



DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

**PUBLIC SECTOR TRANSPARENCY AND
INTERNATIONAL INVESTMENT POLICY**

11 April 2003

This document has been approved and declassified by the Committee on International Investment and Multinational Enterprises at its meeting on 9-11 April 2003.

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Executive Summary

Transparency is a core principle of international investment policy and rules. Recent initiatives in the OECD and in declarations made at Doha, Monterrey and Johannesburg seek to promote transparent policy frameworks that are conducive to countries' attracting and benefiting from FDI. This paper makes the case that transparency is good for societies at large as well as for international investors. It also looks at the broader governance requirements for making public sector transparency a reality and proposes possible contributions in this area by the OECD investment community.

- *Public sector transparency is good not just for investors, but also for effective public governance and development.* Governments can have both positive and negative effects on development. Transparency measures help to reduce governments' negative effects while enhancing their positive contributions.
- *There is no "one-size-fits-all" policy for enhancing transparency, but principles of good practice exist and many have been successfully tested.* Transparency can be defined as successful two-way communication about public policy. The institutional arrangements that make it possible reflect national culture, history and values. However, transparency starts from a core set of measures that are so fundamental as to be almost indistinguishable from governments' basic legislative, administrative and fiscal functions. Core measures help to ensure that people who are affected by policies know about them and can respond to them. Guidelines for good transparency practices have emerged in the fiscal and regulatory areas.
- *The international investment community's concept of transparency is closely linked to these core measures.* International investment agreements contain commitments that vary in terms of detail, follow-up mechanisms and exemptions. However, these commitments focus on core transparency measures that represent good practice for all countries.
- *Need for further progress.* Progress has been made in enhancing public sector transparency. However, data on transparency practices also suggest that there is considerable scope for further progress in both OECD and non-OECD countries.
- *Implementation of transparency-enhancing reform can be a difficult task.* While there is widespread agreement on the importance of transparency, OECD experience shows that actually improving transparency in the public sector can be difficult. Three challenges for reform are identified: overcoming political obstacles; improving the institutions needed to support transparency; and obtaining access to technology and human resources.
- *Roles for the international investment community.* Irrespective of whether new WTO and other international rules are on the horizon, preserving and enhancing transparency is an ongoing challenge for all countries. The international investment community can help by: 1) Continuing to promote the adoption of core transparency measures; and 2) Learning to work with (and possibly enhance) the distinctive features of national transparency practices; and 3) Making the case that improving investors' rights to information complements and reinforces broader efforts to improve public sector transparency and performance.

I. Introduction

(I)nstrumental freedoms contribute, directly or indirectly, to the overall freedom people have to live the way they would like to live... Transparency guarantees can be an important category of instrumental freedom. These guarantees have a clear instrumental role in preventing corruption, financial irresponsibility and underhand dealings.

Development as Freedom, Amartya Sen 1999 (pages 38, 40)

Public sector transparency results from policies, institutions and practices that channel information in ways that improve understanding of public policy, enhance the effectiveness of political processes and reduce policy uncertainty. As the quote above from Nobel laureate Amartya Sen suggests, transparency is not an end in itself. It is an instrument for achieving other goals such as raising general welfare and promoting efficient and effective governments.

Practitioners in many policy fields recognise the importance of transparency¹. It is an essential ingredient for effective political control and monitoring of the public sector. It is an important element of many trade and investment agreements. In particular, it is a core value of the OECD investment policy community and is highlighted in such instruments as the OECD Declaration on International Investment and Multinational Enterprises and the Codes of Liberalisation.

The attention paid to transparency in international policy making circles attests to the emerging consensus on its importance. The United Nation's Millennium Development Declaration and the Monterrey Consensus on Financing for Development both make prominent references to it. Transparency is a focus of preparatory work under the investment section of the Doha Development Agenda², which also notes that developing countries might benefit from capacity building to help them meet possible new transparency commitments³. In the context of post-Doha work in Geneva, the

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1. In order to improve its focus on public sector transparency, this paper sets aside the important issue of transparency in the private sector. This issue is the subject of ongoing discussions in the CIME in the context of the follow-up procedures of the OECD Guidelines for Multinational Enterprises. A review of private sector transparency practices may be found in *Corporate Responsibility: Private Initiatives and Public Goals*. OECD 2001.
 2. Paragraph 22 of the Doha Declaration Development (WT/MIN(01)/DEC/1).states: *In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between members. Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.*
 3. See paragraphs 20 and 21 of the Doha Declaration on Development (WT/MIN(01)/DEC/1).

WTO Secretariat and delegations⁴ have issued discussion papers on issues and options for possible approaches to transparency provisions in a multilateral framework on investment. According to a recent summary,⁵ the focus of transparency discussions in the WTO is “not primarily on the benefits of transparency, but on the nature and the depth of transparency provisions and on the scope of their application (page 5).” The summary notes some countries’ concerns about possible infringement of national sovereignty and about whether the “administrative costs of possible obligations could outweigh any benefits in terms of attracting foreign investors (page 8).”

This paper argues that the most important benefits of transparency are linked, not only to attracting foreign investors, but to its instrumental role in enhancing the accountability of both the business and government sectors. Nevertheless, the importance that international investors attach to transparency when choosing where to invest has been well documented by business surveys⁶. Furthermore, recent OECD and IMF studies show that international investment flows are higher and that investments tend to be of higher quality in countries with more transparent policy environments (Box 1). Recent efforts by the international community seek to strengthen market pressures for pro-transparency reform by improving international investors’ access to information about countries’ transparency practices⁷. Thus, if countries want to attract more and higher quality investment, then fostering a fair, open and accountable policy environment should be a high priority.

The current paper seeks to complement international discussions of transparency, both in the WTO and in other forums. Its contribution is to place the issue of transparency vis-à-vis the international investor in its more general public governance framework. The paper draws on the considerable store of OECD analyses and data developed by the Public Management Directorate and by the Investment, Trade and other Committees. These analyses and data suggest that there are signs of progress, but also considerable scope for improving transparency in many policy fields and in virtually all countries. The international investment community’s role -- helping to define and protect international investors’ rights to policy information -- is part of this broader effort to enhance transparency.

