# Chapter 5. Fostering better rules through international regulatory co-operation

*New opportunities and changes brought by the growing interconnectedness of economies and technologies present policy makers and regulators with challenges that cannot be dealt with in isolation. Increasingly, co-ordination is needed on regulatory matters to tackle the challenges that cross borders and achieve a coherent and effective regulatory response at least costs for business and citizens. This chapter documents and analyses the various jurisdictions' practices in accounting for the international environment in domestic rule-making. It reviews how international considerations are reflected in traditional regulatory management tools and the interface between domestic and international rule-making. The chapter builds on answers to dedicated questions embedded in the 2017 OECD survey of Regulatory Policy and Governance, as well as to a survey carried out in 2015 to 50 international organisations.*

The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

## Key findings

With the fundamental shift in the regulatory culture that it implies, international regulatory co-operation (IRC) may be perceived as a key governance challenge (Hoekman, 2015[1]; Hoekman, 2015[2]; Hoekman and Mavroidis, 2015[3]). However, it is also increasingly seen as a necessary "means for helping governments achieve policy goals and minimise costs on society" (OECD, 2016[4]), to address the challenges and benefit from the many opportunities offered by the growing interconnectedness of economies highlighted in Chapter 1. The *2012 Recommendation of the Council on Regulatory Policy and Governance* recognises the importance of IRC to ensure the quality and effectiveness of regulation in a globalised world. Principle 12 emphasises in particular the need for policy makers and regulators to consider relevant international standards and frameworks for co-operation, and the likely effects of regulation on parties outside the jurisdiction.

In order to highlight IRC practices across jurisdictions, the 2017 OECD Survey of Regulatory Policy and Governance embedded a number of questions on how regulators were required to account for the international environment in domestic rule-making. The results show that despite increasing awareness, implementation of IRC by domestic regulators remains quite new, with the most progress observed in the adoption of international instruments – in line with international commitment under the WTO agreements on Technical Barriers to Trade (TBT) and on the Application of Sanitary and Phytosanitary Measures (SPS) – and the consideration of international impacts in RIA processes.

Compounding the challenge, the data show the fragmentation of IRC policies and responsibilities across various legal and policy tools managed by a variety of responsible bodies. No country has today developed an overarching policy or legal basis consolidating its vision and strategy on regulatory co-operation. The agenda is split across a range of documents addressing separately the adoption and application of international commitments, the consideration of international standards, co-operation agreements in specific sectors… and, in the majority of cases, responsibilities are neither clearly allocated nor co-ordinated among possible responsible bodies. This fragmented governance does not facilitate the development of a unified and compelling narrative around IRC likely to influence the regulatory and legislative culture of countries.

Legal requirements to consider international instruments when developing new laws and regulations are quite widespread – in line with obligation to adopt/transpose EU acquis and other international obligations. However, surprisingly, the practices are still far from systematic and the tools and approaches to support regulators in this endeavour (specific guidance, database of instruments…) are yet to be fully developed in most countries. Often, regulators face a formal requirement in this area with little means or understanding of how to implement it in practice. Where they exist, these requirements also address mainly technical regulations (which carry the most likely impacts on trade) and do not inform more broadly the legislative and regulatory agenda of the country, foregoing the benefits of broader consistency with international instruments and the possibility for regulators to benefit from the international expertise in their own field.

The consideration of the international impacts of a domestic regulation remains limited. The *ex ante* practice is largely focused on trade impacts and does not seem to be deepening or spreading across jurisdictions over time. The *ex post* practice is confined to a small subset of countries but seems to be slightly improving. Again, the limiting factor may be a lack of understanding on the part of regulators of what they could do in this area.

Stakeholder engagement is potentially an important means to collect the insights and inputs of foreign players – be they regulators from other jurisdictions or other stakeholders. However, the most systematic mechanism to leverage foreign inputs is provided by trade notification mechanisms (within EU or through the WTO). They therefore strongly focus on trade concerns. Even within this narrow focus, the data show disconnect between the authorities responsible for the oversight of trade transparency provisions and those in charge of supervising the engagement of stakeholders in the rule-making processes.

Overall, the evidence suggests that there is potential to provide greater support to regulators to implement existing IRC requirements, to broaden them beyond trade considerations and to better integrate regulatory impact assessment, stakeholder consultation, and *ex post* evaluation to consider more systematically the international environment in domestic rule-making.

The evidence also points to ample opportunities to bridge the gap between domestic regulatory practices and international attempts to develop a more transparent and evidence based culture of international norms and standards. Be it with stakeholder engagement or impact assessment, the expertise and evidence collected at the domestic level could be of use to the international one. Conversely, the adoption by international organisations (beyond the European Commission) of practices and disciplines such as those promoted by the 2012 Recommendation at domestic level could go a long way to provide greater confidence to domestic regulators, policy makers and the public at large, in the quality of international norms and standards.

## Introduction: What is IRC and what does it mean for regulators?

Based on (OECD, 2013[5]), IRC can be defined as any step taken by countries (or jurisdictions), formal or informal, unilaterally, bilaterally or multilaterally, to promote some form of co-ordination / coherence in the design, monitoring, enforcement, or *ex post* management of regulation. IRC has become a critical dimension of regulatory quality and effectiveness, as illustrated by the inclusion of a principle on IRC in the 2012 Recommendation (Box 5.1).

This inclusion reflects the recognition that regulating in isolation, i.e. without considering the international environment, is no longer an option. Well informed IRC is a critical driver of regulatory performance and societal benefits, such as improved safety and strengthened environmental sustainability; of administrative efficiency gains and cost savings for government, business, and citizens; and of increased trade and investment flows and economic growth (through reduced inconsistencies and uncertainty) (OECD, 2013[5]).

A recently published study by the International Federation of Accountants (IFAC) and the Business and Industry Advisory Committee (BIAC) on regulatory divergence in the financial sector[1] shows for example that regulatory divergences cost financial institutions around 5-10% of their annual global turnover (some USD 780 billion per year), and unduly affect the financial performance of smaller organisations. The study underlines the importance of regulatory co-operation to address these costs.

IRC has important implications for the activities of regulators and of their oversight bodies. It requires a change in the regulatory culture towards greater consideration of the international environment in the rule-making process. This involves both the more systematic review and consideration of foreign and international regulatory frameworks of relevance when regulating and the continuous assessment of how regulatory measures

will impact and fit into the broader cross-border management of the issue to address. In this perspective, the regulatory management tools provide important entry points in the rule-making process to consider the international environment in the development and revision of laws and regulations. In particular, discussions in the OECD Regulatory Policy Committee[2] and further analytical work (Basedow and Kauffmann, 2016[6]) identified the following four key practices in the implementation of Principle 12.

- Practice 1: In developing regulation, systematically consider international instruments, in particular technical standards and document the rationale for departing from them in the RIA process
- Practice 2: Open consultation to foreign parties
- Practice 3: Embed consistency with international standards as a key principle driving the review process in *ex post* evaluation
- Practice 4: Establish a co-ordination mechanism in government on IRC activities to centralise relevant information on IRC practices and activities and to build a consensus and common language

This chapter maps legal requirements and regulators' practices across jurisdictions in relation to these four key practices, building on new survey data gathered through the 2017 OECD survey of Regulatory Policy and Governance (iREG). It also identifies opportunities for improving the quality of international norms and standards through a more systematic use of stakeholder engagement and evaluation by international organisations, relying on the survey of international organisations carried out in 2015 (OECD, 2016[4]).

**Box 5.1. IRC Principle in the 2012 Recommendation**

Principle 12: "In developing regulatory measures, give consideration to all relevant international standards and frameworks for co-operation in the same field and, where appropriate, their likely effects on parties outside the jurisdiction."

Principle 12 is further elaborated around the following key aspects:

- Take into account relevant international regulatory settings when formulating regulatory proposals to foster global coherence.
- Act in accordance with their international treaty obligations.
- Co-operate with other countries to promote the development and diffusion of good practices and innovations in regulatory policy and governance.
- Contribute to international fora which support greater International Regulatory Co-operation.
- Avoid the duplication of efforts in regulatory activity in cases where recognition of existing regulations and standards would achieve the same public interest objective at lower costs.
- Open consultation on regulatory proposals to receiving submissions from foreign interests.

