Public Sector Transparency and the International Investor

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Public Sector Transparency and the International Investor
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Note by the Editor

This booklet brings together the results of work conducted in 2003 by the OECD Committee on International Investment and Multinational Enterprises (CIME) on the issue of public sector transparency in international investment policy. This activity forms a part of a broader initiative by the Committee to promote the role of international investment in economic development and to contribute to the implementation of the Monterrey Consensus and to the achievement of the Millennium Development Goals.

Parts of this brochure are taken from Chapter 4 of International Investment Perspectives, OECD, 2003.
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Executive Summary

Recent initiatives in the OECD as well as the Monterrey Consensus and the Johannesburg Declaration seek to promote transparent policy frameworks that help countries to attract and benefit from foreign direct investment (FDI). This booklet reports on recent OECD work on this issue. It complements other OECD work in the area of corporate transparency and on inter-governmental information exchange.

The booklet begins with a general consideration of the benefits of public sector transparency for society at large. It argues that the investment community’s efforts to improve investors’ access to information reinforce broader efforts to enhance public sector transparency and effectiveness. The second section describes transparency enhancing policies towards investors in OECD countries as well as transparency provisions in recent international investment treaties. The third section proposes a framework to assist both OECD and non-OECD governments’ efforts to enhance transparency and to serve as a basis for experience sharing among public officials.

The findings of the first section of this booklet may be summarised as:

- 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 transparency 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.
- 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. 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; 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.

Transparency and the investment decision

For domestic and foreign investors alike, knowledge about rules and regulations – including how these are implemented and how they may be changed – is often a critical input to the investment decision. Transparency and predictability may be even more critical for foreign investors having to cope with host country regulatory systems, cultures and administrative frameworks that are very different from their own. It is therefore not surprising that lack of transparency and predictability often tops the list of concerns of foreign investors. At the same time, access to meaningful information is recurrently cited as a powerful incentive to invest. BIAC has recently spelled this out as follows: “From a business point of view, transparency reduces risks and uncertainties, promotes patient investment, reduces opportunities for bribery and corruption, helps unveil hidden investment barriers and draws the line between genuine and less genuine policy objectives, assists investors dealing with ‘thin’ rules, discourages ‘conflicting requirements’ situations between home country or host country, contributes to the playing field among firms and facilitates sustainable development.”
OECD trends in transparency
enhancing measures

Transparency vis-à-vis international investors is generally understood to involve a) effective communication to investors of meaningful information on local laws, regulations and practices that may materially affect their investments, b) prior notification and consultation of regulatory changes of interest to them and c) due process and procedural fairness in obtaining the necessary licensing, permits, registration and other formalities for carrying a business.

Regulatory reform has made information more directly accessible and user-friendly in several OECD countries. Legislative simplification, legal codification and the creation of central registers have cut down the cost for investors of informing themselves about relevant laws and regulations. Central enquiry points have been created to clarify the government rules and their manner of implementation. Public consultation and the use of prior notice and comment procedures have become more widespread – they now provide inputs to regulatory proposals and a means of building support for compliance and effective implementation. Cumbersome regulatory or administrative requirements have been “re-engineered” to reduce formalities, administrative discretion, red tape and corruption. “One-stop” clearing shops have been created. There has also been a distinctive trend away from ex ante controls to ex post checking or silence is consent clauses and appeal rights have been reinforced. New technologies such as Internet are now used in practically every area of public communication.

In addition, OECD governments have felt the need – given the fierce competition for mobile investments – to offer specialized services to foreign investors designed to offset what may be foreigners’ disadvantages, such as language barriers or more limited knowledge of local institutions. Guiding foreign investors through domestic regulatory systems has become a central function of investment promotion agencies. In addition, politicians and government agencies have intensified their contacts with foreign chambers of commerce or business associations. Special efforts have been made to publish information about the regulatory environment in English. In some cases, foreign investors have been given direct access to the decision-making process through special advisory bodies or through official consultations procedures.

In an ideal world, foreign investors should be able to obtain timely information on every regulatory measure that could materially affect their investments. The sheer number of laws and regulations and their increased complexity combined with the potentially broad ramifications of international
investment, however, may mean that this is not always possible. Foreign investors need, however, essential information on how “to get a business started” and how to “operate it effectively”. In particular, they require information about ownership and exchange control restrictions, administrative requirements, taxation, investment incentives, monopolies and concessions, access to local finance, intellectual property protection and competition policy, as well as environmental and social requirements and local corporate responsibilities.

Translating domestic practices into international commitments

Another striking trend is the rise of international transparency obligations in favor of investors. Although the OECD instruments have played a pioneering role in this regard, the most comprehensive “multilateral” standards of the moment are to be found in various WTO Agreements. Recent regional agreements (RAs) such as NAFTA and a new generation of bilateral trade/economic agreements are making new headways in translating good domestic practices into international commitments. Transparency is gaining importance at the highest political level. At their 2002 Annual Meeting, APEC Leaders adopted a Statement to implement APEC Transparency Standards more effectively.

The most recurrent provisions in these agreements are the obligations to “publish promptly” relevant measures, to “notify” non-conforming measures, to respond promptly to “requests” for information by contracting parties and to establish “enquiry points”. Most recent agreements also contain stronger obligations on “prior notification and consultation” and the “uniform, impartial and reasonable administration” of rules and regulations. Greater transparency is also being achieved by a more frequent use of the top down approach for the scheduling of individual country liberalisation commitments. The EU/Chile Agreement has, for the first time, introduced in an investment agreement, the concept of a policy dialogue with representatives of civil societies “in order to keep them informed on the implementation of the Agreement and gather their suggestions for its improvement.”

Transparency is vital to the functioning of international investment agreements. Their obligations need also to be further developed to anchor and promote greater transparency at the national level.
Looking ahead, the CIME recommends that governments remain attentive to
the evolving needs of investors and continue to search for novel and
pragmatic solutions to new problems, as they are encountered.

Far from imposing a “one-size-fits-all” approach to transparency, the CIME
recognises that transparency arrangements necessarily reflect national
culture, history and values, and of course, availability of resources and
skills. At the same time, public authorities can learn from each other’s
regulatory experiences (such as how others have dealt with the emergence
of new communication technologies). Transparency is a moving target
which can be progressively upgraded and enhanced over time as regulatory
environments evolve.

With this perspective in mind, the CIME has recently developed a
“framework”, reproduced in the third section of this booklet, to assist OECD
and non-OECD countries conduct self-evaluations, report policy
developments, engage in peer reviews and developing a multi-stakeholder
dialogue on investment policy transparency. This framework does not propose
universal policy recipes – it is a non-prescriptive framework. The fifteen
annotated questions it contains, however, cover the core transparency values
identified by the CIME. The framework aims to provide helpful clues about
how the transparency can be put into practice and made a reality and to
provide a basis for experience sharing among public officials from both the
OECD and non-OECD regions.

Notes

1. The Agreement on Trade in Services (the GATS), the Agreement on Trade-Related
Investment Measures pertaining to goods (TRIMS), the Agreement on Trade-
Related Aspects of Intellectual Property Rights (Trips), GATT Article X and the
GATT Agreements on the Application of Sanitary and Phytosanitary Measures
(SPS) and Technical Barriers to Trade (TBT).