4. The European Communities (WT/WGTI/W/110), Japan (WT/WGTI/W/112) and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (WT/WGTI/W/129) contributed written comments.

5. See the “Report (2002) of the Working Group on the Relationship between Trade and Investment”. WT/WGTI/6. December 19, 2002.

6. The communication from the European Community and its Member States (WT/WGTI/W/110) “Concept Paper on Transparency” states: “*The TN SOFRES Business Survey conducted for the EC Commission in April 2000 among some of the biggest EU companies showed that lack of transparency on local legislation and rules was considered the most frequent hindrance to investment by 71 per cent of the companies*”. Likewise, the communication from Japan (WT/WGTI/W/112) noted that a survey of Japanese companies operating overseas placed lack of transparency at the top of the list of barriers to foreign direct investment.

7. For example, the International Monetary Fund and the World Bank, at the request of a country, may produce and publish a report on the extent to which the country observes 12 internationally recognised standards and codes. This is called a “Report on the Observance of Standards and Codes” (ROSC). Many of the standards and codes cover, directly or indirectly, policies and practices relevant for both public and private sector transparency. In addition to being of direct relevance to the work of the IMF and World Bank, these reports are also published in order to provide information useful to “the private sector (including rating agencies) for risk assessment.” (www.imf.org/external/np/rosc/rosc.asp).

This paper addresses the following questions:

- Why is public sector transparency an essential support for effective public policy and for successful economic development (in addition to being helpful for attracting foreign investment)?
- How is the concept of transparency used in various policy areas? How does the international investment policy community define the term?
- What is the role of the international investment community in promoting transparency in public policy? How does its role fit with the broader effort to enhance public sector transparency?
- What is known about current transparency policies and practices?
- What institutional and economic resources are needed to sustain transparent governments? What resources and capacities are needed to sustain transparent investment policies?
- Where might capacity building support greater transparency in the investment policies of developing countries? What are the limits to capacity building?

The paper first reviews the role of public sector transparency in contributing to successful and equitable economic development (Section II). It then reviews various concepts of transparency and looks at how the concept used by the international investment policy community fits into broader thinking on transparency (Section III). It looks at what is needed to produce transparent public policies by drawing on several decades of OECD experience (Section IV). In Section V, obstacles to greater public sector transparency and approaches to capacity building are explored.

II. Transparency -- A key input to effective governance and development

For many decades, economists have sought to shed light on the puzzle of economic development. Originally, the development debate focused on the dynamics of macroeconomic or sectoral aggregates -- income, capital accumulation, and employment. While continuing to acknowledge the importance of these aggregates, the debate now also encompasses broader concepts of economic, social and environmental welfare. Amartya Sen notes that successful development -- development that gives people the freedom to “live the way they would like to live” -- is underpinned by the respect of a wide range of rights⁸. These include economic rights (especially property rights), political freedoms, transparency guarantees and protective security. These rights provide instruments for development in that they facilitate the emergence of institutions (e.g. free press) or capabilities (e.g. right to participate in the political process) that improve the ability of people, acting singly or as a group, to raise their own welfare. Institutions of various types -- economic, political and civil -- have also become central to the way people think about economic development⁹. Governments play critical roles -- both

8. See Sen (1999). Coming out of a social choice perspective, Sen’s applied work focuses on the economics of gender inequality, deprivation and famine. His more recent work focuses on the various social, economic and institutional features that determine whether or not people develop the “capabilities” to lead the kind of lives they wish to lead – transparency and information play a major role in this work.

9. See North (1990).

positive and negative -- in the development process by providing (or failing to provide) basic services, including protection of rights and support for the development of a more advanced set of institutions.

Governments as facilitators of development

Governments' positive roles in the development process can be summarised as:

- *Helping society achieve its collective needs and meet its aspirations.* Governments help forge the views of diverse groups into policies that allow societies to meet their needs for co-ordination and co-operation. While assuming this positive role, governments engage in many activities (e.g. infrastructure development, regulation, social insurance, taxation and subsidisation, prudential supervision and contract and law enforcement).
- *Upholding and adapting some of the formal rules systems that underpin successful development.* Economic development is associated with progressively greater reliance on formal rules and a somewhat reduced economic role for other informal rules systems such as those observed in family businesses. Governments play a critical and pervasive role in this formalisation process.¹⁰

Governments as impediments to development

There is, however, a less flattering perspective on government activity. OECD assessments of policy experience¹¹ show that governments -- through over-bearing regulation or taxation, waste and outright corruption -- can be a serious impediment to economic development. If mismanaged, governments can act as brakes on development. Large volumes of resources are channelled through governments. Tax revenues represented, on average, 37 per cent of OECD GDP in 2000. Governments also affect resource allocation through such policies as procurement, competition, state-owned enterprise, subsidies, infrastructure development, regulation, and tax expenditures. These create high stakes for political rent seeking. If not subject to transparency and accountability, governments can condone or promote corruption, stifle entrepreneurship, innovation and market adjustment and fail to achieve social, environmental and economic goals.

To varying degrees, these problems are endemic to public sectors everywhere. They arise from three sources. First, government outputs can be inherently complex or difficult to define and inputs and costs may not be easily measurable. Therefore, it can be difficult to assess public sector efficiency. Second, public policies often create asymmetries in incentives to participate in and to monitor the political processes that lead to their creation. This creates a tendency toward "concentrated benefits" in government activity (OECD, 2002a). Third, government officials' incentives cannot always be perfectly aligned with the public interest, causing problems that range from "slacking off" to outright corruption.

10. Some of these rules systems facilitate the emergence of more advanced business organisations and more complex forms of contracting (e.g. limited liability companies, franchises, multi-divisional companies, and investment in intangible assets). For example, laws underpinning limited liability are essential parts of the rules framework that supports advanced market economies. Governments -- broadly defined to include legislative, judicial and political processes -- were the main organisational channels through which this path breaking innovation was developed. Jepperson and Myer (1991).