*Source*: (OECD, 2012[7]), *2012 Recommendation on Regulatory Policy and Governance*, OECD Publishing, Paris.

## Observed IRC practices of domestic regulators

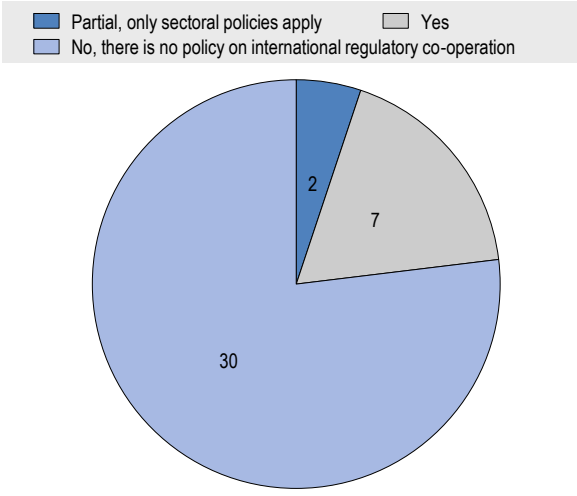
Despite recognition of the potential benefits of IRC, systematic evidence on domestic regulators' IRC practices remains scant. The 2017 survey seeks to address this gap through a series of questions on IRC practices in line with the 2012 Recommendation and related practices. This section provides a preliminary overview of domestic regulators' implementation of IRC based on the responses to this questionnaire. It shows that while there are signs of more systematic embedding of IRC considerations in rule-making, practices remain far from systematic and consistent among OECD countries.

### *Organisation and governance of IRC*

An IRC policy or legal basis can be defined as a systematic, national-level, whole-of-government policy promoting international regulatory co-operation. Based on such definition, and despite engaging in a variety of IRC approaches, no country has so far developed a cross-cutting framework for IRC. Nevertheless, the survey data show that a number of jurisdictions have, in line with Principle 12 of the 2012 Recommendation, developed policies or legal basis that codify domestic regulators' commitment to consider international standards and relevant international regulatory frameworks in their area of activity, and/or support systematic co-operation with their peers in foreign jurisdictions, and/or promote co-operation on good regulatory practices across borders (Figure 5.1 and Table 5.1).

**Figure 5.1. Number of jurisdictions with an explicit, published policy or a legal basis on IRC**

39 respondents




*Note*: Data for OECD countries is based on the 35 OECD member countries, the European Union, and three accession countries.
*Source*: Indicators of Regulatory Policy and Governance Survey 2017, http://oe.cd/ireg.

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**Table 5.1. Examples of domestic IRC policies**

| Australia | Canada | Mexico | United States | EC | EU countries |
|---|---|---|---|---|---|
| Ministerial Directive on International standards and risk assessments | Cabinet Directive on Regulatory Management | Federal Law of Administrative Procedure (LFPA) and the Federal Law of Metrology and Standardisation (LFMN) | Executive Order 13609 (Promoting International Regulatory Co-operation) | Better Regulation guidelines and toolbox | Various legal frameworks and policies involved by EU membership |

*Source*: Indicators of Regulatory Policy and Governance Survey 2017, http://oe.cd/ireg.

These include most prominently Canada, through its new Cabinet Directive on Regulation (Box 5.2) and the United States through Executive Order 13609 (Promoting International Regulatory Co-operation). In Mexico, a variety of legal and policy instruments frame regulators' consideration of international standards and of trade impacts and co-operation across countries on regulatory policy (OECD, 2018[8]). In Australia, a ministerial Directive and specific guidelines frame regulators consideration of international frameworks. Countries of the European Union have established a range of legal provisions and policies to frame their participation in the EU, the most ambitious regional regulatory co-operation framework involving supra-national regulatory powers. Under the Treaty on the Functioning of the European Union, member States have empowered the EU institutions to adopt legal instruments (regulations, directives and decisions), which take precedence over national law and are binding on national authorities.

**Box 5.2. IRC policy framework in Canada**

The Cabinet Directive on Regulation (CDR) establishes the requirements that Canadian regulators must meet when developing and implementing regulation. The Directive requires departments and agencies to examine the regulatory systems of relevant jurisdictions to identify potential areas for alignment and co-operation, including a review of work undertaken by international standard development organisations for possible incorporation by reference. Where differences are required, departments and agencies must provide a rationale for a Canada-specific approach.

Regulatory co-operation is defined as a process for finding efficiencies across jurisdictions, reducing unnecessary regulatory differences, and achieving domestic policy goals, while aiming to facilitate trade and investment, promote economic growth and job creation, and increase consumer choice. A central pillar of Canada's approach to regulatory co-operation is the maintenance or enhancement of standards of public health and safety and environmental protection.

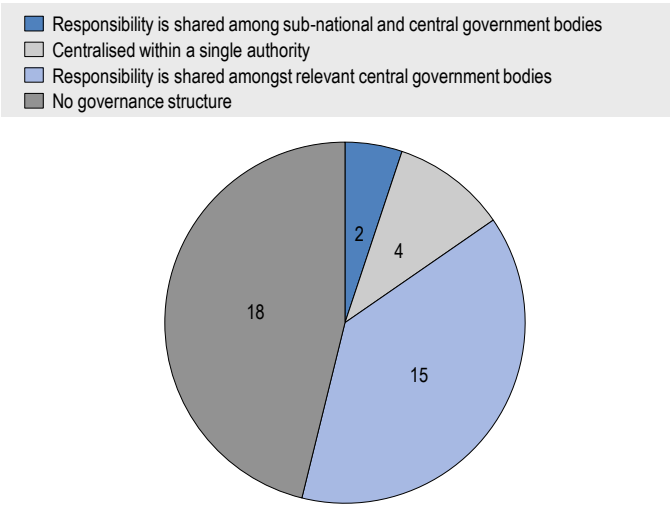
*Source*: www.canada.ca/en/treasury-board-secretariat/services/federal-regulatory-management/guidelines-tools/cabinet-directive-regulation.html (accessed 11 July 2018).

The institutional arrangement for oversight of IRC varies across OECD countries, but fragmentation of IRC responsibilities prevails (Figure 5.2). Among respondents, the most common governance structure is the sharing of responsibility among relevant central government bodies. However, it is notable that almost half of the respondents do not have a governance structure in place for specifically overseeing IRC activities. In only a handful of cases oversight of IRC is reported as centralised in a single authority. It is in

particular the case of Canada (where this responsibility is vested with the Treasury Board Secretariat) and the United States (where this responsibility is carried out by OIRA). This fragmented governance is not surprising given the piecemeal approach to IRC across all countries.

**Figure 5.2. Organisation of oversight of IRC practices or activities**

39 respondents




*Notes:* Data for OECD countries is based on the 35 OECD member countries, the European Union, and three accession countries.
*Source*: Indicators of Regulatory Policy and Governance Survey 2017, http://oe.cd/ireg.

