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International Investment Perspectives

Chapter 4

Special Focus: Transparency and Investment

Among OECD countries and beyond a consensus is developing about the importance of public sector transparency. Above all, transparency is an essential ingredient for effective public policy and sustainable growth. In the specific context of international investment, transparency of the rules guiding cross-border transactions, including the provisions laid down in international investment treaties, is of obvious importance for investors. But the issues involved are much broader. The overall level of public sector transparency in host countries – whether linked with the rule of law, procedural fairness, integrity and public involvement in the political process – is recognised as one of the key factors that make investors, foreign and domestic alike, decide where, and whether, to invest. This special focus sheds light on these issues, drawing on the experiences from individual OECD member countries and in the context of international investment instruments. The articles are the following:

- *The benefits of public sector transparency for investment and beyond.*
- *Investment policy transparency in OECD countries.*
- *Foreign direct investment in professional services: making regulation more transparent.*

*The Benefits of Public Sector Transparency for Investment and Beyond**

1. Introduction

> ***(I)nstrumental freedoms contribute, directly or indirectly, to the overall freedom people have to live the way they would like to live... Transparency guarantees can be an important category of instrumental freedom. These guarantees have a clear instrumental role in preventing corruption, financial irresponsibility and underhand dealings.***
>
> ***Development as Freedom, Amartya Sen 1999 (pages 38, 40)***

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

Practitioners in many policy fields recognise the importance of transparency.[1] 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,[2] which also notes that developing countries

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might benefit from capacity building to help them meet possible new transparency commitments.[3] In the context of post-Doha work in Geneva, the WTO Secretariat and delegations[4] have issued discussion papers on issues and options for possible approaches to transparency provisions in a multilateral framework on investment. According to a recent summary,[5] the focus of transparency discussions in the WTO is "not primarily on the benefits of transparency, but on the nature and the depth of transparency provisions and on the scope of their application (page 5)". The summary notes some countries' concerns about possible infringement of national sovereignty and about whether the "administrative costs of possible obligations could outweigh any benefits in terms of attracting foreign investors (page 8)".

This 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.[6] 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.[7] Thus, if countries want to attract more and higher quality investment, then fostering a fair, open and accountable policy environment should be a high priority.

The current 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.

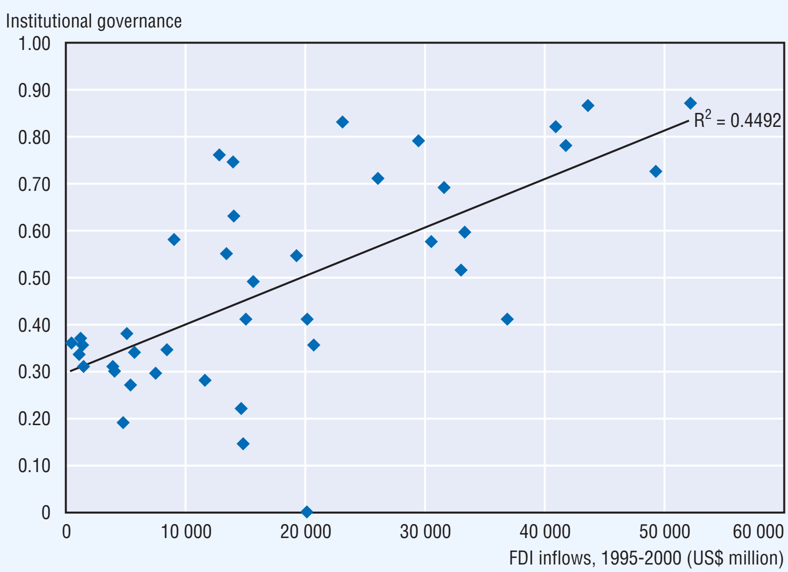
This article addresses the following questions:

- 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)?

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**



Source: OECD 2002c, page 180.

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 holder fewer assets in less transparent markets. They also find that transparency reduces "herding" of fund managers' investment decisions. Herding is a theoretical concept describing the tendency of investors to make decisions based on what they see other investors doing. If found to exist in real markets, such behaviour could point (among other things) to imperfect distribution of information (that is, some investors are better informed than others). This implies that investment decisions are not being made on a fully informed basis and, therefore, that improved transparency could improve the quality of investment decisions.

- How is the concept of transparency used in various policy areas? How does the international investment policy community define the term?
- What is the role of the international investment community in promoting transparency in public policy? How does its role fit with the broader effort to enhance public sector transparency?
- What is known about current transparency policies and practices?
- What institutional and economic resources are needed to sustain transparent governments? What resources and capacities are needed to sustain transparent investment policies?
- Where might capacity building support greater transparency in the investment policies of developing countries? What are the limits to capacity building?

The 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.[8] 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.[9] 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.[10]

2.2. Governments as impediments to development

There is, however, a less flattering perspective on government activity. OECD assessments of policy experience[11] 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

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).

project, two monetary policy theorists, the World Trade Organisation and a glossary of political science terms. Some concepts focus on basic elements of public sector transparency – for example, the public and timely availability of information about legislation, regulation and other public measures that affect business behaviour. Others deal with the broader objective of transparency – governments' "openness to the public gaze" or successful "communication of policymakers' intentions".

