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Working Group on the Relationship between Trade and Investment

TRANSPARENCY

Note by the Secretariat

EXECUTIVE SUMMARY

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.

Transparency is important for two reasons in particular. First, it provides vital information to market participants about the conditions under which commercial transactions can take place, and in this respect it makes markets function more efficiently. Second, it underwrites the effectiveness and integrity of a treaty's policy rules and disciplines, by allowing a treaty participant to monitor whether other participants are meeting their legal obligations. Effective transparency typically requires that information be provided both on laws and regulations, and on procedures for their administration. The underlying premise is that the *way* rules are applied can be as significant as the *substance* of the rules themselves.

Transparency obligations in the WTO are generally more important – and more detailed – in areas where the rules of general application are weakest and where the scope for discretionary government action is greatest. In government procurement, import licensing, technical barriers to trade, and many other areas, WTO agreements lay out detailed procedural obligations to ensure that Member governments conform to accepted norms of transparency. These norms often involve concepts such as "uniform", "impartial", "reasonable" and "independent" administration, and require governments to treat all parties to the agreement in a fair and non-discriminatory way.

Transparency provisions in existing bilateral and regional investment treaties – where they exist – are generally less detailed and prescriptive than similar requirements in the WTO. A number of bilateral investment treaties (BITs) contain an obligation to make all investment-related laws publicly available – both to ensure that investment regimes are understandable and to prevent hidden or unknown laws from being used subsequently to justify discriminatory or arbitrary treatment. Certain rules of general application – such as "fair and equitable treatment" – often found in BITs have also been interpreted as requiring parties to adhere to basic norms of transparency.

This Note suggests that the policy questions that arise in the context of international investment agreements (IIAs) are less about the principle of transparency – on which all Members appear to be in agreement – than about its scope and application. The scope for "transparency" in an IIA depends not just on obligations on publication, notification and administrative procedures, but on the ambition and breadth of the IIA's substantive commitments – i.e. it's scope and definition, its general obligations and exemptions, and a Member's specific commitments or reservations listed in its schedule of commitments.

A number of developing countries – and least-developed countries in particular – have faced technical and capacity constraints in complying with the transparency requirements in WTO agreements. The question arises as to the appropriate balance that should be struck between pursuing transparency in a possible multilateral investment agreement and avoiding the imposition of burdensome obligations. A related question concerns the kind of technical assistance that developing and least-developed countries would need to help them comply with information and notification requirements.

I. INTRODUCTION

1. This Note examines the principle of "transparency" in the context of Paragraph 22 of the Doha Ministerial Declaration. "Transparency" refers to both general and specific requirements in international trade and investment agreements to make their relevant rules and procedures clear and predictable. Transparency is important for the simple reason that, without it, it is difficult to determine what the rules are and whether they are being applied in an appropriate manner.

2. The Note is divided into five sections: (1) a summary of the main points of discussion on transparency in the Working Group; (2) an overview of transparency provisions in the WTO agreements; (3) an examination of the factors that have influenced the evolution of these provisions; (4) some examples of the way "transparency" is treated in existing international investment agreements (IIAs); and (5) an examination of outstanding issues.

3. The underlying purpose of transparency requirements can be summarized as follows:

(i) to underwrite and promote a rules-based approach to policy-making at the national and international level;

(ii) to provide information to market participants so that they can take maximum advantage of the opportunities created by rules and commitments;

(iii) to facilitate monitoring of compliance with international obligations, and through this the avoidance of disputes; and

(iv) to facilitate future multilateral negotiations with a view to building upon existing commitments and disciplines.[1]

4. Clear and predictable rules and procedures – "due process" – are minimum conditions that need to be met in a rules-based system. A prerequisite for the rule of law is that all relevant rules can be understood by the parties affected by them, and that the procedures for administering the rules are uniform, reasonable, and non-discriminatory. Legal rights and obligations should be publicly available and, ideally, not enforceable until the persons subject to them have had a chance to become acquainted with them. The same function is served by provisions on the impartial administration of these legal requirements and the scope for review, by an independent body, of decisions concerning their application.

[1] For example, the basic GATT principle that, if protection is to be accorded, it should take the form of a customs tariff can be understood to have an important transparency function. It makes clear and quantifies the margin of protection given to domestic products. This not only provides valuable information to actors in the market but also facilitates negotiations on the reduction of such duties on the basis of reciprocity.

5. By and large, transparency has a precise and limited meaning in the WTO agreements. Standard provisions on transparency involve three core obligations: (1) to make information on laws, regulations, and other policies related to trade publicly available; (2) to provide notice of (notify) the 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 requirements to be "transparent" do not, strictly speaking, address the question of whether or not a governments has fulfilled its obligations under the agreements (although, of course, transparency is itself an obligation). Rather, transparency is a requirement to provide sufficient *information* so that other Members can determine whether or not obligations are in fact being met. It is also a requirement that the *administration* of rules be reasonable and non-discriminatory. In this respect, the WTO's use of the term "transparency" is generally less broad and normative than is sometimes found in public policy discourse, where transparency has come to be synonymous with the "openness" and "fairness" of a regime.