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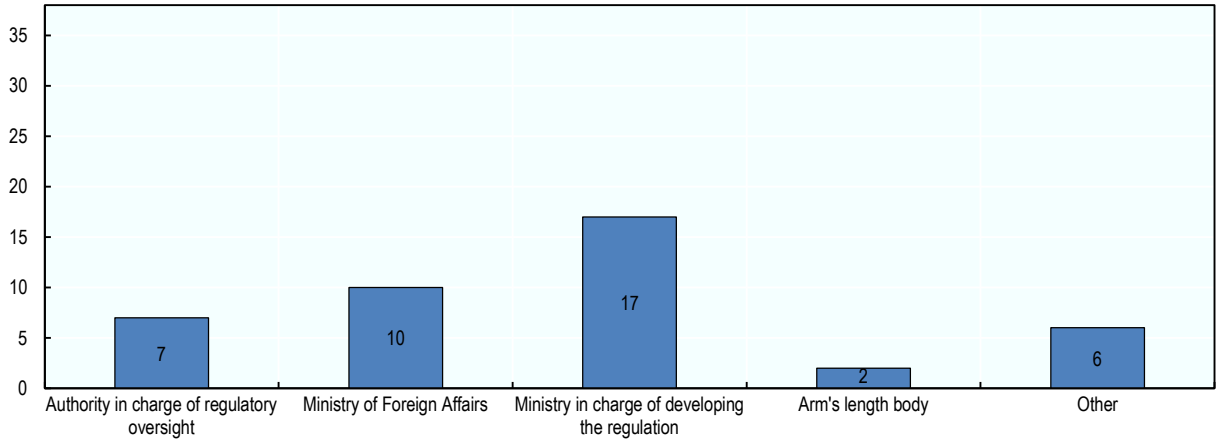
**Figure 5.3. Authorities charged with overseeing the systematic consideration of international instruments**

39 respondents




*Notes:* Data for OECD countries is based on the 35 OECD member countries, the European Union, and three accession countries.
*Source*: Indicators of Regulatory Policy and Governance Survey 2017, http://oe.cd/ireg.

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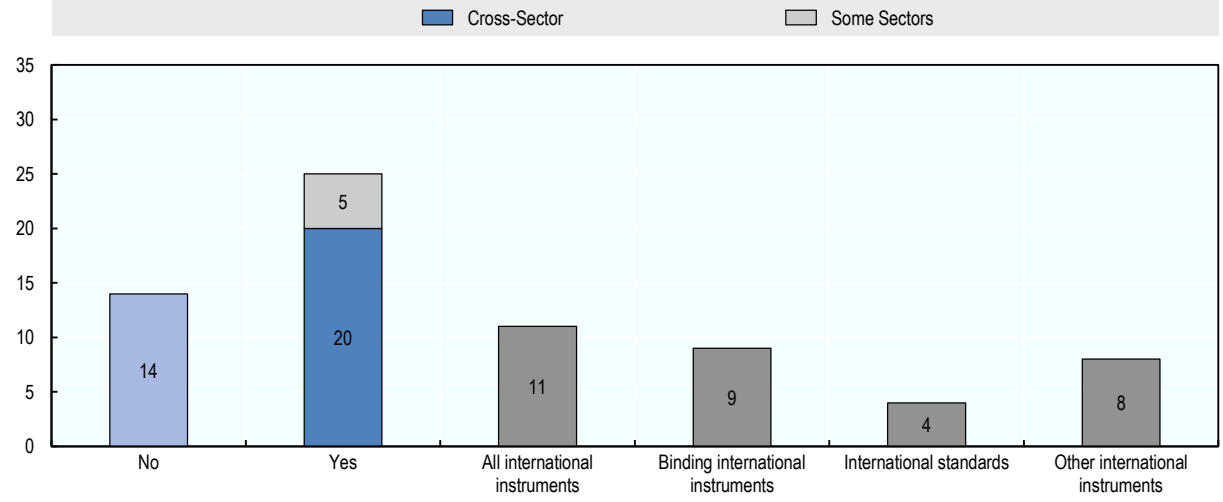
Nevertheless, it is worth noting that when breaking down IRC in its various components, some more structured governance patterns emerge across countries. For example, half of the surveyed jurisdictions report an authority in charge of ensuring that international instruments are systematically considered in the development of regulation (20 over 39). For reference, they are 25 reporting a formal requirement to consider international instruments when developing or revising regulation (see next section). In a majority of these cases, the ministry in charge of developing the regulation has a core responsibility in this matter. In 15 jurisdictions, i.e. 60% of those reporting a legal requirement, at least one other body oversees this process. In a majority of cases, the Ministry of Foreign Affairs is involved. In almost half the cases, the regulatory oversight body also is. Among other bodies volunteered by countries, ministries responsible for trade policy play a role (Figure 5.3).

### *Incorporation of international instruments*

Incorporation of international instruments into domestic regulations is a key driver of regulatory harmonisation (OECD, 2013[5]; OECD, Forthcoming[9]). According to the 2017 survey, 25 jurisdictions report a formal requirement to consider recognition and incorporation of international instruments when developing new domestic regulations or revising existing ones (20 as a cross sectoral one and 5 for some sectors) (Figure 5.4). Of those countries, 11 of them require consideration of all international instruments. Beyond these cases, in 9 additional jurisdictions, a requirement mandates the consideration of binding international instruments. Therefore, overall, 20 countries report a formal requirement to consider recognition and incorporation of binding instruments in their regulatory process. In a number of EU jurisdictions or neighbouring countries (Norway), this requirement applies to EU legislation – captured in part by the category "other" in Figure 5.4.

**Figure 5.4. Number of jurisdictions with a formal requirement to consider international instruments in rulemaking (left) and the types of instruments considered (right)**

39 respondents




*Note:* Data for OECD countries is based on the 35 OECD member countries, the European Union, and three accession countries.
*Source*: Indicators of Regulatory Policy and Governance Survey 2017, http://oe.cd/ireg.

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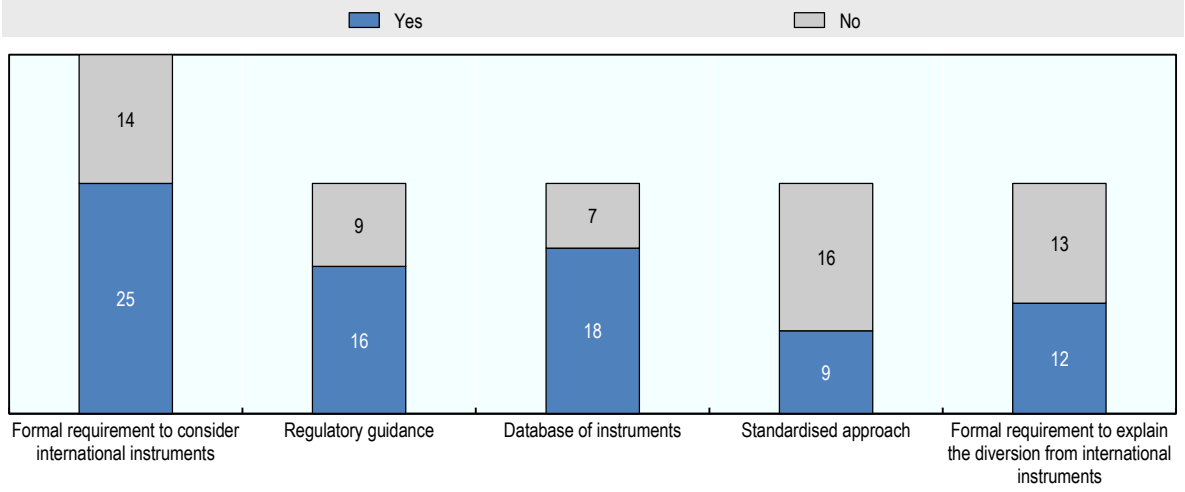
Four countries report having requirements covering international standards – implying that 16 countries mandate the consideration of international standards directly or through a broader requirement. It is significant given the voluntary nature of international standards, and may be traced back to the incentive provided by the 1994 WTO agreements on Technical Barriers to Trade (TBT) and on the Application of Sanitary and Phytosanitary Measures (SPS) to adopt international standards when developing national technical regulations and standards. Signatory governments have committed to base regulatory measures covered by these agreements on relevant international standards, guides and recommendations where they exist and to the extent that they are determined appropriate to limit unnecessary trade frictions.

However, of the 25 countries with a formal requirement to consider international instruments, only 12 have a formal requirement to explain the rationale for diverting from international instruments when country-specific rules are proposed (Figure 5.5). This seems surprising given countries' commitment to international binding instruments and the TBT and SPS Agreements requirement to justify deviations from international standards (art 2.4 TBT Agreement; art. 3.3 SPS Agreement).

**Figure 5.5. Number of jurisdictions with a formal requirement to consider international instruments in rulemaking (left) and supporting measures (right)**

39 respondents




*Note:* Data for OECD countries is based on the 35 OECD member countries, the European Union, and three accession countries.
*Source*: Indicators of Regulatory Policy and Governance Survey 2017, http://oe.cd/ireg.

