

Transparency obligations in international investment agreements

Roy Nixon¹

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1 The author is from Foreign Investment Policy Division, Australian Treasury. This article has benefited from comments and suggestions provided by Chris Legg and Jim Murphy. The views in this article are those of the author and not necessarily those of the Australian Treasury.

Introduction

In the last two decades, debate among FDI policy makers has focussed increasingly on the most appropriate policy response to attract FDI whilst balancing domestic community concerns about levels of foreign ownership and control. Out of this has emerged an international legal framework for FDI consisting of many kinds of national and international rules and principles. International investment agreements (IIAs) play a major role in capturing the benefits from FDI and the structure and content of these agreements has been evolving. IIAs contain provisions linked to the process of liberalising FDI and importantly to the protection of foreign investors and their investments.

This article discusses the growing trend for international organisations and individual countries to incorporate transparency standards into IIAs. Transparency is generally viewed as an important element of good public and private sector governance. It also figures prominently among investors' concerns and has been embraced by APEC and OECD as a key liberalisation principle. In October 2003 both organisations announced new steps towards the implementation of more transparent legal regimes. These initiatives show a remarkable degree of convergence on the economic benefits and the means for achieving regulatory transparency.

The topic of public sector transparency is a very large one. This article is by no means a comprehensive discussion of this topic so interested readers are encouraged to consult the suggested further reading at the end of the article for more detailed coverage. The article discusses what we mean by transparency, its importance for good governance and the benefits it offers. The article looks at recent work on transparency in APEC, OECD and the United Nations Conference on Trade and Development (UNCTAD).

What is transparency?

There is no commonly agreed definition of transparency. It means different things to different groups – be they international organisations like OECD or APEC, foreign investment regulators or investors themselves. This in part reflects the evolutionary nature of understandings of transparency.

Some concepts of transparency focus on the core measures or practices that promote and protect rights to public sector information. For example, APEC, in its transparency standards adopted in 2003 notes that the removal of barriers to trade and investment are '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 ...'²

The OECD has a much broader view of transparency: 'While these (core measures and) 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.'³ Importantly, the OECD found that ultimately what determines how successful this process of communication is, are national culture, history and values.

UNCTAD seems to share the OECD's broader view: 'The concept of transparency is closely associated with promotion and protection in the field of international investment. In the present context, transparency denotes a state of affairs in which the participants in the investment process are able to obtain sufficient information from each other in order to make informed decisions and meet obligations and commitments. As such, it may denote both an obligation and a requirement on the part of all participants in the investment process.'⁴

Benefits of greater transparency for the investor

Transparency is a critical input to the investment decision. This has been well documented by business surveys. Lack of transparency and predictability often tops the list of concerns expressed by foreign investors. On the flip side, access to relevant information is often cited as a powerful incentive to invest. Transparent policy environments offset what may be foreigners' disadvantages to investing in a host country, that is, language barriers and more limited knowledge of local institutions. A good summary was recently provided by the OECD's Business and Industry Advisory Committee: '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.'⁵

Transparency is also linked to higher investment flows and higher quality investments. Recent OECD and IMF studies show that there is a strong positive relationship

2 APEC (2002/2003).

3 OECD (2003), p. 21.

4 UNCTAD (2004), p. 3.

5 OECD (2003), p. 8.

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between international investment flows and the quality of governance. The OECD report plotted a measure of the quality of institutional governance (itself made up of a number of important factors such as the rule of law, the judicial system, enforcement, corruption, and shareholder and creditor rights) against FDI inflows. It found that the overall relationship between the quality of governance and the level of inflows is clear and positive.⁶

The IMF studied the relationship between transparency and the behaviour of managers of emerging market funds and found that these funds hold fewer assets in less transparent markets. Moreover, transparency reduced ‘herding’ or the tendency of investors to make decisions based on what they see other investors doing.⁷

If countries want to attract more and higher quality investment, fostering a fair, open and accountable policy environment is a more efficient way (and involves fewer distortions) than other types of direct incentives – for example, tax holidays etc.

Barriers to transparency reform

While there may be a growing consensus internationally about the importance of transparency reform, this does not necessarily mean there is consensus about how to go about such reform or that it will be easy to implement.