2. In particular, the Agreement between Singapore and Japan for a New-Age
Economic Partnership, the Australia-Singapore Free Trade Agreement, the
Association Agreement between the European Community and Chile, the United
States-Singapore Free Trade Agreement and the United States-Chile Free Trade
Agreement.
The Benefits of Public Sector Transparency for Investment and Beyond*

1. Introduction

Instrumental 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 transparency. 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 Agenda, which also notes that developing countries might benefit from capacity building to help them meet possible new transparency commitments. In the context of post-Doha work in Geneva, the WTO

* This article was prepared by Kathryn Gordon, Principal Administrator, Capital Movements, International Investment and Services Division, OECD and Ursula Wynhoven, Consultant.
SECRETARIAT AND DELEGATIONS 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, 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 ATTRACTION FOREIGN INVESTORS (PAGE 8)”. 

THIS ARTICLE 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 SURVEYS. 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 PRACTICES. 

THE CURRENT ARTICLE 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 ARTICLE 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.

THIS ARTICLE 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?
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) 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. The relationship between inward FDI and the quality of institutional governance

![Graph showing the relationship between institutional governance and FDI inflows](image-url)

Source: OECD 2002c, page 180.
THE BENEFITS OF PUBLIC SECTOR TRANSPARENCY FOR INVESTMENT AND BEYOND

Box 1. Transparency and international investment (cont.)

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 hold 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.

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 article 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.

2. 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 rights. 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 development. Governments play critical roles – both 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.

2.1. 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.

2.2. Governments as impediments to development

There is, however, a less flattering perspective on government activity. OECD assessments of policy experience 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.

2.3. 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.

3. 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
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).
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.

3.1. 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 emerged.12

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 practice.13
- 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).
- 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.

### 3.2. 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 parties.14 Communication about policy poses some difficult challenges: How can policymakers
Table 1. **Transparency provisions mentioned in international agreements dealing with investment**¹

<table>
<thead>
<tr>
<th>Name of Agreement</th>
<th>Draft MAI</th>
<th>OECD Declaration</th>
<th>GATS</th>
<th>NAFTA</th>
<th>German model BIT</th>
<th>US model BIT</th>
<th>APEC standard²</th>
<th>OECD Codes</th>
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**Selected objects subject to specific transparency provisions**³

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<th></th>
<th>Laws, regulations, international agreements, administrative practices/rulings, judicial decisions and/or policies, etc.</th>
<th>Exceptions to most favoured nation</th>
<th>Exceptions to national treatment</th>
<th>Investment incentives</th>
<th>Procedures for applying for authorisations/permits/licenses</th>
<th>Monopolies and concessions</th>
<th>Privatisation</th>
<th>Expropriation and compensation</th>
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<tr>
<td>OECD Codes</td>
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</tr>
</tbody>
</table>

**Selected mechanisms in support of transparency**

<table>
<thead>
<tr>
<th></th>
<th>Timely publication of measures</th>
<th>Establish enquiry points</th>
<th>Peer review</th>
<th>Notification and/or reporting to other Parties and/or IOs</th>
<th>Prior consultation or other forms of participation (e.g. opportunities for comment)</th>
<th>Party/IO can request consultations</th>
<th>Recourse for private actors⁴ (conciliation, mediation, arbitration, courts, etc.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Draft MAI</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
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<td>APEC standard²</td>
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<td>OECD Codes</td>
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</tbody>
</table>

¹ The table is based on information as of 2003.
² APEC standard refers to the Asia-Pacific Economic Cooperation standard.
³ Specific transparency provisions refer to data on the type of transparency provisions included in the agreements.
⁴ Recourse for private actors refers to the mechanisms available to private actors in case of disputes.
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 lead to regulatory style involving “a legalistic 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.
4. 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.

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
Figure 1. **Regulatory quality tools used in OECD countries**

<table>
<thead>
<tr>
<th>Tool</th>
<th>Government wide</th>
<th>Specific sectors or policy areas</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulatory impact analysis</td>
<td>18</td>
<td>12</td>
</tr>
<tr>
<td>Assessment of regulatory alternatives</td>
<td>17</td>
<td>12</td>
</tr>
<tr>
<td>Consultation with affected parties</td>
<td>17</td>
<td>12</td>
</tr>
<tr>
<td>Plain language drafting requirements</td>
<td>23</td>
<td>14</td>
</tr>
<tr>
<td>Evaluation of the results of regulatory programmes</td>
<td>13</td>
<td>16</td>
</tr>
</tbody>
</table>

Source: OECD (2002a), PUMA.

Figure 2. **Measures used to communicate regulations**

<table>
<thead>
<tr>
<th>Measure</th>
<th>1998</th>
<th>2000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Codification of primary laws</td>
<td>19</td>
<td>22</td>
</tr>
<tr>
<td>Publication of a consolidated register of all subordinate regulation currently in force</td>
<td>18</td>
<td>18</td>
</tr>
<tr>
<td>Provision that only subordinate regulation in the registry are enforceable</td>
<td>10</td>
<td>9</td>
</tr>
<tr>
<td>Public access via the Internet to the text of all or most primary laws</td>
<td>13</td>
<td>23</td>
</tr>
<tr>
<td>A general policy requiring “plain language” drafting</td>
<td>18</td>
<td>21</td>
</tr>
<tr>
<td>Guidance on plain language drafting issued</td>
<td>16</td>
<td>16</td>
</tr>
</tbody>
</table>

Source: OECD, Public Management, Regulatory Database.
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).

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.

5. 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. The Doha Declaration notes that capacity building would help developing countries to implement possible new transparency obligations and approaches to capacity building. OECD experience suggests
## Table 2. Regulatory transparency problems in 12 OECD countries

<table>
<thead>
<tr>
<th>Transparency problem</th>
<th>OECD recommendation</th>
<th>No. of countries with problem</th>
</tr>
</thead>
<tbody>
<tr>
<td>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.</td>
<td>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.</td>
<td>8</td>
</tr>
<tr>
<td>A systemic tendency to exclude less organised or powerful groups from consultation, such as consumer interests or new market entrants</td>
<td>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.</td>
<td>4</td>
</tr>
<tr>
<td>Regulatory reform programme and strategy are not transparent to affected groups</td>
<td>Develop coherent and transparent reform plans, and consult with major affected interests in their development</td>
<td>5</td>
</tr>
<tr>
<td>Information on existing regulations not easily accessible (particularly for SMEs and foreign traders and investors)</td>
<td>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.</td>
<td>5</td>
</tr>
<tr>
<td>Legal text difficult to understand</td>
<td>Adopt principle of plain language drafting</td>
<td>12</td>
</tr>
<tr>
<td>Complexity in the structure of regulatory regimes</td>
<td>Codification and rationalisation of laws</td>
<td>12</td>
</tr>
<tr>
<td>National-subnational interface – more co-ordination and communication needed on interactions</td>
<td>Establish clearer competencies between levels of government; exchange information to avoid duplication</td>
<td>3</td>
</tr>
<tr>
<td>RIA is never or not always used in public consultation</td>
<td>Integrate RIA at an early stage of public consultation</td>
<td>9</td>
</tr>
<tr>
<td>Inadequate use of communications technologies</td>
<td>Use Internet more frequently in making drafts and final rules available as a consultation mechanism</td>
<td>6</td>
</tr>
<tr>
<td>Lack of transparency in government procurement</td>
<td>Adopt explicit standards and procedures for decision-making</td>
<td>3</td>
</tr>
<tr>
<td>Lack of transparency in ministerial mandates and roles of regulators</td>
<td>Clarify responsibilities between regulators</td>
<td>3</td>
</tr>
<tr>
<td>Regulatory powers delegated to non-governmental bodies such as self-regulatory bodies without transparency requirements</td>
<td>Develop guidelines on the use of regulatory powers by non-governmental bodies, and extend all transparency requirements to them</td>
<td>2</td>
</tr>
<tr>
<td>Too much administrative discretion in applying regulations</td>
<td>Strengthen administrative procedures and accountability mechanisms. Eliminate use of informal regulations such as administrative guidance and instructions.</td>
<td>4</td>
</tr>
<tr>
<td>Lack of transparency at regional, state, and local levels</td>
<td>Work to improve regulatory transparency at regional and local levels</td>
<td>8</td>
</tr>
</tbody>
</table>
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,

Figure 3. **Indexes of non-transparency by income group**

![Graph showing non-transparency by income group](image)

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

Source: Complied by OECD.
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, web-sites, the development of “plain language” texts and other mechanisms for making the 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.