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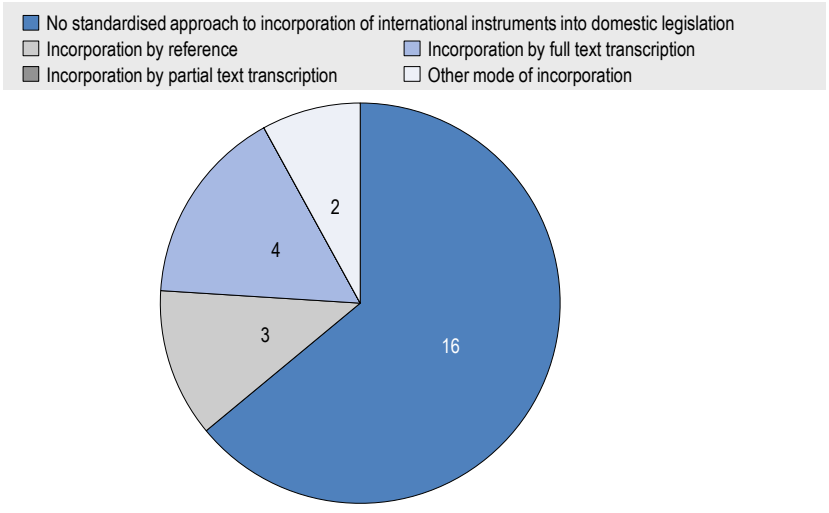
While the lack of a formal requirement to consider international instruments in domestic rule-making is not proof that international instruments are not in practice applied at the domestic level, it is still a reflection of a certain disconnect between the national and international legal systems. Without such a policy, the incentive for regulators to systematically consider international instruments remains weak. At this stage, however, this result may also reflect issues with the reporting of existing relevant requirements. In particular, such a requirement may be part of a different set of policies and legal requirements rather than those falling under the regulatory policy agenda. In particular, it could be the case if the domestic regulatory policy agenda was not fully developed yet or

if these requirements to consider international standards applied only to a subset of regulatory instruments which are not in the scope of regulatory policy (for example technical regulations).

The 2017 survey responses further indicate that a majority (16) of the 25 jurisdictions with a requirement to consider recognition and incorporation of international instruments provide guidance to regulators to facilitate the consideration of existing international instruments in the development and revision of regulation (examples are provided in Box 5.3). Nearly three-fourths make a database of international instruments accessible to regulators to facilitate consideration of relevant instruments. In most cases, this database is nevertheless partial – covering only certain instruments (for 14 jurisdictions) or certain sectors (2 cases).

**Figure 5.6. Number of jurisdictions with standardised approaches to incorporation of international instruments into domestic legislation**

25 respondents




*Notes:* Data for OECD countries is based on the 35 OECD member countries, the European Union, and three accession countries. Data for this question restricted to the 25 countries that reported to have a formal requirement to consider international instruments.
*Source*: Indicators of Regulatory Policy and Governance Survey 2017, http://oe.cd/ireg.

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Only a third of countries indicate having a standardised approach to incorporation of international instruments into domestic legislation. Among those countries with a standardised approach, three incorporate by reference and four by full text transcription (Figure 5.6). This limited systematic use of incorporation by reference or text may suggest a missed opportunity to promote regulatory harmonisation via the incorporation of international instruments. It may also reflect a perceived lack of appropriateness of international instruments to specific country situations and the limited confidence of domestic regulators that these instruments may (without alteration) help them achieve their policy objectives. Hence the importance of strengthening the mechanisms and disciplines likely to reassure domestic regulators and legislators on the quality of international rules and support greater uptake of good quality international instruments in national legislation. This is the focus of the second part of this chapter.

**Box 5.3. How is the need to consider international standards and other relevant regulatory frameworks conveyed in Australia and the United States**

In **Australia**, there is a cross-sectoral requirement to consider "consistency with Australia's international obligations and relevant international accepted standards and practices" (COAG Best Practice Regulation). Wherever possible, regulatory measures or standards are required to be compatible with relevant international or internationally accepted standards or practices in order to minimise impediments to trade. National regulations or mandatory standards should also be consistent with Australia's international obligations, including the GATT Technical Barriers to Trade Agreement (TBT Standards Code) and the World Trade Organization's Sanitary and Phytosanitary Measures (SPS) Code. Regulators may refer to the Standards Code relating to ISO's Code of Good Practice for the Preparation, Adoption and Application of Standards. However, (OECD, Forthcoming[9]) reports that to support greater consistency of practices, the Australian government has developed a Best Practice Guide to Using Standards and Risk Assessments in Policy and Regulation and is considering an information base on standards (both domestic and international) referenced in regulation at the national and sub-national level.

In the **United States**, the guidance of the Office of Management and Budget (OMB) on the use of voluntary consensus standards states that "in the interests of promoting trade and implementing the provisions of international treaty agreements, your agency should consider international standards in procurement and regulatory applications". In addition, the Executive Order 13609 on Promoting International Regulatory Co-operation states that agencies shall, "for significant regulations that the agency identifies as having significant international impacts, consider, to the extent feasible, appropriate, and consistent with law, any regulatory approaches by a foreign government that the United States has agreed to consider under a regulatory co-operation council work plan." The scope of this requirement is limited to the sectoral work plans that the United States has agreed to in Regulatory Co-operation Councils. There are currently only two such Councils, one with Mexico and the other with Canada.

*Source*: Australia COAG Best Practice Regulation Guide: www.finance.gov.au/obpr/docs/COAG_best_practice_guide_2007.pdf and Best Practice Guide to Using Standards and Risk Assessments in Policy and Regulation: https://industry.gov.au/industry/IndustryInitiatives/PortfolioRegulationReform/Using-Standards-and-Risk-Assessments-in-Policy-Regulation/Pages/default.aspx; US OMB Circular A 119: www.whitehouse.gov/omb/circulars_a119; and US Executive Order 13609: www.whitehouse.gov/thepress-office/2012/05/01/executive-order-promoting-international-regulatory-cooperation.

## *Evaluation of IRC impacts*

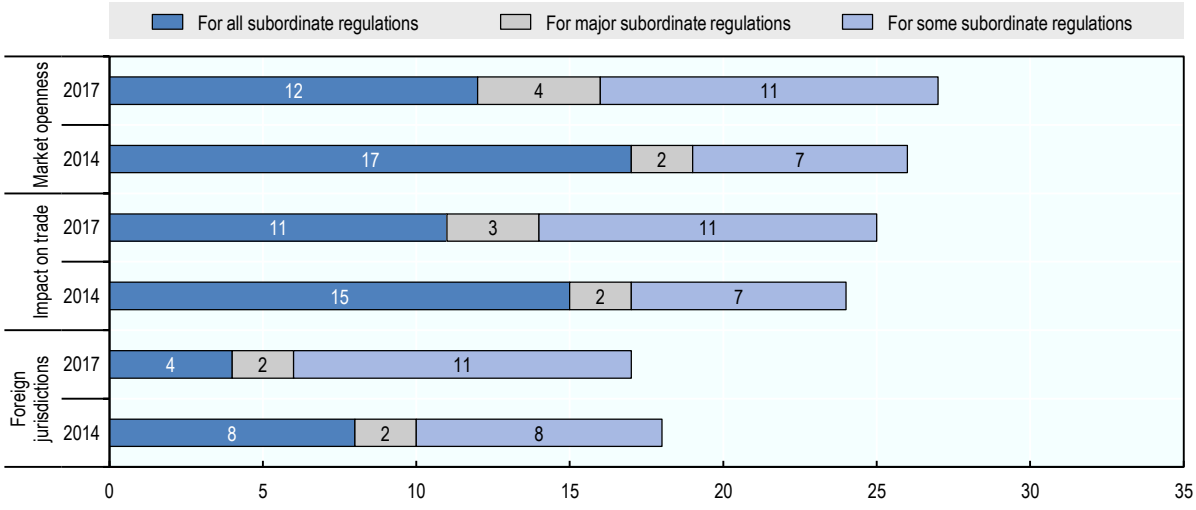
### *Accounting for international impacts in* ex ante *regulatory impact assessment*

In addition to incorporating international instruments in their rulemaking, countries may also promote IRC through the more systematic consideration of international impacts into RIA processes. As Figure 5.7 depicts, countries report, both in 2014 and 2017, that a range of impacts related to IRC are included in RIA. For example, around three quarters of countries consider impacts on markets openness and on trade, and half of countries

consider impacts on foreign jurisdictions, a relatively stable trend since 2014. Nevertheless, it seems that the consideration of these impacts is less systematically done – the share of countries considering these impacts for some regulations, compared to for all regulations has increased substantially. At this stage, it is difficult to infer whether this trend reflects a more proportionate approach to RIA or a decrease in the practice.