In World Trade Organisation discussions about core elements of possible international investment rules, many members expressed the view that any transparency obligations should not be too burdensome as many developing countries do not have the technical resources to implement demanding commitments. The Doha Declaration identifies a role for capacities building to assist developing countries implement new transparency obligations.⁸

However, OECD experience suggests that the underlying challenge in seeking to improve transparency is similar in all countries, viz the desire to protect ‘concentrated benefits’ at the expense of broader wellbeing. Lack of transparency also shields government officials from accountability. Thus, many actors, both inside and outside the public sector, can have a stake in non-transparent practices.

Since the institutional arrangements in a country reflect the national culture, history and values of that country, there is no ‘one-size-fits-all’ policy for improving transparency. Instead, the core measures identified by both APEC and OECD can be seen as good starting points for communication processes that are closely linked to

6 OECD (2002b).

7 Gelos and Wei (2002).

8 WTO (2002).

national institutions. It is assumed that national institutions will evolve gradually to incorporate the transparency measures. Another barrier to reform is that it requires technological, financial and human resources and entails administrative costs. The core transparency measures involve – the creation of registers, websites, the development of ‘plain language’ texts, and other mechanisms for making legal and regulatory codes, and any changes or new regulations being made accessible to interested parties.

OECD work on public sector transparency

The OECD has done a considerable amount of very useful work in the area of public sector transparency, including a large horizontal project on regulatory reform based on a survey of transparency measures in the OECD area between 1998 and 2000 (26 countries were surveyed). The synthesis report,⁹ which was finalised in 2002, suggested that despite there being signs of progress and a trend toward improved transparency, there is still considerable scope for improving transparency policies and practices. (Other data suggests this is also the case for non-OECD countries.)

Significant progress was noted including the more widespread use of public consultations about new laws and regulations, more widespread adoption of centralised registers of laws and regulations and three-quarters of the countries surveyed made most of their primary legislations available on the internet.

In its in-depth regulatory review of 16 OECD countries¹⁰ over the same period,¹¹ OECD found a number of regulatory transparency problems namely:

- lack of transparency at regional, state and local levels of government;
- public consultation not undertaken systematically when developing new or changing existing regulations;
- a tendency toward participation bias in public consultations; and
- inadequate use of communication technologies.

9 OECD (2002a).

10 Canada, Czech Republic, Denmark, Greece, Hungary, Italy, Ireland, Japan, Korea, Mexico, Netherlands, Poland, Spain, Turkey, United Kingdom and United States.

11 OECD (2002c).

OECD Investment Policy Transparency Framework

Following on from its analytical work on regulatory reform, in late 2003, the OECD developed an Investment Policy Transparency Framework. The Framework is intended to assist OECD and non-OECD countries enhance their transparency efforts and to share experiences. It is non-prescriptive in approach and recognises the need for flexibility in country approaches to transparency reform. In other words, transparency arrangements must adapt to local circumstances, reflect national culture, history and values and the availability of resources and skills, to be effective.

The Framework poses 15 questions. The questions have a strong focus on meeting the special needs of foreign investors (through ensuring the availability of all 'relevant' information). The Framework is also intended to assist public officials in conducting self-evaluations, can support peer review and can highlight where technical assistance may be required. The Framework also highlights the ways in which international treaty commitments can enhance domestic transparency measures. A copy of the Framework is at Attachment A.

The questions contained in the Framework are practical and cover issues such as:

- To what extent are the authorities aware of the benefits of greater transparency?
- How and what information is made readily available to foreign investors and how was this determined?
- What are the exceptions to making information available?
- How is information kept and how is it presented?
- Are investors consulted in advance about the purpose and nature of regulatory change?
- How are investors assisted in handling 'red tape' and what rights of appeal exist to dispute administrative decisions?
- How are capacity bottlenecks being addressed?

APEC Transparency Standards on Investment

In October 2002, APEC leaders adopted the Statement to Implement APEC Transparency Standards ('Leaders' Statement'), and directed that these standards be implemented as soon as possible, and in no case later than January 2005. APEC Leaders also instructed APEC sub-forums that have elaborated transparency provisions to review these regularly, and, where appropriate, improve, revise or

expand them further. In October 2003, the Investment Experts Group developed a set of transparency standards on investment for incorporation into the Leaders' Statement. These standards flowed from the General Principles on Transparency agreed to by APEC Leaders in 2002 and also built on the Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies – For Voluntary Inclusion in Individual Action Plans. A copy of APEC's Transparency Standards on Investment is at Attachment B.