11. See OECD (2002a).

Transparency and the performance of the public sector

Transparency helps societies to enhance their governments' positive contributions while also helping to resolve the problems inherent in government activity. Information about policy is an input for *ex ante* political control of the public sector, for day-to-day responses to policy (e.g. for complying with law or making economic adjustments to policy incentives such as taxes) and for *ex post* monitoring and evaluation. It is therefore an essential component of appropriate public governance.

Transparency guarantees involve rights to certain types of information. These rights help prevent potential abuses arising from information asymmetry and permit individuals or organisations to respond to information through political, civil or economic activity. The international investment community is concerned with a small, but important part of this overall framework of rights -- the rights of international investors to certain kinds of policy information. Its activities are part of and complementary to larger efforts to define these rights, enhance transparency and improve public governance.

III. The meaning of public sector transparency

There is no commonly agreed definition of transparency. Box 2 presents concepts taken from various sources -- the draft Multilateral Agreement on Investment (MAI), the International Monetary Fund's Fiscal Transparency Guidelines, a statement by APEC leaders, the OECD regulatory governance project, two monetary policy theorists, the World Trade Organisation and a glossary of political science terms. Some concepts focus on basic elements of public sector transparency -- for example, the public and timely availability of information about legislation, regulation and other public measures that affect business behaviour. Others deal with the broader objective of transparency -- governments' "openness to the public gaze" or successful "communication of policymakers' intentions".

The discussion that follows is based on this distinction. At one level, the meaning of transparency (and the measures that bring it about) is basic and non-controversial. It involves core measures for informing the public about policy and these measures are of universal relevance. The broader view of transparency relating to successful communication about policy requires consideration of national institutions, values, preferences and ways of doing things.

Core transparency measures and international investment agreements

Access to information about public sector activity -- and the scope, accuracy and timeliness of such information -- is the thread that links all concepts of public sector transparency. It can be thought of as the inner kernel from which all other concepts and practices grow. It is so fundamental as to be almost inseparable from basic fiscal, legislative and regulatory functions. For instance, if governments are to make rules effective, then the individuals bound by those rules must be aware of them. Several international best practice guidelines pertaining to this concept have emerged¹².

12. See, for example, OECD 2002a, page 24 for recommendations on regulatory governance, including on regulatory transparency. See also the APEC Leaders' Statement to Implement APEC Transparency Standards (2002) and the International Monetary Fund Code of Good Practices on Fiscal Transparency (1998) and the OECD Best Practices for Budget Transparency (OECD 2000b).

The OECD Secretariat has examined the treatment of transparency in the texts of several international, regional and bilateral investment agreements as well as in the draft Multilateral Agreement on Investment (Table 1). The table is based on an evaluation of the text of the agreements. It shows that the agreements focus on fairly basic measures for making policy information available to private and state actors.

Based on this review, the following list of core transparency measures for the international investment community can be derived:

- Provision of information on policies of interest to international investors. The list of policy areas covered by these agreements is long (Table 1 shows only selected items). It includes legislation, administrative rulings, judicial decisions, exceptions to national treatment and most favoured nation status, procedures for applying for authorisations, administrative practices, privatisation and monopolies.
- Clear definitions of the limits of transparency obligations (security is the most commonly cited exception); and
- Ensuring that policy information is accessible to international investors and to other governments -- for example, by notifying the parties of changes to measures, by establishing national enquiry points, specialised publications or registers and web sites.

Although the coverage and scope of investment agreements vary, they all focus on what can be considered core transparency measures. They involve basic commitments to be transparent in policy areas that affect international business. They amount to a commitment that law will be enacted and enforced in an orderly and fair manner.

Other considerations include:

- *Arrangements for state-to-state information flows* include formal notification procedures and spontaneous responses to request for information from other parties to the agreement. A distinctive feature of the OECD Declaration and the OECD Codes is their use of peer reviews to enhance transparency and to improve policy practice¹³.
- *Prior notification and comment.* The paper summarising recent transparency discussions in the WTO notes states that “there was no common view on the applicability of prior notification and comment requirements.” Section IV of this paper suggests that requirements of this nature reflect emerging best practices (as revealed in the country regulatory reform reviews).

13. Recent reviews of international investment policies include the OECD Reviews of Foreign Direct Investment for Estonia (OECD 2001a), Lithuania (OECD 2001b), Israel (OECD 2002e) and Slovenia (OECD 2002f). These reviews are part of the process of adherence to the OECD Declaration on International Investment and Multinational Enterprises. Peer reviews are also conducted under the legally binding Codes of Liberalisation of Capital Movements and of Current Invisible Operations. Recent reviews under the Codes have focused on new members to the OECD and on particular sectors (such as telecommunications).

Table 1. Transparency Provisions Mentioned in International Agreements dealing with Investment¹

Name of Agreement	Draft MAI	OECD Declaration	GATS	NAFTA	German model BIT	US model BIT	APEC standard ²	OECD Codes
Selected objects subject to specific transparency provisions³								
Laws, regulations, international agreements, administrative practices/rulings, judicial decisions and/or policies, etc	X	X	X	X		X	X	
Exceptions to most favoured nation			X	X		X		X
Exceptions to national treatment	X	X	X	X		X		X
Investment incentives	X	X		X				
Procedures for applying for authorisations/permits/licenses	X		X	X				
Monopolies and concessions	X		X	X				
Privatisation	X							
Expropriation and compensation	X			X	X	X		
Selected mechanisms in support of transparency								
Timely publication of measures	X		X	X		X	X	
Establish enquiry points		X	X	X				
Peer review		X						X
Notification and/or reporting to other Parties and/or IOs	X	X	X	X			X	X
Prior consultation or other forms of participation (e.g. opportunities for comment)				X ⁴			X	
Party/IO can request consultations	X	X	X	X		X		X
Recourse for private actors ⁵ (conciliation, mediation, arbitration, courts, etc.)	X	X	X	X	X	X	X	
Selected exceptions/qualifications to transparency obligations⁶								
Protection of confidential information and/or commercial interests	X		X	X			X	
Security and emergencies	X		X	X		X		X
Public order/public morals/law enforcement	X		X	X			X	X
Pursuit of monetary or exchange rate policies	X							

1. This table is based on the text of the agreements and, in particular, on the transparency obligations they contain. Further interpretation and clarification of the agreements by the responsible international body, and the manner in which the agreements are applied on a day to day basis are not reflected in the table. Nevertheless, these may have a significant impact on how the transparency provisions are construed and on whether the provisions of the agreement are applied in a transparent manner.
2. Leaders' Statement to Implement APEC Transparency Standards.
3. Some agreements do not cover some of the selected objects *per se*. As a result, they are not shown as having specific transparency provisions in the area concerned.
4. Chapter on financial services.
5. "Recourse for private actors" refers to conciliation, mediation and arbitration as transparency measures *per se*; it does not refer to conciliation or mediation with respect to the transparency provisions of the agreement.
6. In some agreements, the exception/qualification to transparency obligations derives from more general exceptions/qualifications to the obligations in the agreements.

