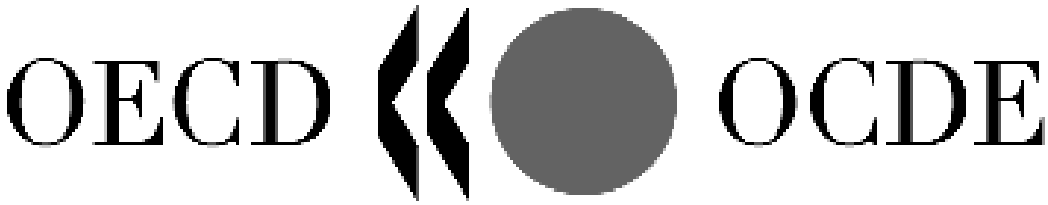

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"Experience and Best Practices in Achieving Regulatory Efficiency and Open Markets"

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Session 2: Development of a trade and investment friendly environment

EXPERIENCE AND BEST PRACTICES IN ACHIEVING REGULATORY EFFICIENCY AND OPEN MARKETS

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I. INTRODUCTION

In recent years it has become increasingly apparent that the benefits of international trade and investment depend not only upon policy measures directly affecting trade and investment flows but also upon domestic regulations that are economically efficient and favour trade and investment. Past progress in tariff liberalisation has brought attention to focus on other types of impediments to such flows, in particular domestic regulations whose trade and investment effects may be unintentional.

Recognition of this interlinkage between trade and investment liberalisation and efficient regulation is contributing to a strong dynamic in favour of regulatory reform. Countries want to draw full benefit from the strengthened global competition expected to emerge from trade liberalisation; at the same time, the multilateral trading system and the liberalisation achieved under it entail national obligations, including explicit or implicit commitments to adopt certain regulatory practices, e.g. as specified under the TBT and SPS Agreements and in the GATS.

These two factors combine in support of reform that will allow the efficient achievement of regulatory objectives with as little trade restrictiveness as possible. In fact, for regulatory reform to be successful in achieving more efficiently the specified objectives, account must be taken of its international dimension, i.e. of the trade and investment impact of regulations.

The objective of this presentation is to introduce briefly the conceptual framework developed by the OECD Trade Committee for reviewing national experiences with regulatory reform in the perspective of the implications for international market openness. This framework has already been used (and further developed) in the review of regulatory reform in sixteen OECD countries. The note will then look at some of the issues and patterns that have emerged from these reviews with respect to six principles of efficient and trade-friendly regulation that have been identified.

II. PRINCIPLES OF EFFICIENT REGULATION

Political and institutional environment for reform

In the context of its ongoing multidisciplinary work on regulatory reform, OECD has considered the implications of domestic regulations for "international market openness" (the term referring to the extent to which markets are open to global competition, principally through trade and investment). In doing this, there has been recognition of the considerable importance of the political and institutional environment in which government-sponsored reform takes place. This environment today is characterised by four particular elements:

Dialogue with stakeholders: This dialogue is inescapable element of any effective reform effort today to give legitimacy to the reform process, since it is the stakeholders who in various ways will be affected by the regulations, just as it is they who will share the benefits and costs of having more efficient regulations. Contact with a range of stakeholders will make it clear to legislators and regulators that regulation generally needs to aim at multiple, and sometimes competing, objectives. An inherent dichotomy is sometimes perceived between open markets on the one hand (bringing greater consumer choice, higher quality and lower prices, through competition and expanded trade), and the range of social objectives on the other (e.g. universal service, environmental protection, labour standards). It is governments that must find the most appropriate solutions for their societies, preferably with good awareness of the regulatory options and their respective implications.

Different country situations: A similar dichotomy in perspective is often seen to arise between different countries, which may have vastly different economic and political structures. Do national differences in regulations and their implementation pose problems for trade? Would steps to reduce any such problems -- as through multilateral guidelines -- threaten regulatory sovereignty? Although non-OECD countries should not necessarily be expected to implement the same regulatory approaches as OECD countries (which already are quite diverse), the experience with the Asian financial crisis of the late 1990s suggests that modern governance structures in fact are an important determinant of business confidence in all countries participating in the globalised economy.

Domestic regulations have international implications: It is clear that regulatory reform is first and foremost a domestic issue: domestic regulations should be crafted so as to achieve domestic objectives efficiently. At the same time, their effects on international economic relations clearly need to be taken into account when seeking to identify "best practices". In addition, the question arises of whether in certain cases good domestic regulatory practices could serve as a basis for multilateral rule-making.

Rapid technological development: A very promising development for facilitating the efficiency and transparency of regulations is information technology. Under the new economy, ICT accelerates innovation and product cycles, creating a need for rapid regulatory change. Technology also influences many of the factors that determine the nature of regulation and the processes for modifying it. The internet greatly facilitates the dialogue with stakeholders; at the same time the speed of innovation raises questions concerning the best-adapted regulatory approaches. For example, the effectiveness of slow-moving government intervention is brought into question and the advantages of self-regulation become clearer.