APEC's investment transparency standards recognise that transparency is an important element in promoting economic growth and financial stability at domestic and international levels. It is conducive to fairer and more effective governance and contributes to public confidence in government. The standards encourage each APEC economy to make increased use of the Internet to ensure that laws and regulations, and progressively procedures and administrative rulings, of general application are published promptly or otherwise made available and that interested persons and other economies become acquainted with them. Other matters explicitly covered by the standards include screening guidelines, procedures for registration and government licensing, prior authorisation requirements and investment promotion programs. When negotiating regional trade agreements and free trade agreements that contain provisions with an investor/state dispute settlement mechanism, Member economies are also encouraged to consider the inclusion of transparency provisions.

Trends in international investment agreements and FTAs

Issues about transparency in the relationship between a foreign investor and a host government are nothing new. However, while it is probably still the case that these issues have and continue to be addressed primarily by recourse to the national law of the host country, questions concerning transparency have begun to be addressed in provisions arising in a number of bilateral, regional and multilateral treaties. Moreover, according to recent work by UNCTAD, this trend towards having transparency provisions in international agreements has found its way into other related areas such as efforts to combat bribery and corruption, environmental agreements and agreements on corporate social responsibility more generally.

The earliest bilateral investment treaties (sometimes called investment protection and promotion agreements as in Australia) more often than not expressly acknowledged that investments of the other Party are to be admitted subject to national laws and regulations whilst at the same time not requiring the host government to publish those laws and regulations. Of course, if there are national transparency laws (and this may cover corporate 'disclosure' requirements), investors must abide by them.

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The next generation of BITs or IPPAs generally contained a relatively narrowly focussed transparency requirement. A good example is Australia's first such agreement with China in 1988 where Article 6 read:

'Each Contracting Party shall, with a view to promoting the understanding of its laws and policies that pertain to or affect investments in its territory of nationals of the other Contracting Party:

- (a) make such laws and policies public and readily accessible;
- (b) if requested, provide copies of specified laws and policies to the other Contracting Party; and
- (c) if requested, consult with the other Contracting Party with a view to explaining specified laws and policies.'

By limiting the transparency obligation to laws and policies pertaining to the investment *in each country's territory of nationals of the other Contracting party*, the obligation to make laws and policies public apply to Australia and China only in their capacity as the host country.

More recently, the transparency obligation has been broadened. A good example is the provision in the Singapore United States Free Trade Agreement where each party:

'shall, to the extent practicable, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Contracting Party to become acquainted with them.'

As foreign investment is affected by the regulatory framework of the host and home countries, such transparency obligations, formulated in these terms, should thus cover laws and regulations of both countries involved.

Turning to the type of information required to be made transparent, clear trends are emerging in international investment agreements towards a broader obligation. In addition to the widespread inclusion of governmental 'laws and regulations', many agreements (as in the Singapore United States Free Trade Agreement noted above) now extend to procedural transparency and include a reference to 'procedures' 'administrative procedures' and/or 'administrative rulings'. Some go further and extend to judicial decisions. Publishing draft laws and regulations together with affording interested parties an opportunity to comment on such draft legislation is another emerging refinement of the transparency obligation with origins in NAFTA.

Then there is the question of where agreements draw the boundary between investment matters *per se*, and other matters indirectly related to investment. Most agreements requiring publication of laws apply transparency rules to matters 'pertaining to investment', 'relevant to investment', or 'affected by' investment. It becomes a matter of legal interpretation where that boundary line is drawn where the agreement does not offer any guidance (for example, the Chile-United States FTA inserted the words 'materially' and 'significantly' to qualify the broad term 'affect').

The trend to increased transparency obligations in international investment agreements has also extended to:

- the manner in which disclosure should occur (encouraging or mandating consultation and exchanges of information);
- whether information is simply made public (that is, no secrecy restriction) or has to be published (actually physically printed in hard copy);
- replacing 'where practicable' requirements with 'publish promptly';
- requiring parties to answer specific questions and provide information upon request from the other party;
- imposing notification obligations to ensure parties are paying due regard to their obligations and to ensure investors are made aware of decisions made under authorisation requirements);
- requiring investors of the other Party to provide information concerning an investment solely for informational or statistical purposes subject to the requesting Party protecting any confidential information from any disclosure that would prejudice the competitive position of the investor or the investment; and
- broadening the participation of interested parties in dispute settlement processes and increasing the transparency of such processes *per se*. For example, the investor-State dispute settlement provisions of the Free Trade Agreement between Chile and the United States provide authority for the tribunal to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.

