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REDUCING REGULATORY BARRIERS TO TRADE: LESSONS FOR CANADA FROM THE EUROPEAN EXPERIENCE

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REDUCING REGULATORY BARRIERS TO TRADE: LESSONS FOR CANADA FROM THE EUROPEAN EXPERIENCE

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INTRODUCTION

The modern nation-state involves a pervasive role for government. Over the past century, as national economies have become more integrated, governments have established a range of regulations and institutional structures to achieve various social, economic and other goals. Until recently, national regulatory structures operated on the assumption that most economic activity took place within the confines of the nation-state, and that the limited activity across national frontiers could be addressed adequately through border regimes.

The balance between domestic and international regimes has shifted. The forces of globalization have made it possible to breach the territorial, economic, social and cultural integrity of the nation-state on a daily basis. An increasing share of national economic activity is conditioned by extra-national transactions and influences; few goods and services and little capital and technology are still produced and consumed wholly within a single national economy. The result is that the national regulatory structures so painfully built up over the past century may now serve more as an impediment to harmonious economic development than as an adjunct or facilitator.

Revolutionary changes in communication and information technologies have made economic production a global rather than national process as firms can now disperse economic activity geographically and bring it together electronically. Advances in information-processing technologies, coupled with remarkable progress in bringing down barriers to cross-border trade and investment, have also led to a quantum leap in the internationalization of the economy. Production is steadily being re-organized on a global or regional basis and the nature of extra-national transactions reflects this change. This new reality is also reflected in progressive trade liberalization through successive rounds of multilateral negotiations and regional free trade agreements. These factors have put significant pressures on national firms to become more efficient in order to compete in the global market.

Canada first responded to the competitive challenge of globalization by entering into a free trade agreement (Canada-U.S. Free Trade Agreement (FTA)) with the United States in 1988. The

Agreement has resulted in a significant restructuring of domestic production that in aggregate terms is believed to have boosted efficiency and made Canadian firms more competitive as they produce for a larger market. Previously, most production was segmented in small factories or branch plants of U.S. firms that served the Canadian market only, inside high protective tariff walls. The North American Free Trade Agreement (NAFTA) exposed Canadian companies to further competition, but they were able to adjust and benefit from integrated production at the North American level. Over time, most barriers to trade and production will be phased out and all firms will compete in an integrated North American market.

In addition, the completion of the Uruguay Round of multilateral trade negotiations in 1994 and the creation of the World Trade Organization (WTO) have led to further liberalization of international commerce. Canada was a very active participant in this process and continues to play a significant role in the Organisation for Economic Co-operation and Development (OECD) where intellectual effort is now focusing on extending the rules to new areas such as investment.

Nevertheless, while most of these changes occurred at the border and were initiated at the federal level, barriers to interprovincial trade have persisted in the domestic market. This discrepancy has added to inefficiencies in the internal market because Canadian producers cannot benefit from economies of scale in many sectors. It has also affected the competitiveness of Canadian manufacturers. The problem is especially evident in 10 areas and an attempt was made to address them in the Agreement on Internal Trade in 1995. This paper focuses on regulatory and standards-related barriers to trade and examines the European approach in this area with a view to inform and perhaps improve the Canadian initiatives. The study first reviews the European Union's (EU) program and institutions for the removal of regulatory barriers to trade, then analyzes their relevance to Canadian attempts to promote the freer flow of goods and services across all provinces and territories. Finally, the paper explores policy options for the Canadian context.

For the purpose of discussion, regulatory barriers will refer to impediments to trade caused by differences in regulations as well as impediments created by differences in technical standards.

Although the former is usually obligatory or mandatory, and the latter is generally voluntary, they often both have similar trade effects in the real world because once a standard becomes the *de facto* norm, most manufacturers adhere to the standard.

A regulation is any document that stipulates product characteristics or their related processes and production methods including administrative requirements. A regulation involves mandatory compliance; it is normally imposed by some level of government and is enforceable by law. Regulations might deal with terminology, symbols, packaging or labeling requirements regarding a product, process or production method. A standard is considered a technical specification involving rules, guidelines or characteristics for products or related processes and production methods that has been approved by a recognized standards body for repeated or continuous application. Compliance is not compulsory[1] for a standard.

[1] World Trade Organization. "Agreement on Technical Barriers to Trade." Annex I. See also Economic and Social Committee of the European Communities. *Opinion on Technical Standards and Mutual Recognition.* Brussels, May 30, 1996. (CES 690/96).

OVERVIEW

The primary purpose of the European Union (EU)[2] is to create an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured among its member states.[3] Somewhat similar objectives are stated in Canada's Agreement on Internal Trade, which seeks to "reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investments within Canada and to establish an open, efficient and stable domestic market."

The Canadian approach to removing interprovincial trade barriers is based on actions initiated by individual provincial governments within a federation. The European approach reflects a supranational strategy in which independent countries cede some of their sovereign powers to regional institutions and processes. While the language of the European Union's legislation is strong and binding on its members (carried out through regulations, directives and decisions), the language of the Canadian interprovincial trade agreement is weak and relies on persuasion and good intentions on the part of provincial authorities. Within the European Union, the Commission and Court of Justice exercise extensive authority to ensure compliance with the objective of an integrated internal market; within the Canadian economic union, compliance with the internal market agreement remains largely a matter of political will and intergovernmental negotiations.

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[2] The European Communities (EC) originally consisted of the European Economic Community (EEC), established by the Treaty of Rome in 1957, along with the European Coal and Steel Community and European Atomic Energy Community. Some of their institutions were merged in 1965 and they became known as the European Communities, but were commonly referred to as the European Community. In 1986, the Single European Act was introduced with the aim of bringing about a unified internal market. This was modified by the Treaty on European Union (Maastricht Treaty) in 1993, which provided for a European monetary system and created what is now referred to as the European Union. It should be noted that Title II of the Maastricht Treaty also amended the Treaty Establishing the European Economic Community (Treaty of Rome of 1957) with a view to establishing the European Community (and thus changed the name of the EEC to the EC). The European Union now consists of 15 members: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

[3] Treaty Establishing the European Community, Art. 7a.

Like the EC treaty (and the Treaty on European Union or Maastricht Treaty), the Agreement on Internal Trade identifies the harmonization of standards and regulations as one of the principal mechanisms for reducing and/or eliminating barriers to interprovincial trade (Articles 101.3(c) and 405). Similarly, the Agreement uses various terms, such as reconciliation and mutual recognition, to convey the notion of harmonization.

Since the European Commission released its White Paper[4] on the integrated market in 1985, there has been accelerated progress in fostering a unified European economic space. Physical barriers to the movement of goods have virtually disappeared in the European market, and since 1992 the focus has been on technical/regulatory barriers to trade. Various initiatives are being used to address this problem. In light of the progress made by the European Union in mitigating problems of regulatory barriers to trade, it would be worthwhile to examine the European approaches and analyze whether there are any policy approaches that could be emulated in Canada.

The European Union, with 15 members and a variety of cultural and linguistic traditions, legal systems, and different levels of development, poses a significant challenge to reducing regulatory trade barriers. While the basic purpose of the EU (i.e., the free movement of goods, services, capital and people) suggests that harmonization could be a clear means of reducing barriers, the diversity of EU members has made total harmonization impractical if not impossible. It is therefore not surprising that regulatory strategies have evolved over time from the original Treaty of Rome (1957), through the Single European Act (1986) to the Treaty on European Union (Maastricht, 1993). They include a combination of harmonization and mutual recognition of regulations and technical standards, along with administrative and judicial processes.

[4] EC. "Completing the Internal Market: White Paper from the Commission to the European Council." June 1985.

THEORETICAL APPROACHES TO THE REDUCTION OF REGULATORY BARRIERS TO TRADE

Much of the debate about policy responses to regulatory trade barriers is couched in terms of regulatory heterogeneity versus harmonization and/or mutual recognition. In a free-trade area or common market, regulatory barriers might stem from divergent national regulations and/or standards that impede the free movement of goods and services across national jurisdictions. In any federal state, differences in regulations at the subnational level have similar effects. The inefficiencies of incompatible or divergent national product regulations and standards are obvious: they distort production patterns, increase unit costs, increase stock-holding costs, discourage business cooperation, and inhibit the creation of a truly national market for industrial and consumer products.

Regulatory diversity is often rooted in varying social traditions, values and economic conditions that may not be well-served by harmonization or recognition of rules developed from different traditions.[5] In these cases, harmonization might increase social or economic costs. Health and safety regulations are a case in point. Some societies are more risk averse than others and want to protect their consumers from products they consider to be dangerous; other societies might not necessarily consider those products to be harmful. These values can and have been used to impede trade and point to the need for cooperative solutions.