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

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

Table 1. **Transparency provisions mentioned in international agreements dealing with investment**[1]

Name of Agreement	Draft MAI	OECD Declaration	GATS	NAFTA	German model BIT	US model BIT	APEC standard[2]	OECD Codes
Selected objects subject to specific transparency provisions[3]								
Laws, regulations, international agreements, administrative practices/rulings, judicial decisions and/or policies, etc.	X	X	X	X		X	X	
Exceptions to most favoured nation			X	X		X		X
Exceptions to national treatment	X	X	X	X		X		X
Investment incentives	X	X		X				
Procedures for applying for authorisations/permits/ licenses	X		X	X				
Monopolies and concessions	X		X	X				
Privatisation	X							
Expropriation and compensation	X			X	X	X		
Selected mechanisms in support of transparency								
Timely publication of measures	X		X	X		X	X	
Establish enquiry points		X	X	X				
Peer review		X						X
Notification and/or reporting to other Parties and/or IOs	X	X	X	X			X	X
Prior consultation or other forms of participation (*e.g.* opportunities for comment)				X[4]			X	
Party/IO can request consultations	X	X	X	X		X		X
Recourse for private actors[5] (conciliation, mediation, arbitration, courts, etc.)	X	X	X	X	X	X	X	

Table 1. **Transparency provisions mentioned in international agreements dealing with investment**[1] *(cont.)*

Name of Agreement	Draft MAI	OECD Declaration	GATS	NAFTA	German model BIT	US model BIT	APEC standard[2]	OECD Codes
Selected exceptions/ qualifications to transparency obligations[6]								
Protection of confidential information and/or commercial interests	X		X	X			X	
Security and emergencies	X		X	X		X		X
Public order/public morals/law enforcement	X		X	X			X	X
Pursuit of monetary or exchange rate policies	X							

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

Source: Compiled by OECD Secretariat.

- 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 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

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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

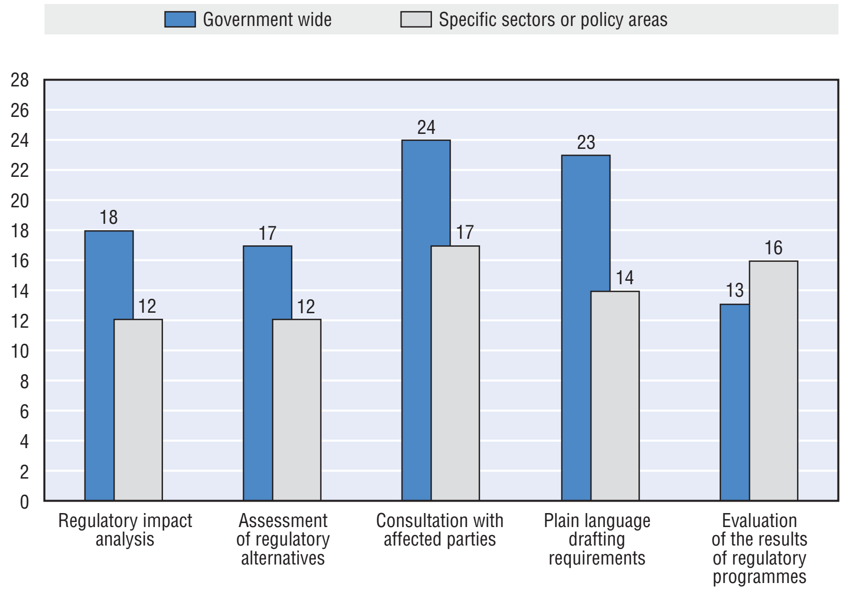
This section reviews what is known about transparency practices and performance. It suggests that, despite signs of progress, there is still considerable room for improving transparency policies and practices.

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:

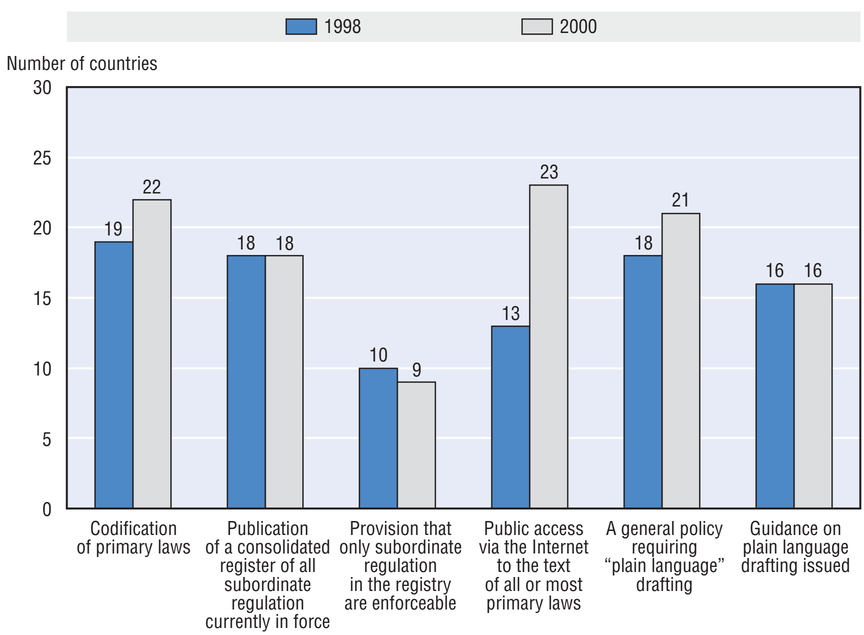
- *Consultation with interested parties*. The widespread use of consultations reflects a growing recognition that effective rules cannot rely solely on command and control – the individuals and organisations covered by rules need to be recruited as partners in their implementation. Consultation is the 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**



Source: OECD (2002a), PUMA.