Source: Compiled by OECD Secretariat.

- *Nature of commitments-- detailed obligations or broad principles.* Some of the instruments contain commitments on transparency that are both comprehensive and detailed. For example, the MAI would have committed countries to a relatively detailed list of obligations. In contrast, other instruments are framed as broad principles. An example is the OECD Declaration (although its associated peer reviews produce investment policy information that is both comprehensive and detailed).
- *Provision of recourse for private actors.* Many of the instruments reviewed (in various ways) recourse for private actors through such facilities as conciliation, mediation and arbitration. This goes beyond investors' rights to access to information -- it promotes their right to act on this information.

Although the agreements differ in how they frame transparency commitments, they tend to deal with a range of measures that are of universal relevance. That is, every formal, organised, democratic government needs to be able to communicate its policy settings, to define the limits to rights to access to information and to provide means of communicating this information and of ensuring that it can be acted on.

Transparency as effective communication about public policy

While these practices are of near universal relevance, they involve a narrow view of transparency. They focus on concrete measures that promote and protect rights to public sector information. A broader view is that transparency is what results from successful two-way communication about policy between governments and other interested parties¹⁴. Communication about policy poses some difficult challenges: How can policymakers communicate their "intentions" to what might be a diverse group of actors -- for example, sophisticated international investors, illiterate peasants, voters? What is their incentive for doing so? Why would non-governmental actors believe what governments say about their announced policies? What institutions facilitate successful communication between governments and the people interested in their policies?

Communicating about public policy involves both "senders" and "receivers" of information as well as transmission channels (paper publications, websites, public hearings etc.). It can happen that communication, for some reason, is not successful. Policy information may not be presented in an understandable way to particular audiences or the transmission channels used may not reach them. Strategic considerations may come into play (e.g. deliberate distortions), implying that honesty, reputation, credibility are also inputs to transparency.

Transparency in this broad sense is closely linked to national institutions, cultures and ways of doing things. The country reviews undertaken by the OECD regulatory reform project describe many instances of this. The review of Denmark (OECD 2000a) shows how history, national values and globalisation have interacted to create a dual regulatory structure. This consists of, on one hand, a codified, transparent system whose emergence is due largely by the pressures of globalisation and of regional disciplines. This coexists with a second system -- relying mainly on informal agreements and private contracting and relatively little on formal law -- that reflects a preference for (and ability to achieve) consensus-based control of business and individual behaviour. This contrasts with the regulatory style described in the review of the United States (OECD 1999). The review suggests that the country's "historic value of economic liberty" has led to regulatory style involving "a legalistic

14. See Winkler (2000) for a discussion of the transparency of monetary policy, viewed as a result of communication.

and adversarial environment based on open and transparent decision-making, on strict separation between public and private actions and competitive neutrality between market actors. These characteristics support market entry and private risk taking.” The review also notes that regulation reflects other threads in American society such as the search for balance between federal powers and states rights, constitutional issues of individual property rights versus collective rights and institutional struggles among the powers of the Congress, the President and the Executive Branch (page 17).

Taken as whole, the OECD regulatory reform reviews show that public sector transparency is a complex phenomenon that reflects national preferences and institutions. It cannot be said to exist simply because core transparency measures (e.g. timely publication of law) are in place (though these are important).

Other factors are also relevant when trying to render public policy more transparent:

- *Policy complexity and choice of audiences.* Policies are often complex and information about it has to be condensed, simplified and put into context in order to make it comprehensible. The OECD regulatory reform project, for example, calls for “plain language drafting”. In some areas, however, the policies to be described are inherently complex and involve specialised expertise. A policy that is understandable and transparent to an audience of specialists, may not be to other audiences.
- *Codification and the transparency of administration and enforcement.* The business activities influenced by public policy are also complex. For example, prudential regulation in banking has to account for financial institutions’ activities in numerous markets and geographical locations. Complexity means that policy makers must make choices about how they frame law and regulation -- should they set forth broad principles and let businesses decide what these principles mean for their behaviour or should they opt for more detailed descriptions of legal and illegal behaviours? These choices influence approaches to transparency. If legislative requirements are framed as broad principles, legal codes will tend to be short and easily understandable. Yet, in this case, approaches to administration and enforcement determine much of a law’s substance. For this reason, it is important that administration and enforcement also be transparent.
- *Reputation and credibility.* Monetary and fiscal policy practitioners have a long-standing interest in the issue of policy credibility -- that is, the extent to which non-government actors believe governments when they announce policies. This, in turn, influences how actors respond to policy. For example, laws that people believe will not be enforced have different impacts than laws backed up by credible enforcement commitments. There are many reasons why a government’s policy announcements might not be credible. One of them is that governments may lack the means to carry out announced plans. Another is that, for various reasons (e.g. political gaming), they may have an interest in changing plans abruptly or not making good on policy “promises”. Governments that engage frequently in such behaviours lose reputation and credibility. Without these, formal measures for transparency will not have their intended effects. That is, governments will not be able to use them to enhance public understanding of policy content, thrust and objectives.
- *Transparency and rights.* Public sector activity can involve thousands of programmes, employ tens of thousands of civil servants operating in thousands of locations and can affect millions of people in diverse and evolving ways. Thus, the transparency

framework needs to create two-way information flows in a decentralised way, as the need arises. For example, a person who has been asked for bribe by a public official should have the means to make this information available to the government without fearing for his or her welfare. This is why respect of basic political, civil, social and labour rights is an integral part of the general transparency framework. Investor rights are an element of this broader rights framework.