In order to arrive at cooperative relationships among different regulatory jurisdictions, it is clear that more understanding is needed of the benefits and costs of various strategies that link regulations across legal and political borders. One broad approach is "regulatory rapprochement" which concentrates on reducing practical differences between regulations in different jurisdictions, so that as regulations eventually come to resemble each other or have similar effects, a more unified regulatory system evolves.[6] Three

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[5] See Sykes (1996) for an explanation of the causes of regulatory heterogeneity.

[6] See Scott H. Jacobs in *Regulatory Cooperation for an Interdependent World*. Paris: OECD, 1994.

particular strategies of regulatory rapprochement operate in OECD countries.

The most rigorous strategy is harmonization, or the standardization of regulations in identical form. The original Treaty of Rome provided for the "approximation" of legislative and administrative provisions of the member states which affected the functioning of the common market (Art. 100). But it proved too difficult to implement.[7] A less structured approach is mutual recognition, or the acceptance of regulatory diversity as meeting common goals. It is also sometimes referred to as "reciprocity" or "equivalence." The softest option is coordination, or the gradual reduction of differences between regulatory systems, which is often based on voluntary international codes of practice (OECD, 1994). The regulatory policies in the European Union incorporate these three strategies, although in recent years mutual recognition has become the chosen approach.

At the conceptual level, discussion has recently shifted to the notion of regulatory competition and reflects the necessity of free movement of goods, services and investment in a globally integrated international economy (Pelkmans, 1995; Nicolaidis, 1996). Regulatory competition involves the modification of national regulation in response to the real or expected impact of internationally mobile goods, services or factors on domestic economic activity.[8]

Proponents of regulatory competition argue that it is superior to harmonization of regulations in that diversity reduces regulatory costs and competition encourages improvement and innovation in regulation. From this perspective, a policy such as mutual recognition, which preserves diversity, would be preferred.

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[7] Note that the term "harmonization" is rarely used in the EEC Treaty and when it is, it is used interchangeably with "approximation." Some scholars who tried to identify varying degrees of harmonization intended in the Treaty concluded that this could not be done because various terms—common rules, approximation, harmonization, coordination and render equivalent—are used interchangeably in the different languages.

[8] Sun and Pelkmans (1995).

If regulatory diversity is accepted as a given, the question is really to what extent should mutual recognition be introduced. This is not only the case in an economic union such as the EU; it is also relevant to unitary federal states. California, for example, sets product and environmental regulations and standards that are usually higher than most other American states. It would strongly oppose harmonization of its standards with other jurisdictions across the United States that are less rigorous, and for similar reasons would oppose mutual recognition of those standards. In Canada, regulations and standards also vary across provinces, reflecting different historical or current priorities, preferences or biases in different jurisdictions. The question then rests on the appropriate mechanism for facilitating the movement of goods and services across a common economic space while taking into account the idiosyncrasies of the different subnational jurisdictions.

BASIC EU PRINCIPLES RELATING TO THE REDUCTION OF TRADE BARRIERS

In considering the European regime for reducing regulatory barriers to trade in the common market, it is important to note first of all, that the basis for all such policies is enshrined in the Treaty on European Union. As in the Treaty of Rome, all members of the EU are bound by the following common principles (among others), in Article 3 of the Treaty on European Union:

- the elimination of customs duties and quantitative restrictions on the import and export of goods, *and of all other measures having equivalent effect* [emphasis added]; and

- the approximation of the laws of Member States to the extent required for the functioning of the common market.

These are the two essential rules which impact on the regulatory system in the EU and which condition all processes and institutions in this regard.

More specifically, as pointed out in the White Paper on Completing the Internal Market (par. 67), harmonization of European regulations is mandated by Article 100 of the Treaty of Rome, which empowers the Council to "legislate by Directive for the approximation of the laws, regulations and administrative actions of member states which directly affect the establishment or the functioning of the common market."

The Maastricht Treaty reiterated this principle and amended Article 100 to read as follows:

> The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the member states as directly affect the establishment or functioning of the common market.

This is further strengthened by Article 100a, which stipulates the following:

> The Council shall, acting in accordance with..., adopt the measures for the approximation of the provisions laid down by law, regulation or

> administrative action in member states which have as their object the establishment and functioning of the internal market.[9]

With respect to the free movement of goods and the issue of product standards, the principle of mutual recognition of national regulations is strongly encouraged in Community law. Mutual recognition of national rules is based on the landmark *Cassis de Dijon*[10] judgment of the European Court of Justice. Under this ruling, any product that is legally put on the market in one member state may freely circulate throughout the Community (Article 30 of the Treaty). This includes mutual recognition of technical specifications and testing and certification requirements. Similar to Article XX of the General Agreement on Tariffs and Trade (GATT), EU member states may derogate from the general principle of Article 30 by virtue of Article 36 in the interest of health, environmental and consumer safety, among others.

While this principle was already being enforced by the courts, in the Single European Act it was written into the EEC Treaty, as amended. The current Article 100b of the Treaty on European Union (Maastricht Treaty) now clearly states that:

> The Council, acting in accordance with the provisions of Article 100a, may decide that the provisions in force in a member state must be

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[9] Note that Article 36 permits measures on the grounds of non-economic criteria such as public morality, public security, the protection of the health and life of humans, animals or plants, among others, which would otherwise be contrary to Article 30. However, they are subject to scrutiny by the Community. Measures saved by Article 36 need to be harmonized. The White Paper (para. 68) indicates that in these areas, legislative harmonization would be "confined to laying down the essential requirements" (rather than detailed technical specifications), "conformity with which will allow free movement within the Community".

[10] European Court of Justice ruling 120/78 of February 20, 1979. In this dispute, a German importer was prohibited from importing a French liqueur *Cassis de Dijon*, because its alcohol content was not compatible with German regulations. The French liqueur actually had lower alcohol (15-20 percent) and therefore had been deemed inadmissible by the German authority according to the regulation which "provides that only potable spirits having a wine-spirit content of at least 32 percent" may be marketed in that country. The court ruled that "the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community."

> recognized as being equivalent to those applied by another member state.

Consequently, the general principle is that goods lawfully manufactured and marketed in one member state must be allowed free entry into other member states. Any exceptions to this rule must be endorsed by the Commission "after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade" (Article 100a).

In practice, this principle seems to apply to services as well. Neven (1992) points out that the Second Banking Directive established the principle that if a bank can provide a service in one country, its branches can provide the same service across the European Union. He cites the example of variable-interest mortgages that were not allowed in Belgium but were popular in the United Kingdom. The Second Banking Directive effectively allowed British banks to sell these types of banking products in Belgium even though Belgian banks could not do so initially. Eventually, regulatory competition occurred in this sector when Belgian authorities allowed the sale of variable-interest loans.[11]

The changes in the Maastricht Treaty build on the principles of the Treaty of Rome and on administrative mechanisms to promote the free movement of goods in the EC market. One such mechanism is Directive 83/189/EEC,[12] which requires member states to notify the Commission in advance of all draft regulations and standards concerning technical specifications that they intend to introduce in their own jurisdictions. The legislation allows other member states to comment on the draft to determine whether the

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[11] Damien Neven. "Regulatory Reform in the European Community." *American Economic Review* 2, May 1992, p. 100. Note, however, that Chapter 3 (Arts. 59-66) contains substantive rules on the provision of services in the common market.

[12] This directive concerning the provision of information on standards and technical regulations was adopted by the European Council in March 1983 and came into effect in January 1985. It is the main instrument for cooperation between the European Union and the standardization bodies (CEN/CENELEC). Apart from the rights and obligations laid down by the Directive for member states, the national standardization institutions also commit to notify the Commission and their counterparts through the CEN/CENELEC secretariat of their standardization programs and draft standards. (See *Common Standards for Enterprises*, p. 38).

proposed regulations or standards contain any aspects likely to create barriers to trade. If there is notification of such, the Commission can routinely require that changes be made to ensure the free movement of goods in the internal market.

Directive 83/189/EEC provides for the following:

- the collection by the European standardization bodies of information from their members concerning their planned and current activity (Arts. 2 & 4);
- requests from national standards bodies to be associated with the work of another body or to have work taken up at the European level (Art. 30);
- a Standing Committee on Technical Regulations and Standards, composed of member state representatives and chaired by the Commission, in whose work the European and national standards organizations could participate (Art. 5);
- requests from the Commission, after consultation of the standing committee, to the European standardization bodies to draw up standards on specific subjects (Art. 6); and
- best efforts by member state authorities to ensure that national standardization did not continue on subjects for which the Commission had requested European standards (Art. 7).