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



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.[15] The Doha Declaration notes that capacity building would help developing countries to implement possible new transparency obligations and approaches to capacity building.[16] OECD experience suggests

Table 2. **Regulatory transparency problems in 12 OECD countries**

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

Table 2. **Regulatory transparency problems in 12 OECD countries** *(cont.)*

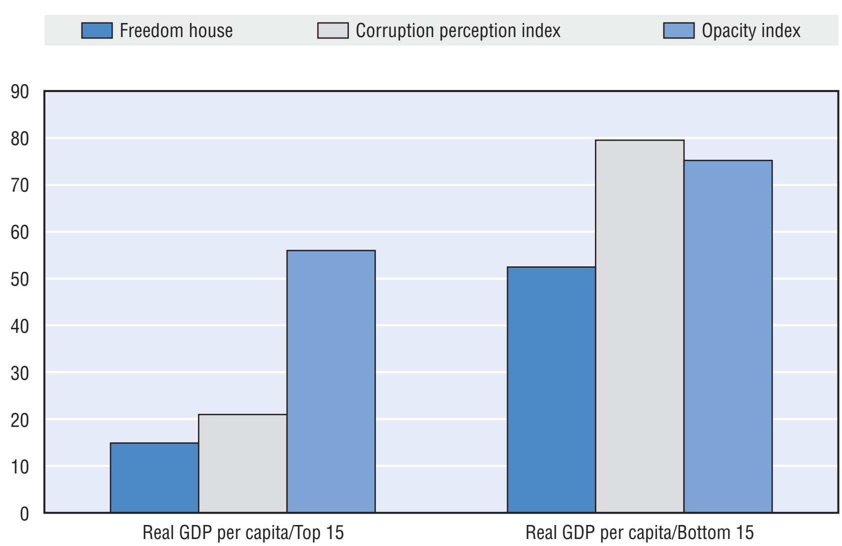
Transparency problem	OECD recommendation	No. of countries with problem
Inadequate use of international standards	Encourage the use of international standards government-wide, and track the use of uniquely national standards	4
Lack of clear standards in licensing and concessions decisions, such as in telecommunications	Reduce the use of concessions and licences to the extent possible by moving to generalised regulation, announce clear criteria for decisions on concessions and licenses, use public consultation for changes in existing licenses and concessions	7
Decisions of independent regulators not transparent enough	Apply RIA to independent regulators, ensure that independent regulators also use public consultation processes with regulated and user groups	5

Source: OECD 2002a.

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**



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

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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.
5. See the "Report (2002) of the Working Group on the Relationship between Trade and Investment". WT/WGTI/6. December 19, 2002.
6. The communication from the European Community and its member States (WT/WGTI/W/110) "Concept Paper on Transparency" states: "*The TN SOFRES Business Survey conducted for the EC Commission in April 2000 among some of the biggest EU companies showed that lack of transparency on local legislation and rules was considered the most frequent hindrance to investment by 71 per cent of the companies*." Likewise, the communication from Japan (WT/WGTI/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.
9. See North (1990).
10. Some of these rules systems facilitate the emergence of more advanced business organisations and more complex forms of contracting (*e.g.* limited liability companies, franchises, multi-divisional companies, and investment in intangible assets). For example, laws underpinning limited liability are essential parts of the rules framework that supports advanced market economies. Governments –

broadly defined to include legislative, judicial and political processes – were the main organisational channels through which this path breaking innovation was developed. Jepperson and Myer (1991).

11. See OECD (2002a).
12. See, for example, OECD 2002a, page 24 for recommendations on regulatory governance, including on regulatory transparency. See also the APEC Leaders' Statement to Implement APEC Transparency Standards (2002) and the International Monetary Fund Code of Good Practices on Fiscal Transparency (1998) and the OECD Best Practices for Budget Transparency (OECD 2000b).
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.[1] 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[2] and Monterrey[3] 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

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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 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.[4] Other related work has examined the role of the state in good governance and accountability[5] and the contribution of new communications technologies to better government (the so called e-government).[6] 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.[7]

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.[8] 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

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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.[12]

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.[13] 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.[14]

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.[15] Sector-specific transparency obligations can be found in the WTO telecommunications Reference Paper[16] 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.[17]

A number of observers are of the opinion,[18] 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.[19]

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[20] 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.[21] 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[22] "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[23] 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)[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[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[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,

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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"[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.[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.[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.[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.[37] 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 is 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 custom 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.[38] 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.[39]

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

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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 of 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.[40] 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".[41] 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".
3. See paragraph 21 of the United Nations Report of the International Conference on Financing for Development held in Monterrey, Mexico in September 2002 (*http://ods-dds-ny.un.org/doc/UNDOC/GEN/N02/392/67/PDF/N0239267.pdf?OpenElement*
4. See *Regulatory Policies in OECD countries: From Interventionism to Regulatory Governance*, OECD, 2002.
5. See *Public Sector Transparency and Accountability: Making It Happen,* OECD, 2002.
6. See *OECD E-Government Studies: The E-Government Imperative*, OECD, 2003.
7. See *Integrating Market Openness into the Regulatory Process: Emerging Patterns in OECD countries* [TD/TC/WP(2002)25/FINAL].
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/EN/document/0,,EN-document-9-nodirectorate-no-6-16767-9,00.html#title1*
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"

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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 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/EN/document/0,,EN-document-9-nodirectorate-no-6-16767-9,00.html#title1*
27. See Annex IV, *OECD Regulatory Policies in OECD Countries*, 2002.
28. See in particular, *Trade in Services, Transparency in Domestic Regulation: Prior Consultation,* TD/TC/WP(2000)31/Final.
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

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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.

32. See the last Report of the Working Party on Domestic Regulation to the Council for Trade in Services of 6 December 2002 (S/WPDR)4.

33. See WT/WFTI/6, Report (2002) of the Working Group on the Relationship between Trade and Investment to General Council.

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."

36. See Trade Facts, *www.ustr.gov*.

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.