**Figure 5.7. Number of jurisdictions with requirements for consideration of impacts on foreign jurisdictions, market openness, or trade as part of RIA**

35 respondents




*Note:* Data is based on 34 OECD member countries and the European Union.
*Source*: Indicators of Regulatory Policy and Governance Surveys 2014 and 2017, http://oe.cd/ireg.

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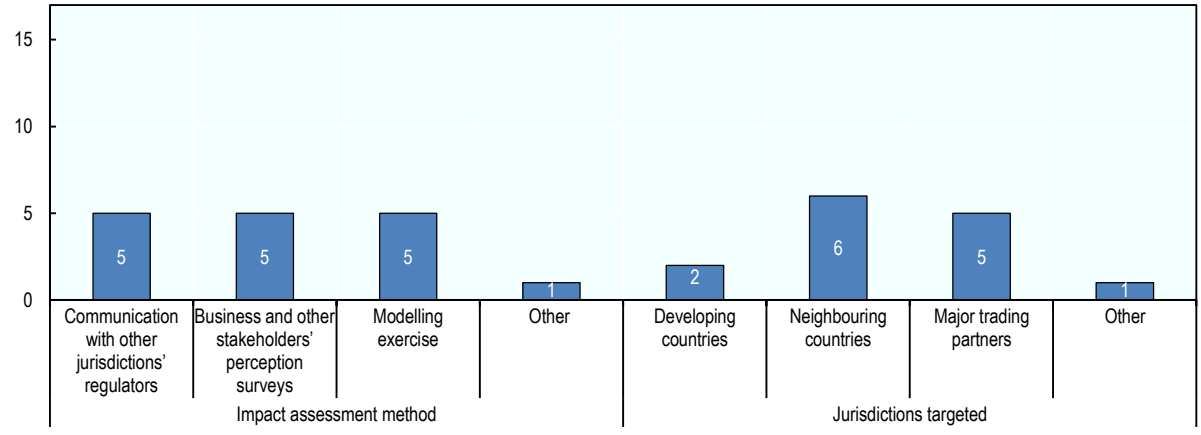
**Figure 5.8. Approaches to assessing impacts on foreign jurisdictions and to targeting jurisdictions for assessment for subordinate regulations**

17 respondents




*Note:* The sample is restricted to the 17 countries that reported assessing impacts on foreign jurisdictions.
*Source*: Indicators of Regulatory Policy and Governance Survey 2017, http://oe.cd/ireg.

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Among the 17 countries that report considering impacts on foreign jurisdictions, the most commonly targeted jurisdictions are neighbouring countries and major trading partners (Figure 5.8). Countries report using a mix of approaches to assessing impacts, involving communication with the other jurisdictions' regulators, use of perception surveys to business and other stakeholders and more theoretical modelling exercises.

Despite these results showing some assessment of the international impacts of regulation, there may be disconnects between policies and implementation practices. Indeed, (Basedow and Kauffmann, 2016[6]) finds that only a few jurisdictions – i.e., Austria, Canada and the European Commission – formally provide guidance on how to consider the international regulatory environment as part of their RIA guidelines casting a doubt on how it is done in practice in jurisdictions where regulators do not benefit from such support.

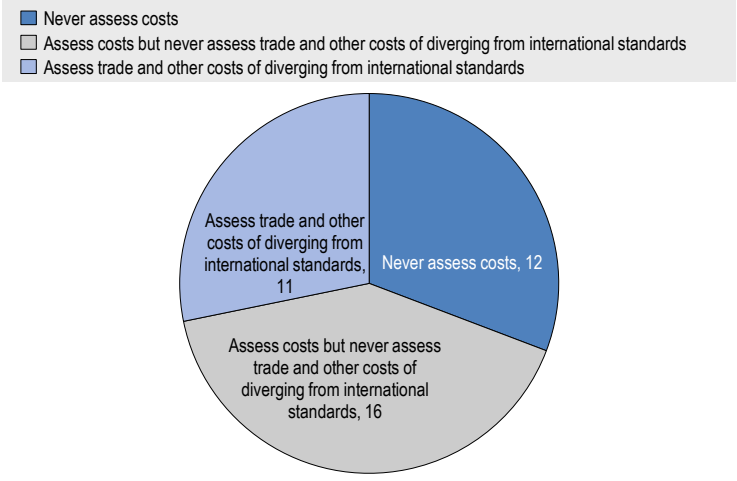
### *Assessing the consequences of regulatory divergence through ex post impact assessment*

The full extent of the impacts of a regulatory measure is only known after its implementation. Therefore, *ex post* evaluation provides a critical opportunity to identify the potential divergence with international frameworks as well as the trade and other IRC impacts of laws and regulations (Basedow and Kauffmann, 2016[6]).

While *ex post* impact assessment related to IRC is relatively nascent for most countries in practice, data shows progress since 2014. For example, in the 2017 survey, almost three times as many countries indicate having completed an assessment of consistency with comparable international standards and rules as part of *ex post* reviews in the last 12 years than were reported in 2014 (from 3 to 8). However, this represents only a subset of OECD countries – around one over 5.

**Figure 5.9. Number of jurisdictions that assess costs in *ex post* evaluations of primary laws or secondary regulations, including trade and other costs of diverging from international standards**

39 respondents




*Note*: Data for OECD countries is based on the 35 OECD member countries, the European Union, and three accession countries.
*Source*: Indicators of Regulatory Policy and Governance Survey 2017, http://oe.cd/ireg.

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Furthermore, these practices are far from being systematic. Indeed, countries rarely consider the unintended consequences related to diverging from existing international instruments in *ex post* evaluation. When they do, it is on an ad hoc basis (for some *ex post* evaluations). Similarly, among those countries that assess costs in *ex post* evaluations of primary laws or secondary jurisdictions (27), only around a third (10) report including assessments of trade and other costs of diverging from international standards (Figure 5.9).

### *Engaging foreign stakeholders in regulatory processes*

Engagement of foreign stakeholders in regulatory processes may raise awareness for regulatory approaches in other jurisdictions or provide information about unintended impacts for third parties of maintaining the same or different regulatory approaches (Basedow and Kauffmann, 2016[6]). Only about a third of surveyed countries report pursuing specific efforts to engage foreign stakeholders when developing laws and regulations. Even in these cases, for the vast majority, it is done for some regulations and not all or major ones.

In practice, most countries do not have specific procedures in place for involving foreign stakeholders and rely on an open, non-discriminatory procedure domestically, for example via an open-access internet platform accessible to all, including foreign stakeholders. Only a handful of countries pursue targeted foreign stakeholder engagement, for example through the translation of draft regulations (in 4 cases), dissemination of information through business portals (in 5 cases) or specific workshops with foreign stakeholders (in 6 cases). Given the absence of specific mechanisms and that countries do not usually track the participation of foreign stakeholders, the occurrence and impact of foreign stakeholder engagement is difficult to appraise.