This Directive thus provides a mechanism for facilitating collective scrutiny of national standardization and for initiating European standardization work by Community authorities.

The Directive's notification procedure was recently strengthened by Council Decision 95/3052/EC,[13] which provides for the implementation from January 1, 1997, of a procedure whereby Member States have to notify the Commission of any measure preventing the free movement of a particular model or type of product lawfully produced or marketed in another Member State where the direct or indirect effect of the measure is a general ban on the goods, a refusal to allow the goods to be placed on the market, the modification of the model or type of product concerned or its withdrawal from the market. This process will promote a quicker solution to problems regarding the movement of goods by either

[13] Decision of the European Parliament and of the Council of 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community. (OJ L 321, 30/12/95).

adjusting the national rules or, if necessary, by amending Community legislation.[14]

At the more general level, the annual report by the Commission on the functioning of the Single Market also acts as a monitoring mechanism for identifying barriers to trade in order to arrive at policy responses from the European Council of ministers.

[14] EC Commission. *The Single Market in 1995* (para. 106).

STANDARDIZATION IN THE EUROPEAN UNION

Although mutual recognition is the preferred policy for member states, in many cases Europe-wide standards are being developed by the various standardization bodies through a mandate from the Commission. It is useful to examine the rationale for this strategy.

The Green Paper, which was released in 1990, recognized that a single community market would become a reality for European industry only insofar as common technical standards could be developed at the European rather than national level. It resulted in a new structure, the European Standardization Council, responsible for the overall policy of European standardization. It is made up of representatives of European industry, social groups, standardization bodies, the European Commission and EFTA secretariat.

A European Standardization Board acts as the executive body of the Standardization Council and is responsible for the management and coordination of European standardization. Its membership comprises the officers of the European standardization bodies and the Secretary of the Standardization Council. The European standardization bodies are organized at the European level and are recognized by the Council as being responsible for standardization in their particular field. They enjoy full autonomy in the programming, financing, preparation and adoption of European standards, subject to compliance with the rules of the European Standardization System and to formal agreements with the national standardization bodies.[15] The national standardization bodies carry out particular tasks at the national level on behalf of the European standardization bodies (e.g., public enquiry and expression of national vote). Furthermore, they provide regular information concerning their national activity and comply with "standstill" rules during the development of European standards.

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[15] In 1992 the European Council confirmed continued financial aid to the standards organizations so that the required European standards could be prepared. At the same time, CEN and CENELEC decided to reduce their dependence on official sources for their funding; CEN to roughly 25 percent of its total budget and CENELEC to less than 17 percent (*Report on the Progress of European Standardization*, SEC 95 2104).

The three primary standards bodies are the European Committee for Standardization (CEN); the European Committee for Electro-technical Standardization (CENELEC); and the European Institute for Telecommunications Standardization (ETSI). They all work closely together yet each maintains a framework for the programming and acceptance of mandates, the allocation of preparatory tasks, the approval of draft standards for public enquiry, and the final approval of standards. Each organization also has a formal process for liaising with European organizations representing industry and other economic partners. There is also significant cooperation between European standards associations and the relevant international organizations. Since the EU aims to promote international trade in goods and services, European standards are based as far as possible on international norms, with adaptations to suit European conditions. Standardization, testing and certification are mainly conducted by non-governmental organizations.

The European standard is the primary standardization instrument in the European Union. In CEN and CENELEC this is known as an EN, and in ETSI as an ETS. All EU members must ensure mandatory national transposition of the European documents. Both CEN and CENELEC also produce “harmonization documents” (HD) that have slightly less rigorous national transposition requirements. ETSI produces Technical Bases for Regulation (TBR) that have a more or less mandatory status under the Telecommunications Directive. Recently, most CENELEC HDs have been transferred to full European standards, with the full obligation on national members of CENELEC to transpose them as national standards without change. Since 1994, all of CENELEC’s documents consist of European standards.

Europe-wide standardization now forms a substantial part of all standardization taking place in Europe, and constitutes an essential link between national and international standardization. European standards organizations appear to give priority to mandated work or work directly related to European public policy.

In spite of the progress made in the overall standards area, there is criticism from industry of the tedious procedures and the long time it takes for a standard to be prepared and adopted. In addition, a tremendous number of standards need to be prepared

each year and this further adds to the problem.[16] More than 10,000 standards are in the process of development in 1996 alone. In addition, mutual recognition is not operating smoothly and there is reluctance among some EU members to accept test results and certificates from other members. At the same time, the mutual recognition of proofs of conformity cannot be legally enforced by users.[17]

[16] It is estimated that over 50 percent of all standards projects are close to completion. The existing program comprises over 15,000 work items. However, purely national standardization remains strong in construction, foodstuffs and a few other areas. The EU's standardization system has almost 5,000 standards and produces about a further five standards per working day (*Report on the Progress of European Standardizaton*, SEC 95 2104, p. 6).

[17] See "Opinion on Technical Standards and Mutual Recognition." Brussels, May 29, 1996 (CES 690/96).

EUROPEAN MECHANISMS FOR REDUCING REGULATORY BARRIERS TO TRADE

The essence of the European effort to reduce regulatory barriers to trade in the common market was first formally outlined in 1985 in the White Paper. Significantly, a major factor contributing to the completion of the internal market was the removal of "technical barriers" (in addition to physical barriers). The White Paper proposed a new approach to the harmonization of national regulations and standards that would streamline administrative processes and facilitate the movement of goods across member countries. The paper called for the harmonization of industrial standards through the creation of European standards; however, in the interim, it proposed "mutual acceptance of national standards, with agreed procedures".

The new approach to harmonization was also a clear attempt to define broad categories at the level of the Community, instead of procrastinating over intricate details. It was intended to reduce the delays involved in incorporating detailed technical specifications in Commission Directives that required a unanimous vote by the European Council. The pre-1987 approach was to harmonize national standards through Community directives, but the requirement of unanimity from the Council of Ministers frustrated this process. It is widely believed that the "old" approach did not work effectively because of the consensus requirement at the design level; regulations were long delayed and extremely complex as a result of protracted negotiations. Unanimity still exists under the original Article 100, but the Single Act (Article 100a(1) provided that by way of derogation from Article 100, measures affecting the functioning of the internal market could be approximated by qualified majority voting.[18] The harmonization of national legislation continues in cases where legislation creates different levels of protection for the essential requirements of public health/safety,

[18] Harmonization can be effected under other provisions of the Treaty, some of which require unanimity (Art. 99 on indirect taxes), and others (Art. 49 on free movement of workers) a qualified majority. Harmonization of measures relating to free movement of persons and rights of employed persons still require unanimity.

environmental and consumer safety.[19] Where appropriate, Articles 100 and 100a of the Treaty provide for Community-wide harmonization in these areas.[20]

The White Paper also introduced mutual recognition of national regulations as a regulatory principle: approximation of laws was purposely limited to essential requirements and beyond this mutual recognition would apply. In other words, as long as a product from one member state meets the essential criteria established by the Commission, another member state cannot keep that product from its market on the grounds of additional national stipulations. For example, a German test on "saliva and perspiration for textile" that goes beyond the essential requirement of the relevant EU directive can be challenged if it acts as a trade barrier.

Another mechanism was the devolution of responsibility for formulating product standards to various European standards organizations or producers' associations. Previously, EC directives contained very detailed technical specifications (e.g., precise measuring procedures for noise emissions from lawn mowers). The new approach is more succinct. Community harmonization directives now simply set out the essential requirements. The detailed technical mechanisms for complying with these requirements are outlined in separate, harmonized standards developed by the European standardization bodies (CEN, CENELEC and ETSI). It should be pointed out, however, that the use of harmonized standards is voluntary rather than mandatory.

In the European Union, "harmonized standards" are specifications developed by a European standards organization on

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[19] Sun and Pelkmans (1995**)** argue that even if Article 36 EC-type essential requirements apply, mutual recognition is compulsory if those requirements are deemed to be equivalent among member states, to the extent that national essential requirements are maintained. Moreover, measures must be proportional to the objective sought and least restrictive for free movement.

[20] Neven (1992) points out that by November 1991, 217 of the 282 proposals (announced in 1985) for the completion of the internal market had been approved by the European Council, and about 70 percent of those had been implemented in national law. This was exceedingly fast compared to the previous decade, and he argues that the substitution of consensus for qualified majority as a decision rule in the Council was largely responsible for this success.

the basis of instructions issued by the Commission under Directive 83/189/EEC and in accordance with the general directives on cooperation between the European standards bodies and the Commission. Once a standard is published in the *Official Journal of the European Communities* and implemented by at least one member state, compliance with the standard assumes conformity with the relevant essential requirements.