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*Foreign Direct Investment in Professional Services: Making National Regulation More Transparent**

Services industries play an important role both in developed and developing markets, accounting for a large and growing share of economic output and employment. Although developed economies continue to account for the lion's share of the world market for services, developing countries' participation in this market has increased in recent years, due in part to the new cross-border delivery options made possible by innovations in information and communications technology. Data also indicate that developing countries host and increasing share of FDI stock in the services industries, even though the OECD area accounts for the majority of implantations of foreign firms in the services sector.

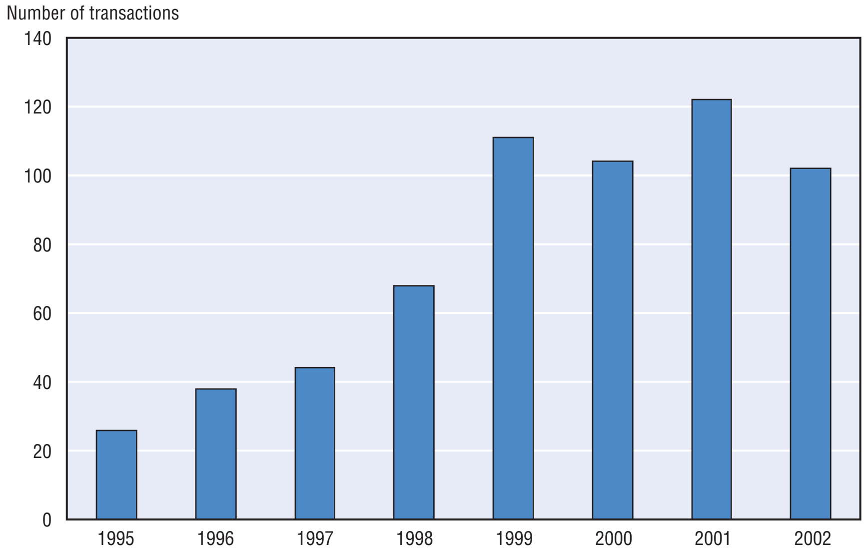
Professional services are among the most rapidly growing economic activities in the services area. Internationalisation is a marked trend, driven *inter alia* by increased demand resulting from expanding foreign direct investment and establishment in other sectors of the economy. In this context, firms providing accountancy, legal or other professional services to major domestic clients find it increasingly important to follow these clients in their ventures abroad by establishing a commercial presence in foreign markets.

1. Trends in cross-border investment

Figure 4 endeavours to reflect this growth of international investment in professional services through charting the number of cross-border mergers and acquisitions[1] (M&As) which took place in these services sectors within the OECD area 1995–2002. A rapid growth in the number of transactions during most of the past decade is clearly demonstrated. Moreover, a change in composition has taken place. In the mid-1990s, engineering services

* This article was prepared by Eva Thiel, Principal Administrator, Capital Movements, International Investment and Services Division, OECD, on the basis of a report by the OECD Committee on Capital Movements and Invisible Transactions presented to the OECD Council in March 2003.

Figure 4. **Cross-border M&As in professional services, OECD total**

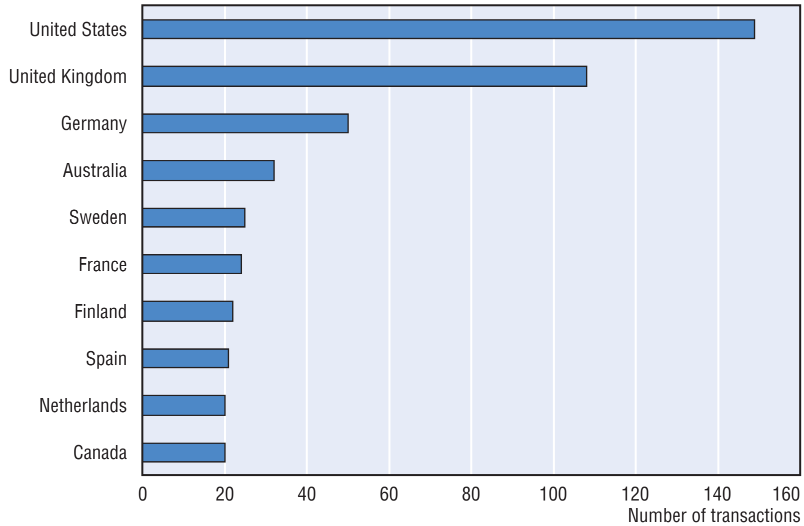


Source: Dealogic.

dominated the cross-border investment in professional services by a wide margin, but during the last five years the importance of cross-border M&As in legal and accounting services has steadily increased. However, because of the normally higher capitalisation of engineering firms than those in other categories of professional services, engineering services still dominate in terms of value of bids.

As to the major recipient countries, 10 countries recorded at least 20 cross-border transactions over the period under review (Figure 5). However, by far the largest recipients (and to a lesser extent also originating countries) were the United States and United Kingdom. It is not possible to conclude in a straight-forward manner that those two necessarily operate the most liberal regulatory framework for inward FDI in professional services. Many other factors may account for the position of a recipient country in a prominent position in the ranking, including the presence of major international financial centres. FDI in legal advisory and accountancy services is naturally stimulated by the wish of foreign firms to gain access to intangible assets and externalities existing *e.g.* in the financial centres in London and New York.

Figure 5. **Cross-border M&As in professional services: main 10 recipient countries, 1995-2002**



Source: Dealogic.

