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TRANSPARENCY IN DOMESTIC REGULATION: PRACTICES AND POSSIBILITIES

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EXECUTIVE SUMMARY

Transparency is an essential component in the openness of decision-making related to the introduction, administration and enforcement of new or amended regulations. In both social and economic terms, it plays an important role in revealing the basis for, and the full range of possible costs and benefits of, regulatory decisions and their implementation. Regulatory transparency is also an important tool in preventing unnecessary barriers to trade for both goods and services, with open processes resulting in better regulation, greater compliance and ultimately greater political legitimacy. Participation by foreign parties may also assist in disseminating international best practice as well as providing early warning of any trade dispute which may arise regarding a regulation. This paper synthesises and builds upon earlier OECD Trade Directorate studies on transparency, with a view to identifying good regulatory practices and options for enhancing transparency under the GATS.

The paper begins by outlining existing transparency requirements under WTO Agreements for legislative measures, subordinate measures and administrative decisions. The GATT and GATS require Members to publish legislative and subordinate measures before they are enforced, with the GATS also requiring annual notification of new or changed measures. WTO agreements also include three types of prior consultation: (i) via notification to the WTO (per the SPS and TBT Agreements); (ii) via information exchange, upon request, amongst Members; and (iii) as a domestic procedure (per the Disciplines for the Accountancy Sector, although this obligation is "best endeavours" and the Disciplines themselves have yet to enter into force). For administrative decisions, WTO agreements require uniform, impartial and reasonable administration, as well as a review mechanism and an opportunity to appeal. Some agreements (e.g., the GATS, TBT/SPS Agreements and the Disciplines for the Accountancy Sector) also include greater disciplines. WTO Members are usually required to take such reasonable measures as may be available to them to ensure compliance by local governments and non-government entities with WTO disciplines.

The paper then explores disciplines on transparency in selected regional trade agreements. All the agreements studied require publication of legislative measures and subordinate measures at the time of entry into force. They also require uniform, impartial and reasonable administration of administrative decisions, and an opportunity for review and appeal. Many agreements also include more detailed disciplines, including for specific sectors (e.g., telecommunications). Most of the agreements studied also include prior notification between governments or prior consultation with interested parties as a domestic procedure; however this is generally only required "to the (maximum) extent possible" or "when so established by laws". While transparency disciplines in regional agreements among developing countries tend to be weaker than those in agreements amongst developed countries, they nonetheless sometimes exceed requirements under the WTO.

The paper also examines a range of practices at the national level, in both OECD and non-OECD countries. Overall, there seems to be a trend towards prior consultation for subordinate measures, with practices taking different forms at different stages of preparation. Certain types of measures are generally excluded from prior consultation: those relating to urgent problems of safety, health and environment or military and foreign affairs and national security; and those which merely meet an obligation under an international agreement or are of a minor nature. In most cases, regulatory authorities must explain any exceptions.

Measures of local governments and other self-governing sub-entities are also often excluded from prior consultation. Practices vary more widely for legislative measures, reflecting different political systems or institutional structures. However, whatever the political system, once a draft measure is before the legislative branch, consultation takes place only through elected representatives. While in some cases public hearings are held, direct participation by foreign interested parties is generally limited.

Some OECD Members have horizontal administrative procedures legislation imposing disciplines on administrative decisions, but in other countries these disciplines are prescribed in specific statutes or guidelines. Developing countries are increasingly introducing public notice and comment procedures; however, given their limited resources, these tend to be focused on priority issues in specific sectors (e.g., universal service obligations and spectrum management in telecommunications), rather than horizontal.

The final section of the paper considers options for enhancing transparency under the GATS, including via the WTO or domestic procedures. The section features a continuum of options, from binding disciplines covering all sectors, to "best endeavours" commitments adopted in full or in part for some sectors only. Among the arguments raised in support of a horizontal approach is the fact that, while services sectors may be diverse, requirements for transparency are not and that transparency should be encouraged across all sectors, not just high profile sectors. Horizontal disciplines can also prevent sectoral special interests from blocking progress and allow for economy of negotiating effort and clarity of obligations. Arguments for a sectoral approach include the fact that not all service sectors are traded to the same extent, and priorities for disciplines could differ. Moreover, developing countries with limited administrative capacity may wish to focus on priority sectors and measures, and may be more willing to accept increased transparency disciplines on a sectoral basis. Horizontal and sectoral approaches need not be mutually exclusive, however; a basic set of horizontal rules could be supplemented by sector- or mode-specific rules, as appropriate.

The administrative burden could be lessened depending on the form of any further transparency disciplines. They could, for example: be formulated as general objectives, allowing maximum flexibility for implementation in line with level of development and existing administrative and regulatory systems; build to the greatest extent possible upon existing domestic structures and practices; include appropriate exceptions, and carve out sub-national level measures. Special and differential treatment for developing countries and/or LDCs might also be considered, such as transition periods; a requirement for Members to have regard to the level of development and administrative capacity in other Members in interpreting "a reasonable period"; or a "peace clause" subsequent to the deadline for implementation.

