance issues.

28. A brief overview of FCC rules governing importation of telecommunications equipment underscores the central importance of technical regulations and conformity assessment procedures in gaining entry to the US market. Foreign providers of telecommunications equipment destined for the United States must typically satisfy a range of federal regulatory requirements. The FCC requires exporters of terminal equipment destined for the US market to obtain documentary evidence based on laboratory testing that their product conforms to FCC–defined standards. Typically, such evidence must establish that the product is safe to use; that it will not cause radio frequency interference; that it will not disrupt interconnection networks; and that it can be used by disabled consumers. In sum, a three-step process is in place, requiring that: (1) importers have a product tested by a laboratory for compliance with FCC product standards; (2) the product be registered as meeting FCC standards (usually involving submission to the FCC of laboratory test results, general product description, and photographs) and a certificate issued to this effect; and (3) individual batches of the product must be accompanied by a copy of the FCC registration certificate for border checks by customs officials. See Measuring the Costs of Regulations on International Trade: Progress Report in TD/TC/WP(98)37.

29. For example, the FCC is required by the National Environmental Policy Act of 1969 to evaluate the effect of emissions from FCC-regulated transmitters on the "quality of the human environment". In the current absence of a federally-mandated radio frequency (RF) exposure standard, the Commission has adopted recommended maximum limits developed by the National Council on Radiation Protection and Measurements (NCRP). In addition, certain applicants may be required to routinely perform an environmental evaluation to determine compliance with FCC exposure limits, and submission of an Environmental Analysis is required in the event of non-compliance. See RF Safety Programme, FCC Office of Engineering and Technology at FCC website.

30. See discussion in OECD (1997), "Product Standards, Conformity Assessment and Regulatory Reform", in *The OECD Report on Regulatory Reform: Volume I: Sectoral Studies*, Chapter 6, Paris.

31. NAFTA Article 1304 embodies the principle of least-trade restrictiveness by requiring Parties to ensure that standards-related measures are adopted or maintained only to the extent necessary to (a) prevent technical damage to public telecommunications transport networks; (b) prevent technical interference with, or degradation of, public telecommunications transport services; (c) prevent electromagnetic interference, and ensure compatibility, with other uses of the electromagnetic spectrum; (d) prevent billing equipment malfunction; or (e) ensure users' safety and access to public telecommunications transport networks or services.

32. The Reference Paper contains a binding, enforceable set of competition rules, including guarantees of fair and economical interconnection between competing carriers; prohibitions on anticompetitive conduct; and independent regulation of the telecommunications industry.

33. The ECO test – still in place for carriers from non-WTO Member countries -- looks at such issues as legal barriers to entry; interconnection factors (reasonable and non-discriminatory charges, terms or conditions and whether adequate means exist to monitor and enforce these charges); competitive safeguards to protect against anticompetitive practices (cost-allocation rules, protection of carrier and customer proprietary information); and regulatory framework (separation between regulator and operator, transparent regulatory procedures).

34. Section 66 of the Foreign Participation Order states that the Commission will make an independent decision on applications and evaluate concerns raised by the Executive Branch in light of all the issues

raised (and comments in response) in the context of a particular application. The US authorities expect trade policy concerns to be raised "only in very rare circumstances" and that any Executive Branch concerns communicated to the FCC in respect of a given application would be fully consistent with US law and international obligations. Comments by US Delegation at the Trade Committee Working Party, 16 September 1998.

35. In the past, Japan has claimed that when US subsidiaries of NTT and KDD applied to the FCC for licenses to provide international telecommunications services between the US and Europe, USTR, the Department of Commerce, and the Department of State required that the applications be suspended because of "trade concerns" (specifically, the extension of the NTT procurement agreement). The suspensions were later lifted and the applications ultimately approved after agreement was reached on NTT procurement. See 1998 Report on the WTO Consistency of Trade Policies by Major Trading Partners (Industrial Structure Council, Japan). FCC has noted that USTR, after co-ordination with other Executive Branch agencies, asked the Commission on four occasions during a recent two-year period not to act on certain applications because of trade concerns. However, all these requests occurred before the effective date of the WTO BT Agreement. See FCC Report and Order on Reconsideration 97-398 in the Matter of Rules and Policies on Foreign Participation in the US Telecommunications Market.

36. The regulator may take an additional 90-day period for review of applications which raise issues of extraordinary complexity, and each successive 90-day period may be so extended. See 47 C.F.R., Section 63.12.

37. Comments by the US Delegation at the Trade Committee Working Party, 16 September 1998.

38. Applications by carriers affiliated with foreign carriers that possess market power in non-WTO markets are not eligible for streamlined processing.

39. See FCC Public Notice (1998), "FCC Grants over 200 International Service Applications in First 90 Days of New Foreign Participation Rules" released 14 May.