- *Insiders versus outsiders.* Since transparency involves national institutions, ways of communicating and even languages, “insiders” -- people who are native to a particular policy environment -- might be more comfortable with national transparency arrangements than “outsiders”. This consideration is of particular interest to the investment policy community, since it implies that, in order for the principle of non-discrimination to apply in matters of transparency, governments may have to make special efforts to communicate effectively with “outsiders” -- including international investors.

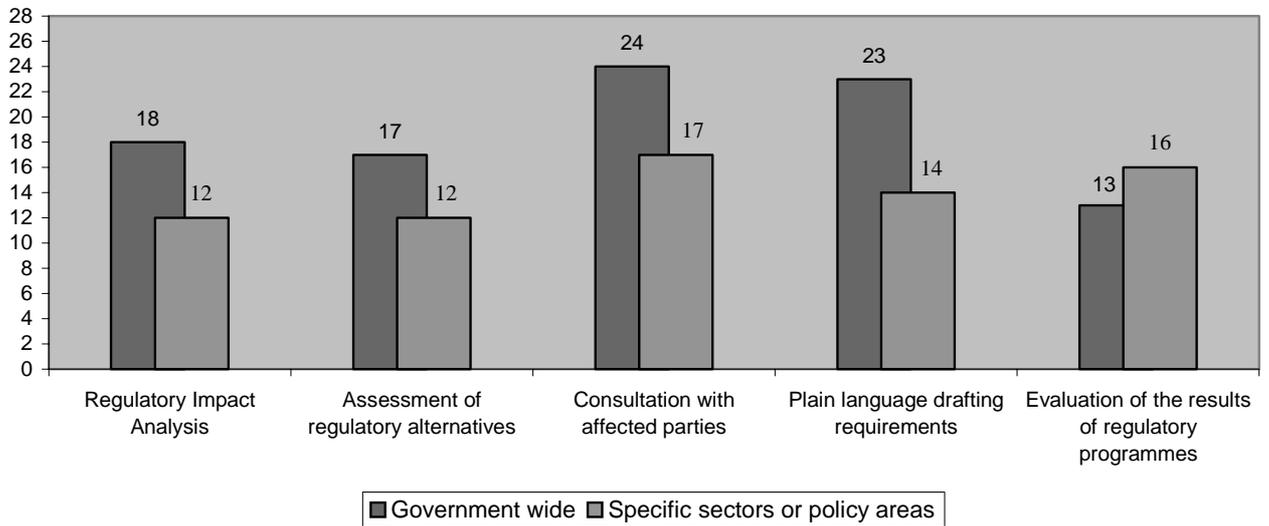
IV. OECD experiences with public sector transparency

This section reviews what is known about transparency practices and performance. It suggests that, despite signs of progress, there is still considerable room for improving transparency policies and practices.

The OECD long-standing horizontal project on regulatory reform emphasises the importance of transparency for effective regulation. It also surveyed transparency measures in the OECD area. The synthesis report on this work (OECD 2002a) suggests that the trend in the OECD area has been toward heightened transparency. Figures 1 and 2 show the main transparency measures surveyed in the project’s database on regulatory practices based on surveys of 26 countries conducted in 1998 and 2000. These include codification of law, publication of registers of law, linking enforceability to availability on the register, access via Internet and plain language drafting. The report notes that this trend has been reinforced by a widening set of international disciplines such as the OECD investment instruments and the GATS.

Figure 1. Regulatory Quality Tools Used in OECD Countries

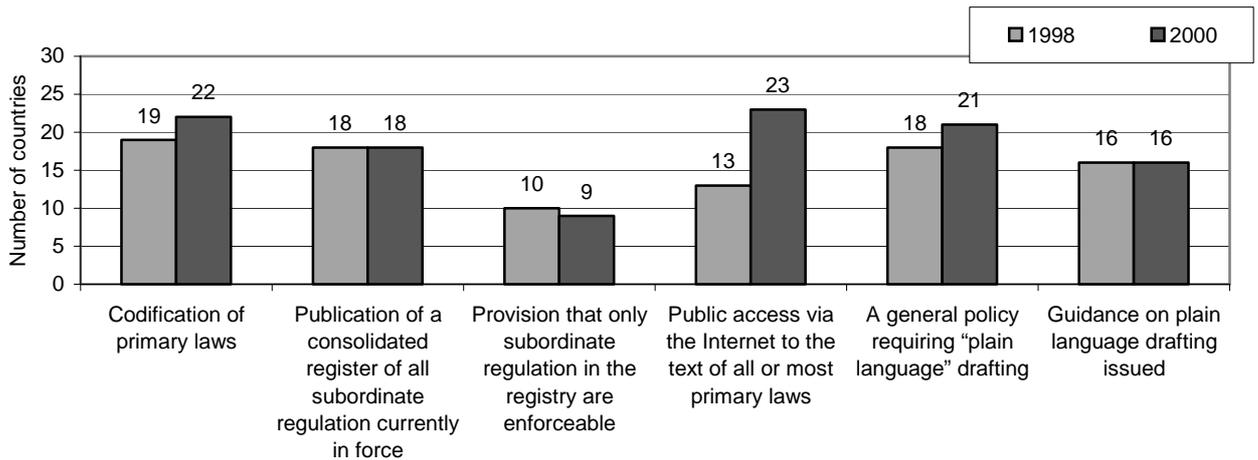
(Out of 26 countries)



Source: OECD (2002a), PUMA

Figure 2. Measures used to communicate regulations

(Out of 26 countries)



Source: OECD, Public Management, Regulatory Database.