Possible new transparency disciplines could establish a list of best practices to be implemented at the national level, taking the form of an annex, applying across all sectors, or a reference paper which could be voluntarily inscribed against individual sectors, in full or in part. Elements for inclusion in a horizontal reference paper are suggested, without prejudice to the development of sector-specific disciplines. Options for improving the transparency of scheduled commitments are also considered, including: development of standard forms for notifications under GATS Article III, VII.4, economic needs tests and for mode 4; improvements to GATS enquiry points (either by creation of sectoral enquiry points or in the context of a central code of regulations); and specific focus on transparency of domestic regulatory regimes in WTO Trade Policy Reviews.

TRANSPARENCY IN DOMESTIC REGULATION: PRACTICES AND POSSIBILITIES*

1. This paper aims to synthesise and build upon earlier OECD Trade Directorate studies on transparency in domestic regulation [TD/TC/WP(99)43/FINAL and TD/TC/(2000)31/FINAL¹], with a view to identifying good regulatory practices and options for enhancing transparency under the GATS. The paper will serve as part of the OECD Secretariat's contribution to the third Services Experts Meeting (4-5 March 2002), which will include on its agenda work undertaken jointly with the World Bank on the interface between domestic regulation and international trade in services.

2. The paper both draws together a range of information from previous studies and includes additional material on disciplines in regional trade agreements and practices in developing countries. Proposals for enhancing transparency under the GATS, including via practices at the national level and notifications to the WTO, are also further developed. The paper includes the following elements:

- The benefits of transparency in domestic regulation(Section I)
- Regulatory disciplines at multilateral level (Section II)
- Regulatory disciplines at regional level (Section III)
- Regulatory practises at national level (Section IV)
- Options for enhancing transparency under the GATS (Section V)

Detailed information on provisions in WTO Agreements and regional trade agreements, as well as practices at the national level, are included in Annexes to the paper.

I. Why transparency matters

3. Transparency is an essential component in the openness of decision-making related to the introduction, administration and enforcement of new or amended regulations. Regulatory transparency is an important tool in preventing unnecessary barriers to trade for both goods and services. The cost and complexity of delivering services across borders or of establishing commercial presence in a market underscores the importance of regulatory transparency for trade in services.

4. Transparency in regulation is not static, but rather is part of the dynamic process of regulatory policy-making. In both social and economic terms, it plays an important role in revealing the basis for, and the full range of possible costs and benefits of, regulatory decisions and their implementation. Regulatory

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¹ Available at www.oecd.org/ech.

transparency is conducive to both fairer and more effective governance, improving public confidence in governmental and regulatory performance, and to economic efficiency, helping to remove distortions which might otherwise undermine domestic policy objectives. For trade policy, transparency in domestic regulation is a crucial tool in making policy-makers, business and civil society aware of the need for, and the full range of social and economic costs and benefits of, regulatory reform and trade and investment liberalisation.

5. In addition, transparency and openness in decision-making is an essential part of public governance under any democratic setting. Lack of transparency reduces the information available to interested parties and undermines their ability to participate meaningfully in policy processes.² On the other hand, participation of various interests through open processes can lead regulatory authorities to reflect carefully on the full range of alternatives before introducing or modifying regulations, resulting in better regulation, greater compliance and ultimately greater political legitimacy. If foreign parties also have opportunities to be informed and participate, they may play a role in disseminating international best practices for achieving policy objectives, as well as providing an early warning system for trade disputes that may arise with respect to new or modified regulations.

6. Further, transparent trade-related domestic regulatory processes provide firms with more predictable conditions in foreign markets. When trade-related regulatory decision-making is transparent, foreign firms are able to gain: (i) information on the conditions and constraints they will encounter in a market; (ii) information on the measures they could take to comply with regulatory requirements; (iii) a more accurate picture of costs and returns on their investment or commercial presence; and (iv) time and flexibility to adjust to potential changes in regulation. Transparency also helps to reveal hidden discrimination that can potentially arise from administrative rules and procedures established by the regulatory authorities. Transparency enables foreign firms to find out whether these rules and procedures deviate from the founding, or enabling, legislation. As transparency permits business and other parts of civil society to be better informed about such discretion, it creates additional incentives for bureaucrats to establish them within the mandate of legislation. Finally, regulatory transparency makes it more difficult for regulators to be captured by regulated firms, helping to protect the independence and autonomy that regulators need to do their jobs effectively.

7. Furthermore transparency in applying regulations also enhances predictability and accountability in the implementation of trade-related regulation. While the focus tends to be on rule-making, enhanced transparency (and thus predictability and accountability) in applying regulations (e.g. in licensing processes, procedures for administrative actions and decisions, review mechanisms for administrative decisions) would considerably facilitate trade in services by reducing unnecessarily burdensome administrative processes.

II. Disciplines at multilateral level

8. This section surveys existing regulatory disciplines in the various WTO agreements, with a view to providing the basis for discussion on possible enhancement of transparency disciplines under the GATS. Detail of the provisions in each agreement is at Annex I.

9. Different terms describing regulations are found across the WTO agreements such as laws, decrees, regulations, procedures, requirements, administrative guidelines, administrative ruling of general applications, administrative proceedings, decisions or actions. To avoid any confusion and enable

² See Joseph E. Stiglitz, "On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life", Oxford Amnesty Lecture, Oxford, U.K., January 27, 1999.

consistent usage in this paper, “legislative measures” refers to laws to be finally enacted by the legislative branch; and “subordinate measures” to decrees, regulations, procedures, requirements, administrative guidelines and administrative rulings of general application established by regulatory authorities in the executive branch within the legislative mandate. “Administrative decisions” refers to any administrative proceedings, decisions or actions by regulatory authorities in the executive branch within the legislative mandate. While these distinctions are useful, they should be approached with some caution, given that these categories could vary amongst WTO Members, reflecting their differing legal and constitutional systems. It should also be recalled that the Reference Paper on Basic Telecommunications covers transparency on measures taken by non-government entities.