2. Restrictions on cross-border investment

Both international trade and investment in professional services may be hampered by a complex mixture of restrictions and regulations which are characteristic for this highly regulated sector. Foreign investment may be adversely affected by, for instance, nationality, residence or local licensing requirements or prohibitions on incorporation as well as on partnerships between foreign and locally qualified professionals. Not only do existing restrictions need to be fully transparent. The issue is also to what extent they are necessary and whether they could be replaced by measures which do not constrain foreign investment to the same degree.

OECD has been for almost a decade in the forefront of new efforts to combine more freedom for international supply of professional services with safeguarding quality of service and protection of consumers. Three OECD workshops on professional services were organised in the period 1994-1997. These brought together representatives from the business sector as well as from government, each resulting in the adoption of a concrete set of common understandings, and each building on the achievements of the previous event. The work of the OECD Trade Committee in this field developed since these workshops took place is also relevant.

The extensive analytical work carried out was intended not only as a benefit to OECD members but also as an input into the WTO work on liberalisation of professional services and to clearly recall the policy rationales for pursuing open professional services markets through liberalisation of trade and investment. Since 1995, the entry into force of the WTO General Agreement on Trade in Services (GATS) and the launch of a specific GATS mandate on professional services have further underpinned the general trend towards globalisation of the execution and delivery of professional services, for which both by internationalisation of higher education and the advent of new communications technologies are important factors.

The OECD also needs to ensure that its own legal instruments, the Codes of Liberalisation of Capital Movements and of Invisible Operations remain supportive of this trend and raise the transparency of member countries' practices regarding professional services[2]. For OECD members, these instruments provide more comprehensive liberalisation and transparency obligations than GATS provisions, through their reliance on a" "top-down" framework where all services sectors not specifically reported as containing restrictions must be considered free. Under the Code of Liberalisation of Capital Movements, member countries are obliged to grant non-discriminatory access to foreign investors wishing to provide professional services, unless they have lodged a reservation under the Code, stating the nature and extent of the restriction.

As emerged from the workshop discussions, it may not always be easy to decide whether host country rules on professional services discriminate against foreign enterprises, or whether they address a legitimate regulatory concern. Consequently, situations of doubts whether existing restrictions require a reservation or not have occasionally arisen.

Since the early 1990s, OECD has worked on developing common understandings as to what kind of regulations on professional services constitute an unjustified discrimination and therefore require a reservation under the Code. The material presented in this article results from these efforts to align and harmonise reservations to the Code with existing restrictions, with special emphasis on achieving maximum transparency through as precise wording as possible of the reservations, which are posted and regularly updated on the OECD official website.

In addition, ways and means to advance regulatory reform in the professional services sector are discussed in the article, including alternative, less burdensome approaches to restrictions on investment which members were encouraged to consider.

The restrictions to inward direct investment and the right of establishment examined concern accounting, legal, engineering and architectural services.[3] The review is based on an inventory of measures, which was prepared for the workshops, as well as on supplementary information provided by member countries.

The Code does not contain a precise definition of accounting, legal, engineering and architectural services. It has therefore been left to individual member countries to take account of their national laws and regulations which define the scope of activities that fall under a specific category of service, while aiming at the same time to harmonise the text of their reservations as much as possible with those of other member countries.

Section III of the present article examines the scope of member countries' obligations regarding professional services under the so-called Item I/A ("Direct Investment and Establishment") of the Capital Movements Code and provides comments on member countries' current measures and position under the Code. Section IV considers motivations underlying restrictions and suggests alternative, less restrictive approaches. A list of OECD members' current restrictions (the so-called" "reservations") under the Capital Movements Code is provided in the Annex.

3. The disciplines of the Capital Movements Code with respect to professional services

Under the Capital Movements Code, member countries have legally binding obligations to notify OECD of any existing restrictions affecting direct investment in the professional services sector, to apply any measures without discrimination among OECD countries[4] and to abstain from applying restrictions not covered by a reservation to Item I/A." "Liberalisation" in the Codes means the abolition of measures (laws, decrees, regulations, policies and practices) taken by the authorities which may restrict the conclusion or execution of transactions and transfers with respect to the operations specified in the Codes. The liberalisation obligations apply only to operations between the residents of OECD member countries adhering to the Codes.

3.1. Nationality requirements

Nationality requirements discriminate against non-resident investors. They constitute restrictions calling for reservations under Item I/A to the extent that they apply to ownership of a professional services enterprise. Since Item I/A only applies where professionals are able to establish a firm with legal personality (or constituting an enterprise, or a subsidiary or branch of an enterprise having legal personality abroad), nationality requirements applying to the establishment of individuals as self-employed persons are not covered.[5] For the purposes of this study, it has been assumed that partnerships between individual professionals would normally not constitute an enterprise. As a consequence, nationality requirements in sectors where incorporation is not permitted would not give rise to reservations. member countries are, however, invited to provide any clarification on the legal status of partnerships under their national laws which might qualify them as" "enterprises" within the meaning of Item I/A.

Should the possibility to incorporate become available in the future in any country for professions where this is not the case at present, Item I/A would begin to apply. Any nationality or residence requirements maintained would then have to be notified and appropriately reflected in reservations under the Code.

In a majority of cases, the nationality requirement is not imposed as a direct condition of ownership, but as a condition to obtain a local licence which, in turn, is necessary to own or hold shares in a professional services firm. Since, however, the effect of such restrictions is to prevent all foreign nationals from owning or establishing a professional services firm, they should require the lodging of a reservation to Item I/A as well. This is also consistent with the treatment of nationality requirements affecting cross-border professional services. Where holding participations, including a controlling position, in a professional services firm is permitted for non-professionals or foreign-licensed professionals, a nationality requirement as a condition (whether imposed on employees or shareholders of the firm who want to practice as active professionals) for obtaining a local license would be irrelevant to Item I/A.