Principles of efficient regulation for market openness

Within this context, the OECD Trade Committee has identified six "principles of efficient regulation" to help assess the extent to which regulations are both economically efficient and trade- and investment-friendly. These principles in fact broadly underpin the WTO, and can be seen to be particularly relevant in the TBT and SPS Agreements and the GATS when they touch on domestic regulation. They are:

- Transparency and openness of decision-making;
- Non-discrimination;
- Avoidance of unnecessary trade restrictiveness ;
- Use of international standards as a basis for regulations;
- Recognition of equivalent foreign measures; and
- Use of competition principles.

Through studies at OECD that have examined the regulatory regimes of different countries and the ways in which they have implemented these principles, it has become apparent that the principles are in fact interdependent. Together, they form a comprehensive package for creating a level playing field to promote international competition and ensure that countries can reap the benefits of globalisation. In particular they can support efficient regulatory decision-making by:

- Making clear the costs and benefits of regulation to all stakeholders;
- Providing business (domestic and foreign) with predictable conditions;
- Reducing discretionary or arbitrary implementation;
- Facilitating identification of alternatives favouring trade, investment, competition and economic growth;

However, these benefits may not be universally perceived. Market incumbents protected by a restrictive regulatory regime may oppose reform. Similarly, there may be domestic sensitivity in giving foreigners more access to the domestic regulatory system and, through it, to the domestic market.

III. SOME REGULATORY "BEST PRACTICES" FOR MARKET OPENNESS

While no one model is necessarily best for all countries, the analyses conducted so far at OECD allow identification of some approaches to implementing the principles and that seem of interest for their positive contribution to achieving domestic objectives while maintaining or improving market openness.

A. Transparency and openness of decision-making

Transparency is perhaps the most frequently recurring theme in the application of the other principles of regulatory efficiency. It concerns the provisions of both legislation and subordinate measures, as well as decision-making in the contexts of regulation-setting and of the administration of regulations. Four particular approaches are raised here:

1. Focus on legislation and subordinate measures that significantly affect trade

In order to ensure that efforts to improve regulatory transparency will be relevant for traders, particular consideration should be given to ensuring the transparency of legislation and subordinate measures that significantly affect trade. For example, there should be systematic publication of such regulations and relevant procedures; and efforts should be made to ensure transparency in areas where it frequently appears lacking, as in sub-national regulations and the allocation of investment incentives.

2. Consolidated codes of regulations and enquiry points

For the sake of efficiency, a number of countries have established consolidated codes of regulations, thus facilitating the access of business to the various regulations to which they may be subject. This is of course particularly useful for businesses that not incumbent in a market. Moreover, enquiry points can provide an important service to economic actors, as an easily identifiable and accessible source of information, able to respond to queries and provide clear explanations. In the WTO, requirements for enquiry point already exist under the SPS Agreement and the GATS. These approaches have been enhanced by countries that have created internet websites providing extensive regulatory information and permitting enquiries, thus strengthening transparency and reducing business costs.

Even for countries with a good record in these areas, there is often more that can be done. For example, enquiry points should of course not be limited to SPS measures and services. In addition, information facilities remain significantly weaker with respect to sub-federal regulations.

3. Prior consultation

When a new regulation is being defined and put into place, "prior consultation" normally consists of a "notice and comment" procedure involving:

- Public announcement of the consultation procedures that will be followed, of the proposed regulation and of any comments received;
- Non-discrimination as between domestic and foreign parties;
- No discretionary choice of the parties to be consulted.

Prior consultation provides benefits by ensuring equality of treatment among different stakeholders, including foreign ones, who may be in position to contribute significantly to the development of the local economy. This equality of treatment allows regulatory authorities to make a fuller assessment of stakeholders' views and gives the ensuing regulation a higher degree of legitimacy. It also provides stakeholders with better information on future regulations, including their objectives and rationale, which can be especially important for business.

4**. Clear implementation procedures**

Some countries have enacted specific legislation to ensure transparency in administrative procedures for implementing regulations, e.g. including requirements in such areas as:

- Publication of objective criteria for judging requests;
- Standard time periods for decisions;
- Providing explanations when requests are denied; etc.

B. Non-discrimination

This involves both national treatment (i.e. equivalent treatment to national as well as foreign suppliers) and most-favoured nation (MFN) treatment (i.e. no differentiation in treatment among foreign producers). Mention may be made here of three particular issues that are important for the trade-friendliness of domestic regulation.

- *Due process*, or the right to appeal administrative decisions or actions, irrespective of nationality.