6. It should be noted that transparency obligations generally become more important, and more detailed, in areas where the role of WTO rules of general application is limited – i.e. where the scope for discretionary government measures, within the framework of rules, is relatively wider. For example, the WTO agreements on Import Licensing, Technical Barriers to Trade, Sanitary and Phytosanitary Measures, and the plurilateral agreement on Government Procurement lay out detailed procedural obligations to ensure that Members conform to accepted norms of transparency. These norms often involve concepts such as "uniform", "impartial", "reasonable" and "independent" administration, and require governments to treat all parties to the agreement in a fair and non-discriminatory way. Transparency obligations therefore pertain to both substance and procedures. The underlying premise is that the way rules are applied can be as significant as the substance of the rules themselves.

7. Transparency requirements are arguably as relevant to IIAs as they are to international trade agreements. Yet most existing IIAs have little to say on the subject.[2] One reason may be that, unlike most WTO agreements, much investment regulation frequently falls within the remit of sub-federal or local authorities, and the BIT negotiations are unwilling or unable to easily improve transparency requirements at these levels of government. Transparency provisions are not standard components of model bilateral investment agreements, but they are included in some international investment instruments. The fullest reference to transparency is found in the North American Free Trade Agreement (NAFTA).

8. These existing transparency provisions in IIAs are also generally less detailed and prescriptive than similar requirements in the WTO. A number of bilateral investment treaties (BITs) contain an obligation to make all investment-related laws publicly available – both to ensure that investment regimes are understandable to and prevent hidden or unknown laws to be subsequently used to justify discriminatory or arbitrary treatment. Certain rules of general application – such as "fair and equitable treatment" – often found in BITs have also been interpreted as requiring parties to adhere to basic norms of transparency.

II. THE MAIN POINTS OF DISCUSSION ON TRANSPARENCY IN THE WORKING GROUP

9. The Working Group received four written contributions from Members on the subject of transparency.[3] Discussions in the Working Group centred on three themes: the purpose of

[2] UNCTAD, Bilateral Investment Treaties in the Mid-1990s, (1998), pp. 85-86.

[3] Accounts of the Working Group's principal discussions on the topic of Transparency can be found in the following meeting Reports: WT/WGTI/M/5, para. 29; M/8, para. 72; M/11, paras. 40-50; M/12, paras. 53-69; M/14, paras. 77-79; and M/15, para. 52 The main references to this topic in Members' submissions can be found in WT/WGTI/W/70, W/75, W/87, W/90 and W/104.

transparency; the possible relevance of WTO transparency provisions to the area of investment; and the technical and resource requirements for meeting different levels of transparency.

10. There was broad agreement that transparency is important for creating a predictable, stable and secure climate for foreign investment, although differences were expressed as to whether multilateral rules would advance significantly these objectives. Some Members suggested that improving transparency of legal systems should be regarded as one of the core objectives of possible multilateral rules on investment. One contribution identified a range of problems experienced by firms that were said to be caused by non-transparency of the regulatory environment in host countries. This lack of transparency reduced the ability of foreign investors to develop their business operations based on long-term plans, increased the costs of their investments, and distorted the conditions of competition in favour of domestic firms.[4] It was suggested that negotiating multilateral investment rules could in itself lead to increased transparency, by drawing attention to potentially non-transparent policies and procedures, and by providing a benchmark for countries desiring to enhance the overall level of transparency of their investment regimes. The point was also made that multilateral rules on transparency were desirable from a systemic, as well as a national perspective, since the complexity of administering a growing number of bilateral and regional IIAs had reduced the transparency of the global investment climate for businesses and governments alike. Compared with bilateral investment treaties, which by and large had been ineffective in dealing with the transparency issue, multilateral rules could provide a unified set of regulations regarding the transparency of investment regimes.

11. Others expressed the view that, given the importance of transparency to the promotion of FDI, governments acting in their own self-interest would take the necessary steps to enhance the transparency of their investment regimes. It was also suggested that problems of lack of transparency might be addressed more effectively through appropriate representation with individual governments directly, including in the context of bilateral investment treaties. Therefore, the benefits of multilateral rules on transparency were questionable.