It is possible, however, that nationality requirements applying to directors and senior management of a professional services firm might have an inhibiting effect on the establishment of a firm by non-residents. Again, such requirements may apply directly or indirectly by requiring a local license which is reserved to nationals. The Committee has agreed that the question of whether such restrictions have a decisive effect on investment has to be examined on a case-by-case basis.

Where professional services are exclusively supplied by government bodies – so that neither foreign nor national firms can establish in that particular sector – any nationality conditions are irrelevant.

The examinations carried out during the workshops showed that a considerable number of OECD countries maintain nationality and/or local presence requirements for one or several professions which affect foreign investors.

In general, nationality and citizenship requirements are not uncommon in the accountancy and legal field, while they affect engineering and architecture only in very few member countries. Considering all professions together, eleven out of the 30 OECD members maintain nationality

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requirements, which are, with very few exceptions, imposed either as a condition for obtaining a local licence or, for use of the local title.

However, not all of these nationality conditions are relevant to investment as covered by Item I/A of the Code. As mentioned above, where the establishment of an enterprise is prohibited in one or more of the professions concerned, the nationality requirement is irrelevant to Item I/A. Where the nationality requirement pertains only to use of the local professional title, this is only considered a restriction on investment, if holding such a title is also required for ownership of incorporated professional firms. In some cases, however, a nationality requirement may be linked to the local licence, but such a licence is not always required for ownership of a firm by non-nationals.

As a result, the number of members lodging reservations to Item I/A on account of nationality or citizenship requirements maintained for certain professions was reduced to seven (Austria, Belgium, Finland, Greece, Mexico, Spain and Turkey – see Annex). In a majority of cases, only one profession – either accountants or lawyers – was concerned. Sometimes, the requirement for investors to hold a local licence reserved to nationals of the host country only applies to firms wishing to provide certain regulated services within the profession, such as auditing of public companies, or court representation.

3.2. Local presence requirements

Residence and other local presence requirements may be relevant to Item I/A to the extent that they concern shareholders of a firm, or directors and senior management. Where non-residents may not hold shares in a professional services firm, whether this is the result of a residency requirement linked to a local licence or not, this should give rise to a reservation to Item I/A as in the case of nationality requirements. Again, the requirement of a local presence matters solely if it prevents ownership of an enterprise by non-residents, irrespective of whether, at the same time, it prevents cross-border supply of professional services.

With regard to residency requirements for directors and senior management, the Committee considered that they constitute a less burdensome regulatory alternative rather than an outright restriction. Indeed, imposing such a condition might allow regulators to avoid restrictions on incorporation or foreign ownership. In addition, since such requirements often tend to apply horizontally rather than being specific to the professional services sector, it was found more appropriate for the purposes of the review not to consider them as restrictions under the Capital Movements Code.

In some instances, the residency requirement is replaced by the obligation to appoint a local representative, or, as regards locally licensed professionals, to provide a professional address. Since this will not necessarily require the shareholder in a professional firm to become a resident of the host country, it was proposed that such conditions should not give rise to reservations.

As in the case of nationality requirements, residency requirements would not give rise to reservations where they can only affect natural persons, *i.e.* where legal persons may not establish or invest at all in the sector concerned. Should incorporation, however, become available as a form of business in the future, Item I/A would begin to apply to residency requirements for shareholders and the lodging of reservations might become necessary.

While almost all OECD member countries impose local presence requirements for one or more of the four professions, with auditing and legal services coming in first and second by a considerable margin, their relevance to Item I/A is often cancelled out by the fact that establishment of an enterprise is prohibited in the relevant sector for both domestic and foreign service providers. Thus, they imply reservations to Item I/A less frequently than they do with respect to cross-border supply of services under Item L/6 of the Invisibles Code.

As in the case of nationality requirements, residency requirements in virtually all cases tend to be attached to a local professional licence which in turn is needed for ownership. In some countries, a professional licence is subject to both nationality and local presence conditions. In this case, a local presence requirement is not relevant to foreign investors, since they are already precluded from market access by virtue of their nationality. It may, however, become relevant to Item I/A in the future once the member countries concerned decide to abolish their nationality requirements.

Once account is taken of all the considerations above – local presence requirement in the absence of a nationality requirement, licence required for ownership and incorporation permitted – only four countries maintain a local presence requirement restricting non-residents from ownership of a professional firm and requiring a reservation to Item I/A (Denmark, Finland, Norway and Sweden – see Annex). Of these, one case concerns the accountancy sector, and the three others both the accountancy and legal sectors.

As mentioned before, some countries have replaced traditional local presence requirements for professionals by less burdensome requirements, such as the registry of a professional address in France. In other countries, the license required for ownership is subject to maintaining an office in the host country, without requiring the licensee to be personally resident. Such conditions are easy to fulfil for foreign-based owners of professional firms,

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since the establishment of a firm per se implies the maintenance of an office and a professional address

3.3. Restrictions on form of business

Are restrictions on the form of business relevant to Item I/A of the Capital Movements Code? The Committee has in the past taken the position that they are when dealing with an obligation to incorporate (as opposed to permitting branching), even if applied to residents and non-residents alike. Its rationale was that such obligations required non-resident investors to engage in a second incorporation, and thus placed a heavier burden on them as compared to residents.

In the professional services sector, we are, however, dealing almost exclusively with the opposite case: Professionals are either not allowed to incorporate at all, or restricted to certain forms of incorporation. This condition is in general applied in a non-discriminatory manner to nationals and foreigners alike. It has, however, the potential to affect foreign firms' access to the market since it restricts their ability to establish subsidiaries and branches and may also prevent foreign firms from conducting business using the parent practice's name. This applies in particular where no incorporation at all is permitted.