In the regulated sector, the circulation of products is governed by laws and regulations to protect consumers. There is a distinction between the harmonized sector governed by EC directives and the non-harmonized sector regulated by national legislation. In the former, conformity with requirements is assessed by authorities recognized by the European Commission. This is due to the safety risks and/or public concerns regarding areas such as food, drugs and chemicals, among others. In the non-harmonized sector, the marketing of products is not governed by similar laws and regulations because the products do not present any danger.

Where Community harmonization for products that involve consumer health and safety (e.g., foodstuffs or pharmaceuticals), the legislation or regulation must be sufficiently detailed to allow no scope for product failure. However, in practice, EU institutions resolve any identified problems with the least form of intervention in the functioning of the market or national regulatory systems.

To further consolidate the "new approach" to harmonization, the EU also adopted a "Global Approach to Conformity Assessment" in 1989. It set out a system aimed at providing a credible, transparent and technically competent framework for conformity assessment, with only minimum interventions to ensure that a product meets adequate levels of health and safety standards.[21] This system was intended to enable the principle of mutual recognition of proofs of conformity to operate in both regulatory and non-regulatory spheres. The mechanisms for this global approach are based on international practices, using International Standards Organization/International Electrotechnical Commission guidelines.[22]

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[21] Council Resolution of 21 December 1989 (*Official Journal*. 90/C 10/01).

[22] WTO. *Trade Policy Review Mechanism: European Union 1995,* p. 37.

In sectors regulated by EC directives, the global approach established standard "modules" for testing and certification products. In most cases, manufacturers are offered some level of choice, depending on the level of risk associated with the particular product. This ranges from the most lenient—in which the manufacturer can simply declare that the product meets essential requirements—to the strictest, in which case a third party, such as a nationally approved laboratory, would test and assess the product. Once this process is completed, a manufacturer can affix the European (CE) logo and market its products in all countries in the EU without any need for further national tests or certification.[23]

In addition to the basic principles and policies regarding regulatory barriers to trade that have been described, there are two other Community principles that condition the European regulatory approach: subsidiarity and proportionality.

The economics of federalism suggests that any intervention to remedy market failure should be devolved to the lowest level in a multi-tier system of government. Nevertheless, this approach must be qualified where intervention at a local level would be ineffective due to spillover effects, inefficient, adverse to others (beggar-thy-neighbour policies) or unnecessary (where the same action would be taken by all Member States anyway). In the EU, these ideas are synthesized in the concept of "subsidiarity" that is enshrined in the Treaty on European Union (Article 3b).

The second important principle that shapes the regulatory framework for the EU's internal market is that of "proportionality." Where Community level action is needed, "proportionality" requires that the measures adopted impose minimum restriction on member state governments and/or market operators that still guarantees effective realization of the regulatory/policy objective. In other words, measures intended to secure a legitimate public policy objective should not go beyond what is immediately necessary to attain that objective.

By limiting Community action to areas where it is strictly justified (subsidiarity) and by selecting the least intrusive legislative

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[23] See "Opinion on Technical Standards and Mutual Recognition." (CES 690/96).

options (proportionality), the Commission ensures that it does not over-legislate the affairs of its citizens and unnecessarily obtrude in the domain of EU members. In addition, the combination of mutual recognition and subsidiarity provides a framework for competition among rules and regulators. The former ensures that the entire EU market for products and services is open to any member state. The latter, which requires that regulations be made at the lowest possible level of government, allows national regulators wide responsibilities.

In summary, the Internal Market programme initiated by the White Paper takes the existing framework of national regulatory and public policy systems as a given and asks whether there are ways in which diverse national arrangements can be better managed and coordinated. The ultimate aim is to dismantle unnecessary hindrances to cross-border transactions. Therefore, EU legislation needed to complete the internal market should not be considered as a displacement of national legislation; it is a means of creating a convergence of national measures to uphold public policy objectives, while eliminating any obstacles to market access that would arise from the uncoordinated pursuit of these objectives.

ENFORCEMENT AND DISPUTE SETTLEMENT PROCEDURES

The principle of mutual recognition of regulations usually acts to reduce trade barriers for products. However, in the absence of a harmonized standard for a particular product, instances may arrive where it is necessary to resort to dispute settlement measures under the Treaty. In such an event, barriers to intra-EU trade or free movement may exist which inhibit mutual recognition. Such barriers would usually be the result of health or safety requirements which national authorities impose in the absence of EU legislation harmonizing these "essential" requirements.

To understand how the process works, let us assume the example of a Dutch manufacturer who attempts to export computers to France. He is inhibited from doing so because French regulations governing electromagnetic radiation from computer monitors are different from those of the Netherlands.[24] The Dutch firm seeking to export to the member state (France) that imposed the restrictions has two options.

First, if the firm considers the regulations an unnecessary barrier to trade, it complains to the European Commission and/or its national government to begin infringement procedures against the offending Member State (under Article 169 or 170 of the EC Treaty).[25] If the Commission and the French government fail to reach agreement, the Commission takes France to the European Court of Justice either for violation of Article 30, or for failure to implement Directive 90/270/EEC. Note that the French rule could be valid under Article 30, because it is saved by Article 36, yet still be inconsistent with the Directive. In either case, if the Court finds France in breach of its obligation (to comply with Article 30 or with the Directive), it will order France to rectify the breach. If it fails to

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[24] Council Directive 90/270/EEC states that "all radiation with the exception of the visible part of the electromagnetic spectrum shall be reduced to negligible levels from the point of view of the protection of workers' safety and health."

[25] Usually the Commission would start proceedings under Art. 169, rather than the national government initiating a complaint under Art. 170. Note, however, that many firms, certainly small firms, may not want to incur the cost (financial and other resources) involved in taking their case to the Commission and may first complain to their government, which is required to bring the matter before the Commission.

comply with the Court order (which rarely happens), the Commission will bring further proceedings under Article 171.

Alternatively, the firm defies the French regulation and markets its computers in France. It is prosecuted in France and raises a "Euro-defense." The defense is either that the French regulations are contrary to Article 30, and therefore invalid, or that the computers conform with the Directive, and therefore can be lawfully marketed in France and elsewhere in the EU. The French judge then requests a preliminary ruling from the European Court of Justice (under Article 177). If the Court finds that Article 30, or the Directive, prohibits the regulation complained about, then the French court must apply Community law and disallow the offending French regulation. This is the concept commonly known as *direct effect*.

An important difference between the two processes is that, in the second option, the manufacturer has direct access to the Court, whereas he has to rely on the Commission in the first. Another major difference is that the first option takes, on average, about five years from first complaint to final court ruling; the second process may take as little as a year. Most commentators argue that the most important and distinctive feature of Community law (and perhaps the most effective tool in the integration process) is this concept of direct effect, in conjunction with the preliminary ruling procedure of Article 177. However, in the Canadian context, it is the absence of any form of individually enforceable rights that makes the Agreement on Internal Trade such a weak instrument for market integration, compared to the EC Treaty.

The availability of binding dispute settlement procedures under the jurisdiction of the European Court of Justice acts as a powerful incentive for member states to respect the authority of the Commission and the objectives of various treaty obligations and implementing directives related to harmonization and mutual recognition. After all, it was the European Court, which in the *Cassis de Dijon* case, provided a critically important catalyst toward promoting and achieving a more integrated single market. Since then, it has proven to be a zealous guardian of this objective, adding to the credibility of what has become known as the *acquis communautaire*, i.e., the growing acceptance of EU regulations in the field of product and process standards not only by member states but also by other European states and countries tied to the

Union by its network of association and free-trade agreements (OECD 1995).

EFFECTIVENESS OF COMMISSION POLICIES TO REDUCE NATIONAL REGULATORY BARRIERS

Despite various provisions to streamline regulatory processes and to create a convergence of rules and regulations among all members of the EU, there is significant reticence at the national level toward Community-wide approaches. The extent of this reserve was recently emphasized in a special report by the Commission:

> The information procedure reveals a cascade of national technical regulations, important as to the number of measures brought forward, their length and their complexity. Despite the achievement of the agreed programme of measures covered by the 1985 White Paper...member states continue to adopt a vast array of national technical regulations concerning products, regulating their specification, the conditions in which they can be used, the tests which they must undergo and the certificates or approvals to which they must be subject...
>
> Some 415 Community directives and regulations currently apply to the placing of products on the Internal Market. It has taken the Community 35 years to achieve such a stock of measures. Indeed, there is some tendency for the total of Community measures to decline, with the introduction of new techniques or regulations, such as the Community's New Approach, which are more economical in terms of their requirements than older methods.
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> In contrast, in the years 1992-94, the 12 member states together notified proposals for no less than 1136 proposals for technical rules...The number of pages involved is also instructive, as it gives some insight into the comparative complexity of the measures involved in each category. In 1994, the 15 member states put forward some 10,000 pages of regulation. The Commission proposed some 250 pages.[26]

In its report, the Commission expressed great concern about the proliferation of individual national regulations that work against efforts to harmonize regulations across the Community.