12. Some considered that existing transparency provisions in the WTO offered a useful starting-point for the discussion of rules to promote transparency of the investment environment. Since GATS Article III applied to all measures of general application pertaining to GATS rules – including measures relating to the establishment of a commercial presence – the WTO already contained transparency obligations in regard to foreign direct investment in the services sector. It was felt that GATS Article III provided a useful model that should be examined when considering transparency provision for foreign direct investment more generally. It was also felt that the Working Group should also take into account existing work on transparency issues in the GATS Working Party on Domestic Regulation. Attention was also drawn to the role of the Trade Policy Review Mechanism in contributing to transparency in the area of investment.

13. One contribution presented the advantages of the WTO as an institutional framework to promote the transparency of investment laws and regulations, and made concrete suggestions on specific transparency provisions that could be included in a possible multilateral framework.[5] Another contribution outlined some of the potential policy and legal questions that might arise in the framing of transparency provisions in a possible multilateral investment agreement.[6] It was suggested that, based on existing international agreements, certain provisions which were essential to enhancing transparency of investment rules and regulations could be identified, including: rules on the publication of laws and regulations; the availability of enquiry points; due process requirements with regard to authorization and licensing procedures; non-discrimination requirements; standstill requirements; and dispute settlement procedures.

[4] WT/WGTI/W/75.
[5] WT/WGTI/W/87.
[6] WT/WGTI/W/90.

14. Many concerns were raised about the technical and resource capacity of developing countries to meet new transparency requirements in the area of investment, given the difficulties they already faced in complying with existing WTO publication and notification requirements. Some felt that developing countries would benefit significantly from enhanced transparency provisions, and that the administrative costs of transparency obligations would be easily outweighed by the positive climate created for both foreign and domestic investors. Others said that care should be taken to avoid transparency requirements that could prove too onerous for developing countries. An example cited was the proposal that transparency requirements should encompass prior notification requirements and the right to comment. It was stated that the question of developing-country capacity was an area where the Working Group could benefit from the experience of the Working Group on Transparency in Government Procurement. It was also suggested that any possible multilateral rules should include provisions on technical assistance to assist countries to publish comprehensive, focused lists of all regulations and rules governing foreign investment, and to assist countries in implementing necessary procedural reforms.

III. THE THREE BASIC TRANSPARENCY REQUIREMENTS IN THE WTO

15. The provisions of the three main WTO Agreements containing transparency obligations are: GATT Article X; GATS Article III; and TRIPS Article 63 (see Annex I). The concept of transparency as reflected in these agreements can be understood as having three broad aspects:

(i) the obligation to publish, or at least make publicly available, all relevant regulations, and, as a general rule, not to apply or enforce them until this has been done;

(ii) provisions on the notification of various forms of governmental action to the WTO and other Members; and

(iii) obligations relating to the consistent, uniform, impartial and reasonable administration of regulations, and the right of review of decisions taken under them.

A. PUBLICATION REQUIREMENTS

16. The core obligation to publish – or make publicly available – all relevant laws, regulations, judicial decisions and administrative rulings is in GATT Article X. Article X:1 requires each government to promptly publish trade regulations "to enable governments and traders to become acquainted with them". Article X:2 adds that trade regulations cannot be enforced before they have been officially published, and requires the publication of agreements reached with other governments. Although panels have ruled in support of the notion that a trade regulation cannot be applied unless it has been published, Article X has not been interpreted to require publication of trade regulations *in advance* of their entry into force or to require that the information be made available to domestic and foreign suppliers at the same time. This question of prior notification, as will be discussed below, is the subject of other WTO obligations.

17. General publication requirements are equally central to the GATS and the TRIPS Agreement. GATS Articles III.1 and 2 require Members to publish all relevant measures of general application which pertain to or affect the operation of the Agreement, together with any international agreements pertaining to or affecting trade in services to which a Member is a signatory. It states that "where publication ... is not practicable, such information should be made otherwise publicly available". Article 63.1 of the TRIPS Agreement says that all "laws and regulations, and final judicial decisions and administrative rulings of general application … shall be made publicly available, in a national language, in such a manner as to enable governments and rights holders to become acquainted with them". Furthermore, Article 63.3 states that each Member should be prepared to supply, in response to a written request from another Member, all information of the sort referred to in Article 63.1.

B. NOTIFICATION REQUIREMENTS

18. The obligation to notify the WTO and other Members of changes to laws and regulations is present throughout most WTO agreements, and is generally more detailed and complex than the publication requirement. As noted, GATT Article X has not been interpreted as requiring publication in advance of trade regulations, and this remains true under the WTO for virtually all covered areas. However, the "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" which was adopted at the close of the Tokyo Round, underlined the desirability of "advance notice" as a generalized principle in transparency, and introduced a rudimentary version of trade policy surveillance.[7]

19. This general notification obligation was reinforced and clarified in the Marrakesh Ministerial "Decision on Notification Procedures". Its objective was to "improve upon the operation of notification procedures under the Agreement Establishing the WTO, and thereby to contribute to the transparency of Members' trade policies and to the effectiveness of surveillance arrangements established to this end". This Decision established a general obligation to notify, backed up by a central registry of notifications in the WTO; it also provided for a review to rationalize existing notification obligations, which were believed in some cases to involve unnecessary requirements and some duplication. The general obligation, although stated in terms of the WTO agreements as a whole, focuses on measures affecting trade in goods and reinforces the earlier Tokyo Round understanding.