10. GATT and GATS already require Members to publish legislative and subordinate measures before they are enforced. Disciplines in the GATT are more specific than GATS, requiring that measures shall be published promptly in such a manner as to enable relevant parties to become acquainted with them. Similarly the SPS Agreement also specifically mentions a “reasonable interval” between the publication of measures and its entry into force, with consideration given to the difficulty for developing countries in adapting their products to the requirements of the importing Members.

11. Notification and comment procedures via notifications to the WTO are found in both the TBT and SPS Agreements, with exceptions for emergency situations. Notifications should include a brief indication of the objective and the rationale of the regulation. Notification and comment procedures are triggered when a technical regulation or sanitary or phytosanitary measure is not based on an international standard or where no such standard exists. This is likely to be the case most of the time with regard to measures concerning services, as there are few international standards (work to develop international standards has thus far been concentrated in some professional services such as architecture).

12. The GATS also has an annual notification requirement on new or changed measures to the Council of the Services. An obligation to conduct prior consultation as a domestic procedure is only found in the Disciplines for the Accountancy Sector. However, this obligation takes the form of "best endeavours" ("Members shall endeavour to provide an opportunity for comment, and give consideration to such comments, before adoption") and the Disciplines have yet to enter into force (they are expected to come into force at the end of the GATS 2000 negotiations). The Disciplines also require Members to inform another Member, upon request, of the rationale behind measures in the accountancy sector, in relation to legitimate objectives as referred to in paragraph 2 of the Disciplines. These procedures in the TBT, SPS, GATS and Accountancy Disciplines are only required for measures significantly affecting trade. In summary, three possible arrangements are identified in these agreements: (i) notification procedures through the WTO secretariat, (ii) information exchanges upon request by Members and (iii) prior consultation as a domestic procedure.

13. Regarding disciplines on administrative decisions, all agreements require uniform, impartial and reasonable administration, an opportunity to appeal and also a review mechanism, with the degree of specificity varying amongst agreements. The GATS already incorporates some higher standard disciplines for “authorisation required for the supply of service” such as obligations to inform applicants of the decision concerning the application within a reasonable period of time and to provide information concerning the status of the application.

14. Enhanced requirements are found in the TBT and SPS Agreements and the Disciplines for the Accountancy Sector. These include (i) publication of the standard process period (TBT, SPS) or informing the applicant of the decision within, in principle, 120 days (Accountancy); (ii) notices of the deficiencies in application (TBT, SPS and Accountancy); (iii) transmission of results in a precise and complete manner so that corrective action may be taken (TBT, SPS) or provision of information on the reasons for rejection of application (Accountancy). While license procedures for trade in services are different from the conformity

assessment in the TBT and inspection or approval in the SPS, these key elements could be shared and applied to both procedures (see Section V below).

15. Other types of disciplines on administrative decisions found in the SPS and TBT Agreements and Accountancy Disciplines are not included in the GATS. They include: (i) non-discriminatory processing of submission or application for both domestic and foreign parties; (ii) avoidance of unnecessary information requirements for application; (iii) non-discriminatory treatment of confidential information; (iv) reasonable application fees; and (v) reasonable requirement for authenticity of application materials. While these disciplines also facilitate trade in services by reducing burdensome administrative process, they are more related to non-discrimination and necessity in implementation than transparency.

16. Regarding the measures taken by local governments and non-government entities, WTO agreements generally require Members to take such reasonable measures as may be available to them to ensure their compliance with the agreements.

III. Disciplines at regional level

17. Disciplines on transparency are also found in regional trade agreements. It is particularly useful to examine these agreements since some countries, including developing countries, already make commitments to higher level disciplines on transparency in these regional frameworks than in the WTO. This section provides a summary of the situation regarding disciplines on transparency across a range of regional trade agreements. Information regarding disciplines on transparency in a range of regional trade agreements is at Annex II³.

18. Like the GATT and GATS, all regional trade agreements require publication of legislative measures and subordinate measures at the time of entry into force. They also incorporate basic disciplines on administrative decisions such as (i) uniform, impartial and reasonable administration and (ii) opportunity for review and appeal of those administrative decisions. Generally speaking, in addition to the horizontal disciplines, more specific and detailed disciplines are also developed for specific sectors such as telecommunications and financial services.

19. As for the GATS, obligations to inform applicants of the decision concerning the application within a reasonable period of time and to provide them with information concerning the status of the application are also included in the services provisions. It should be noted that, in some regional trade agreements, a more specific period (120 days) is set in the provisions covering financial services, but this period could vary for other sectors (e.g., the EU Directive on telecommunication services sets the period at six weeks, with some exceptions).