In addition, the *1995 Report on the Single Market* indicates that 258 cases involving obstacles to trade were reported to the Commission in 1995. The main areas in which government measures are likely to affect intra-community trade are road

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[26] European Commission. "National Regulations Affecting Products in the Internal Market: A Cause for Concern." Brussels, 28 February, 1996. (pp. 6-8).

vehicles, food, chemicals and pharmaceutical and medical products.[27] In 1994 and 1995, the greatest number of barriers were in the food and road vehicles sectors. In the case of vehicles, obstacles were caused by the non-application of mutual recognition by vehicle inspectors and different national technical standards. The main problems regarding foodstuffs were caused by national procedures requiring prior authorization aimed at checking the composition of food and especially the presence of food supplements and/or additives.

Another obstacle involves an "upsurge in regulations necessitating the use of national language for certain information found on the labeling of products."[28] Interestingly, in examining a complaint against the requirement by Danish legislation that clothing imported and sold under the name of a Danish company or trademark should indicate that it was imported or the country of origin, the Commission found that such labeling rules were equivalent to a restriction on trade between member states and were in breach of Article 30 of the EC Treaty.

The EU responded in 1995 to the Commission's concern regarding persistent barriers to trade caused by national regulations by introducing the procedure mentioned above for exchanging information on national measures that derogate from the principle of the free movement of goods.[29] This procedure will strengthen the means available for tackling illegal restrictions on the free movement of goods across jurisdictions and will help to endure that the principle of mutual recognition is respected.

There are also a number of directives designed to replace the national technical regulations governing the construction and operation of motor vehicles. This technical harmonization (Directive

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[27] The opening of the European Agency for the Evaluation of Medicines should reduce barriers in the pharmaceuticals sector.

[28] *The Single Market in 1995.* (para. 78).

[29] See Council Decision 95/3052/EC, November 23, 1995. A decision is binding entirely on those to whom it is addressed, but no implementing legislation is required.

70/156/EEC) is to substitute for all national procedures, and its application will enable a vehicle with a Community-type approval certificate to be sold and registered in any Member State, without further technical formalities. It applies not only to the marketing and registration of new vehicles but also to the free movement of all vehicles within the EU.

With respect to the recognition of professional qualifications, the Commission reported that during 1991-94 almost 10,000 European citizens obtained recognition of their diplomas under Directive 89/48/EEC.[30] Furthermore, each year about 5,000 citizens benefit from sectoral directives for professions such as doctors, dentists, veterinarians, nurses, midwives, pharmacists and architects. Nevertheless, there was an increase in 1995 of complaints from migrants who had experienced difficulty in obtaining recognition of their certificates or diplomas in their new location. This was partly because only seven Member States have fully transposed the relevant directives into national law, and also because of problems regarding the interpretation of the directives.

The discussion above indicates that the various mechanisms and processes for reducing regulatory barriers to trade in the EU have not yet resulted in a trouble-free market. Nonetheless, as long as the reporting and monitoring procedures operated by the Commission continue, all parties will eventually conform to the requirement of free movement of goods, services, persons and capital in the common market. The legislative, regulatory, and administrative roles of the Commission, which acts as the guardian of the Treaty, the advice of the Economic and Social Committee, and the adjudicatory role of the European Court are all important in this regard.

[30] This directive pertains to the recognition of higher education diplomas awarded on completion of professional education and training of at least three years' duration. It was amended in 1992 by Directive 92/51/EEC.

THE RELEVANCE OF EUROPEAN APPROACHES TO CANADA

The EU has developed a comprehensive system for reducing trade barriers in its common market: it combines basic treaty law, administrative processes and judicial principles. Moreover, the individual states have ceded considerable sovereign powers to a supranational process in which final authority is vested, to ensure the operation of the single market. It must be emphasized that the first concern is the free movement of goods, services, capital and people in the EU's economic space. As far as possible, national authorities voluntarily defer to this process as mandated in the Treaty. As noted earlier, all members of the Union adhere to this process because of the possibility of adverse reaction by the Commission or binding judgments by the European Court of Justice.

This is a critical element of the overall strategy to reduce barriers to trade in the EU which is not the case in Canada. As Pelkmans (1996) indicates:

> Central to integration within the EU is that there is an *a priori* acceptance of far-reaching market contestability in the framework of the internal market. Not only are the criteria (establishment of freedom of movement as an overriding principle; proper functioning) far more encompassing than in the international arena, but the overall incentives, obligations and systems of sanctions are also without parallel. It is, in fact, quasi-federal, if not in some respects outright federal. This, in turn, is embedded in a philosophy of what is called "pooled sovereignty" and decision making according to the "Community-method." Thus, the behavioural functions of bureaucrats and politicians are shaped (and constrained) by these political and institutional characteristics.[31]

In fact, EU Member States are not totally free to regulate what they wish because the Maastricht Treaty (Article 101) indirectly obliges them to uphold the market economy with free competition by empowering the Council to issue directives to correct distortions caused by law, regulation or administrative action in these states. Sykes (1996) describes the EU regulatory system as "policed decentralisation" in which "regulators in different jurisdictions operate independently and may adopt different substantive

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[31] Jacques Pelkmans, "Removing Regulatory Barriers: The Case of Deep Integration." Paper prepared for OECD Trade Directorate meeting in Paris, February 15, 1996. (TD/TC/(96)9), p. 10.

regulations, but most do so subject to a number of constraints." These consist of the obligations under the Treaty of Rome as administered by the European Court of Justice, and various directives from the Commission. Furthermore, "policed decentralisation" in the EU is subject to strict and detailed judicial review and the ultimate result of this is judicial mutual recognition.

To summarize, in addition to the basic treaty principles that shape the behaviour of individual governments, there are various other mechanisms that prevent national authorities from creating or perpetuating regulatory barriers to trade in the EU. The first is the detailed monitoring, complaints and infringement system run by the European Commission. The second is the work of the Mutual Information Directive Committee that scrutinizes every proposed national economic regulation in draft stage. This committee has the power to stop national legislative processes and it is used routinely every year. Through this procedure, EU member states notified the Commission of 442 measures in 1994 and were required by the Commission to simplify or improve 325 of them in order to minimize the regulatory burden in the internal market.[32] Third, member states are prohibited from regulating products (and some services) for which "equivalence" is already regulated at the EU level through approximation directives. Finally, and perhaps most important, the European Court of Justice can penalize national governments that act against the spirit of the Treaty in a manner that restricts or inhibits the movement of goods in the common market.[33]

Caveats

To understand the relevance to Canada of European approaches to reducing regulatory trade barriers, it is important to note some caveats. First, Canada's federal system is very different from the EU in that Canadian provinces and territories were never sovereign states. Although the similarities are sometimes assumed,

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[32] EC, "Comments of the Commission on the Report of the Independent Experts Group on Legislative and Administrative Simplification." SEC(95)2121.

[33] Article 171 stipulates that if the Court of Justice finds that an offending member state has not complied with its judgement it may impose a lump sum or penalty payment on it. The Court is also the ultimate arbiter with respect to interpretation of the Treaty and Commission directives (Art. 177).

many of the challenges in creating an economic union in Europe stem from the fact that the Community consists of separate political entities with several different languages. The regulatory barriers in Canada originate in very different circumstances. In some areas of government activity, there are no interprovincial barriers equivalent to those that needed to be overcome in the European context, while in others barriers developed gradually as a result of the assignment of jurisdictions in the constitution. For example, there are very few restrictions on capital movement in Canada and no fiscal barriers among provinces. Many important sectors of the Canadian economy are wholly within federal jurisdiction, and providers thus face no internal barriers to serving customers anywhere in Canada. A sector like telecommunications, for example, which is only now being harmonized in Europe, was always under federal jurisdiction with rules and regulations that apply equally across Canada. Similarly, most regulations concerning health and food safety are regulated by Agriculture Canada and Health Canada, especially with respect to food additives.[34]

Various commentators have identified flaws in the Agreement on Internal Trade that constrain the prospects for meaningful changes toward a truly national market in Canada or represent a retrograde step.[35] The Agreement proceeds on the basis of the conceit that negotiations among provincial governments are analogous to negotiations among sovereign states. The result is an approach that might have been necessary to achieve progress in the context of the GATT, for example, but which seems perverse within the confines of a single nation. To treat the agreement to reduce regulatory barriers as "concessions" to be traded and bargained away was to elevate them to a level of legitimacy that is likely to have embedded them further into the political economy of the country. The repeated failure of the constitutional process to address the conundrum of a splintered national market, however,

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[34] However, regulations concerning phytosanitary matters are under provincial jurisdiction. Pesticides, on the other hand, operate under a mixed regime in which a federal agency regulates approval, use and safety, and seven provinces maintain some sort of regulatory role with respect to their sale and application through either their ministry of Agriculture or the Environment.