Conclusions

Analysis of the most recent trends of FDI-enhancing transparency rules and practices shows that prominent international organisations and individual governments are paying closer attention to this issue. Investors, both foreign and domestic, have clearly benefited from enhanced transparency through regulatory reform and efforts to make

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existing domestic laws and regulations more accessible and to consult more effectively on the making of new ones. Experience shows that more transparent rules for foreign and local investors promote openness and accountability which is conducive to enhancing economic development. The recent trend toward broader transparency obligations at multilateral, regional and bilateral levels can enhance this process and complement national policies. UNCTAD cautions that we must be careful not to consider transparency provisions or standards as an end in themselves, but rather as a means to an end:

‘Transparency being essentially a means to other ends in investment policy, the addressees, content and modalities of any transparency provision depend on the nature and objective of the particular international agreement under consideration. For example, agreements for the protection of investment, on the one hand, and investment liberalization agreements, on the other, do not address the same actors of the investment relationship (the former dealing mainly with the “host country”, the latter with all “members” of the agreement); and if they do, the type of transparency provisions may differ.’¹²

It is important that OECD countries like Australia give careful thought to the inclusion of transparency provisions in its bilateral and regional agreements affecting investment.

12 UNCTAD (2004), p. 55.

References

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Attachment A: OECD Framework for Investment Policy Transparency (reprinted from OECD 2003)

Desirability and appropriateness of transparency for international investment

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

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

How to make 'relevant' information available to foreign investors

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

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

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

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

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

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

Publication avenues and tools

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

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

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

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

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

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

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

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

Prior notification and consultation

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

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

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

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

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

Procedural transparency

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

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

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

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

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

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

Capacity building

Question 15: What efforts are being made to address capacity building bottle-necks?

Setting transparency goals and drawing on other country experiences go hand in hand with improvements in administrative structures, staff training and investment in new technologies.

Attachment B: APEC Transparency Standards on Investment

1. Each Economy will, in the manner provided for in paragraph 1 of the Leaders' Statement, ensure that its investment laws, regulations, and progressively procedures and administrative rulings of general application ('investment measures') are promptly published or otherwise made available in such a manner as to enable interested persons and other economies to become acquainted with them.
2. In accordance with paragraph 2 of the Leaders' Statement, each Economy will, to the extent possible, publish in advance any investment measures proposed for adoption and provide a reasonable opportunity for public comment.
3. In accordance with paragraph 3 of the Leaders' Statement, upon request from an interested person or another Economy, each Economy will:
 - (a) endeavor to promptly provide information and respond to questions pertaining to any actual or proposed investment measures referred to in paragraph 1 above; and
 - (b) provide contact points for the office or official responsible for the subject matter of the questions and assist, as necessary, in facilitating communications with the requesting economy.
4. Where warranted, each Economy will ensure that appropriate domestic procedures are in place to enable prompt review and correction of final administrative actions, other than those taken for sensitive prudential reasons, regarding investment matters covered by these standards, that:
 - (a) provide for tribunals or panels that are impartial and independent of any office or authority entrusted with administrative enforcement and have no substantial interest in the outcome of the investment matter;
 - (b) provide parties to any proceeding with a reasonable opportunity to present their respective positions;
 - (c) provide parties to any proceeding with a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority; and
 - (d) ensure subject to appeal or further review under domestic law, that such decisions will be implemented by, and govern the practice of, the offices or authorities regarding the administrative action at issue.

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5. If screening of investments is used based on guidelines for evaluating projects for approval and for scoring such projects if scoring is used, in accordance with paragraph 1 of the Leaders' Statement each Economy will publish and/or make publicly available through other means those guidelines.
6. Each Economy will maintain clear procedures regarding application, registration, and government licensing of investments by:
 - (a) publishing and/or making available clear and simple instructions, and an explanation of the process (the steps) involved in applying/government licensing/registering; and
 - (b) publishing and/or making available definitions of criteria for assessment of investment proposals.
7. Where prior authorization requirement procedures exist, each Economy will conduct reviews at the appropriate time to ensure that such procedures are simple and transparent.
8. Each Economy will make available to investors all rules and other appropriate information relating to investment promotion programs.
9. When negotiating regional trade agreements and free trade agreements that contain provisions with an investor/state dispute settlement mechanism, each Economy should consider whether or not to include transparency provisions.
10. Each Economy will participate fully in APEC-wide efforts to update the APEC Investment Guidebook.