20. Most regional agreements have more detailed disciplines on administrative decisions. They require that persons directly affected by administrative decisions are provided a reasonable notice on the nature of these decisions and such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final decision. Regarding the review and appeal on administrative decisions and actions, some of regional agreements require that each party shall establish or maintain judicial, quasi-judicial or administrative tribunals or procedures and such tribunals shall be

³ It could be noted that, in addition to specific disciplines on transparency, the structure of trade agreements can impact upon the overall level of transparency achieved. For example, in the case of services, it can be argued that the "negative listing" approach to the scheduling of sectoral specific commitments (found in NAFTA and the Australia-New Zealand Closer Economic Relations Services Protocol) delivers more in terms of clarity and transparency than a "positive listing" approach.

impartial and independent of the office or authority entrusted with administrative. They also state that the parties to the proceeding are provided with the right to: (a) a reasonable opportunity to support or defend their respective positions; and (b) a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority.

21. Most of the regional agreements also require prior notification bilaterally between governments or prior consultation with interested parties or pre-publication as domestic procedures. As for multilateral disciplines, this takes three forms: notification among parties, information exchange upon request through enquiry, and prior consultation as a domestic procedure. While the measures to be covered by these consultations are broad, they include some reservations such as “to the (maximum) extent possible”, “when so established by laws ” or “make its best endeavours.”

22. It is also interesting to note that further, weaker disciplines are found in regional agreements among developing countries. The agreement between Mexico, Colombia and Venezuela only requires an effort to publish any measures in advance and to offer the parties and any interested bodies a reasonable opportunity to formulate observations on the measure. Despite these reservations and some doubts on whether these provisions are fully implemented, it is significant that a few developing countries already make higher commitments on transparency than required by WTO agreements.

23. Regarding use of international standards, only the Free Trade Agreement between Mexico and the EU refers to international standards being developed by international financial regulatory organisations.

IV. Regulatory practices at national level⁴

24. This section provides an overview of the range of practices on prior consultation on subordinate measures and legislative measures, and administrative decisions and actions in implementation of measures, found at the national level in OECD Members and selected developing countries. Detailed information on the regulatory processes in each country can be found at Annex III.

Practices on development of subordinate measures⁵

25. Overall, the case studies indicate a trend towards prior consultation for subordinate measures. Across various country practices, three important elements for prior consultation practices can be identified for comparative analysis: the extent to which they incorporate transparency, non-discrimination and accountability.

- Transparency means that the consultation procedures themselves should be open and accessible.

⁴ These studies of regulatory practices at national level often draw on regulatory reform country reviews conducted under the OECD Regulatory Reform Project in case of the countries already reviewed by the OECD. See Regulatory Reform Review of each country, particularly, Chapter 2: Background Report on Government Capacity to Produce High Quality Regulation and Chapter 4: Background Report on Enhancing Market Openness Through Regulatory Reform. The reports are available for Netherlands, the United States, Japan, Mexico, Denmark, Spain, Korea, Hungary, Italy, Greece, Ireland the Czech Republic and reports on Poland and the United Kingdom are forthcoming. However, it should be noted that other materials are also used for analysis and they are referred in individual footnotes to collect more detailed or relevant information for this cross-cutting analysis.

⁵ As noted previously, distinctions between subordinate and legislative measures may vary between WTO Members in view of their differing legal and constitutional systems.

- Non-discrimination ensures that prior consultation procedures treat domestic and foreign parties equally in a non-discretionary and impartial manner.⁶
- Accountability mandates that regulatory authorities explain the factual and logical basis for their decisions by giving due consideration to comments received, although they retain ultimate discretion in determining to what extent to consider and respond to a particular comment.

26. It can also be observed that prior consultation takes different forms depending on the different stages of preparation. When regulatory authorities introduce and modify measures, they first need to analyse the problems and explore possible solutions with experts and with their constituents. In earlier stages, consultations tend to be limited to a relatively narrow range of interests; regulatory authorities may then build policies through progressive dialogues with strongly affected parties. In some cases, they also set up forums for consultation, such as advisory councils or committees consisting of selected interests. In other cases, they draft a policy recommendation, sometimes as a report of these forums, and apply notice and comment procedures for those reports to share their views with outside parties.

27. Regulatory authorities could make these preliminary consultations more transparent and non-discriminatory by publishing reports on the substance of consultations or by collecting views of both domestic parties and foreign parties. While these consultations should be as non-discriminatory as possible, it might be difficult for regulatory authorities to eliminate all discretionary aspects arising in the preparation process. However, as is already the case in some of the reviewed countries, regulatory authorities could notify draft measures for public comment at a later stage to ensure that all interested parties are informed and given equal opportunity to comment. This practice would provide an effective and credible safeguard against the possible abuse of selected participation in earlier stages of consultation and ensure transparency and non-discrimination in prior consultation. In a few countries, draft texts are also pre-notified with statements of regulatory impact analysis, which describe the objectives, rationale, alternatives and benefits/costs of regulatory measures.

28. The studies also show that there are common types of measures excluded from prior consultation. The following measures are often excluded, as prior consultation is perceived as impracticable, unnecessary, or contrary to the public interest:

- Measures to cope with urgent problems of safety, health and environment arising or threatening to arise;
- Measures dealing with military and foreign affairs, which are required in the interests of national security or which merely meet an obligation under an international agreement;
- Measures of a minor nature, which do not substantially alter existing regulations.

29. Other categories of exceptions are found in some countries, but regulatory authorities are in most cases required to explain why they are exempted from the prior consultation requirements. Additionally, measures of a local government and other self-governing sub-entities are also typically carved out from prior consultation requirements.