Some important elements of regulatory transparency, as practised in the OECD, are:

- *Consultation with interested parties.* The widespread use of consultations reflects a growing recognition that effective rules cannot rely solely on command and control -- the individuals and organisations covered by rules need to be recruited as partners in their implementation. Consultation is the first phase of this recruitment process. It can also generate information and ideas that would not otherwise be available to public officials. Consultation mechanisms are becoming more standardised and systematic. This enhances effective access by improving predictability and outside awareness of consultation opportunities. There is a trend toward adapting forms of consultation to the stage in the regulatory process. Consultation tends to start earlier in the policy making process, is conducted in several stages and employs different mechanisms at different times. Problems have been noted as well. For example, consultation fatigue -- where some organisations are overwhelmed by the volume of material on which their views are requested -- has been noted in several countries.
- *Legislative simplification and codification.* There is increased use of legislative codification and restatement of laws and regulations to enhance clarity and identify and eliminate inconsistency.
- *Plain language drafting.* Twenty-three countries require the use of “plain language drafting” of laws and regulation. Sixteen countries issue guidance materials and/or offer training programmes to help with clearer drafting.
- *Registers of existing and proposed regulation.* The adoption of centralised registers of laws and regulations enhances accessibility. Eighteen countries stated in end-2000 that they published a consolidated register of all subordinate regulations currently in force and nine of these provided that enforceability depended on inclusion in the register. Many countries now also commit to publication of future regulatory plans.
- *Electronic dissemination of regulatory material.* Three quarters of OECD countries now make most or all primary legislation available via the Internet.
- *Clear definition of the limits of transparency requirements* and a presumption in favour of transparency are also important elements of transparent policy.

According to the synthesis report, “performance is still far from satisfactory” (OECD 2002a, page 41). Table 2 summarises the problems that were identified in the course of in-depth regulatory reviews of 12 countries. All twelve countries have problems with legal texts that are difficult to understand and with overly complex regulatory structures. Biased participation in public consultation is noted for 8 countries and a tendency to exclude less powerful groups from consultation is cited for 4 countries. Other problems include lack of systematic policy analysis (called regulatory impact analysis -- RIA -- in the report) as a tool for improving the quality of consultations and a lack of clear standards in licensing and concessions (7 countries).

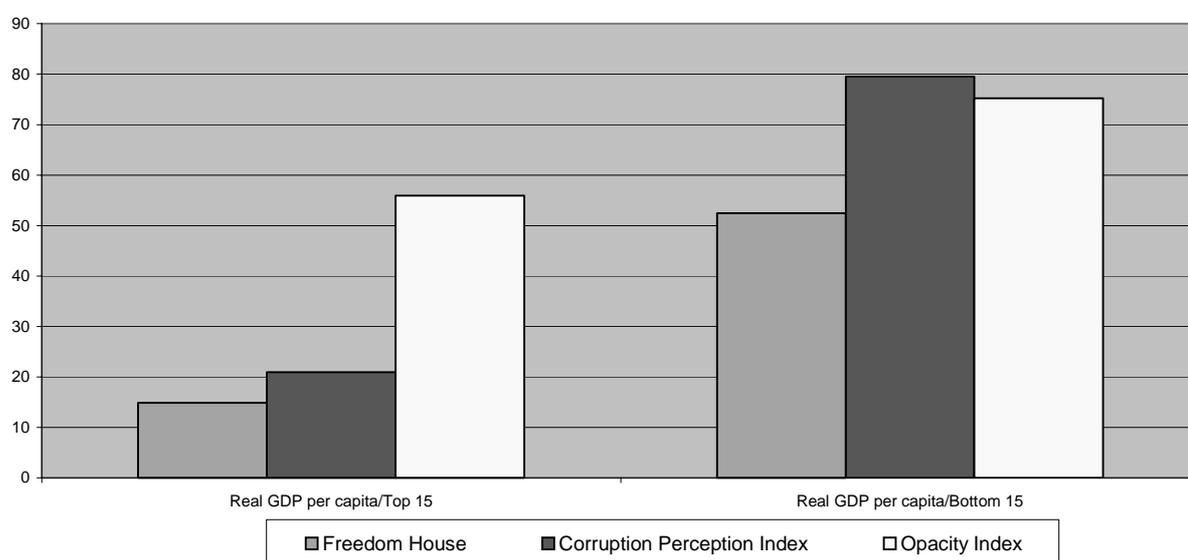
Table 2. Regulatory Transparency Problems in 12 OECD Countries

Transparency problem	OECD recommendation	No. of countries with problem
Some form of public consultation is used when developing new regulations, but not systematically and with no minimum standards of access. Participation biased or unclear.	Adopt minimum standards, with clear rules of the game, procedures, and participation criteria, applicable to all organs with regulatory powers. Use "notice and comment" as a safeguard against regulatory capture. Reduce use of "informal" consultations with selected partners.	8
A systemic tendency to exclude less organised or powerful groups from consultation, such as consumer interests or new market entrants	Supplement existing consultation approaches with targeted approaches for affected groups. Include "outsider" groups, such as consumers and SMEs, in formal consultation procedures. Open advisory bodies to all interested persons. Take care that new approaches such as Internet are not biased against small businesses and less affluent parts of civil society.	4
Regulatory reform programme and strategy are not transparent to affected groups	Develop coherent and transparent reform plans, and consult with major affected interests in their development	5
Information on existing regulations not easily accessible (particularly for SMEs and foreign traders and investors)	Creation of centralised registries of rules and formalities with positive security, use one-stop shops, use information technologies to provide faster and cheaper access to regulations.	5
Legal text difficult to understand	Adopt principle of plain language drafting	12
Complexity in the structure of regulatory regimes	Codification and rationalisation of laws	12
National-subnational interface – more co-ordination and communication needed on interactions	Establish clearer competencies between levels of government; exchange information to avoid duplication	3
RIA is never or not always used in public consultation	Integrate RIA at an early stage of public consultation	9
Inadequate use of communications technologies	Use Internet more frequently in making drafts and final rules available as a consultation mechanism	6
Lack of transparency in government procurement	Adopt explicit standards and procedures for decision-making	3
Lack of transparency in ministerial mandates and roles of regulators	Clarify responsibilities between regulators	3
Regulatory powers delegated to non-governmental bodies such as self-regulatory bodies without transparency requirements	Develop guidelines on the use of regulatory powers by non-governmental bodies, and extend all transparency requirements to them	2
Too much administrative discretion in applying regulations	Strengthen administrative procedures and accountability mechanisms. Eliminate use of informal regulations such as administrative guidance and instructions.	4
Lack of transparency at regional, state, and local levels	Work to improve regulatory transparency at regional and local levels	8
Inadequate use of international standards	Encourage the use of international standards government-wide, and track the use of uniquely national standards	4
Lack of clear standards in licensing and concessions decisions, such as in telecommunications	Reduce the use of concessions and licences to the extent possible by moving to generalised regulation, announce clear criteria for decisions on concessions and licenses, use public consultation for changes in existing licenses and concessions	7
Decisions of independent regulators not transparent enough	Apply RIA to independent regulators, ensure that independent regulators also use public consultation processes with regulated and user groups	5