20. Many of the agreements that make up Annex IA of the WTO Agreement, relating to trade in goods, also contain a specific notification obligation. A Secretariat note prepared for the Working Group on Notification Obligations and Procedures lists 165 different notification obligations and procedures in the area of trade in goods.[8] Some of these are of broad application; for example, most WTO agreements require the notification of implementing legislation and any changes to such legislation. Some call for notifications on a periodic basis, such as biannual reports on countervailing and anti-dumping actions. Some notifications only have to be made when a particular trade action is taken or contemplated, such as a safeguard action, an anti-dumping investigation, or a countervailing investigation. Still others have to be made only on a "one-time" basis, for example at the time of the coming into force of the WTO Agreement. These notifications are reported through specialized committees which act in a *de facto* surveillance role.

21. The general GATS and TRIPS provisions regarding notification are those contained in the Articles referred to above,[9] although there are other provisions calling for notifications in particular instances. Since the conclusion of the Uruguay Round negotiations, Members have expanded some of the sectoral GATS transparency provisions. For instance, both the Reference Paper on Basic Telecommunications (BTRP) and the Provisional Disciplines on Domestic Regulation in the Accountancy Sector contain provisions which require Members to ensure that their service suppliers

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[7] "Contracting Parties moreover undertake, to the maximum extent possible, to notify the CONTRACTING PARTIES of their adoption of trade measures affecting the operation of the General Agreement, it being understood that such notification would be without prejudice to views on the consistency of measures with or their relevance to obligations under the General Agreement. Contracting Parties should endeavour to notify such measures in advance of implementation. In other cases, where prior notification has not been possible, such measures should be notified promptly *ex post facto*. Contracting Parties which have reason to believe that such trade measures have been adopted by another Contracting Party may seek information on such measures bilaterally, from the Contracting Party concerned." (BISD 26S/210).

[8] G/NOP/W/2. The most recent paper setting out information on compliance with these procedures is G/L/223/Rev.1 dated 27 January 1999.

[9] Article III:3 of the GATS states that Members "shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement".

and relevant non-governmental entities release information crucial to the industry. Specifically, the BTRP states that "it is ensured that a major service supplier will make publicly available either its interconnection agreements or a reference interconnection offer". The Accountancy Disciplines require, *inter alia,* that Members or their competent authorities provide "information describing, where applicable, the activities and professional titles which are regulated or which must comply with specific technical standards; ... requirements and procedures to obtain, renew or retain any licences and professional qualifications; ... the rationale behind the measures".

C. PRIOR NOTIFICATION AND COMMENT

22. Several notification requirements, specific to certain agreements, are worth noting. Both the Agreement on the Application on Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT) lay out detailed requirements for prior notification and comment. In instances where an international standard does not exist or where a domestic standard departs from the international standard, both agreements require that an opportunity for advance comment on proposed regulations be provided to other Members. For instance, 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 standardizing bodies, and encouraged for other standardizing 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.

D. REVERSE NOTIFICATIONS

23. Several WTO agreements allow for the possibility of "reverse" notifications to be made – i.e. notifications made by an affected Member about another Member's practices. GATS Article III.5, for example, states that "any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement".

E. REQUEST FOR INFORMATION/ENQUIRY POINTS

24. Many of the agreements that make up Annex IA of the WTO Agreement, relating to trade in goods, contain a specific publication and information obligation. Members are required to respond to requests for information – and to establish enquiry points to make access to such information easier. For example, the SPS Agreement contains detailed provisions for assessing whether an exporting Member's health or sanitary measures meet an "equivalence" test – i.e. that the Member can objectively show that its measures, even if they differ from those used by other Members, achieve the importing Members appropriate level of technical or sanitary protection. To verify this undertaking, Article 4 states that "reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures".

25. These more detailed "access to information" requirements are also found in both the GATS and the TRIPS Agreement. GATS Article III:4 prescribes that "each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application". It also obliges each Member to establish within two years of the entry into force of the Agreement one or more "enquiry points" to provide specific information to other Members upon request.

26. Article 63:3 of the TRIPS Agreement states that "each Member must be prepared to supply, in response to a written request from a Member, all relevant information pertaining to the subject-matter of the Agreement". Moreover, if a Member has reason to believe that a specific judicial decision or

administrative ruling or bilateral agreement affects its rights under the Agreement, it "may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements".