⁶ It may also be interesting to consider discrimination between different stakeholders at the national level, such as between producer and consumer groups.

Practices on development of legislative measures

30. Unlike practices on subordinate measures, wider differences in practices for legislative measures can be observed in the country studies, reflecting different political systems or institutional structures. While in parliamentary systems the executive branch proposes draft legislative measures and could conduct prior consultation before their submission to the legislative branch (as they do for subordinate measures), enactment of legislative measures may also be initiated from the legislative branch itself, based on political platforms or election commitments⁷. The draft of legislative measures is pre-announced in some countries to encourage the participation of citizens and other interested parties.

31. However, whatever the political system, once the draft is submitted to the legislative branch, public consultation inevitably takes the form of political deliberation and citizens can participate in the discussion only through elected representatives (which are usually required to be nationals or citizens). While in some cases public hearings could be held in the legislative branch to seek comments from external parties, including foreign interests, direct participation by foreign interested parties is generally limited.

Practice on administrative decisions

32. Some OECD Members have enacted horizontal administrative procedures legislation to impose disciplines on administrative decisions. Basically, they require that regulatory authorities make rules and procedures publicly available and take administrative decisions within a reasonable time. In some countries, regulatory authorities are required to publish the standard period for processing applications as a benchmark for a “reasonable time” and to inform applicants of the reason for denial of an application. They also ensure that, in the case of suspension or revocation of license or other decisions adversely affecting licensees, the licensee is given notice of the reasons by the regulatory authorities and the opportunity to demonstrate compliance with requirements or to defend his/her position. In other countries these disciplines are prescribed in specific statutes or guidelines, but are not covered by horizontal regulations.

Developing countries

33. Even in developing countries with limited administrative capacity, there are now greater efforts to enhance transparency in policy making, with public notice and comment procedures recently adopted to facilitate participation by citizens in the policy-making process. Developing countries are also increasingly adopting electronic means for these public notice and comment procedures as part of efforts to promote E-government. This can help to ensure transparent and non-discrimination processes with less administrative resources; however, access to information might be more limited in developing countries due to lack of technical infrastructure. While in some cases committees or other forums are set up to formulate regulatory measures, efforts have been also made to enhance transparency by publishing recommendations and inviting comments from external experts and other market participants. The study so far could not find any constitutional constraints on these consultations.

34. Nonetheless, public notice and comment procedures are not as widespread in developing countries as they are in some OECD Members. Since they often do not have capacity to implement

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Note that this process is not limited to parliamentary systems. In Mexico, both branches can propose draft legislative measures and the executive branch can conduct prior consultation before their submission to the legislative. Enactment of legislative measures may also be initiated by the legislative branch itself.

horizontal schemes, these procedures are more frequently conducted for specific sectors such as telecommunications and financial services. They are also conducted for specific issues considered to be more important in specific sectors such as universal service obligations and spectrum management. This also reflects particular commitments undertaken on greater transparency in accordance with the GATS Reference Paper on Basic Telecommunications. In the context of their limited administrative capacity, it is not altogether surprising that developing country regulatory authorities tend to narrow the scope of prior consultation to specific regulatory issues in specific sectors.

V. Options for enhancing transparency under the GATS

35. This section explores some of the options open to WTO Members for increasing transparency under the GATS. As indicated in Section II above, the GATS contains a number of provisions relating to transparency.

36. A threshold question may be the extent to which any further disciplines are actually necessary, or whether the focus should be on improving the implementation of existing obligations. A number of transparency issues are arguably more a question of poor implementation of existing obligations than the need for new obligations. However, this also suggests that there may be scope to improve the implementation of existing obligations, for example via the development of standard form notifications. In other cases, the scope and content of existing obligations could be clarified, for example by giving greater precision to the types of information that could be made available under Article III and to the means by which Members could facilitate access to that information. A number of proposals in this section are focused on improving and facilitating adherence to existing transparency obligations.

37. However, new obligations could also be considered - including prior consultation and opportunity for comment before regulations are finalised. The suggestions in this section include options for increasing transparency via the WTO (e.g., for notifications and trade policy reviews) and through domestic procedures, as part of national regulatory processes. Both are necessary and can be mutually reinforcing. Finally, for all the options presented, WTO Members can choose from along the continuum of possibilities, from binding disciplines covering all sectors, to "best endeavours" commitments adopted in full or in part for some sectors only.

Types of measures covered by the GATS

38. Before considering the possibility of enhanced disciplines, it is important to have a clear understanding of the scope of measures to which those disciplines could apply. In the GATS, "measure" is defined very broadly as any measure whether in the form of law, regulation, rule, procedure, decision, administrative action or any other form (Article XXVIII). The following different types of measures are referred to in the GATS:

- Measures of general application which pertain to or affect the operation of this Agreement (Article III.1 and 4);
- Laws, regulations or administrative guidelines which significantly affect trade in services *covered by...specific commitments* (Article III.3);
- Measures of general application affecting trade in services *in sectors where specific commitments are undertaken* (Article VI.1);

- Administrative decisions affecting trade in services (Article VI.2(a));
- Authorisation required for the service *on which a specific commitment has been made* (Article VI.3);
- Measures relating to qualification requirements and procedures, technical standards and licensing requirements (Article VI.4).