6. 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.

Notes

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).

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.


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/W112) 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).

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.


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).


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).

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

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.

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Investment Policy Transparency in OECD Countries*

1. The meaning of transparency

As noted in the previous article, public sector transparency is fundamentally about effective communication on public policy between governments, business and other civil society stakeholders. In the international investment policy community, it is primarily understood as making relevant laws and regulations publicly available, notifying concerned parties when laws change and ensuring uniform administration and application. For an increasingly larger number of practitioners, it may also involve offering concerned parties the opportunity to comment on new laws and regulations, communicating the policy objectives of proposed changes, allowing time for public review and providing a means to communicate with relevant authorities. In addition, it is broadly acknowledged that international collaborative efforts have a complementary role to play in disseminating information, defining common standards and providing peer review support and capacity building for more transparency. Transparency has been identified as a key issue for the post-Doha and Monterrey agendas on international investment.

Of course, transparency alone is not sufficient to ensure a favourable regulatory environment if the underlying laws and regulations are inadequate or unpredictable. However, the ability of investors to fully understand the regulatory environment in which they are operating as well as having a voice in regulatory decision-making remains critical to their operations. This is true for domestic and foreign investors but particularly relevant to foreign investors who may be confronted abroad not only with different regulatory content, but with a differing regulatory culture and administrative frameworks. Only when they have access to complete and transparent information, can they exploit all the possibilities foreign markets may offer. Indeed, transparent systems of rules and regulations can act as an important incentive to foreign investors. The Business and Industry Advisory Committee to the OECD (BIAC) has recently put the benefits of transparency to be as follows: “From a business point of view transparency reduces risks and uncertainties, promotes patient investment, reduces

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opportunities for bribery and corruption, helps unveil hidden investment barriers and draws the line between genuine and less genuine policy objectives, assists investors dealing with “thin” rules, discourages ‘conflicting requirements’ situations between home country or host country, contributes to the playing field among firms and facilitates sustainable development”.

Considerable efforts have been deployed by the OECD in the recent past to assess the quality and possible areas for improvement of OECD regulatory frameworks; and transparency has been one of the main areas of attention. The multidisciplinary OECD Regulatory Reform Programme identified last year a number of emerging “best OECD practices” for regulatory transparency. Other related work has examined the role of the state in good governance and accountability and the contribution of new communications technologies to better government (the so called e-government). Early this year the OECD Trade Directorate released a documented analysis of the regulatory policies and practices favouring market openness among 16 OECD countries, including on transparency and openness of decision-making.

Taking advantage of these efforts, the OECD Committee on International Investment and Multinational Enterprises (CIME) has also recently embarked on the development of an FDI-focussed and outreach-relevant inventory of transparency measures in the 38 countries which have adhered to the OECD Declaration on International Investment and Multinational Enterprises. This endeavour covers the three main clusters of issues allegedly at the core of international investment transparency policy, namely a) publication and notification, b) prior notification and consultation and c) procedural transparency. Beyond providing an organised and consistent mode of collection of information on this subject, the framework may also assist OECD and non-OECD governments, conduct self-evaluations and engaging in peer reviews of their transparency measures.

As the remainder of this paper will show, the number and quality of transparency measures at national and international level in these three areas are generally on the rise.

2. Publication of relevant information

2.1. The domestic context

The availability of a clear, detailed, user-friendly and if at all possible costless description of all regulatory requirements and implementation process can be considered to be one of the most fundamental guarantors of a transparent and open rule-making system. Giving regulated entities full access to applicable rules is by all means not a small endeavour, however.

The increased sophistication of national economies and societal demands have given rise to an ever increasingly complex set of regulations
and regulatory structures either at home or abroad. Any firm – whether of foreign or domestic origin – must not only fulfil various incorporation or registration requirements or restrictions but it must also comply with a vast array of other local regulations such as on employment and industrial relations, environment, intellectual property protection, competition policy, consumer protection, bribery, money laundering, etc. It needs to become aware of official incentives or disincentives or procurement policies that may affect its profitability. If it decides to trade or invest abroad, it must also become acquainted with the trade and investment rules that prevail in the concerned foreign countries. Beyond all this, a foreign firm may be confronted with discriminatory constraints uniquely based on his nationality.

There are also numerous sources and means by which this vast quantity of information can be disseminated. Laws and regulations may be made public in official gazettes, press releases, communiqués by government departments or regulatory agencies, government websites, etc. Depending on the media used, they can be released almost instantaneously upon adoption or with some delay. Central enquiry points may or may not be available to facilitate clarification of rules and their manner of implementation. The rules themselves may not be easily accessible to non-specialists or they may be available in plain language.

Recent work conducted by the Organisation on OECD country regulatory transparency practices suggests that making information available on the Internet has clearly emerged as one of the “best publication practices”. Internet technology has allowed the creation of centralised online compendiums of laws and related regulations in force (e.g. Canada, Mexico), often equipped with search engines, offering users rapid and unabridged access to the full legal texts of laws and related regulations. Such one-stop electronic portals, which can easily be updated, often feature built-in hyperlinks to closely related websites such as sponsoring Ministries. Some countries have gone further in creating comprehensive e-gateways (such as the UK site www.ukonline.gov.uk or the Canada site www.canada.gc.ca) to enhance transparency and accessibility of government services and information.

Such increased reliance on Internet has also been accompanied by legislative simplification and legal codification, which in some countries (e.g. Italy and Turkey) has led to the elimination of a large number of obsolete laws. There have also been efforts to create central registries of government laws and regulations. Efforts have also been deployed with varying degrees of success in favour of plain language drafting of regulations.

All things considered, however, foreign investors are often in a disadvantageous position vis-à-vis national investors in taking advantage of this information because of language barriers or more limited knowledge or
exposure to the functioning of local institutions. Guiding foreign investors through the complex net of domestic regulatory requirements has thus come to represent an important tool of promotion policy and a central activity of foreign investment promotion agencies. Politicians and government agencies have intensified their contacts with the international business community through the organisation of special events and public appearances at various chamber of commerce or business associations and establishment of special channels of communication. Special efforts have also been made to publish information about the regulatory environment into English. In some cases, foreign investors are given direct access to the decision-making process through special advisory bodies or through official consultations procedures.

2.2. The international context

There several ways in which international agreements may enhance transparency. First and foremost, their notification and consultation frameworks themselves make regulation more transparency, among adhering countries and beyond. Moreover, many agreements stipulate concrete actions that adhering countries must take - or be prepared to take - to keep investors informed of the regulatory environment in which they will be operating.

2.2.1. The WTO

Making information relevant to foreign investors promptly available has also been made the subject of international obligations. While both the GATT\(^9\) and the WTO Agreements are punctuated by provisions on transparency, the most comprehensive “multilateral investment policy transparency standards” of the moment are to be found in the Agreement on Trade-Related Investment Measures pertaining to goods (TRIMs)\(^{10}\) and most importantly in the General Agreement on Trade in Services of the WTO (GATS) as a result of the investment dimension of “mode 3 covering the supply of a service through commercial presence”. The Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPs) contains transparency provisions for the enforcement of intellectual property rights that are also of interest to foreign investors.\(^{11}\)

Returning to the GATS, its Article III requires members to “publish promptly ... all relevant measures of general application which pertain to or affect the operation” of the Agreement. International agreements pertaining to or affecting trade in services to which a member is a signatory shall also be published.