- *Regional trade arrangements* by their nature provide preferential (i.e. discriminatory) treatment for their members. Yet arrangements with certain characteristics seem less trade-distortive and may contribute in a positive way to the growth of world trade and competition: e.g. arrangements whose net effects are trade-creating rather than trade-diverting; which abide by WTO rules (e.g. do not increase trade barriers to third countries and cover substantially all trade); which liberalise trade in areas not yet well covered by the WTO, such as services; etc. Further study is needed to well identify such characteristics.

- *Public procurement* represents approximately 20% of GDP world-wide, according to recent work in OECD. It is thus a significant market, which is often effectively closed to foreign suppliers and may not even be contestable domestically. Greater efficiency and economic benefits can be expected if procedures become more transparent and more strongly based on non-discrimination.

C. Avoidance of unnecessary trade restrictiveness:

In addition to the adoption of RIAs, as discussed above, other approaches aim at reducing the burden of government formalities; or at using performance requirements rather than product characteristics.

1. Regulatory Impact Analysis (RIA)

Regulatory impact analysis has been developed as a process for ensuring that regulatory decisions are made on the basis of easy access to all information relevant for understanding the benefits and costs of proposed regulations. The rationale of RIAs is thus to help ensure the adoption of regulations that are efficient in achieving their objectives. A trend has been observed in a number of countries toward increasing public involvement and more transparent RIA procedures. There is also increasing recognition of the usefulness of including consideration of trade and investment effects, in particular to help identify options that are least restrictive of trade and investment. In order to do this, RIAs should consider the purpose of a regulation, its impact and possible alternatives.

It is worth recognising that some countries (in particular developing countries) have expressed concern that requirements to conduct RIAs may be a heavy and costly administrative burden that is incommensurate with their governmental capacity. In such cases, a lighter (though less effective) alternative could be simply to publish the rationale for new or proposed regulations.

2. Performance criteria

Standards and regulations based on design standards can be subject to "regulatory capture" by established interests and tend to discourage innovation aimed at greater efficiency, in particular by new market entrants. Similarly, qualification requirements for professional services (e.g. based on nationality) may be overly burdensome. The preferable approach in such cases is to define requirements in terms of performance, which is usually more directly linked to the objectives sought.

3. Independent regulators

Greater efficiency can usually be achieved in attaining regulatory objectives when the regulatory body is separate from any suppliers subject to the regulations. Similarly, the decisions and procedures of regulators should be non-discriminatory among all market participants.

4. Trade facilitation and simplified customs procedures

Procedures relating to customs clearance can often impose significant delays and costs on traders. Significant benefits can be secured through efforts such as streamlining documentary requirements, accelerating customs clearance procedures and pursuing international harmonisation.

D. Internationally harmonised measures

The diversity of standards in different markets is often perceived a barrier to trade and investment. The difficulty may be overcome through the *use of international standards* as a basis for regulations. For example, this is required by the TBT and SPS Agreements, where feasible. When international standards do not yet exist, some positive effects can nevertheless be achieved by striving to improve the transparency of standards applied and ensuring broad participation in the development of standards. Consideration should also be given to r*ecognising the equivalency of foreign measures* that aim at the same regulatory objectives.

E. Avoidance of duplicative conformity assessment

Excessive costs that arise from duplicative conformity assessment requirements may be reduced through mutual recognition agreements (MRAs), typically covering testing results or certification. However, given the complications frequently encountered in negotiating such agreements, attention has recently focused on alternative approaches, in particular recognition of supplier's declarations of conformity (SDOCs), which reflect tests by the manufacturer or by a third party. Progress can also be made through unilateral recognition of conformity assessment results reported in other countries, which is possible when the same or similar technical regulations are applied. In some instances, voluntary arrangements between conformity assessment bodies in different countries have also been effective.

F. Use of competition principles*:*

Anti-competitive practices are addressed through national processes, although an interesting example of a multilateral effort to establish a framework for this approach can be seen in the GATS Reference Paper for Basic Telecommunications.

IV. CONCLUDING REMARKS

OECD's trade-related "principles of efficient regulation" have been identified on the basis of concepts underpinning the GATT/WTO system. They are general and seem relevant for all countries -- although our understanding of them evolves in the light of particular national experiences. Knowledge of best practices has grown out of experiences collected in a number of OECD countries (so far including four APEC countries: US, Japan, Mexico and Korea). There should be no presumption that these practices are valid in all cases, since situations may differ significantly among sectors and countries; nevertheless, these practices are worth consideration in the context of national efforts at regulatory reform.

The practices identified could also be considered in the context of international co-operation and co-ordination that aims at promoting market-opening regulatory reform. They could moreover be relevant as and when there is interest in considering whether or to what extent multilateral disciplines have a role to play in contributing to predictability. Thus national experiences may provide insights for the effective implementation of WTO disciplines and for possible strengthening and clarifying of international approaches. Meetings such as this one, organised under the APEC-OECD Co-operative Initiative on Regulatory Reform, can play a highly productive role in advancing understanding in this regard.