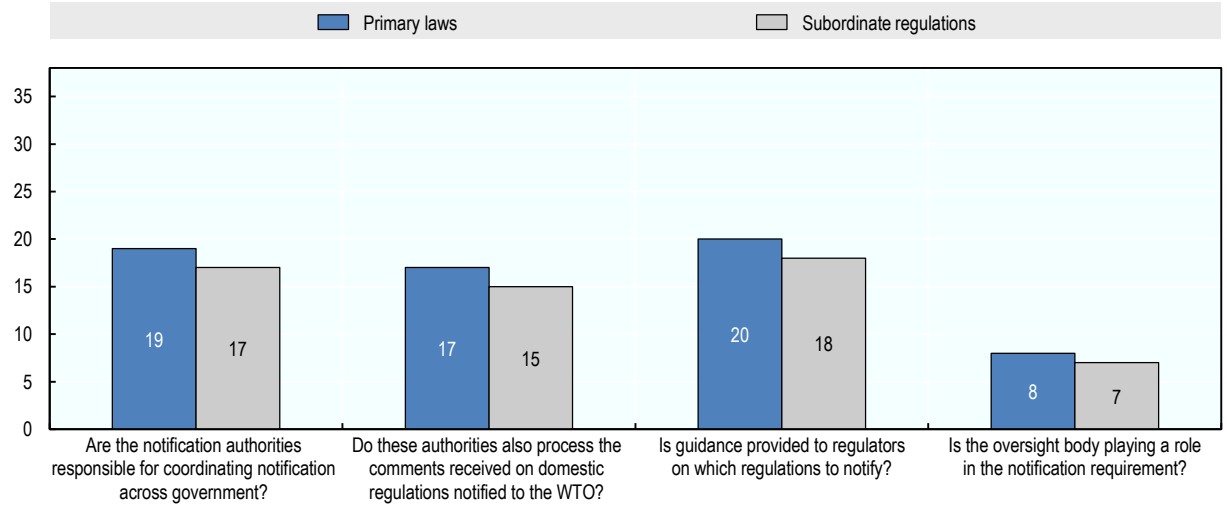
Compulsory notification of draft regulations to international fora provides potentially an important means by which to alert and draw inputs from foreign stakeholders. From the survey answers, these opportunities arise mainly in connection to trade agreements. Under the WTO TBT and SPS Agreements, for example, countries are required to establish a single central government authority responsible for notifications to the WTO to ensure transparency of domestic measures which are not based on international standards and have a significant effect on trade.[3]

In the EU, a notification procedure allows the European Commission and EU countries to examine new technical regulations for products and online services that they intend to introduce, with a view to prevent the creation of new technical barriers to trade. According to this procedure, EU countries must inform the Commission of any draft technical regulation before its adoption and allow a three-month period to enable the Commission and other EU countries to examine the proposed text and respond.[4] Non EU countries also report notification obligations to trade partners under a number of free trade agreements.

The authorities in charge of notification are also generally involved in processing comments received (Figure 5.10). This notification process may complement the regulatory policy disciplines by allowing an additional opportunity for comments on draft regulation, namely from foreign stakeholders who gain awareness of draft measures through the WTO notification portal.

**Figure 5.10. Domestic procedures for compliance with WTO agreements on Technical Barriers to Trade and on the Application of Sanitary and Phytosanitary Measures**

38 respondents for primary laws and 39 respondents for subordinate regulations




*Note:* Data for OECD countries is based on the 35 OECD member countries, the European Union, and three accession countries. The question is not applicable for primary legislation in the United States.
*Source*: Indicators of Regulatory Policy and Governance Survey 2017, http://oe.cd/ireg.

StatLink https://doi.org/10.1787/888933815205

However, the survey answers point to a disconnect between the WTO notification process and the regulatory policy agenda. While the transparency disciplines related to notification in trade fora have been thoroughly developed by the trade community, including related guidance, they appear to be largely self-contained and have limited interface with the regulatory policy agenda. As an illustration, only 8 countries report that their regulatory oversight bodies play a role in the notification requirement for primary laws and 7 for subordinate regulations. Arguably, the competence has been delegated to other bodies in a number of jurisdictions – including EU members. However, there is clearly an opportunity to bridge good regulatory practices across the two policy communities that remain largely untapped so far. From this perspective, Mexico provides a unique example connecting domestic regulatory policy procedures to the WTO notifications. Indeed, through a new procedure set up in 2016, the Mexican central oversight body on regulatory policy (COFEMER) leverages RIAs to identify regulatory drafts with an effect on trade and ensure that all such drafts get notified to the WTO (Box 5.4).

**Box 5.4. Mexico's regulatory impact assessment on foreign trade**

In 2016, Mexico introduced a specific procedure to take into account systematically, and when relevant, the trade impacts of regulation in its *ex ante* regulatory impact assessment. This procedure allows namely to ensure automatic co-ordination among relevant authorities to ensure notifications of regulations with trade impacts to the WTO, or FTA partners. The trade impacts are first estimated during the impact calculator. The results to this calculator may launch notification procedures to the WTO or other FTA partners, as well as a Foreign Trade RIA procedure.

The actual RIA process in Mexico is launched with a "regulatory impact calculator", which allows regulators to identify potential impacts of their draft regulation, and thus determine which type of RIA to prepare. This calculator comprises three verification filters: i) foreign trade impacts, ii) risk, iii) competition.

When regulators answer positively to the trade filter, COFEMER forwards the draft proposal to the Directorate on International Trade Rules (*Direccion General de Reglas de Comercio Internacional*, DGRCI), in charge of verifying the consistency of the drafts with Free Trade Agreement (FTA) and WTO obligations, and particularly the Agreements on Technical Barriers to Trade (TBT) or Sanitary and Phytosanitary measures (SPS). If DGRCI determines that the measure falls under the notification obligations, namely because it has a significant trade impact and deviates from international standards, it then sends an official letter to the regulating agency, with COFEMER on copy, requesting them to contact Mexico's General Bureau of Standards (*Dirección General de Normas*, DGN), the notification authority and enquiry point for the SPS and TBT Agreements.

In parallel to notification to the WTO, the result of the impact calculator lead the regulator to answer specific questions on the impact of the regulation, which entail consideration namely of its effects on international trade and the existing international or foreign standards in the field.

Source: (OECD, 2018[8]), *Review of International Regulatory Co-operation of Mexico*, OECD Publishing, Paris, https://doi.org/10.1787/9789264305748-en.

## Observed normative activity of international organisations and the connection between domestic and international IRC efforts

Results from the 2017 iReg survey show that consideration of international instruments in domestic rule-making has become a significant aspect of domestic regulators' implementation of IRC. This finding is in line with (OECD, 2013[5]), which highlights the growing role of international organisations (IOs) — both treaty-based IOs and the more recent development of trans-governmental networks of regulators (OECD, Forthcoming[9]) – as standard setters and supporters of IRC. Therefore, the relationship between international rule- and standard-setting processes and domestic implementation of such rules and standards has become a critical component of IRC.

In particular, while regulators need to more systematically consider international instruments when developing and applying domestic regulatory frameworks, they also need assurance that these instruments are of high quality, widely and easily accessible, and fit to achieve public interest in their own jurisdiction. Lessons learnt from the systematic application of regulatory policy at the domestic level can usefully inform the development of rules and standards at the international level, in particular by identifying the good practices in evidence-based, transparent rule-making. Greater monitoring and more regular evaluation of the application of international instruments would help make the case for their use and inform domestic regulators of their expected and realised impacts.