[35] See M. Trebilcock and D. Schwanen (eds.). *Getting There: An Assessment of the Agreement on Internal Trade*. Toronto: CD Howe Institute, 1995.

may have made this process more attractive. Nevertheless, it is something to be regretted.

At the same time, the "internationalization" of an internal process has inadvertently strengthened the legitimacy of making a comparative analysis of the Canadian intra-national versus the EU international experience. While there are valuable lessons to be learned, it is important to keep in mind the fundamental distinction between efforts to create a single market out of a large and diverse group of national economies on the one hand, and to reverse the splintering taking place within an already existing single national market on the other.

It is also important to remember that, in some instances, economic barriers within Canada have been mandated by federal laws and policies. For example, federal programs in supply-managed sectors such as dairy and poultry help to segment the agriculture market into provincial enclaves, further complicating the process of integrating the Canadian internal market.[36] It is wholly within the power of the federal government to remove those programs and policies and thus facilitate efforts to create a stronger economic union within Canada.

Putting aside the peculiarities of the Agreement on Internal Trade, this study confines its analysis to those deficiencies in the Agreement that relate to regulatory and standards-related barriers. It is in the area of "technical barriers" to trade where Canada's similarity with the EU is most evident. This is due to the fact that, historically, the provinces have exercised control over the regulation of domestic commerce.[37] Thus, notwithstanding the fundamental differences between the EU and Canada, there is some utility in considering the relevance of some of the European approaches as a basis for the further reduction of regulatory barriers to trade and improvement in the Agreement.

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[36] Note that the chapter on Agriculture and Food Goods in the Agreement "applies only to measures identified as technical barriers to trade by the Federal-Provincial Agri-Food Inspection Committee."

[37] For background on the constitutional issues relating to this, see D. Brown and M. Smith, *Canadian Federalism: Meeting Global Economic Challenges?* (1991).

Basic Principles and Judicial Process

In the European Union, the role of the European Court as the ultimate arbiter of justice and interpreter of the Treaty is important. In Canada, access to a similar court to remedy breaches of the Agreement might be the most effective means of avoiding and resolving problems regarding regulatory barriers to trade among provinces. The problem is securing agreement to legally enforceable rules. The Supreme Court of Canada is a natural option, but the provinces were unprepared to extend this power to the Supreme Court or any other judicial body because they apparently deemed trade barriers to be political rather than judicial issues. Because the Agreement on Internal Trade is conceived as a trade agreement among governments rather than a set of rules within one country, its enforcement procedures are based on *governments* consulting and seeking redress rather than on courts responding to the complaints of aggrieved individuals. The EC, from the beginning, recognized the importance of access to redress outside a political body by establishing a court and providing individuals with access to that court. In the Canadian context it would be very difficult and perhaps not feasible to introduce a court to ensure that the aims of the Agreement on Internal Trade are not compromised. This would entail major attitudinal changes among provincial governments and a fundamental rethinking and retooling of the Agreement.

First, the language of the Agreement does not exert a firm commitment on the parties to ensure that their regulations will not impede the internal movement of goods and services. In fact, the Agreement allows a party (i.e., a province) to adopt or maintain any regulatory measure or regulatory regime that it considers necessary or appropriate to achieve a legitimate objective, and it does not bind the party to ensure that the regulation does not act as a trade barrier:

> Each Party shall, in developing a new regulatory measure or regulatory regime, *seek* to ensure that the measure or regime is not more trade restrictive than necessary to achieve a legitimate objective.[38]
> [emphasis added]

[38] Agreement on Internal Trade, Annex 405.2 (5).

One would be hard pressed to find a softer commitment. It echoes back to the early, tentative steps taken during the Tokyo Round GATT negotiations leading to the first multilateral agreement governing technical barriers to trade. The new Uruguay Round Agreement exerts more discipline than the Agreement on Internal Trade.

The Agreement can benefit a great deal from the basic principles of the Treaty on European Union. The most obvious advantage of the European model is the strong, overriding principle of the free movement of goods and services that mandates mutual recognition of regulations. The Agreement on Internal Trade can be substantially strengthened by the inclusion of language such as Article 100a of the Treaty on European Union (see above). This could solidify mutual recognition of regulations across Canada and ensure that minor differences in regulations and administrative requirements or product standards do not inhibit the free movement of goods.

The Agreement could also be strengthened by providing for an effective system of legal supervision and for prohibitions against measures that impede trade. Instead of offering such a judicial process, the Agreement simply provides for consultations with no requirement for mandatory change or harmonization:

> Where differing regulatory measures or regulatory regimes of several Parties operate to create a substantial obstacle to internal trade, the affected Parties shall jointly conduct a review of the aspects of the regulatory measures or regulatory regimes that are creating the obstacle.[39]

Furthermore, although the Agreement requires that new regulatory measures be not "more trade restrictive than necessary", it excludes regulatory measures from the dispute settlement procedures.[40]

By contrast, the EU's experience clearly demonstrates that the most effective approach is a mandatory and binding system of

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[39] Agreement on Internal Trade, Annex 405.2 (9).

[40] Paragraph 10 of Annex 405.2 states that "Chapter Seventeen (Dispute Resolution Procedures) does not apply to this Annex."

dispute settlement (i.e., the European Court of Justice) in the event of trade conflicts. Therefore, at the least, regulatory barriers to trade must be brought under the dispute settlement chapter of the Agreement. It was a great mistake to exclude this in the original Agreement. In the absence of strong, definitive principles proscribing trade-inhibiting regulations, and the lack of a binding judicial process, it is critically important that regulatory conflicts be subject to the dispute panel process of the Agreement.

Improvements to the Decision-Making Process

The fact that the Agreement contains a reaffirmation of constitutional powers and responsibilities (Article 300) indicates that the provinces continue to guard their prerogative over internal trade matters under the constitution. Although strictly speaking, Section 91 of the Constitution gives the federal parliament jurisdiction over interprovincial trade, as a practical matter, Section 91 does not provide the federal government with authority over a wide range of provincial regulations and measures that may affect interprovincial trade. Considering the political realities of Canada's weak federal structure and the pride provincial governments take in their power over domestic trade, the provinces will be reluctant to cede any powers to the federal government or any federal institution. The federal government has no special status in the Agreement and has no extra influence on the progress being made in implementing commitments under it. There is therefore no leader in the process of interprovincial trade liberalization, like the European Commission in Brussels. An efficient Committee on Internal Trade is therefore critical to the future success of the Agreement in order to ensure that the goal of a truly unified Canadian market in the long run.

At present the Committee on Internal Trade can only make decisions or recommendations by consensus. This means that controversial changes will be very difficult to implement. The experience of the European Council of Ministers in recent history is testimony of this; however, it is worth recalling that when it became clear that consensus voting was inappropriate for meaningful policy changes, the process was changed to qualified majority voting in the Single Act. Decisions on most matters except for amendments to the Treaty can be carried by a 70 percent majority. For the sake of efficiency, and in order to ensure that meaningful policy changes

can be implemented, Canada's Committee on Internal Trade would do well to replicate this strategy.

Strengthening the Administrative Process

Given the volume of transactions in the common market, it is noteworthy that relatively few cases involving regulatory or administrative barriers to trade reach the European Court. The regulatory, monitoring and administrative role of the European Commission is usually sufficient to deal with most disputes. Like the Commission, the Internal Trade Secretariat could perform a critical role as guardian of the Agreement and ensure that regulatory processes of provincial authorities do not inhibit the free movement of goods and services across all provinces. This will not necessarily entail the creation of a large bureaucracy similar to that of the European Commission because there is a longer history of national traditions in Canada. Nevertheless, it will require an amended mandate and more personnel.