This obligation is somewhat broader than other GATS obligations. It applies in all except emergency situations, and regardless of whether members made specific commitments under Article XVI (market access), Article XVII (national treatment) or Article XVIII (additional commitments). It applies to measures taken by central, regional or local government and
authorities and non-governmental regulatory bodies affecting more than one service supplier.  

Two other transparency pillars are provided by Article III in addition to the basic “publication” obligation. Members must also respond promptly to requests by other members for specific information and establish one or more enquiry points. They must also promptly notify the Council for Trade in Services of any new or any changes to existing laws, regulations or administrative guidelines which significantly affect a service covered by a specific commitment.

While the term “transparency” as such is not used elsewhere in the GATS, other provisions are moving in the direction of enhanced transparency. This is notably the case with Article VI on Domestic Regulation which targets the objective of creating more transparent regulatory decision-making, implementation and enforcement. Sector-specific transparency obligations can be found in the WTO telecommunications Reference Paper and the WTO Disciplines on Accountancy. Also, despite the recognised shortcomings of the “bottom-up approach”, a certain degree of “revealed regulatory transparency” emanates from the national schedules of specific commitments, particularly those pertaining to mode 3. The Trade Policy Review Mechanism is the other major WTO instrument for ensuring transparency.

A number of observers are of the opinion, however, that compliance with the publication obligation of the GATS largely relies on member countries’ own appreciation of the requirements and that no comprehensive review of member country practices has been undertaken. The current enquiry system has also apparently not been often consulted. Discussions are under way within the WTO, notably in the Council for Trade in Services and the Working Group and Trade and Investment, on how to improve transparency in domestic regulation. Transparency is also a central concern of ongoing WTO work on government procurement.

2.2.2. BITs/RAs

While bilateral investment treaties (BITs) have traditionally not addressed the subject of transparency, recent regional trade agreements (RAs) and a new generation of bilateral trade/economic agreements devote special provisions or even chapters to this subject, some of which are directed at foreign investment. NAFTA, the Agreement between Singapore and Japan for a New-Age Economic Partnership, the Australia-Singapore Free Trade Agreement, the Association Agreement between the European Community and Chile, the United States-Singapore Free Trade Agreement and the United States-Chile Free Trade Agreement provide a good illustration of this trend.
In all these six agreements, transparency starts with a publication obligation of an horizontal nature, meaning that it applies to all laws, regulations, procedures and administrative rulings of general application respecting any matter covered by the Agreement. The Singapore/Japan Agreement extends this requirement to “judicial decisions of general application” and international agreements. NAFTA, the EC-Chile, the US FTAs with Singapore and Chile foresee furthermore the establishment of contact points to “facilitate communications between the parties”. These contact points must be able, upon request, to identify the office or official responsible for the matter and assist as necessary in facilitating communication with the requested party. Parties to these agreements are obliged to notify any other interested party of any measure (actual or proposed) that the party considers might materially affect the operation of the agreement or otherwise substantially affect that other party’s interests under the agreement. As in the WTO, the new agreements contain more elaborated sector-specific transparency requirements, notably on financial services and telecommunication services. Finally, a great deal of transparency results from the top down approach adopted for the scheduling of individual liberalisation commitments. Additional transparency is generated by the scheduling of individual country commitments, particularly as regards the top down approach applied across the board by NAFTA, Singapore-Australia FTA, and with respect to services sectors under the US FTA with Singapore and Chile (with the exclusion of non-service sectors, the scheduling of which relies on a bottom up approach).

Knowledge about the respective regulatory frameworks of the parties is also broadly enhanced by articles of co-operation in specific fields, which include exchange of information undertaken between the parties. The EU/Chile agreement encourages the parties to “establish mechanisms for providing information, identifying and disseminating investment rules and opportunities”. It also contains a rather novel provision “promoting regular meetings” with representatives of civil societies in order to keep them informed on the implementation of the Agreement and gather their suggestions for its improvement.

2.2.3. APEC

At Los Cabos, Mexico, on 27 October 2002, APEC Leaders adopted a Statement to Implement APEC Transparency Standards which conveys the belief that transparency is an important element in promoting economic growth and financial stability at domestic and international levels and that it is conducive to fairer and more effective governance as well as improving public confidence in government. It also confirms that transparency is a basic principle underlying APEC trade and investment liberalisation and facilitation efforts. It encourages each APEC economy to make increased use of Internet to ensure
that laws and regulations, and progressively procedures and administrative rulings, of general application are promptly published or otherwise made available and that interested persons and other economies become acquainted with them. Each economy is invited to have or designate an official journal or journals for this purpose.

These activities are to be carried out in accordance with the general guidelines for implementing an Individual Action Plan (IAP)\textsuperscript{24} which in the area of investment liberalisation and business facilitation list as a possible menu of options in the transparency area, the possibility of making available to investors timely updates of changes to investment regimes, publishing or otherwise making publicly available information on an economy’s investment laws and regulations, and procurement procedures, conducting briefings on current investment policies and making available to investors all rules and information relating to investment promotion schemes.

2.2.4. OECD instruments\textsuperscript{25}

While the OECD instruments do not contain a general article on transparency, this objective is promoted through a notification, consultation and examination framework. Non-conforming measures to their most fundamental obligations – non-discrimination – must be notified to the Organisation within 60 days of their adoption or amendment. Detailed reports on country positions under the instruments are submitted for peer reviews and publication.

The Declaration on International Investment and Multinational Enterprises\textsuperscript{26} provides additional clues about the international investment policy areas which deserve particular attention, including from the point of view of transparency. The National Treatment instrument, in particular, identifies five broad categories of country exceptions to national treatment that need to be singled out to the Organisation, namely investment by established foreign-controlled enterprises; official aids and subsidies; tax obligations; government purchasing and access to local finance. Measures based on public order and essential national security considerations, monopolies and concessions and corporate organisation restrictions must also be reported for the sake of transparency. Such scrutiny also applies to the new adherents to the Declaration in the form of comprehensive reviews of their regulatory framework for FDI and the general business environment. The International Investment Incentives and Disincentives instrument, on the other hand, recognizes that adhering countries to the Declaration may be affected by this type of measure and stresses the need to strengthen international co-operation in this area. It encourages these countries to make such measures as transparent as possible so that their scale and purpose can be easily determined. The instrument also provides for consultations and review
procedures to make co-operation between adhering countries more effective, including through participation in studies on policy trends in this field.

3. Prior notification and consultation

3.1. The domestic context

Work carried out under the OECD programme on Regulatory Reform suggests that prior notification and consultation of regulatory proposals to the public could enhance both the legitimacy and the effectiveness of regulatory measures. Recommended practices include the following: The policy objective of proposed changes should clearly be stated. The consultation procedures should be timely, transparent, open and accessible. Domestic and foreign parties should be treated in a non-discriminatory and impartial manner. Concerned parties should benefit or participate wherever possible in the preparation of regulatory impact analyses (RIAs). Regulatory authorities should be accountable for their decisions, in particular as to whether and when to engage in prior consultations, to disclose the comments received and react to or publish the reasons for taking them into account or not. Greater use could be made of independent expert advice. Regulatory authorities should also be aware of the danger of becoming captive to special interests or avoid consultation fatigue.27

While these recommendations have been made in the context of the public governance agenda, the OECD Working Party of the Trade Committee has engaged in a discussion of the potential benefits of prior consultation in the field of services.28 It was felt that prior consultation in “trade-related” and “investment-related” domestic regulatory processes can provide firms with more predictable conditions in foreign markets. It can help reveal hidden discrimination that can potentially arise from subordinate measures which deviate from the founding or enabling legislation. By allowing for feedback from interested parties before implementation, prior consultation may lead regulatory authorities to reflect carefully before modifying existing legislation, encourage them to consider alternatives in line with best international practices and assist in the assessment of the regulatory impact. Finally, a greater comprehension of a proposed change can build support for compliance and more effective implementation once the new measures in question come into force.