(OECD, 2016[4]) underlines that IOs have increasingly developed processes and practices to support the quality of their rule- and standard-setting, including stakeholder consultation and impact evaluation. It provides evidence on the practices pursued at the

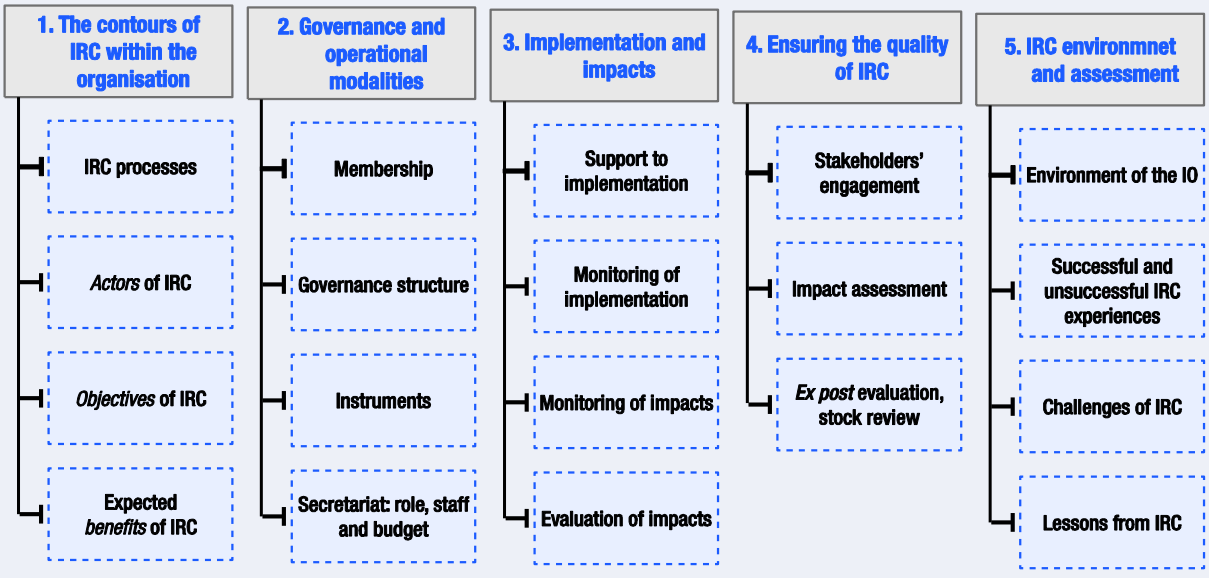
international level to foster the quality of norms and standards, drawing on a survey of 50 IOs (Box 5.5). This section highlights findings from the survey and draws on the iREG results to understand the connections between domestic and international rule-making processes and the potential for improvement.

**Box 5.5. 2015 OECD Survey of international organisations**

In order to collect systematic evidence on the organisation and practices of normative IOs, the OECD developed a survey structured in five parts (see Figure 5.11).

- The first part sought to outline the specific processes in support of IRC within IOs, the actors involved in these processes and the objectives and benefits pursued.
- The second part focused both on aspects of governance (membership and the internal structure of the organisation, the organs of the organisation involved in IRC, etc.) and on the operational modalities to promote IRC (legal or policy instruments, role of the secretariat, etc.).
- The third part aimed to collect information on the procedures adopted to supervise and encourage implementation of IO instruments (i.e. the forms of assistance provided, the mechanisms used to track information on implementation, etc.) and to monitor their impacts.
- The fourth part focused on the use of specific tools/procedures to ensure the quality of standard-setting activities, including the use of impact assessment, consultation, *ex post* and stock review.
- The fifth part surveyed the context in which IRC takes place (i.e. the presence of different international organisations in the same area of IRC) and the main lessons learnt related to IRC in terms of success factors and challenges.

**Figure 5.11. Scope and structure of the 2015 OECD Survey of International Organisations**



The survey was carried out in 2015 to a sample of 50 IOs. Among them, 32 were inter-governmental organisations (IGOs), 5 were international private standard setting organisations, 4 were secretariats of international conventions and 9 were trans-governmental networks of regulators (TGNs).

*Source:* (OECD, 2016[4]), *International Regulatory Co-operation: The Role of International Organisations in Fostering Better Rules of Globalisation*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264244047-en.

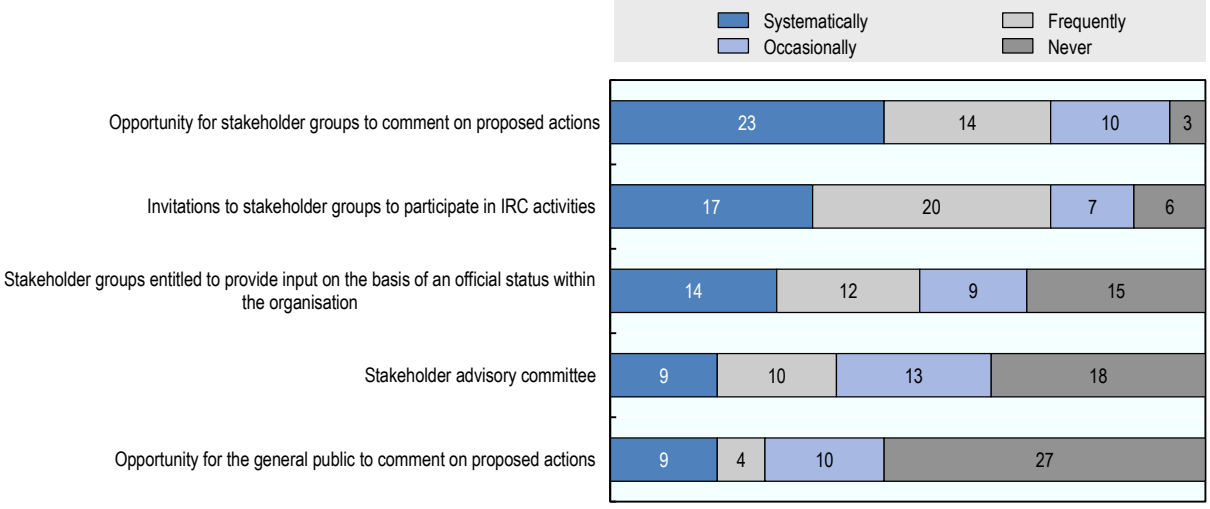
### *Stakeholder engagement and evaluation practices of international organisations*

Stakeholder engagement has become a common practice among IOs (Figure 5.12). Most of them have set up specific standing bodies or processes to engage stakeholders (in a non-decisional manner) at key moments of the development of their instruments. IOs frequently manage their stakeholders by inviting specific groups to participate in their normative activities. By contrast, only a minority of them open comments more broadly to the public.

By contrast, evaluation, both *ex ante* and *ex post*, is not well institutionalised among IOs (Figure 5.13). When it is done, it is mostly *ex post* (after the adoption of the instrument). Half of the surveyed IOs report carrying out *ex post* evaluations of their instruments' implementation and impacts systematically or frequently. By contrast, only 16 IOs undertake *ex ante* regulatory impact assessment systematically or frequently.

**Figure 5.12. IO stakeholder engagement practices for standard-setting and other IRC activities**

50 respondents




*Source*: OECD (2016), based on the 2015 OECD Survey of International Organisations.

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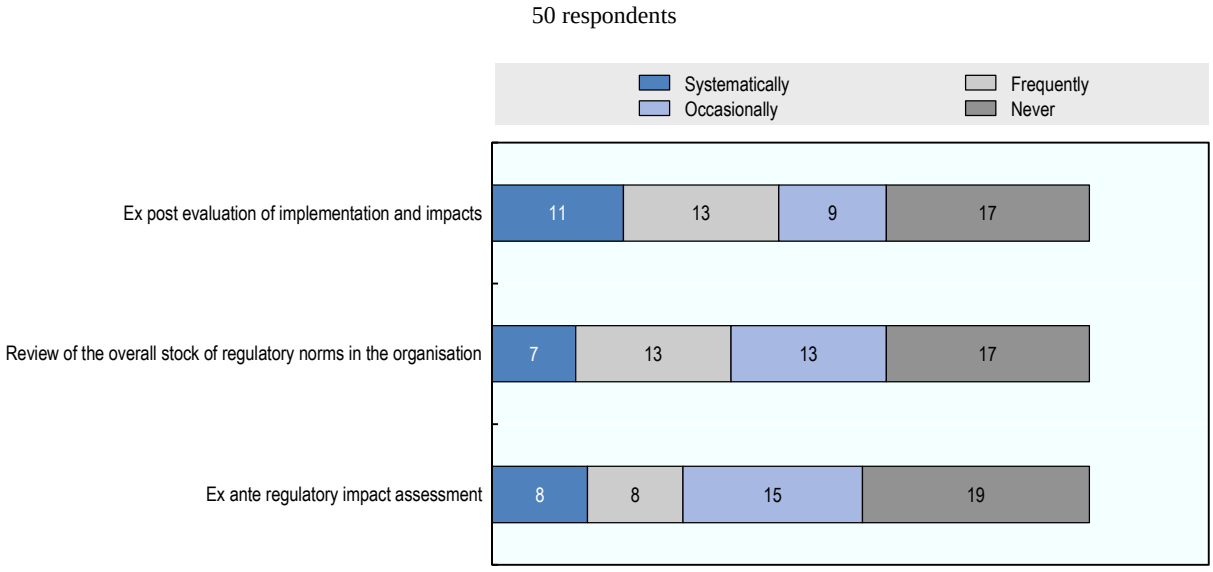
**Figure 5.13. IO evaluation practices for standard-setting and other IRC activities**




*Source*: OECD (2016), based on the 2015 OECD Survey of International Organisations.