Source: OECD 2002a

The OECD regulatory reform project has provided a detailed look at transparency practices and problems within the OECD area. Such comparative data and peer reviews are not widely available on a global scale. However, the global transparency data that does exist suggest that the finding that there is wide scope for transparency-enhancing reform in the OECD holds for other regions as well. Figure 3 presents comparative data on three indices -- the Freedom House index of political and civil rights, the Corruption Perceptions Index based on a survey by Transparency International and the Opacity Index (also based on a survey). An average is taken for each transparency measure, based on the bottom 15 countries in terms of income (real GDP per capita) and the top 15 countries. The data show that the transparency performance of the higher income countries is better than the lower income countries. Although the relations of cause and effect underlying this finding are undoubtedly complex, the data do suggest that lower income countries might also benefit from further efforts in this area.

Figure 3. Indexes of non-transparency by income group



Source: Compiled by OECD. *Note:* Scale of corruption perception index is reversed and multiplied by 10. Freedom House index is scaled and multiplied by 100.

V. Addressing the Obstacles to Reform

The growing consensus in international circles about the importance of transparency does not imply that transparency-enhancing reforms will be easy to enact and implement. In recent WTO discussions of transparency, developing countries emphasised that transparency requirement should not be unduly burdensome.¹⁵ The Doha Declaration notes that capacity building would help developing countries to implement possible new transparency obligations and approaches to capacity building.¹⁶ OECD experience suggests that all countries -- developed and less developed -- could benefit from assistance, as the obstacles to reform can be sizeable. The difficulties stem from three areas:

- *Politics.* The main obstacles to transparency-enhancing reform are political. Attempting to overcome the natural political dynamic in favour of “concentrated benefits” is an ongoing struggle for all political systems. Lack of transparency also shields government officials from accountability. Thus, many actors -- both inside and outside the public sector -- can have a stake in non-transparent practices. It is for this reason that, despite the broad apparent agreement in principle about their benefits, actual implementation of transparency-enhancing reforms are likely to involve painful shifts in the way policies are made and implemented, especially in countries with highly opaque policy environments. The difficulty will be to develop the political momentum for pro-transparency reform and to prevent backsliding. Transparency commitments in international investment agreements and international peer pressure can help countries face this difficulty. In this sense, transparency disciplines pose similar challenges for the developing and the developed worlds and are equally valuable for both.
- *Institutions.* All countries’ institutional structures make certain transparency measures possible and make others more difficult. For example, it would probably not be possible to implement Danish-style transparency practices for labour standards in the United States -- the necessary formal and informal institutions do not exist there. On the other hand, international agreements tend to focus on core transparency measures. These are the starting points for other communication processes that are closely linked to national institutions which usually evolve slowly and incrementally. The challenge for the international investment community is to create the conditions that help countries move forward on core measures, while also working with and enhancing the distinctive national characteristics of transparency practices.
- *Technological, financial and human resources.* Transparency requires access to resources and entails administrative costs. Although the core transparency measures discussed earlier tend to be straightforward, they involve the creation of registers, websites, the development of “plain language” texts and other mechanisms for making the

15. From a WTO press release describing the discussions of transparency at the April 18-19, 2002 meeting of the Working Group on the Relationship between Trade and Investment.

16. Paragraph 21 of the Ministerial Declaration adopted at Doha states the following about capacity building: *We recognise the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral co-operation for their development policies and objectives and human and institutional development. To this end, we shall work in co-operation with other relevant ... organisations... to provide strengthened and adequately resourced assistance to respond to these needs.*

language of legal and regulatory codes accessible to target audiences. For foreigners, translation of the host country's texts into relevant foreign languages would also require resources and entail costs. If new transparency disciplines are on the horizon, there may be a need for capacity building and technical assistance designed to supply or develop the necessary human resources and technology in a more cost-effective way.

There are many options for using international agreements as a means of promoting transparency-oriented reform. A report to the Trade Committee (Working Party of the Trade Committee 2002) describes a "continuum of options, from binding disciplines covering all sectors to 'best endeavours' commitments adopted in full or in part for some sectors only (page 6)." The report notes that the formulation of such disciplines will influence the degree to which the obstacles identified above will come into play. For example, broad cross-sectoral approaches to transparency commitments make it more difficult for sectoral special interests to block reform -- they may therefore reduce political obstacles. On the other hand, more flexible or prioritised approaches might allow countries to circumvent institutional or resource obstacles more readily.

VI. Conclusions

Irrespective of whether new international disciplines are on the horizon, the challenge of enhancing and maintaining public sector transparency is an ongoing task for all countries. The preceding discussion suggests that transparent public policy is both straightforward (the people covered by policies must know about them) and extremely subtle (resulting from successful communication between governments and millions of diverse actors).