Various stakeholders are known to support prior consultations as a means of enhancing transparency of trade and investment regulation. BIAC, in particular, has made a number of recommendations in this respect. It has indicated that governments should take steps to provide notice to the public at an early stage of proposals to introduce new rules or to change existing rules; that they should provide sufficient time to submit comments in a pre-
determined manner and prior to decisions being taken; that they should give
to the public an explanation of the reason(s) why the rules are being changed/
introduced and the goals and objectives intended to be met; that they should
ensure that the analysis of costs and benefits of regulation is clear and
defensible; and that they should provide a reasonable period of time to allow
affected persons prepare for the implementation. BIAC has also
recommended that an independent agency be charged with oversight
responsibility across the regulatory spectrum.

Public consultation and the use of prior notice and comment procedures
have been a longstanding practice in some OECD countries (such as the United
States, United Kingdom, the Netherlands and Canada). A majority of OECD
countries apply systematic public consultations procedures to the
development of primary legislation, a practice which is also increasingly
extended to subordinate regulations. Consultation is normally applied to
three main stages of regulatory development, namely prior to formulating
detailed proposals as well as prior to and after formulating detailed proposals.
Use of the Internet to solicit and gather public support has enhanced the
potential reach of public consultations in real time, and has the added
advantage of universal availability to all (online) stakeholders, national and
non-national alike, regardless of geographic location. This is a process in
constant evolution open to new concepts and tools such as that of “regulatory
negotiation”, “regulations government” and “peer reviews”.29

3.2. The international context

The subject of prior consultation and notification has also gained in
importance in recent international discussions or negotiations. In the WTO,
the most advanced WTO disciplines are found in the GATT Agreement on the
Application of Sanitary and Phytosanitary Measures (SPS) and the GATT
Agreement on Technical Barriers to Trade (TBT) which require an opportunity
for advance comment on proposed regulations to be provided to other
members, notably where an international standard does not exist or where a
domestic standard departs from the international standard.30

For the time being, the transparency article of the GATS (Article III) simply
encourages WTO members to make available for advance comments the texts
of new laws, regulations and administrative guidelines or amendments to
existing ones prior to their publication. The GATS Disciplines for the
Accountancy Sector goes a bit further by providing that domestic regulatory
authorities endeavour to conduct prior consultation as a domestic
procedure.31 Preliminary consideration is also being given in the WTO
Working Party on Domestic Regulation of the possibility of extending the GATS
Disciplines to cover other services, in particular other professional services.32
Participants in the WTO preparatory discussions on a multilateral framework on investment (MFI) have been exploring the possibility of including obligations/provisions on “prior notification” and “right to comment”\textsuperscript{33} drawing on other existing WTO disciplines. A recent communication by the European Communities and its member states to the WTO Working Group on Trade and Investment argues that notifying and consulting the WTO on proposed laws that substantively affect foreign investors may help ensure that any potential problems are discovered before enactment.\textsuperscript{34} They have suggested that WTO members could endeavour to publish and notify proposed measures on FDI in advance in order to allow interested parties to become acquainted with them. Some WTO delegations have argued that this would be a too ambitious and administratively burdensome provision for a majority of WTO members.

The issue of prior consultation has recently attracted increased attention in the bilateral or regional economic co-operation context. NAFTA (article 1802.2) provides a “reasonable opportunity” to “interested” parties to comment on new measures covered by the Agreement.\textsuperscript{35} In the area of financial services (Article 1411), the agreement goes further by providing that, “to the extent practicable” all interested parties be “provided in advance” with any measure of general application proposed for adoption in order to allow “an opportunity” for such persons “to comment” on the proposed measure. The Los Cabos Declaration encourages APEC economies “when possible” to publish in advance or give advance notice of proposed new measures and provide an opportunity to comment on such proposed measures. The EU/Chile Agreement recognises the need for “timely consultation” with economic operators on substantial matters concerning legislative proposals and general procedures related to customs and the need to establish “appropriate consultation mechanisms”. The FTAs recently concluded between the United States and Singapore and the United States and Chile contain state-of-the art consultation procedures before the issuance of regulations and advance notice and comment periods for proposed rules.\textsuperscript{36} The article on Transparency in the Development and Application of Regulations of the US-Chile Agreement contains, in particular, provisions not found in NAFTA.

4. Procedural transparency

4.1. The domestic context

Although outright controls on FDI have receded significantly in almost every country since the mid-80s, less visible and nonetheless unnecessarily cumbersome regulatory or administrative requirements, notably in the form of registration, licensing and permits, can effectively frustrate investment. These formalities have risen significantly in recent years and are imposing
large costs on business, both in terms of time and money. Procedural transparency can help reduce administrative discretion, red tape and corruption. It is in any case essential for due process in the application of discriminatory screening or special authorisation procedures.

This is also one area where OECD countries have made decisive moves to reduce scope for unnecessary restrictiveness while at the same time encouraging greater efficiency within government. As noted before, their efforts have led to amalgamations or special registries of related licences and referral authority arrangements and the creation of “one-stop” service shops. Internet technology has also helped enhance search functions of regulatory requirements, thus facilitating compliance. National Investment Promotion Agencies have also been put to contribution as the first point of entry, or employed in an advisory capacity. Greater emphasis has been given to improved dialogue between government and business communities. Canada’s example is a particularly eloquent one among several others. This country has introduced accelerated business procedures, notably through the use of “one-stop” online facilities, allowing businesses to meet a series of regulatory requirements in one integrated process instead of securing necessary authorisations from different regulatory authorities and improve access to business-related information (including through a cross-country network of Canada Business Service Centres).

Process re-engineering has been another tool for achieving greater procedural transparency. This method is based on review of the information transactions required by government formalities with a view to optimising them, including reducing their number and reducing the burden of each through redesign, elimination of steps and application of new technology, as appropriate. The most common tool in this regard is licence and permit simplification and reduction programmes. There has also been a distinctive trend away from ex ante controls to ex post checking or silent consent clauses. Streamlining of border procedures has been the third major area of attention. This is also a major concern for foreign investors which rely on imported inputs to carry their operations abroad. Certain OECD countries have become leaders in adopting fully automated clearing systems. Concepts such as self-assessment, advance information and pre-arrival documentation, and risk assessment are being increasingly deployed in support of faster movement of low risk goods, allowing a greater concentration of resources on goods with higher or unknown risk. OECD work points to major successes to date (such as in Mexico). Existing and aspiring EU member states have also greatly benefited from harmonisation and simplification under the EU Customs Code. However, the non-interoperability or geographic exclusivity of certain computer systems, lack of “single window” integrated approaches to customs clearance, lack of interface with license delivery or other permit networks and lack of
transparency remain important challenges on the road of trade facilitation in several countries. Lack of comprehensive rules to guide the development of transparent and predictable customs rules is also viewed as a major shortcoming for trade and investment.