39. While Article III.1 refers to "measures of general application", Article III.3 is limited to "laws, regulations or administrative guidelines" significantly affecting trade in services covered by a Member's specific commitments. While many of the measures of general application are likely to take the form of laws, regulations and administrative guidelines, they need not directly regulate a particular service, and need only affect or pertain to the operation of the agreement, rather than significantly affect trade in services. Such measures need only be published, not notified to the WTO (as is the case for measures under Article III.3). Article VI.1 also refers to measures of general application, but unlike Article III.1, is limited to sectors where specific commitments are undertaken. Article VI.1 requires that, for sectors where specific commitments are undertaken, measures of general application affecting trade in services must be administered in a reasonable, objective and impartial manner; however, a more detailed prescription is laid down for the narrower range of measures in Article VI.4. Article VI.4 qualification requirements and procedures, technical standards and licensing requirements and Article VI.3 authorisations are mainly related to licenses for services. "License" in this context should be interpreted broadly, with basically the same meaning as "authorisation", as it includes the whole part of an agency permit, certificate, approval, registration or other form of permission.

40. Measures relating to restrictions on movement of natural persons are given further definition. The Annex on Movement of Natural Persons states that the agreement does not prevent a Member from applying measures to regulate the entry or temporary stay of natural persons in its territory provided that such measures do not nullify or impair the benefits accruing to any Member under the terms of a specific commitment. Discriminatory visa requirements *per se* are not regarded as nullifying or impairing benefits under a specific commitment. General requirements for transparency under Article III apply to measures regulating the entry and temporary stay of natural persons. However, while regulations governing the issuance of work permits and defining foreigners' ability to work in individual areas fall under the GATS, general immigration legislation may not.

Sub-national measures

41. "Measures" under the GATS can also be categorised by the level at which they are taken:

- Central government measures;
- Local government measures;
- Measures taken by non-governmental entities.

42. As described in Section II, in recognition of the different constitutional or institutional constraints of Members, the GATS, while including regional and local government and non-government bodies exercising delegated power in its definition of "measure" (Article I.3(a)), stipulates that each Member shall take such reasonable measures as may be available to it to ensure observance by regional or local government bodies or non-governmental bodies. It may be useful to examine whether transparency requirements should operate at the sub-national level, given the difference in transparency practices

between central government bodies and other bodies, the benefits of transparency for both governance and trade and the fact that the locus of services regulation in many federal systems is at the sub-national level (where some difficulties for foreign traders can also arise). Exclusion of sub-national measures may also result in any additional transparency obligations falling disproportionately on those WTO Members with centralised political and regulatory systems. However, the additional administrative burden for WTO Members with federal systems of including measures at the sub-national level must also be considered; indeed, sub-national measures are excluded from a number of these countries' prior consultation requirements. Nonetheless, transparency disciplines based around requiring or encouraging certain domestic practices or procedures could also encourage similar practices at the local or regional level.

Possible types of disciplines

Horizontal versus sectoral disciplines

43. Another threshold issue is the extent to which any new transparency obligations should be horizontal or sectoral in application, and whether any horizontal rules should apply across the board to all sectors, or only to sectors where specific commitments have been made.

44. Existing transparency disciplines apply both across the board and only in sectors where specific commitments have been made (see paragraphs 128-129 above). Notwithstanding this, it may be worth considering whether any further disciplines on transparency should apply across all sectors, regardless of whether specific commitments have been undertaken. Given the benefits of transparency for both domestic governance and the development of efficient domestic services, it can be argued that all areas of the economy should benefit from greater transparency, not simply those sectors where international trade commitments have been made. Further, transparency is increasingly recognised as a fundamental principle of the trading system (like MFN), and lack of transparency as a major barrier to trade. Given the degree of unilateral liberalisation being undertaken by countries outside of the GATS framework, an annex on transparency applying to all sectors could serve countries' own interests in developing sound transparency practices to assist with smooth-functioning and orderly market development at the same time as they liberalise. Further, having decided to open the market to foreign suppliers, it is in Members' interests to provide trading partners with the information necessary to take advantage of the access granted.

45. However, there are also counter-arguments, notably that Members may be more willing to countenance additional transparency disciplines if they only applied in areas where commitments had been made.

46. Similar arguments arise in relation to the question of whether any new transparency disciplines should apply horizontally or be developed on a sector-specific basis. Proponents of a horizontal approach to increased disciplines on transparency note that transparency is usually considered as a cross-cutting issue, a fundamental principle of the trading system which is not dependent on sectoral specificities. They also point to the fact that, while services sectors themselves may be highly diverse, the fundamental requirements of transparency - such as making information available in a timely and readily accessible fashion - do not vary greatly between sectors. Similarly, it is argued that there is little justification for treating one sector more favourably than another in terms of transparency, and that good regulatory practices should be encouraged across all of government, not simply in certain relatively easy or non-controversial sectors. Horizontal disciplines can also prevent sectoral special interests from blocking progress. These arguments are underlined by the existence in a number of WTO Members of national horizontal administrative procedures laws or regulations. Horizontal transparency rules are also argued to

provide benefits in terms of economy of negotiating effort and the legal clarity and simplicity of obligations by avoiding a proliferation of sector-specific disciplines.