F. ADMINISTRATIVE PROCEEDINGS

27. The notion of procedural transparency is embodied in GATT Article X which contains provisions on the administration of trade measures and on the right of review of action taken pursuant to them. Article X:3 obliges Members to administer rules and regulations in a "uniform, impartial and reasonable manner". The terms "uniform", "impartial" and "reasonable" have not been the subject of legal interpretation.

28. More detailed provisions spelling out procedural rules that must be followed in order to fulfill the obligation of "due process" can be found in many other WTO agreements. GATS (in particular Article VI:2), the TRIPS Agreement (in particular Articles 41-42 and 62) and in various Annex IA Agreements, such as those on Subsidies and Countervailing Measures, Anti-Dumping Measures, Customs Valuation, Import Licensing Procedures and Pre-Shipment Inspection, incorporate a range of procedural "rights" aimed at enhancing the transparency and fairness of administrative processes, including the right to prior notification and consultation.

29. GATS Article VI provides an illustration of the kind of detailed procedural requirements that Members must meet to ensure transparency. Article VI:3 provides that "where authorization is required for the supply of service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application". Moreover, at the request of the applicant, "the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application".

30. GATS Article VI:3 further tasked the Council for Trade in Services to develop requirements and disciplines with a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licencing requirements do not constitute unnecessary barriers to trade in services.

G. REVIEW AND APPEAL

31. The notion of the right of appeal and review by an "independent" body is also embodied in GATT Article X which contains detailed provisions on the review of action taken pursuant to the administration of trade measures. Article X:3 obliges Members to maintain "judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters" which are to be "independent of the agencies entrusted with administrative enforcement".

32. Detailed provisions outlining the procedural rules that must be followed in order to fulfill the right of appeal and review can be found in other WTO agreements. As noted above, the GATS (in particular Article VI:2), the TRIPS Agreement (in particular Articles 41-42 and 62) and various Annex IA Agreements, such as those on Subsidies and Countervailing Measures, Anti-Dumping Measures, Customs Valuation, Import Licensing Procedures and Pre-Shipment Inspection, incorporate a range of procedural "rights" - including the right to file a complaint, and the right of appeal.

33. For example, GATS Article VI:2 states that "each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies

for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall provide, without undue delay, information concerning the status of the application".

H. TRADE POLICY REVIEWS

34. The important role of information-sharing, surveillance, and policy transparency in the WTO system is perhaps most clearly expressed in the objectives of the Trade Policy Review Mechanism (TPRM). The objectives of the TPRM are codified in Annex 3 of the Agreement Establishing the WTO: "to provide greater transparency of national laws and practices, to contribute to improved adherence by all Members to [WTO] rules, disciplines and commitments, and to examine the impact of a Member's trade policies and practices on the multilateral trading system". Although the TPRM encourages greater transparency in national trade policies, it is not intended "to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members".[10] The TPRB is also the repository of all notifications that countries are obliged to make under the various WTO agreements.

IV. SOME IMPLICATIONS OF THE TRANSPARENCY PRINCIPLE

35. Transparency has been a core principle of the multilateral trading system from the outset. The publication and notification obligations in the WTO Agreements are broad, covering "laws, regulations, judicial decisions and administrative rulings of general application" pertaining, in each area, to the full range of issues covered by the agreement in question. They also include an obligation to publish relevant international agreements. Moreover, they contain detailed provisions for procedural or administrative transparency, including requirements for review of decisions and comment.

36. The function of transparency obligations is relatively more important in areas where the role of WTO rules of general application is limited. One example is areas where the scope for discretionary government measures is large, either because of their actual or potential direct control over specific economic transactions affecting trade, such as in the areas of government procurement and state trading, or because national laws of general application allow for considerable executive discretion in establishing trade measures.

37. The plurilateral Agreement on Government Procurement contains detailed provisions for both *ex ante* transparency in regard to procurement opportunities and *ex post* transparency in regard to decisions taken to award procurement contracts, as well as provisions for possible subsequent review at the domestic level. It also contains significant notification procedures, for example of a statistical nature. The important role that transparency can play in this area has also been recognized through the establishment of a multilateral work programme on transparency in government procurement at the 1996 Singapore WTO Ministerial Conference. This work programme is still under way. The area of state trading is another where transparency is the focus of multilateral efforts, notably through the establishment of a Working Party to review notifications and counter-notifications and make recommendations regarding the adequacy of the notification obligations.

38. An example of where national laws of general application allow for considerable executive discretion in establishing trade measures is the area of import licensing. The WTO Agreement on Importing Licensing Procedures has, as one of its principal aims, to ensure that import licensing, particularly non-automatic import licensing, is implemented in a transparent and predictable manner, and that the rules "shall be neutral in application and administered in a fair and equitable manner". Article 1:4-7 lays out detailed procedural obligations to ensure that the administration of important licencing regimes conform to accepted norms of transparency.