4.2. The international context

Procedural transparency is a long-standing international concept. GATT Article X on (the publication and administration) of trade barrier measures obliges members to administer rules and regulations of general applications in a “uniform, impartial and reasonable manner”. GATS Article VI (domestic regulation) goes further in providing that when authorisation is required the competent authorities shall “… within a reasonable period of time inform the applicant of the decision concerning its application”. Procedural transparency also implies a range of procedural “review rights” including the “right to file a complaint”, the “right to appeal” and the “existence of judicial arbitral or administrative tribunals or procedures for prompt and impartial review and remedy of administrative decisions”. The Council for Trade in Services is also working on ways to ensure that formalities do not constitute unnecessary barriers to trade.

The same basic rights are spelled out in two NAFTA articles found in chapter eighteen, which is devoted to “publication, notification and administration of laws”. In article 1804, “persons that are directly affected by an administrative proceeding resulting from the application of measures of general application affecting matters covered by the agreement must be provided, whenever possible, with “reasonable notice… when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated and a general description of any issues in controversy”. They must also be “afforded a reasonable opportunity to present facts and arguments” in support of their position “prior to any final administrative action, when time, the nature of the proceedings and the public interest permit”. In article 1805, the parties are required to establish impartial and independent review and appeal procedures. Parties to proceedings also have the right to “a reasonable opportunity to support or defend their respective positions”, a right of access to a decision based on the evidence and submissions of record, or where required by domestic law, the record compiled by the administrative authority”. Of course, relevant decisions must also be implemented (Articles 1803 and 1804).

Under Article 1411 of the Financial Services chapter, financial regulatory authorities are required to make available to interested persons their requirements for completing application relating to the provision of financial services (this provision applies to cross-border operations). On the request of
an applicant, the regulatory authority shall inform the applicant of the status of its application. The administrative decision must be taken within 120 days and be promptly notified to the applicant. Under NAFTA telecommunications chapter (Chapter 13), any licensing, permits, registration or notification authorisation shall be “processed expeditiously”.

Procedural transparency and due process is also becoming an important feature of the new generation of bilateral trade agreements such as the recent Singapore’s FTAs with EFTA, Japan, Australia, the United States, and Chile’s FTAs with the European Community and the United States. The provisions largely build upon the WTO provisions but they also entail more detailed obligations for customs and related matters, and financial and telecommunication services. The Los Cabos Statement to Implement APEC Transparency Standards devotes a large section to transparency and due process in regard to administrative proceedings pertaining to investment, services, customs procedure, intellectual property rights and government procurement.

Finally the US/Singapore FTA and the US/Chile FTA present as “ground-breaking provisions” the fact that investors rights under the agreements are backed by open and transparent procedures for settling investment disputes. These agreements specifically stated that “submissions to dispute panels and panel hearings will be open to the public, and interested parties will have the opportunity to submit their views”. This is consistent with advocacy by some WTO members for greater transparency with respect to WTO dispute settlement through the possible inclusion of a mechanism permitting non-government stakeholders to present their written views on disputes and the WTO allowing the public to observe WTO and panel and appellate proceedings.

5. Conclusions

The general “tour d’horizon” presented in this paper of some of the most recent trends of FDI-enhancing transparency rules and practices attests to the growing attention given by OECD governments to this issue. FDI has clearly benefited from OECD regulatory reforms and from the special efforts which have been made to render domestic laws and regulations more accessible to investors and to consult them more effectively on the elaboration of new ones. FDI has also benefited from the increased willingness of OECD governments to undertake transparency obligations at multilateral, regional and bilateral levels.

Obviously not the same transparency tools are directly applicable to every country. Capacity-building and cultural considerations play an important role on how information is disseminated and exchanged. Transparency also remains a moving target. New technologies, such as Internet, and more efficient government can push the frontiers of good transparency practices...
and set the direction for further reforms. More can still be done to secure firmer and broader policy commitments on transparency.

Notes

1. See, in particular, the recent publication by the World Bank Group Global Economic Prospects and the Developing Countries, 2003, page 124.

2. Paragraph 22 of the Doha Declaration states that “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”.


8. The Declaration on International Investment and Multinational Enterprises is a political agreement providing a balanced framework for co-operation on a wide range of issues designed to improve the domestic regulatory framework for investment and encourage the positive economic contribution by multinational enterprises. All 30 OECD member countries, and eight non-member countries (Argentina, Brazil, Chile, the three Baltic States – Estonia, Latvia and Lithuania – Israel and Slovenia have subscribed to the Declaration. For further information see www.oecd.org/daf/investment/instruments

9. The importance of transparency to an effective trading system is at the origin of Article X of the GATT on “Publication and Administration of Trade Regulations” which includes special provisions for the publication of laws and other measures affecting trade in goods, as well as their administration.

10. TRIMS Article 6 reaffirms commitments with respect to Article X of the GATT, as well as notification procedures, including the Ministerial Decision on Notification Procedures adopted on 15 April 1994 (WTO document symbol LT/UR/D–1/5).

11. Given the importance of the protection of intellectual property rights for international investors, it is indeed worth mentioning the inclusion of Article 63 of the TRIPs in the Dispute Prevention and Settlement chapter of the Agreement. Article 63 specifically provides that relevant laws and regulations, and final judicial decisions and administrative rulings of general application that affect the operation of the Agreement shall be published in such a manner as to enable governments and rights holders to become acquainted with them. Any agreements concerning the subject matter of the TRIPs must also be published. In addition, WTO members must be prepared to supply, in response to a written
request from another member, information pertaining to these various rules and regulations.

12. In fulfilling its obligations and commitments under this Agreement, each member shall take such reasonable measures as may be available to it to ensure their observance by regional and local authorities to ensure their observance by regional and local government and authorities and non-governmental bodies within its territory. Article 13(a).

13. The list of enquiry points is available at www.wto.org. Some 86 enquiry points have been established and notified to the WTO as of June 2002.

14. Pursuant to Article III.3 of the GATS, some 210 notifications have been made as of June 2002. Most of the notifications provide either the reference of the legislation or the national enquiry points. This raises the question of the utility of the contact points.

15. See also Soonhwa Yi and Sherry Stephenson, Transparency in Regulation of Services, July 2002.

16. The GATS Telecommunication Annex contains specific provisions on the publication of information about conditions for access to, and use of public network and services.

17. The objectives of the Trade Policy Reviews are “to increase the transparency and understanding of countries’ trade policies and practices, through regular monitoring, to improve the quality of public and intergovernmental debate on the issues and to enable a multilateral assessment of the effects of policies on the world trading system”. See www.wto.org Trading into the future – agreements – trade policy reviews.

18. See in particular, Soonhwa Yi and Sherry Stephenson, Transparency in Regulation of Services, Meeting of APEC Group on Services, Merida, Mexico, 16-18 May 2002.

19. At the Ministerial Meeting in Doha, WTO members also agreed “that negotiations will take place (in this area), after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations... Negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers”.

20. The US-Singapore FTA Agreement was signed by President Bush and Singapore Prime Minister Goh on 6 May 2003. See www.whitehouse.gov/news/releases/2003/05/20030506-11.html

21. This is in contrast to the WTO obligation which only applies to new or amended legislation pertaining to a scheduled service.

22. Including the academic community, social and economic partners and non-governmental organisations.

23. The Asia-Pacific Economic Forum, created in 1989 is the primary international organisation for promoting open trade and international co-operation among the 21 Pacific Rim countries including 7 OECD countries, Russia, China, Hong Kong, Chinese Taipei, Singapore and Chile.