The purely administrative, almost secretarial, function of the Secretariat is a major constraint on its ability to play an influential role in containing or flagging regulatory barriers to trade among the provinces. Provincial ministers could request the Secretariat to perform tasks that go beyond administration and include policy making. In this way the role of the Secretariat may evolve in the future. Indeed, this should be encouraged in order to formulate a holistic understanding of the status of internal trade in Canada. If properly equipped, the Secretariat can act as watchdog and mediator to pursue the goals of the Agreement in the same way that the European Commission safeguards the principles of the European Union and monitors the proper functioning of the common market. But this would require a significant increase in resources and personnel to perform these tasks. However, since there is no full-time mechanism at this time to further the goals of the Agreement, it is surely evident that there is need for greater capacity by the Secretariat.

Under the current regime, all notifications of barriers to trade must be resolved bilaterally between the concerned provinces. A supplier or firm which is unable to sell its product in another province must contact its provincial government which in turn consults with the province whose regulation is posing a trade barrier. The

problem is then solved by means of bilateral negotiations that may often involve non-transparent processes. This is costly in terms of time and financial and human resources.

In international economic relations, a patchwork of bilateral deals is less efficient than a consistent multilateral process. The same applies to the domestic Canadian context. The recent dispute between Ontario and Quebec regarding construction workers is a case in point.[41] Under the current framework, the approach to promoting the free movement of goods, services and personnel across provinces could become a patchwork of bilateral deals rather than a single national process. The principles used to solve the dispute regarding labour mobility in the construction industry should apply in a similar dispute between any two other provinces, instead of *ad hoc* solutions. Over time, these cases should be documented and should establish precedence for future dispute resolution. In order to ensure impartiality and consistency in this process of consultation and dispute resolution, the process should be insulated from political influences by having the Internal Trade Secretariat play a central role in monitoring and mediating the deliberations. The European process owes some of its success to the mediation and regulatory roles of the Commission.

[41] After many years of complaints, the Quebec government agreed in a bilateral agreement with Ontario in October 1996 to exempt Ontario contractors from Quebec competency examinations, eliminate the duplicate certification procedure for Ontario construction workers, eliminate administrative fees charged to Ontario workers and recognize certain compulsory and voluntary trades for which competency has been established.

THE CONVERGENCE OR HARMONIZATION OF REGULATIONS AND STANDARDS

In the EU, regulations that explicitly discriminate against a product or person in one member state are forbidden by the EC Treaty. National regulations that are formally non-discriminatory, but that *effectively* discriminate and inhibit the free movement of goods (e.g., the German beer purity law) are usually struck down by the Court of Justice and mutual recognition normally applies. In cases where national regulations affect the functioning of the common market (but are saved by Article 36), the Commission resorts to harmonization through directives. Alternatively, if the problem is related to standards, then the Commission will request that a European standard be established. Such an approach is feasible in Canada but it will require some changes to the current regime for managing standards nationally. Historically, provincial authorities have been free to introduce regulations of their choice. In addition, standards that were developed by national standardization bodies were adopted on an *ad hoc* basis by provinces and adapted to their needs with little concern about uniformity and consistency across Canada. In the current context, it is somewhat perverse to find that it is easier in some cases to import products into Canada than it is for certain goods to move from one province to another.

It is not clear what types of barriers are most common in Canada, especially in terms of standards or regulations[42] (see Annex I for a list of identified barriers). Canadian government officials cite standards as a major obstacle to interprovincial trade. Easson (1995) also argues that "the most serious obstacles to free movement within Canada are attributable to differences in standards." However, the Standards Council of Canada believes that regulatory requirements, not product standards, are the greater problem. This is due to the fact that most standards are supposedly

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[42] Some confusion may arise from the definition of standards versus regulations. According to the AIT, a "measure" is "any legislation, regulation, directive, requirement..." A standard is defined as "a specification, approved by a Party or by a recognized body, including those accredited as members of Canada's National Standards System, that sets out the rules, guidelines or characteristics for goods or related processes and production methods, or for services, service providers or their related operating methods" (Art. 200). Therefore, a measure includes a regulation. But a "regulatory measure" is defined as a measure that does not contain a standard (Art. 407).

national, not provincial. There are five standards-setting groups in Canada: the Canadian Standards Association (CSA); the Canadian Gas Association (CGA); the Underwriters Laboratories of Canada (ULC); the Bureau de normalisation du Québec (BNQ); and the Canadian General Standards Board (CGSB). There are also 200 accredited laboratories, 11 certification organizations and 14 accredited registration bodies. They are all considered part of a putative unified standards system which is national in scope.[43] Some commentators therefore argue that the problem may lie in standards-related measures or regulations that cite particular standards.

Standards-Related Barriers

There is a need for a mechanism to coordinate in a thorough manner the development of standards in Canada so that they are compatible or equivalent across all subnational jurisdictions. There is no reason why most standards in Canada should not be national. The Agreement refers to "Canada's National Standards System" as an entity and defines a national standard as any standard approved by the Standards Council of Canada. It also requires parties to "establish mechanisms to consult and cooperate on matters relating to standards and standards-related measures." There is an implicit assumption that parties will do this on their own. Furthermore, in addressing the question of harmonization of standards, the Agreement is very vague:

> Where a Party, in pursuing a legitimate objective, has or establishes a level of protection that is the same as that of another Party, the affected Parties shall endeavour to adopt a harmonized standard or standards-related measure in respect of that objective.[44]

This offers little more than a piecemeal approach to the harmonization of standards across twelve jurisdictions and will prove neither efficient nor timely. Ideally, the Standards Council should be formally entrusted with the task of documenting which standards need to be harmonized, similar to its EU counterpart. It would be an independent, arm's length body with expertise in the area of

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[43] Interview with Elva Nilsen of the Standards Council of Canada.

[44] Annex 405.1 (17).

standards. This is critical in light of the fact that the Agreement seems to attach particular importance to standards, judging from the language used and the detailed treatment of this subject.[45]

The Canadian Standards Association has encouraged all standardization bodies to try to develop national standards; however, provincial authorities can fail to adopt them. All provinces make reference to CSA standards for electrical products but some provinces accept electrical products from overseas that do not meet CSA standards. There is a national plumbing code that is used by all provinces, and a building code which was developed by the National Research Council. Nevertheless, there is no truly national standard for building codes, and variations can create problems. Building regulations are a provincial responsibility under the Canadian Constitution. Ontario recently released its own new building code that is an adaptation of the NRC code. Meanwhile, the city of Vancouver is thinking of adopting the U.S. plumbing code instead of the Canadian code. This has raised concerns among industry because if Vancouver adopts U.S. plumbing standards, it will create obstacles for Canadian manufacturers trying to sell plumbing equipment in Vancouver.

The problem of incompatibility in the building sector stems from the fact that the codes developed by the NRC do not state performance aspects (insulation, etc.). This is the area especially where differences across provinces emerge. On the positive side, the Government of Manitoba has stated that it will adopt national codes in the future without modifying them. This approach should be emulated by all provinces.[46]

The CSA has indicated that it wants a truly national strategy for standardization in order to promote national competitiveness. It points out that most OECD countries have a national strategy. The CSA stresses that the biggest concern in the standards area is the possible breakdown of the national standards system in Canada.

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[45] Note that Easson (1995) argues that perhaps the authors of the Agreement may have considered standards as a more serious obstacle to trade than other types of laws or regulations.

[46] Interview with Richard Desserud of the National Research Council.

This is partly due to the current agenda of budget reductions at all levels of government. For example, provincial representatives find it difficult to attend CSA meetings because of a lack of funds for travel costs. In fact, Ontario representatives cannot travel out of the province.[47]

In principle, standards are voluntary rather that compulsory, but industry works with them. Standards act as barriers when a regulation refers to them, and they are sometimes cited in regulations. The federal government, through an initiative by the Treasury Board, is promoting the notion of using international standards in government operations and is trying to encourage departments to use existing national or international standards. The Treasury Board also believes that product standards are largely compatible across Canada and that the problem areas are essentially labour mobility and certification issues.

The European standardization strategy is not quite applicable to Canada because of the complex combination of supranational and national structures. Nevertheless, it demonstrates that a clear, unified standardization system is necessary to ensure compatibility of products across any economic space. On the Canadian domestic front, there is already the basic structure of a national standards system. It simply needs clearer definition and acceptance by all provinces.

While the Agreement on Internal Trade did not create a centrally coordinated, national standardization strategy, it does appear to require mutual recognition and/or harmonization of standards over time. Such a process will depend on continued negotiations and will be influenced by local interest groups instead of efficiency in national production and overall consumer welfare. This further indicates that mutual recognition should be given as much priority in Canada as in the European Union. Experience around the world suggests that it is too difficult to harmonize standards across jurisdictions yet it is quite possible to recognize standards that are equivalent. Indeed, in Canada, all testing, certification and registration bodies are approved by the Standards

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[47] Interview with Peter Rideout of CSA. Incidentally, the United Kingdom has a national standards system based on ISO 9000.