[10] Paragraph A.i-iii.

39. The second area where transparency obligations figure prominently concerns those aspects of essentially internal governmental regulation that have as their principal objects the promotion of legitimate public policy objectives, such as public health or protection of the environment, but where the regulations in question can have an important impact on the conditions of international competition. The challenge in this area is how to find a proper balance between, on the one hand, the need to ensure that such policy instruments are not used as disguised restrictions on trade and, on the other hand, the need for the WTO not to be overly intrusive in areas where trade considerations are not paramount, nor to overload the process of increasing transparency to the point where it becomes impossible for Members to see the wood for the trees.

40. The WTO SPS and TBT agreements approach this issue by first providing for some broad rules of general application, revolving around the concept that regulations should be drawn up and applied on a national treatment basis and should be no more trade-restrictive than necessary to fulfill their legitimate objectives, and then putting a great deal of emphasis on transparency, especially in situations where Members deviate from international standards or where international standards are not available. In such situations, as a general rule, Members are required to provide opportunities for other Members and interested parties to express their views in advance, notably by prior publication and notification to the WTO of proposals to introduce regulation.

41. Panels and the Appellate Body have generally emphasized the duty to provide information in a comprehensive, timely and non-discriminatory manner.[11] The *Japan – Film* case dealt with an alleged violation of Article X of the GATT relating to a purported failure to publish certain enforcement actions taken by the Japan Fair Trade Commission and local fair trade councils as well as administrative "guidance" given by regional offices of the Ministry of Trade and Industry, prefectural governmental and local authorities concerning the Large Stores Law and relevant local regulations. In reviewing the complaint, the Panel noted that, on the plain meaning of Article X:1 of the GATT, the requirement of publication does not extend to administrative rulings addressed to specific individuals or entities. It noted further that "inasmuch as the Article X:1 requirement applies to all administrative rulings of general application, it should also extend to administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases".[12]

42. The importance of transparency and procedural fairness was underscored in the *US – Shrimp* case, which dealt with an alleged violation of Article X relating to the failure of the United States to respect due process in developing and applying its law prescribing the shrimp import ban. In upholding the findings of the original dispute settlement panel, the Appellate Body observed that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations. It further noted that "insomuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension *pro hac vice* of the treaty rights of other Members".[13]

V. KEY EXCEPTIONS TO THE PRINCIPLE

43. The main transparency provisions of the GATT, GATS and TRIPS Agreement contain exceptions making it clear that Members are not required to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest, or which would

[11] *Japan – Trade in Semiconductors,* BISD 35S/116 and L/6309, and *European Communities – Measures Affecting the Importation of Certain Poultry Products,* WT/DS69/AB/R.

[12] *Japan – Measures Affecting Consumer Photographic Film & Paper*, WT//DS44/R.

[13] *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R.

prejudice legitimate commercial interests of particular enterprises, public or private.[14] Similar clauses are to be found in many of the other Annex IA WTO agreements.

VI. TRANSPARENCY PROVISIONS IN EXISTING INVESTMENT AGREEMENTS

44. Model bilateral investment treaties are largely silent on the question of transparency.[15] One notable exception is the United States' prototype bilateral treaty concerning the encouragement and reciprocal protection of investment. Article II:5 states that each party "shall ensure that its laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions, that pertain to or affect covered investments are promptly published or otherwise made publicly available".[16] Another example is China's Model Agreement Concerning the Encouragement and Reciprocal Protection of Investments, which contains the following provision:

Article 12

The representatives of the two Contracting Parties shall hold meetings from time to time for the purpose of:

(a) reviewing the implementation of this Agreement;

(b) exchanging legal information and investment opportunities; ....[17]

45. The 1961 OECD Code of Liberalisation of Capital Movements, Articles 11 to 15, contain provisions requiring members to notify the OECD "*... of measures of liberalisation which they have taken and of any other measures which have a bearing on this Code, as well as of any modifications of such measures.*", along with more detailed information on restrictions imposed *"... on specific transactions or transfers relating to direct investments ..."*, and on reservations or derogations made under the Code.[18]