24. The Individual Action Plan (IAP), now available in an electronic form (www.apec-iap.org/) is a report updated annually by each APEC member Economy which records its actions that help realise the APEC goal, set down in Bogor, Indonesia, of free and open trade and investment in the APEC region by 2010 for
industrialised economies and 2020 for developing economies. In line with the concept of concerted unilateral liberalisation, APEC member economics undertake these actions on a voluntary and non-binding basis.

25. While no agreement was reached on any MAI provision at the time the negotiations ended in May 1995, the draft consolidated text contained a transparency article which provided for a general commitment to broadly publish relevant information of general application which could affect the operation of the Agreement, promptly respond to specific enquiries and provide routine information (such statistical information) while protecting confidential or privy business information. While public dissemination of investment-related information was considered essential, the consolidated text language reflected a balance between this objective and the administrative burden of implementing it. Negotiators did not have time to complete their discussion on a notification of obligations. See www.oecd.org/daf/mai.

26. See www.oecd.org/daf/investment/instruments


29. Regulatory negotiation is a relatively new tool in the United States involving negotiations with specific interest groups. Regulations.gov launched on 23 January 2003 is a new consolidated online rule-making Web site for the entire federal government intended to provide one-stop point of entry for citizens to comment on open rules from all agencies via e-mail. In its 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local and Tribal Entities, the Office and Management and Budget reports a growing interest for external peer review of Regulatory Impact Analyses.

30. If a member has reason to believe that a measure introduced or maintained by another member is trade restricting, an explanation of the reason for such a measure may be requested “and shall be provided by the member maintaining the measure”. The TBT Agreement extends the reach of its transparency provisions to cover governmental and non-governmental standard-setting bodies through its Code of Good Practice for the Preparation, Adoption and Application of Standards. Compliance with the Code is obligatory for central government standardising bodies, and encouraged for other standardising bodies. The Code requires advance publication and a 60-day comment period during which all “interested parties within the territory of a member of the WTO” may submit comments, and request a reply from the body.

31. According to the Disciplines (paragraph 6), when introducing measures significantly affecting trade in accountancy services, members shall endeavour to provide opportunity for comment, and give consideration to such comments, before adoption. members shall inform another member, upon request, of the rationale behind domestic regulatory measures in the accountancy sector, in relation to legitimate objectives. Preliminary consideration is under way in the WTO Working Party on Domestic Regulation of the possibility of extending the Disciplines to cover other services, in particular other professional services.


34. See WT/WGTI/W/110 Communication from the European Community and its member States, March 2002.

35. Article 1411 of the financial services chapter of NAFTA uses instead the following more elaborate language: “... Each Party shall, to the extent practicable, provide in advance to all interested persons any measure of general application that the Party proposes to adopt in order to allow an opportunity for such persons to comment on the measure. Such measures shall be provided: a) by means of official publication; b) in other written form; or c) in such other forms as permit an interested person to make informed comments on the proposed measure.”


37. For a comprehensive description of these arguments, see Regulatory Policies in OECD countries, from Intervention to Regulatory Governance, 2002, Chapter 4. This section also draws on the findings of the Trade Directorate’s study TD/TC/ WP(2002)25/Final mentioned before. The World Bank Foreign Investment Advisory Service (FIAS) has also done considerable work in this area in fulfilment of its mandate to improve developing countries’ investment environments in order to attract FDI (www.fias.net).

38. Detailed WTO provisions on due process can be found in several WTO agreements, notably the GATS, the TRIPS Agreement, the agreements on Subsidies and Countervailing Measures, Anti-Dumping Measures, Customs Valuation, Import Licensing Procedures and Pre-Shipment Inspection. For recent description of these provisions, see the Note by the WTO Secretariat, WT/WGTI/W/109.

39. For example, the Council for Trade in Services has been requested to develop requirements and disciplines with a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.

40. There is also an interesting provision in the Singapore/FTA agreement which goes further than GATS Article VI: Article 64(2) states that “In sectors where a Party has undertaken specific commitments subject to any terms, limitations, conditions or qualifications set out therein, the Party shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which: a) does not comply with the following criteria: i) based on objective transparent criteria, such as competence and the ability to supply the service; ii) not more burdensome than necessary to ensure the quality of the service; or iii) in the case of licensing procedures, not in themselves a restriction on the supply of the service and b) could not reasonably have been expected of that Party at the time the specific commitments in those sectors were made.”

41. USTR also seeks public comment, through a Federal Register notice, on every dispute settlement proceeding where the United States is a party. It also makes its written submissions to panels and the WTO Appellate Body available to the public as soon as they are submitted.
A Framework for Investment Policy Transparency*

The following framework for investment policy transparency has been developed by the OECD Committee on International Investment and Multinational Enterprises (CIME) to assist both OECD and non-OECD governments’ efforts to enhance transparency of their investment policy frameworks and to serve as a basis for experience sharing among public officials. It completes the analytical work conducted in 2003 by the Committee on public sector transparency with the endorsement by the 38 adherent countries1 to the OECD Declaration on International Investment and Multinational Enterprises.

Fifteen questions are proposed to government officials. These questions aim to facilitate self-evaluations and reporting of policy developments. They also can support peer reviews and multi-stakeholder dialogue on investment policy transparency. While the focus is on the information gaps and special needs of foreign investors, they apply, in most instances, to domestic investors as well. The questions are supportive of a level playing field for all investors.

The framework underlines the importance of effective communication of meaningful information, prior notification and consultation of regulatory changes and uniform administration and application of laws and regulations. It also pays particular attention to capacity-building issues and the evolution of international transparency commitments.

None of the questions in the framework are intended to be prescriptive however. The CIME recognises that transparency arrangements necessarily reflect national culture, history and values, and of course, availability of resources and skills. These must be adapted to local circumstances in order to be effective. At the same time, public authorities can learn from each other’s regulatory experiences (such as how others have dealt with the emergence of new communication technologies).

Looking ahead, the CIME recommends that governments remain attentive to the evolving needs of investors and continue to search for novel and pragmatic solutions to new problems, as they are encountered. Transparency remains a moving target - it can be progressively upgraded and enhanced over time as regulatory environments evolve.

* This article has been prepared by Marie-France Houde, Principal Administrator, Capital Movements, International Investment and Services Division, OECD.
Framework for Investment Policy Transparency

Desirability and appropriateness of transparency for international investment

Question 1: Are the economic benefits of transparency for international investment adequately recognised by public authorities? How is this being achieved?

The CIME has recently stated that transparency is one of the most effective actions that public authorities may take to meet (domestic and) foreign investor’s expectations. In particular, it reduces business risks and uncertainties, helps combat bribery and corruption and ultimately promotes patient investment. Public authorities may not always be aware of these benefits or simply take them for granted. Conscious efforts are required to promote regulatory transparency.

How to make “relevant” information available to foreign investors

Question 2: What information pertaining to investment measures is made “readily available”, or “available” upon request to foreign investors?

Ideally foreign investors should be able to obtain easily meaningful information on all the regulatory measures which may materially affect their investments. Investment measures may include laws, regulations, international agreements, administrative practices/rulings, judicial decisions and/or policies. Their sheer number and increased complexity and the potentially broad ramifications of business operations, however, may not always make this possible. It is nevertheless in governments’ interests to provide “essential” information on how “to get a business started” and “operate it effectively”. Recent trends in government practices, international co-operative instruments, business circles, and independent analysis converge to suggest that foreign investors need to be informed, inter alia, about ownership and exchange control restrictions, administrative requirements, taxation, investment incentives, monopolies and concessions, access to local finance, intellectual property protection and competition policy as well as environmental and social requirements and corporate responsibilities.
Framework for Investment Policy Transparency (cont.)