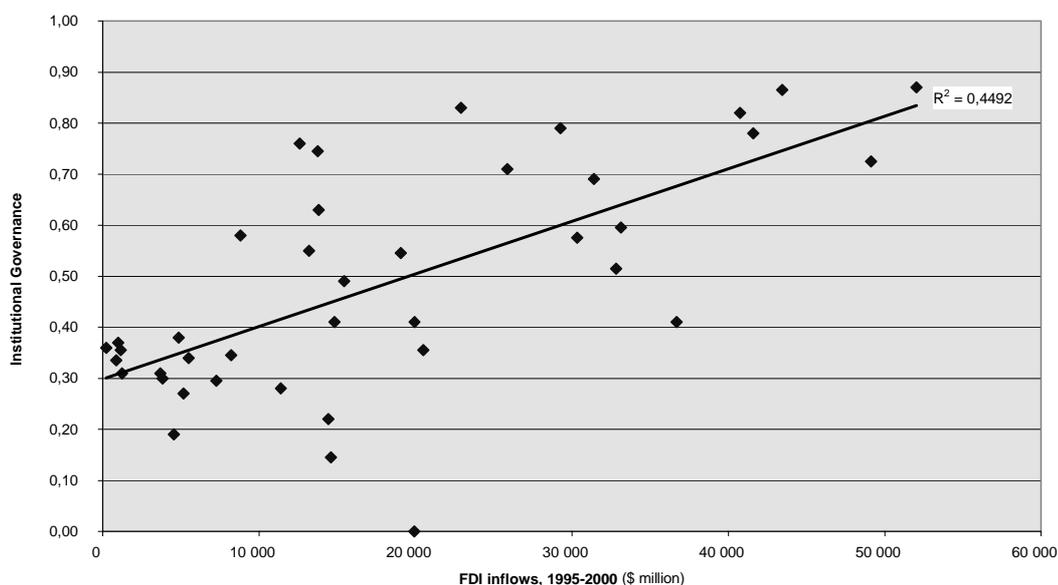
In this context, the challenges for the international community would appear to be to:

- *Promote core transparency measures.* These measures are already the subjects of the investment provisions of existing international agreements. They are an integral part of good public governance and are of universal relevance.
- *Understand the distinctive features of national transparency practices and, where possible, help to make them more effective.* National specificities in transparency arrangements are an important and deeply entrenched feature of the economic landscape. They will influence how individual countries approach international negotiations on transparency and how transparency disciplines will be enacted in and will influence the domestic policy environment. Understanding these national differences will therefore facilitate international discussions. In addition, certain of these national arrangements could benefit from international experience sharing (e.g. via peer reviews) so as to enhance their strengths and minimise their weaknesses.
- *Make the case that improving international investors' access to information complement broader efforts to improve public sector transparency and effectiveness.* Investors' rights to information are one part of the framework of rights to access and to use policy information. Efforts to promote investors' access to information are the international investment community's contribution to the broader effort to improve these frameworks everywhere.

Box 1. Transparency and International Investment

Chapter 10 of *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs* reviews the evidence on the relationship between transparency and foreign investment flows. The report notes that transparency, by its nature, cannot be easily quantified, nor can it be isolated from other policies that influence FDI. The focus needs to be both on the nature of the rules applying to foreign investment and on the degree of transparency in their implementation. The report uses a measure of the quality of institutional governance, an index of qualitative evaluations the rule of law, the judicial system, enforcement, corruption, and shareholder and creditor rights. It plots this measure against FDI inflows. The overall relationship between the quality of governance and the level of inflows is clear and positive (see Figure 1) even though there are wide variations in inflows even for countries with similar institutional governance ratings (as one would expect given the large number of factors affecting investment decisions).

Figure 1. The relationship between inward FDI and the quality of institutional governance



Source: OECD 2002c. page 180.

Gelos and Wei (2002) also study the relationship between transparency and the behaviour of managers of emerging market funds). Using indices of both government and corporate transparency, they find that these funds holder fewer assets in less transparent markets. They also find that transparency reduces “herding” of fund managers’ investment decisions. Herding is a theoretical concept describing the tendency of investors to make decisions based on what they see other investors doing. If found to exist in real markets, such behaviour could point (among other things) to imperfect distribution of information (that is, some investors are better informed than others). This implies that investment decisions are not being made on a fully informed basis and, therefore, that improved transparency could improve the quality of investment decisions.

Box 2. Definitions of transparency

- ◆ *Political science dictionary* (Brewer's Politics): "openness to the public gaze" (in Florini (1999)).
- ◆ *Business consultancy*. "the existence of clear, accurate, formal, easily discernible and widely accepted practices" (PriceWaterhouseCoopers 2001).
- ◆ *OECD Public Management*. "The term 'transparency' means different things to different groups [of regulators]. Concepts range from simple notification to the public that regulatory decisions have been taken to controls on administrative discretion and corruption, better organisation of the legal system through codification and central registration, the use of public consultation and regulatory impact analysis and actively participatory approaches to decisions making." OECD (2002a)
- ◆ *International Monetary Fund*. "...[b]eing open to the public about the structure and functions of government, fiscal policy intentions, public sector accounts and fiscal projections" IMF (1998).
- ◆ *Draft Multilateral Agreement on Investment*: "Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rules and judicial decisions of general application as well as international agreements which may affect the operation of the Agreement. Where a Contracting Party establishes policies which are not expressed in laws or regulations or by other means listed in this paragraph but which may affect the operation of the Agreement, that Contracting party shall promptly publish them or otherwise make them publicly available." April 1998 draft text. www.oecd.org/daf/mai/
- ◆ *APEC Leaders' Statement to Implement APEC Transparency Standards (October 2002)*: Transparency "is a basic principle underlying trade liberalisation and facilitation, where removal of barriers to trade is in large part only meaningful to the extent that the members of the public know what laws, regulations, procedures and administrative ruling affect their interests, can participate in their development.. and can request review of their application under domestic law... In monetary and fiscal policies, [transparency] ensures the accountability and integrity of central banks and financial agencies and provides the public with needed economic, financial and capital markets data....
- ◆ *Monetary policy practitioners*: "The communication of policymakers' intentions with a view to enhancing their credibility". (Friedman 2002); "The communication of policymakers' intentions" (King 2000).
- ◆ *World Trade Organisation*. Ensuring "transparency" in international commercial treaties typically involves three core requirements: (1) to make information on relevant laws, regulations and other policies publicly available. (2) to notify interested parties of relevant laws and regulations and changes to them; and (3) to ensure that laws and regulations are administered in a uniform, impartial and reasonable manner. WTO (2002).

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