Council of Canada. Furthermore, as in the EU, if a product, process, safety/health and environmental standard is good enough for consumers in one province, it should be good enough for consumers in all provinces.

It would be worthwhile to give the Standards Council of Canada the mandate and resources to oversee the creation of a truly national standardization strategy through the Agreement on Internal Trade. The Council is also best qualified to indicate what is needed to reconcile standards across Canada. Furthermore, the recent amendment to the *Standards Council of Canada Act* gives the Council new powers to provide advice and assistance to the Government of Canada in the negotiation of standards-related aspects of international trade agreements, and to make recommendations without limitation to the Minister of Industry on standards-related matters. In addition, a new Provincial-Territorial Advisory Committee would allow the Council to assist more effectively in the removal of internal trade barriers. The Council should therefore be given the formal authority and the necessary resources to participate in all provincial ministerial meetings on internal trade and to advise those groups.

Regulatory Barriers

Although no formal inventory of regulatory barriers to trade across provinces exists, there is strong indication from many companies that differences in regulations across provincial jurisdictions make it difficult to conduct their business on a national scale. A study by the Conference Board in 1992 involving 50 companies[48] reveals that a multitude of barriers exist that inhibit efficient production and distribution in Canada. It cites such barriers as preferential provincial procurement policies; incompatible regulations governing pharmaceuticals; differences in professional registration and licensing; divergent food inspection regulations; and labour mobility restrictions. The study suggests that differences in regulations among provinces are more critical than standards.

[48] S. Loizides and M. Grant, "Barriers to Interprovincial Trade: Fifty Case Studies." Conference Board of Canada. April 1992.

Many of these barriers would virtually disappear overnight if all provinces and territories were to implement policies for the mutual recognition of similar regulations and technical requirements as stated in Article 101(c) of the Agreement on Internal Trade and reiterated in five specific chapters. Alternatively, in areas where regulations or product standards vary significantly, there should be harmonization of those measures based on some essential criteria; currently there is no central mechanism or organization to facilitate these processes. There is also no mechanism in the Agreement for outlawing current provincial regulations or requirements that contravene the main objective of the Agreement, which is to "reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada."

One European mechanism that could be extremely useful in Canada is a mandatory notification system for new regulations (similar to 83/89/EEC). It would allow other provinces to comment on the drafts and ensure that the province enacting the regulations takes these comments into account in the final regulation. In addition, the Internal Trade Secretariat should be empowered to scrutinize all such regulations to ensure that they do not contravene the principles of the Agreement on Internal Trade. This is particularly effective in pre-empting future regulatory barriers to trade although it cannot address current regulatory impediments to the flow of goods and services. Clearly, current regulations that act as barriers to trade must also be addressed. This can be accomplished through the mutual recognition of regulations and it is therefore critical that this approach be actively pursued by the Committee on Internal Trade.

Labour mobility remains a salient issue although it is encouraging that the Forum of Labour Market Ministers (through a Coordinating Group) has started the process of working towards reconciling differences in regulations governing professional occupations across Canada in line with the Agreement on Internal Trade. Similar initiatives are under way in the areas of consumer affairs, transportation, the environment, investment and procurement. In September 1996, provincial ministers responsible for consumer affairs agreed in principle to adopt proposals for

harmonization in several consumer areas.[49] Similarly, in November 1996, the Canadian Council of Ministers of the Environment announced a "Canada-wide Accord on Environmental Harmonization" that is intended to develop and implement consistent environmental measures in all jurisdictions. The intention is to achieve overall harmonization of environmental policies, standards, objectives, legislation and regulations over three years. There is also some progress at the level of officials, toward extending rules on procurement to municipalities, academic, health and social service entities, and some sort of agreement is expected in 1997. But agreements in principle only express good intentions; it remains to be seen whether, and how quickly, real action will occur.

[49] The proposals include a standard contract for direct sales across Canada and a standard disclosure on all forms of credit.

CONCLUSIONS AND RECOMMENDATIONS

In the final analysis, Canadians seem to have had less success in reducing regulatory barriers to trade in 130 years than Europeans who have been working together toward a common market for about 40 years. In Canada, trade liberalization measures instituted at the federal level have helped business address the challenges of globalization; but efforts to date internally, are feeble. Internal regulatory reforms seem less concerned with general welfare or economic efficiency and more with the concerns of interest groups. The Agreement on Internal Trade is only a first step in the task to reduce regulatory barriers but the lesson from the European Union is clear: political commitments are not good enough; legal provisions are needed in order to ensure that future governments do not reverse earlier reform efforts.

To strengthen the liberalization process in Canada, this paper recommends that the following actions be taken:

- The decision-making process of the Agreement on Internal Trade be changed from consensus to a qualified majority vote.

- The Committee on Internal Trade be empowered to adopt measures for the mutual recognition of regulations and administrative actions of Members to promote the free movement of goods and services in Canada, by the addition of a clause to the Agreement on Internal Trade similar to that of the Treaty on European Union (Article 100a).

- The Internal Trade Secretariat, in conjunction with the Standards Council of Canada, be given a formal role in the Internal Trade Agreement to promote conformity of standards and regulations nationally, to assess whether all new standards and regulations of Members conform with the aims of the Agreement, and to advise the Committee on Internal Trade on these matters.

- A mandatory notification system for new regulations be introduced in the Agreement on Internal Trade to allow other provinces and territories to comment on draft regulations and

to ensure that the authorities enacting the regulations take the comments of interested Parties into account in the final regulations.

- Annex 405.2 of the Agreement on Internal Trade be amended by the deleting paragraph 10 so that the dispute resolution procedures apply to regulatory measures and regimes. While this change falls far short of the European provisions, it should give some impetus to the mutual recognition and reconciliation process in Canada. Otherwise, there is no incentive in the Agreement to reduce regulatory barriers.

- Some attempt be made to ensure the effective enforcement of the Agreement by conferring rights on *individuals* and not only on provincial governments. The European experience makes this requirement quite clear.

At a more general level, the segmentation of the Canadian market should be eliminated as soon as possible. In this regard, both provincial and federal programs and regulations that prevent the formation of a national market for products and services should be phased out. It would be wise for the relevant authorities to begin the process of dismantling the supply management system for dairy, poultry and eggs to enable Canadian producers to compete with foreign producers by the time agricultural tariffs fall to the low levels intended in the WTO Agreement on Agriculture.

The competitive challenges of globalization dictate that the inefficiencies caused by regulatory barriers to trade in the Canadian market be eliminated. If all levels of government in Canada do not act to address these challenges, in the long run the barriers will be detrimental to both Canadian consumers and producers. It is therefore worthwhile to take the bold steps and make the policy changes now rather than later in order to minimize the pains of adjustment.

ANNEX I
Technical/Regulatory Barriers by Sector

Agriculture/Food Products
Marketing boards and local content requirements;
Differential markups;
Distribution restrictions;
Licensing requirements;
Different standards/grading/regulations;
Lack of harmonization among federal and provincial laws and regulations regarding packaging and labeling (dairy, alcoholic beverages and processed foods);
Enforcement re standards and grading; and
Market share quotas for industrial milk.

Consumer Health and Safety
Different labeling of products across provinces;
Provincial government listing of pharmaceutical products under health plans; and
Certified training programs for food handlers.

Environment
Lack of harmonization of federal and provincial regulations; and
Regulation of pulp mill effluents.

Investment
Corporate registration and licensing requirements including fees and absence of reciprocity;
Requirements to establish provincial production facilities in order to supply government or obtain local financing (medical devices, forest products, construction and food services); and
Provincial controls over out-of-province investment in real estate or strategic industries.

Manufacturing
Different provincial standards and regulations;
Licensing requirements;
Distribution restrictions;
Regional development/provincial subsidy programs;
Log export policies in forest products sector;
Provincial markings on cigarettes; and
Refillable versus recyclable bottling regulations.

Services
Licensing requirements;
Discriminatory tendering practices;
Differing licensing, weight/load restrictions and vehicle registrations;
Requirements for interprovincial movement of construction vehicles;
Local trade union hiring restrictions;
Limiting publication of project tender; and
Advertisement in local geographic areas.

Transportation
Differing technical standards and regulations (vehicle weights and limits and safety);
Quantitative restrictions on trucking; and
Limits on interprovincial bus travel.

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