The case for arguing that this results in discrimination between resident and non-resident investors requiring a reservation to Item I/A appears, however, less strong than with regard to the obligation to incorporate mentioned above. Its discriminatory effects on foreign firms are more uncertain and will depend on the circumstances of each case. Where restrictions on incorporation affect foreign firms' business opportunities to the point that they can be considered as *de facto* restrictions, it is possible that Article 16 of the Code could be invoked, particularly if no incorporation at all is permitted. (Article 16 provides that action may be taken" "[i]f a member considers that the measures of liberalisation taken or maintained by another member… are frustrated by internal arrangements likely to restrict the possibility of effecting transactions or transfers, and if it considers itself prejudiced by such arrangements".)

Although non-discriminatory prohibitions on incorporation do not require reservations to Item I/A, they were nevertheless recorded during the examinations, for their role in indicating in which countries and sectors investment in professional services is excluded in practice.

It was found that accountants are not allowed to incorporate in eight member countries (Australia, most provinces of Canada, Ireland, Italy, Japan, Portugal, New Zealand and some US states), with the prohibition applying, in general, to accountants carrying out statutory audit. A substantial number of member countries likewise prohibit incorporation for the purpose of providing full legal services (nine, but not all the same as for accountants). Only three members (Canada, Italy and Portugal) exclude incorporation for architects and/or engineers.

Among those countries permitting professionals to establish an enterprise, many restrict the forms of incorporation available. The full range of business forms is available to accountants, including auditors, in five member countries only (see Annex). With regard to lawyers, four members reported that no legal restrictions exist on the form of business (on condition, in two cases, that the local title is not used). An overwhelming majority of OECD member countries permit all legal forms of business for the establishment of engineering and architect firms.

3.4. Local licensing requirements

Licensing requirements may include an obligation for owners of professional firms to hold local qualifications, even if they do not wish to practice in the host country. These requirements are nevertheless considered consistent with the disciplines of Item I/A provided that they do not discriminate against non-resident suppliers.

Where access to a local license is relatively easy for foreign professionals, for instance through recognition of their home country professional qualifications, they may suffer little or no *de facto* restriction on their ability to hold participation in a local firm. At the opposite end of the scale, licensing requirements that amount to a full retraining obligation for foreigners may *de facto* almost entirely prevent ownership of local firms by foreign professionals. Particularly in the case of foreign professionals not wishing to practice in the host country, few would consider it reasonable to retrain for years in order to be able to hold shares or participations in a locally established firm. This may unfairly reduce their business opportunities in the host country. Such restrictions, while not requiring reservations, may therefore entitle a member country to invoke the disciplines of Article 16 of the Code.

Measures by self-regulatory organisations affecting investment should be recorded as restrictions under the Code, provided these organisations are acting under delegated authority from the government. The reason is that, in this case, they can be considered as measures by the government itself. In the professional services field, it is not uncommon that professional organisations or associations, including privately controlled entities, are authorised to design regulations. Cases may arise where such entities deny equal market access conditions to foreigners or non-residents. It may also occur that governments require membership of a given local professional association as a condition of ownership of a professional services firm. Where, in such cases,

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membership may be denied by the association concerned on nationality or residence grounds, this should be regarded as a restriction under the Code.

Almost all OECD member countries require a local professional licence for shareholders in an accounting or law firm, while only a minority do so for engineering and architects' firms. In most cases these requirements are non-discriminatory and based on objective criteria. A few members permit minority shareholding by foreign professionals in an accountancy firm, while a somewhat larger number allow minority shareholding by non-professionals.

As noted above, the requirement of a local licence may have a very dissuasive effect on foreign investors. Where years of retraining are needed for the sole purpose of owning shares in a professional firm, without necessarily intending to practice, few will find it worthwhile. Whether it makes economic sense for foreign investors to acquire a licence will depend on factors such as the availability of systems for the recognition of their home country qualification, of simplified aptitude tests, short periods of complementary training etc. While OECD member countries have reported during the workshops a growing trend towards the introduction of such facilities, it would go beyond the scope of this article to review in detail existing possibilities for the recognition of foreign professionals.

3.5. Discrimination among OECD member countries

Discrimination among OECD member countries is contrary to Article 9 of the Code. Article 10 provides an exception for special customs or monetary systems. So far, only the Belgium-Luxembourg Economic Union and the European Community have been recognised as special systems under Article 10. In other instances (NAFTA, EEA) differential treatment among OECD member countries has not been determined to be consistent with the provisions of the Code and is thus not reflected in reservations to the obligations of the Code. This also applies where discrimination is based on reciprocity considerations.

Selective recognition agreements can, in principle, be relevant to Item I/A in those cases where establishment and ownership of a firm require a professional licence. However, such agreements mostly establish conditions under which discrimination is based on objective technical criteria. In these circumstances, they would be compatible with the Code's non-discrimination provisions.

Where, however, recognition agreements include nationality or residency criteria for the professional, rather than quality assessments with regard to degrees or qualifications obtained, such requirements constitute potential violations of the non-discrimination principle of Article 9 of the Code. In these cases, the host member country concerned should stand ready to afford third

OECD countries adequate opportunity to demonstrate that comparable circumstances exist for similar recognition of their licensing requirements, degrees, etc. Recognition relying on the country of acquisition of licenses, degrees, or working experiences per se would be susceptible of a similar interpretation.

Thus, as a general rule, discrimination among OECD countries should be removed from professional services regulations, with the only exceptions being those permitted under Article 10 of the Code.