47. However, those favouring sectoral disciplines point to the particularities of various services sectors - arguing that more detailed regulatory disciplines, especially beyond transparency, cannot be uniform across sectors, reflecting the nature of the sectors themselves and the administrative capacity of sectoral regulatory authorities. Given the need to develop sector-specific rules to address issues such as interconnection which only arise for certain types of sectors, it is argued that it is better to include tailored and specific transparency requirements in these rules - as was done in the Reference Paper on Basic Telecoms and the Accountancy Disciplines - than to develop general transparency disciplines.

48. Proponents of a sectoral approach also argue that not all service sectors are traded to the same extent, and not all encounter the same degree of problems with lack of transparency. Priorities for which measures should be addressed by what type of enhanced disciplines could also differ between sectors. Further, as national regulatory practices vary among sectors, it is argued that it may be difficult to develop a horizontal approach (e.g. administrative procedures laws or guidelines), especially for developing countries with limited administrative capacity. Members may be more willing to accept increased transparency disciplines if they are able to implement such disciplines gradually, starting with sectors and measures of priority interest, rather than an "all or nothing" approach. Arguably, Members may be less willing to convert unilateral liberalisation into GATS commitments if they automatically assume additional obligations with regard to transparency.

49. However, horizontal and sectoral approaches to enhanced transparency disciplines need not be mutually exclusive. Another option could be a basic set of horizontal rules on transparency which could be supplemented as necessary by sector- or mode-specific rules, as applicable. Additional sector-specific transparency requirements could be scheduled as additional commitments against the appropriate sector.

50. Another approach would be to give Members the flexibility to inscribe standard new disciplines on transparency in their schedules against some sectors but not others. Alternatively, Members could be allowed to accept common new rules in full or in part; i.e., selecting some of the disciplines to inscribe in their schedules, while leaving others out. However, these last suggestions also raise the issue of the extent to which any new disciplines should be binding.

Binding versus best endeavours

51. New transparency obligations could take the form of mandatory disciplines or "best endeavours" provisions. Mandatory provisions could take the form of an annex applying horizontally to all sectors, and binding on all Members. Alternatively, Members could choose to inscribe new transparency disciplines in their schedules in sectors where they have made specific commitments - i.e., while the decision to adhere to the increased disciplines would be voluntary, once inscribed in the schedules (per Article XVIII additional commitments) they would have the status of binding commitments. Members could be given the flexibility not to include all sectors where they have made commitments, or not to include all disciplines. A further option - which could operate either for all sectors or for only those where specific commitments had been made - would be for any additional disciplines to be worded on a "best endeavours" basis, providing Members with a benchmark of best practice, but with some flexibility in implementation. In any of these options, general transparency disciplines could be supplemented by additional sector- or mode-specific rules as appropriate. These options are summarised in Box 1 below.

Box 1: Summary of options for possible increased transparency requirements

- Binding general disciplines applying horizontally across all sectors.
- Binding general disciplines, applying to all sectors where specific commitments have been made.
- Binding general disciplines applying only to those sectors where Members have specifically scheduled them.
- Binding sector-specific transparency rules developed on a sector-specific basis.
- "Best endeavours" disciplines applying horizontally across all sectors.
- "Best endeavours" disciplines applying only in sectors where specific commitments have been made.
- "Best endeavours" disciplines applying only to those sectors where Members have specifically scheduled them.
- Flexibility to apply only some of the disciplines (be they binding or "best endeavours") to only some sectors.
- Any of the above supplemented by additional sector- or mode- specific rules as appropriate.

Reducing the potential administrative burden

52. A key consideration in assessing whether, and to what extent, GATS transparency disciplines might be augmented or specific means for implementing current obligations developed, is the need to balance the administrative burdens of new transparency requirements against the benefits (for domestic efficiency and governance, as well for trade) of increased transparency. A number of options are open to WTO Members with a view to ameliorating the administrative burden of increased transparency requirements, while garnering the benefits.

53. Obviously, the degree of burden in terms of the timing and form of implementation will be affected by the type of disciplines which Members choose (see Box 1 above). Additionally, the administrative burden of increased transparency may be reduced to the extent that any new disciplines focus on developing procedures at the national level and on minimising additional notification requirements to the WTO. Development of transparency practices at the national level, while still requiring resources, provides immediate and demonstrable domestic benefits, in addition to those for trading partners. Indeed, the nature of services trade suggests that many transparency procedures can be best operationalised at the national level, building on existing administrative structures and practices.

54. This flexibility can be further increased to the extent that any new obligations take the form of general objectives, leaving scope for Members to implement them within their existing administrative structures. For example, specific time limits need not be set - timing requirements should be stated in general in terms of the objective they are designed to meet - i.e., a specific time limit (e.g., 6 weeks) for prior consultation or application processing need not be mandated, provided that the period meets the objective of being "sufficient to enable comments to be received and taken into account" or, in the case of applications, is "reasonable", "prompt" and "not an unnecessary barrier or restriction on the supply of the service". Ideally, transparency obligations should be objectives which Members may achieve by a range of means appropriate to their domestic systems and levels of development.

55. The degree of administrative burden associated with increased transparency disciplines will also depend on the nature and scope of any provisions agreed. Exceptions for measures of a relatively minor nature or related to security, for example, may reduce the burden, as could the carve-out of measures at the sub-national level. In this regard, it is also worth noting the different types of measures already referred to

in the GATS and the different disciplines which apply to them. Additionally, as in the SPS and TBT Agreements, special transparency provisions could apply in emergency situations.⁸

Special and differential treatment

56. Members could also consider whether special and differential treatment might be appropriate to address the particular concerns of developing countries in the context of their limited capacity to implement increased transparency requirements.