46. The 1976 OECD Declaration on International Investment and Multinational Enterprises contains several transparency provisions.[19] With regard to "Conflicting Requirements" imposed on multinational enterprises "*Member countries should endeavour to promote co-operation as an alternative to unilateral action to avoid or minimize conflicting requirements and problems arising therefrom.*". In the context of this cooperation, the Declaration recommends that "*Member countries should be prepared to: (a) Develop mutually beneficial, practical and appropriately safeguarded bilateral arrangements, formal or informal, for notification to and consultation with other Member countries; (b) Give prompt and sympathetic consideration to requests for notification and bilateral consultation on an ad hoc basis ...; (c) Inform the other concerned Member countries as soon as practicable of new legislation or regulations proposed by their Governments for adoption which have significant potential for conflict with the legal requirements or established policies of other member countries and for giving rise to conflicting requirements being imposed on multinational enterprises; (d) Give prompt and sympathetic consideration to requests by other Member countries for consultation in the Committee on International Investment and Multinational Enterprises or through other mutually acceptable arrangements.*" With regard to "International Investment Incentives and Disincentives", "*... Member countries will endeavour to make such measures as transparent as possible, so that their importance and purpose can be ascertained and that information on them can*

[14] GATT Article X:1, GATS Article III*bis* and TRIPS Article 63:4.
[15] See UNCTAD, International Investment Instruments: A Compendium, 5 volumes (1996 – 2000).
[16] See UNCTAD, International Investment Instruments: A Compendium, Vol.III, p. 198.
[17] *Ibid*, Volume III, p. 156.
[18] *Ibid*, Volume II, p. 9.
[19] *Ibid*, Volume II, pp. 185-194.

be readily available.". The Declaration also contains detailed recommendations to enterprises on the disclosure of information.

47. The North American Free Trade Agreement (NAFTA), which contains rules of foreign investment as well as trade, includes general transparency requirements that are similar to the core requirements in the WTO – i.e. the requirement to publish, to notify and to conform to accepted norms of procedural transparency.

48. *Publication requirement.* The NAFTA contains a number of transparency provisions which pertain to the entire agreement, including its investment provisions. Article 1802 requires Parties to ensure that "its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by [the] Agreement are promptly published or otherwise made available in such a manner as to enable interested persons or parties to become acquainted". It also requires Parties, to the extent possible, to publish all such measures "in advance" and to "provide interested persons or Parties a reasonable opportunity to comment".

49. *Notification and Provision of Information.* Article 1803 requires, to the maximum extent possible, that Parties "notify any other Party with an interest in the matter of any proposed or actual measure that the Party considers might materially affect the operation of [the] Agreement or otherwise substantially affect that other Party's interests under [the] Agreement". This Article also obliges Parties, on the request of another Party, to "promptly provide information and respond to questions pertaining to any actual or proposed measure, whether or not that other Party has been previously notified of that measure".

50. *Contact Points.* Article 1801 requires Parties to "designate a contact point to facilitate communications between the Parties on any matter covered by [the] Agreement. On the request of another Party, the contact point shall identify the office or official responsible for the matter and assist, as necessary, in facilitating communication with the requesting Party".

51. *Administrative Proceedings.* With a view to "administering in a consistent, impartial and reasonable manner" all measures of general application affecting matters covered by the Agreement, Article 1804 requires Parties to ensure that, in their administrative proceedings[20], persons of another Party that are directly affected by a proceeding "are provided with reasonable notice, in accordance with domestic procedures, 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". Article 1804 also states that persons affected by these proceedings are to be "afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceedings and the public interest permit". Finally Article 1804 stipulates that these proceedings must be in accordance with domestic law.

52. *Review and appeal*. Article 1805 requires Parties to establish or maintain judicial, quasi-judicial or administrative tribunals or procedures "or the purpose of the prompt review, and where warranted, correction of final administrative actions regarding matters covered by [the] Agreement". It stipulates that such tribunals "shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter". Article 1805 states that Parties to the proceeding have the right to "a reasonable opportunity to support or defend their respective positions". Parties also have 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". Lastly, Article 1805 states that Parties will ensure that, subject to appeal or further review as provided in domestic law, "decision shall be implemented by,

[20] When "applying measures referred to in Article 1802 (i.e. the publication requirement) to particular persons, goods or services of another Party in specific cases".

and shall govern the practice of, the office or authorities with respect to the administrative action at issue".

53. *Confidentiality.* Article 1111, a requirement to share confidential investment-related information with the host country, is the only transparency requirement in the NAFTA which is specific to its investment chapter (chapter 11). It states that a Party may require an investor of another Party, or its investment in its territory, to provide routine information concerning that investment solely for information or statistical purposes. However, it also states that the Party is obliged to "protect such business information that is confidential from any disclosure that would prejudice the competitive position of the investor or the investment".