Several EU member countries have reported nationality or residency requirements for one or more professions which only apply to nationals of non-EU countries, thus giving rise to reservations to Item I/A with an EU preference (Austria, Belgium, Denmark, Finland, Greece, Spain and Sweden). In some cases (Italy and Portugal) these restrictions fall outside the scope of Item I/A since incorporation in the profession concerned is prohibited in the relevant EU member.

Finally, reciprocity conditions apply in a number of OECD member countries. The Committee has not yet adopted a common stand regarding reciprocity measures under the Capital Movements Code (other than those listed in Annex E to the Code).

3.6. Measures by sub-national units of government

Measures by sub-national units of government – which are frequent in the professional services sector – are subject to the full disciplines of the Code, except for measures taken by the States in the United States (by virtue of Annex C to the Code). Canada's obligations regarding measures by her provinces are defined by a General Remark in Annex B. Australia maintains a full reservation to Item I/A regarding measures by its states and territories.

All three members have reported restrictions at sub-federal level. In Australia, these concern only restrictions in the legal services sector on forms of business and licensing requirements. In Canada, most provincial authorities prohibit incorporation for accountants and lawyers or require residency for licensed shareholders. In the United States, some states do not allow for ownership of accounting, architectural engineering or law firms by unlicensed individuals. Foreign nationals may be admitted to practice as foreign legal consultants in 24 jurisdictions, in accordance with special provisions. Additionally, in Switzerland, nationality requirements are imposed by some cantons on lawyers.

4. Motivations for restrictions and alternative approaches

The main concern behind restrictions regarding the ownership of professional services firms is to protect consumers and the public interest

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more generally. In this context, *nationality requirements* appear to be on the retreat, with a number of countries no longer considering that they could be reliable indicators for concerns about local knowledge.

Proponents of the *prohibition of incorporation* are reported to be concerned that establishment as a joint stock company, a limited liability company, etc., may reduce the accountability of professional service suppliers *vis-à-vis* their clients by limiting personal liability in case of professional fault or malpractice. The need for excluding non-professionals from ownership and control of a firm providing professional services may be motivated by fears that this could threaten the independence and integrity of the professional services supplied. The requirement for investors to hold a *local licence* is said to ensure that the firm respects rules and other conditions in the host market, and that services are rendered with the necessary competence expected by the public in the host country. *Residency requirements* for shareholders in a professional services firm probably affect the latter only incidentally as an element of local licensing requirements; considerations such as the need to enforce ethical rules and codes of conduct have been expressed with regard to professional practice, rather than with regard to ownership not involving the personal exercise of the profession.

Participants in the Third OECD Workshop on Professional Services discussed ways and means to advance regulatory reform in the professional services sector. This included a search for alternative, less burdensome approaches to restrictions on investment. In many instances, discussions were inspired by comparisons across the four professional fields considered, and by the positive experiences of OECD member countries which maintain more open markets for professional services while addressing adequately consumer protection and public interest concerns.

Among the approaches recommended by participants and subsequently supported by the OECD Council were the following:

- Incorporation should be permitted for professional services providers. Consumer protection concerns could be addressed through mandating minimum levels of capitalisation or professional insurance. Personal accountability of practitioners for their acts can be maintained, as can disciplinary action by professional associations.
- Non-professional investors, whatever their nationality, should be allowed to hold minority participation in firms, rather than being excluded from ownership altogether. This would still preserve professional control over the management of the enterprise, in order to ensure the quality of service and the independence of professionals with respect to outside interests. Appropriate shareholding diversification rules could be defined.

- Restrictions on investment by foreign-qualified professionals could be eased subject to adequate safeguards, such as an obligation on the foreign professional to hold membership in a recognised professional association or a requirement that at least one member of the board of directors be a locally-licensed professional.

Notes

1. Due to insufficient data availability, the figures do not include greenfield ventures in professional services. However, it can probably be assumed that mergers and acquisitions constitute the dominant form of FDI in these services sectors, both for legal and regulatory reasons (requirements for locally licensed or accredited professionals, language abilities, etc.) as well as the need to seek already established local expertise to develop in the particular field chosen.
2. For the full text and a User's Guide of the Codes, see *www.oecd.org/daf/investment* or OECD 2003 publications.
3. With regard to engineering and architectural firms, those providing consulting and advice, but not those providing construction services, are considered to fall within the professional services sector.
4. This applies unless the measures fall under the exception clause of Article 10 on preferential treatment with special customs and monetary unions.
5. However, restrictions on cross-border professional services are covered by the Current Invisibles Code.

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ANNEX 1

OECD Members' Restrictions to FDI in Professional Services Listed Under the OECD Code of Liberalisation of Capital Movements

Restrictions apply to:

Austria

- Investment by non-EC residents in accountancy services exceeding 49 per cent.
- Investment by non-EC nationals in legal services and in engineering and architectural services exceeding 49 per cent.

Belgium

- Investment by non-EC nationals in accountancy and legal services.

Denmark

- Investment in accountancy services by non-EC residents and in legal services by non-residents.

Finland

- Legal services: EC nationality and residency requirement for investment in a corporation or partnership carrying out the activities" "asianajaja" or" "advokat".
- Investment in auditing companies by non-EU residents.

Greece

- Investment by non-EC nationals in the accountancy, legal, engineering and architectural sector.

Mexico

- Investment by foreign nationals in legal services and private education services exceeding 49 per cent of equity, unless an authorisation is granted.

Norway

- Investment in the accountancy sector exceeding 49 per cent, and in the legal sector, by non residents.

Spain

- Investment originating in non-EC member countries in legal services.

Sweden

- Investment in the accountancy sector by non-EC residents exceeding 25 per cent.
- Investment in a corporation or partnership carrying out the activities of an" "advokat" by non-EC residents.

Turkey

- Investment in the accountancy sector.

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Note by the Editor

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