40. Comments by the US Delegation at the Trade Committee Working Party, 16 September 1998.

41. US dominant carrier regulation does not discriminate between US and foreign carriers, its objective being to discipline monopoly power wherever it may have domestic effects on US consumers of telecommunications services. The Foreign Participation Order clarifies that dominant carrier regulation will be applied to all US licensed carriers affiliated with foreign carriers regardless of their ownership. Criteria applied to identify "dominant" carriers are also set out in the Order. In general: any US international carrier, irrespective of ownership, would be classified as dominant on a route where it is affiliated with a foreign carrier that has sufficient market power in a relevant market on the foreign end to affect competition adversely in the US market. Relevant markets on the foreign end of a US international route generally include: international transport facilities or services, including cable landing station access and backhaul facilities; inter-city facilities or services; and local access facilities or services on the foreign end. The FCC also adopted a rebuttable presumption to identify a category of foreign carriers that do not possess market power in any relevant market on the foreign end of an international route and therefore lack the ability to affect competition adversely in the US market. This presumption of non-dominance applies to carriers with less than 50 per cent market share in each of the relevant markets on the foreign end; accordingly, such carriers are not normally subject to dominant carrier safeguards on the affiliated route. Parties may also make a showing that a foreign carrier with a market share of 50 per cent or more in a relevant market does not have sufficient market power to harm competition and consumers in the US market, so that its US affiliate should be classified as non-dominant. Comments by the US Delegation at the Trade Committee Working Party, 16 September 1998.

42. International Settlement Rates, IB Docket 96-261, Report and Order, FCC 97-280 (released 18 August 1997). The US approach has met with pointed criticism by trading partners. Japan, for example, views the system as constituting barriers to potential new entrants to the US market; sees it as a unilateral imposition

of settlement rates linked to market entry regulation (instead of being determined primarily on a commercial basis); and questions its WTO consistency. From comments by the Japanese Delegation in the Trade Committee Working Party on 16 September 1998.

43. The FCC has publicly stated its commitment to transparency, noting that "to implement the telecommunications law fairly, the decision making must be transparent, which means that public input form all interested parties should be welcome and the final decision must explain why parties' views were or were not adopted. Not only must the system be transparent, but its decisions must be made in a timely fashion."

44. See the FCC 1998 Biennial Review Home Page at FCC website.

45. Under this system, a national regulatory body certifies that a type of vehicle or separate technical unit satisfies technical requirements set out in relevant regulations. This involves bringing each vehicle model (domestic or imported) to the regulatory body's testing facility where it must be tested and certified as meeting relevant technical regulations. See "Standards and Certification Procedures in the Automobile Sector" by Denis Audet (1997), in *Market Access Issues in the Automobile Sector*, OECD Proceedings.

46. FERC has traditionally regulated US investor-owned (*i.e.*, privately-owned) utilities but not federal power utilities such as the Tennessee Valley Authority and the Bonneville Power Administration or other government owned entities, such as the New York Power Authority and municipal utilities (some of which own a significant amount of transmission). As noted in Chapter 6, about 350 IOUs account for 73 per cent of electricity generated in the United States.

47. In contrast to most US utilities that have less than 10 per cent wholesale load (and FERC-guaranteed recovery of stranded assets in the move to greater competition), Ontario Hydro has a 70 per cent wholesale load and no analogous mechanism for stranded asset recovery. Ontario Hydro maintains that it cannot offer open access until provincial industry restructuring is complete – expected in the year 2000. As it restructures, the province is addressing many of the same issues faced by US States as they move to retail access.

48. See Chapter 6 for a fuller discussion of NERC.

49. See, for example, "Impact of Industry Restructuring in the US on Canada: Ontario Hydro Perspective", speech by Barry Green, Senior Advisor-Regulatory Affairs (External Markets).

50. U.S.C. Title 15, Chapter 2C, Sections 79*z*-5*b*.

51. For a development of this argument, see article by David Vogel, *op. cit*.

52. OECD (1998), "Open Markets Matter. The Benefits of Trade and Investment Liberalisation", Paris; OECD (1995), "Report on Trade and Environment to the OECD Council at Ministerial Level", Paris; OECD (1994), "The Environmental effect of Trade", Paris.

53. See GAO (1996), *Regulatory Burden: Measurement Challenges and Concerns Raised by Selected Companies*, November.

54. Some US trading partners have objected to US reliance on third-party conformity assessments when less onerous means (such as reliance on manufacturers' or purchasers' declarations of conformity) could be employed. However, concerns about the safety, health, or environmental impact of some products may be too important to be left to self-assessments. This would be true of products whose failure could lead to injury, illness, property damage or loss of life. Drug safety certification provided by the FDA, for example, requires third-party assessment to verify product safety. See Standards, Conformity Assessment, and Trade into the 21st Century, National Research Council, *National Academy Press*, Washington, DC, 1995.

55. GATT jurisprudence sheds light on how this obligation has been interpreted in practice with respect to US state measures. A 1992 GATT panel report on US measures affecting alcoholic and malt beverages examined the application of Article XXIV in relation to various measures of US state and local governments relating to imported beer, wine and cider. The panel ruled, *inter alia*, that some state measures were discriminatory and that the United States had not demonstrated to the panel that conditions for the application of Article XXIV:12 had been met. See DS23/R, adopted on 19 June 1992, in Basic Instruments and Selected Documents, 39S/206.

56. See FCC 97-398, Report and Order on Reconsideration adopted on 25 November 1997.