Question 3: What are the legal requirements for making this information "public"? Do these requirements apply to primary and secondary legislation? Do they apply to both the national and sub-national levels? Is this information also made available to foreign investors in their countries of origin?

Legal requirements may derive from several sources (the constitution, laws and regulations, delegated regulatory powers...). They may also originate from public authorities at various levels of governments (central/federal, provincial, regional, municipalities). Moreover, it is not unusual nowadays for governments to take “pro-active” steps to inform foreign investors (including in their home countries) about prevailing investment conditions.

Question 4: Are exceptions/qualifications to making information available clearly defined and delimited?

The most common exceptions/qualifications to transparency are protection of confidential information or commercial interests, national security and public order, and pursuit of monetary and exchange rate policies. Special care should be given, however, to limit their application to the minimum extent possible and ensure that they are used within their legitimate purposes.

Publication avenues and tools

Question 5: What are the main vehicles of information on investment measures of interest to foreign investors? What may determine the choice of publication avenues? What efforts are made to simplify the dissemination of this information?

While culture and traditions and institutional capacity play a determinant role, there are various means of communicating regulatory information to foreign investors (official gazettes, communications by government departments or regulatory agencies, government websites, formal and informal contacts). Better public governance, new regulatory tools and technologies are contributing to a more effective and simpler communication on public policy between governments and stakeholders.
Framework for Investment Policy Transparency (cont.)

Question 6: Is this information centralised? Is it couched in layman’s terms? In English or another language? What is the role of Internet in disseminating essential/relevant information to foreign investors?

This may be done through national investment promotion agencies, special websites, online compendiums, and e-gateways, special publications, etc. Even in this modern age, however, Internet is not an end in itself or automatic. It is a rapidly changing technology and environment, and for the information to remain “fresh”, it must where feasible be collected and up-dated on a regular basis.

Question 7: Have special enquiry points been created? Can investment promotion agencies fulfil this role?

Because foreign investors may be in a disadvantageous position in comparison to national investors in understanding the domestic regulatory framework, they are bound to profit from special measures to make key information easily accessible and understandable to them.

Question 8: How much transparency is achieved via international agreements or by international organisations?

Transparency requirements under international agreements can provide a valuable source of information on domestic investment regulatory frameworks. Adhering governments may be called upon to notify regulatory changes, respond to special inquiries or requests for consultations, or subject themselves to peer reviews. International secretariats may also undertake their own studies on country policies.

Prior notification and consultation

Question 9: Are foreign investors normally notified and consulted in advance of the purpose and nature of regulatory changes of interest to them? What are the main avenues? Are these avenues available to all stakeholders?

Involving foreign investors and other stakeholders in the process of relevant regulatory changes can contribute to the legitimacy and effectiveness of the new regulatory investment measures. Allowing feedback through prior notification and consultation prior to actual decisions can help public authorities to devise better regulations and build support for compliance. Various notification and consultation avenues can be used. In addition to statutory notification or consultation requirements, governments may also take advantage of regular contacts with business associations or advice from business advisory bodies.
Framework for Investment Policy Transparency (cont.)

Question 10: Are the notice and comment procedures codified?
Do they provide for timely opportunities for comment by foreign investors and accountability on how their comments are to be handled?

Better results are normally achieved when procedures are timely, transparent, open and accessible to all investors.

Question 11: Are exceptions to openness and accessibility to procedures clearly defined and delimited?

Procedural transparency

Question 12: What are the available means for informing and assisting foreign investors in obtaining the necessary licensing, permits, registration or other formalities? What recourse is made to “silent and consent” clauses or “a posteriori” verification procedures?

Registration, authorisation or permit formalities can impose large costs on business, both in time and money. These formalities may also be a source of administrative discretion, red tape and corruption. Every possible effort should thus be made to lighten the burden on business. It is important that they be administered in a transparent, uniform, impartial and reasonably speedy manner.

Question 13: What are foreign investors’ legal rights in regard to administrative decisions?

Procedural transparency also implies a right to complain or appeal and the existence of prompt and impartial review and remedies. This may involve providing a clear description or other necessary explanation of the administrative requirements, statutory delays for rendering decisions and the possibility of presenting additional facts and arguments.

Question 14: To what extent “one-stop” shops may assist foreign investors fulfil administrative requirements?

Administration simplification and reduction programme, “one-stop” service shops and application of new technology may be additional means to enhance procedural transparency.
Notes

1. Thirty OECD members and 8 eight non-members: Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania and Slovenia.


3. For example, the new French Government Agency for International Investment provides key information for doing business in France including setting up (formalities, legal structure, partnerships and commercial real estate), taxation employment and financial assistance (investment and job creation, innovation, training activities, incentives overview). See www.affi.fr, KISC, Korea's Investment Promotion Agency, as part of its services as a one-stop window, provides foreign investors with key information about Korean foreign investment regimes, including investment procedures, tax incentives, foreign investment zones, labour and industrial complexes for the exclusive use of foreign investors. Moreover, all procedures pertaining to the investment process from investment registration to factory establishment can be initiated through KISC. See www.kotra.co.kr

4. Adherents to the OECD Declaration on International Investment and Multinational Enterprises are under the obligation to notify their exceptions to national treatment after establishment. These are classified under five main categories: investment by established foreign-controlled enterprises, official aids and subsidies, tax regulations, access to local bank credit and the capital market, government procurement. These measures may include general authorisation or licensing requirements, limitations or acquisition or expansion of activities, ceilings on foreign ownership, grants or financial assistance for specific activities, higher or special taxes, public works projects reserved to local firms, etc. Peer reviews conducted under the Declaration may also examine national foreign exchange regulations, the companies’ law, employment and labour relations, intellectual property rights protection, competition law, money laundering, anti-corruption measures, international commitments, national security and public order measures, monopolies and concessions.

5. The World Bank Group is an important source of information about developing countries’ legal and regulatory environments. Its Foreign Investment Advisory Service (FIAS) undertakes diagnostic studies to identify a country’s main policy impediments to productive foreign direct investment. The issues typically identified include prohibitions on foreign investment in many sectors or locations; restrictions on the share of foreign ownership in the equity of domestic companies;
difficult administrative approval processes; restrictions on repatriation of dividends and capital; taxes; the character and functioning of legal systems; and problems foreign firms have in gaining access to land and bringing in technical and managerial staff. www.fias.net/services.html

In the context of the preparation of the yearly World Investment Report, UNCTAD prepares, on an annual basis, an inventory of new regulatory changes relating to foreign direct investment with the assistance of member governments. The information sought, preferably in English, pertains to eight broad categories of measures: foreign ownership, sectoral restrictions, approval procedures, operational conditions, foreign exchange, promotion (including incentives), guarantees, and corporate regulations. Special themes (such as privatisation, intellectual property) may be examined in greater depth. Legal sources of the policy changes have also been compiled.

6. BIAC and the International Chamber of Commerce have recently underlined that all national provisions affecting rights of entry and post-investment operations such as sectors restricted to domestic investors, conditions applying to joint ventures, and taxation should be made publicly available. See ICC Policy Statement regarding a WTO investment agreement, Document 103/234 rev. 7 Final EN, 7 March 2003.

7. In the area of foreign direct investment, the Heritage Foundation’s Economic Freedom index focuses on foreign investment codes, restrictions on foreign ownership of business, restrictions on the industries and companies open to foreign investors, restrictions on performance to companies, foreign ownership of land, equal treatment under the law for both foreign and domestic companies, restrictions on repatriation of earnings, and availability of local finance. See www.heritage.org/research/features/index/2002/
Public Sector Transparency and the International Investor

www.oecd.org