VII. TRANSPARENCY ISSUES AND INVESTMENT

54. The WTO's general transparency provisions – the obligation to publish, to notify, and to impartially administer all relevant rules and regulations – already apply to investment-related trade issues insofar as they are key provisions of the GATS (specifically mode 3), the TRIPS Agreement, and the TRIMs Agreement. For example, Article 6.1 of the TRIMs Agreement, through making a reference to GATT Article X, the 1979 "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance", and the 1994 "Ministerial Decision on Notification Procedures", requires Members to notify all publications in which a TRIM may be found, including "those applied by regional and local governments and authorities within their territories". It also states that Members shall accord "sympathetic consideration to requests for information, and afford adequate opportunity for consultation, on any matter arising from this agreement raised by another Member.

55. The question that arises in the context of multilateral investment relations is less about the principle of transparency, than about its scope and application. Here it is important to note that the scope for "transparency" depends not just on obligations regarding publication, notification and administrative procedures, but on the ambition and breadth of an agreement's substantive commitments – i.e., it's scope and definition; its general obligations and exemptions; and a Member's specific commitments or reservations as listed in its schedule of commitments. For example, regarding the schedule of commitments, the use of a "positive list" approach to reservations would in principle result in a less "transparent" investment regime, insomuch as it would not oblige parties to list all the non-conforming measures that they wish to exclude from certain obligations. However, the importance of the principle of transparency has generally been seen from the WTO's perspective in the context of its operational role in underwriting WTO rules and disciplines, rather than from the perspective of transparency for transparency's sake.

56. Transparency is essentially about the requirements to publish, notify and administer fairly and predictably an agreement's rules and regulations. In the WTO agreements, these requirements can vary widely in specificity and detail. Several points may warrant further discussion and elaboration:

(a) *Publication requirements.* The obligations to publish or make publicly available all relevant rules, regulations, judicial decisions, and administrative actions of general application is the most basic transparency requirement in the WTO. Is there value in extending these basic publication requirements to more detailed "access to information" obligations – such as provisions regarding the right to request information or a requirement to establish enquiry points?

(b) *Notification.* Most notification obligations in the GATT, GATS and the TRIPS Agreement come into play only after a measure has been formally adopted. But there are a also a variety of prior notification requirements scattered throughout the WTO agreements – ranging from the simple obligation to notify the WTO and other Members of proposed changes to laws and regulations, to more complex obligations to allow other Member the opportunity to comment on proposed regulatory changes

and even to submit "reverse notifications". The expectation is that prior comment reduces uncertainty and discriminatory treatment in a given market, as all parties are better informed through the ability to participate in the development of regulations. What kind of prior consultation requirement is most desirable?

(c) *Procedural transparency*. The WTO's transparency provisions apply not only to the substantive rules, but also to the procedures for administering the rules. Procedural transparency in the WTO is particularly important in areas where the rules of general application are weakest and where the scope for discretionary government action is greatest. General and specific obligations relating to the "uniform, reasonable and impartial" administration of rules and regulations, including, in many instances, the right of appeal and review, can be found throughout the WTO agreements. For example, transparency issues arise in procedures for the administration of rules governing authorization or licencing to invest or operate in a host country (GATS Article VI), professional accreditation, and changes to domestic regulations. Is it desirable to incorporate a right to appeal and review in the discussion of procedural transparency?

(d) *Development dimension.* Developing countries, and least-developed countries in particular, face technical and capacity constraints in complying with the transparency requirements in WTO agreements. Where should the balance be struck between pursuing more transparency and avoiding the imposition of burdensome obligations? What kind of technical assistance is needed to assist developing and least-developed countries to comply with information and notification requirements?

(e) *Confidentiality exemptions.* The general and specific transparency provisions of the WTO agreements often contain exceptions making it clear that Members are not required to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

(f) *Binding versus non-binding undertakings.* WTO rules on transparency are binding on Members and subject to dispute settlement. Another possible approach is voluntary undertakings. APEC's Non-Binding Investment Principles encourage Members to "*make all laws, regulations, administrative guidelines and policies pertaining to investment in their economies publicly available in a prompt, transparent and readily accessible manner".*

ANNEX I

Main Provisions Relevant to the Principle of Transparency

GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

Article X

Publication and Administration of Trade Regulations

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

3. (*a*) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

(*b*) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

(*c*) The provisions of sub-paragraph (*b*) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this sub-paragraph.

GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

Article III

Transparency

1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.

3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.

4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.

5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.

AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

Article 63

Transparency

1. Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.

2. Members shall notify the laws and regulations referred to in paragraph 1 to the Council for TRIPS in order to assist that Council in its review of the operation of this Agreement. The Council shall attempt to minimize the burden on Members in carrying out this obligation and may decide to waive the obligation to notify such laws and regulations directly to the Council if consultations with WIPO on the establishment of a common register containing these laws and regulations are successful. The Council shall also consider in this connection any action required regarding notifications pursuant to the

obligations under this Agreement stemming from the provisions of Article 6*ter* of the Paris Convention (1967).

3. Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.

4. Nothing in paragraphs 1, 2 and 3 shall require Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

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