StatLink https://doi.org/10.1787/888933815243

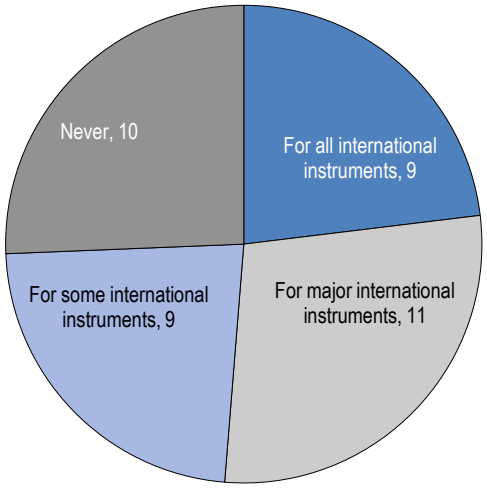
### *Disconnect between domestic regulatory and international practices to ensure the quality of rules*

The limited use of *ex ante* impact assessment by IOs contrasts with domestic practices. As illustrated in Chapter 2, RIA is well embedded in the rule-making process of OECD countries. It is also noteworthy that some three quarters of countries also report conducting RIA prior to adopting or transposing international instruments into domestic legislation (Figure 5.14). In most jurisdictions, this reflects the fact that when international instruments are not directly applicable, they need to be transposed in national legislation. Therefore, they fall under the systematic regulatory policy requirements faced by any domestic legislation, including RIA and stakeholder engagement. In a couple of jurisdictions though, transposing international commitment provides grounds for avoiding RIA.

These findings suggest that there may be opportunities for transfer of expertise from the domestic to the international level to support more systematic *ex ante* assessment of impacts of international instruments. They also point to a potential for greater connection between the impact assessment carried out at domestic level and the international level. Indeed there seems to be lost opportunities to build better evidence base across countries and IOs to inform the development of normative instruments. For instance, if impact assessments were conducted more systematically at the international level, they could usefully inform the adoption of international instruments in domestic jurisdictions and provide useful evidence that domestic regulators could use in their own RIAs. Reciprocally, impact assessment of international organisations could usefully rely on evidence gathered by domestic jurisdictions, including on past RIAs carried out in the same field.

**Figure 5.14. Number of jurisdictions with RIA requirements when adopting or transposing international instruments in domestic legislation**

39 respondents




*Note:* Data for OECD countries is based on the 35 OECD member countries, the European Union, and three accession countries.
*Source*: Indicators of Regulatory Policy and Governance Survey 2017, http://oe.cd/ireg.

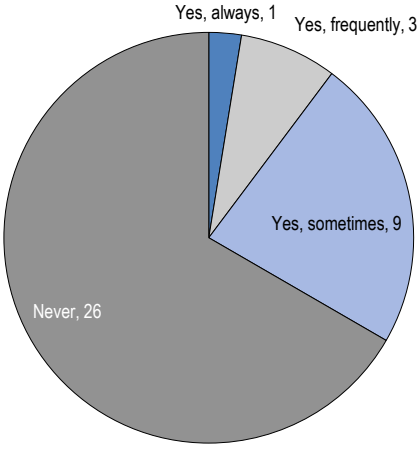
StatLink https://doi.org/10.1787/888933815262

While two-thirds of IOs report conducting at least some *ex post* evaluations of their instruments' implementation and impacts, the evidence suggests that IOs may lack control of, and information about, domestic implementation, monitoring, and enforcement of international instruments (OECD, 2016[4]). Therefore, more systematic integration of international and domestic *ex post* evaluations of international instruments may promote more effective evaluation practices at both levels. However, results from the 2017 iReg survey suggest that this potential to bridge the gap between domestic and international *ex post* assessment has not yet been realised: less than a third of countries report reviewing the implementation of international instruments to which they adhere (Figure 2.15). Of those, six report sharing the results of these evaluations with the relevant IOs – including in some instances by simply making these results available on a website.

Similarly, while stakeholder engagement has become a common component of IO standard-setting and rule-making processes, less than half of OECD countries require stakeholder engagement prior to the adoption or transposition of international instruments into their domestic legislation (Figure 5.16). It is not clear if these processes converge, suggesting an opportunity to promote IRC through more deliberate integration of stakeholder engagement practices at the domestic and international levels.

**Figure 5.15. Number of jurisdictions that review the implementation of the international instruments to which they adhere**

39 respondents

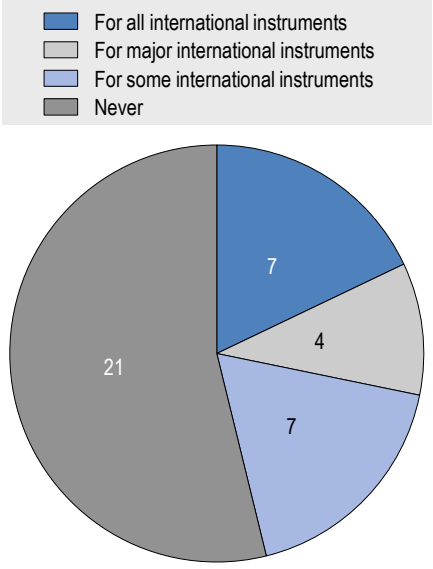



*Note:* Data for OECD countries is based on the 35 OECD member countries, the European Union, and three accession countries.
*Source*: Indicators of Regulatory Policy and Governance Survey 2017, http://oe.cd/ireg.

StatLink https://doi.org/10.1787/888933815281

**Figure 5.16. Number of jurisdictions with a requirement to conduct stakeholder engagement prior to the adoption/transposition of international instruments in domestic legislation**

39 respondents




*Note:* Data for OECD countries is based on the 35 OECD member countries, the European Union, and three accession countries.
*Source*: Indicators of Regulatory Policy and Governance Survey 2017, http://oe.cd/ireg.

StatLink https://doi.org/10.1787/888933815300

## Notes

[1] http://biac.org/wp-content/uploads/2018/04/ifac-oecd_regulatory-divergence_v9_singles.pdf.

[2] 5th expert workshop on Assessing Progress in the Implementation of the 2012 Recommendation of the OECD Council on Regulatory Policy and Governance (www.oecd.org/gov/regulatory-policy/stockholm-workshop.htm) and "Key Practices for Drafting Survey Questions on the Implementation of the Recommendation: Results of Consultation With RPC Delegates", Room Document 2, 10th meeting of the Regulatory Policy Committee.

[3] It is worth noting that in the EU SPS notification is harmonised to a very large extent: there is one central EU SPS Notification Authority and Enquiry Point located within the European Commission, which act on behalf of the EU and the 28 EU Member States. EU countries have not designated SPS notification authorities. They nevertheless have established enquiry points tasked with processing comments. For TBT there is no distinction between notification authorities and enquiry points and all countries have designated such authority (TBT enquiry points). De facto, while the EU notifies a large number of measures –1504 TBT notifications and 1196 SPS notifications, EU Member States also submit SPS and TBT notifications on their own behalf. E.g. Germany has submitted a total of 25 TBT notifications and 17 SPS notifications. France has 17 SPS notifications and 251 TBT notifications.

[4] https://ec.europa.eu/growth/single-market/barriers-to-trade/tris_en.

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