57. Possible special and differential treatment could take a number of forms: the content of obligations could be different for developing countries and/or least developed countries (LDCs), or, in the case of binding disciplines, these countries could be granted transition periods. While it could be argued that, given the domestic benefits of transparency, there is little case for differential levels of obligations, the limited administrative capacities of many developing countries and/or LDCs needs to be recognised.

58. Transition periods for binding disciplines could be set at a particular period (for example, 10 years) with countries to implement the requirements on a "best endeavours" or "to the extent possible" basis in the interim. Were additional transparency obligations to be inscribed in schedules for sectors where specific commitments had been undertaken, developing countries and LDCs could perhaps also take advantage of the flexibility already provided under the GATS to make "pre-commitments", i.e., to pre-commit (in additional commitments) to the introduction of certain transparency practices in certain sectors at a later date.

59. In the context of binding disciplines, some flexibility could also be provided by the introduction of a "peace clause" - i.e., establishing a further period subsequent to the deadline for implementation during which no dispute action would be brought. It may be questionable whether this would be necessary, given that dispute settlement procedures are unlikely to be brought against failure to implement transparency provisions; however, such a clause may be helpful to the extent that failure to adhere to transparency obligations might arise in the context of a broader dispute and may in any case contribute to Members' confidence in assuming additional obligations.

60. However, as noted above, the relative administrative burden of increased transparency provisions, and the need for special and differential treatment, is lessened in the context of obligations which are already "best endeavours", or where Members voluntarily opt to sign onto additional transparency obligations for certain sectors. Similarly, the need for special and differential treatment would also depend upon how prescriptive any transparency obligations were. For example, if obligations specified exact time periods for processing of applications or responding to comments, there might be a case for allowing developing countries additional time in recognition of their more limited resources. However, obligations which are more general in nature - "a reasonable time" - arguably already contain sufficient flexibility. Equally, obligations could avoid containing specific technological requirements (e.g., requiring Internet publication) in the interests of flexibility for developing countries. One further possibility might be to include a general provision that Members shall have regard to the level of development and administrative capacity of other Members in interpreting "a reasonable period" or similar provisions.

61. Specific technical assistance and capacity building provisions could also be considered in the context of any further transparency disciplines. However, notwithstanding their link to and importance for

⁸ See Article 2.10 of the TBT Agreement and Article 6 of Annex B of the SPS Agreement for emergency cases.

trade, programs to increase domestic capacity for transparency in domestic regulation may be most effectively and appropriately pursued in the context of general development co-operation programs aimed at developing domestic institutions and frameworks for good governance.

62. While any increased transparency involves resources, these must be set against the benefits for governance, the domestic economy and trade from increasing the participation of stakeholders in regulatory decision-making. Additionally, resources devoted to increased transparency are more likely to heighten the legitimacy and "necessity" of regulatory measures. The more transparent the process of regulatory decision-making, the greater the opportunities for input at an early stage by interested parties, the less may be the likelihood of trading partners bringing WTO disputes over the necessity of a given regulation.

Box 2: Summary of ways to reduce the burden of additional transparency provisions

- Any obligations to be expressed in terms of general objectives, with maximum flexibility for Members to implement in line with their level of development and existing administrative and regulatory systems.
- Build to the greatest extent possible upon existing domestic structures and practices, for example by implementing requirements at the national level, rather than via notification to the WTO.
- Consider exceptions provisions, for example related to measures of a minor nature or those related to security. Consider special provisions for emergency situations.
- Consider carving-out certain types of measures or measures at a sub-national level.
- Consider special and differential treatment provisions for developing countries and/or LDCs, including transition periods; a provision requiring Members to have regard to the level of development and administrative capacity in other Members in interpreting "a reasonable period" or similar transparency requirements; or the extension of a "peace clause" subsequent to the deadline for implementation.
- Encourage developing countries to make pre-commitments on transparency in specific commitments.
- Encourage focus on transparency in domestic regulation in general capacity building and development co-operation programs, including by drawing attention to the benefits for trade performance.

Transparency at different stages of the regulatory process

63. Transparency is also required at a number of stages throughout the regulatory process - i.e., not just after the measure has been adopted or the decision taken, but in the decision-making process itself. These stages are recognised in existing GATS obligations, which refer to the need to publish measures before they come into force (Article III.1) and the need for prompt consideration of applications in the decision-making process (Article VI.3), as well as to procedures for the review of administrative decisions affecting trade in services (Article VI.2). The GATS also provides some guidance on how regulations should be implemented (Article VI.1 and VI.4). Proposals for increased transparency have tended to reflect these three different stages: the process of making the regulation; application procedures pursuant to a regulation; and review or appeals procedures subsequent to decisions having been taken. The three stages are considered seriatim below.

(i) Making the regulation

64. The focus of transparency in the regulatory decision-making process has been on the opportunity for all interested parties - including foreigners - to be consulted and to provide comment on proposed new regulations. As the analysis in Section IV indicates, prior consultation as a domestic procedure could be implemented for subordinate measures in line with the key principles of transparency and non-

discrimination. The question arises whether it would be feasible for regulators to be transparent and non-discriminatory throughout the process of developing a regulation, especially at the first stage, where they tend to consult selectively with relatively narrow range of strongly affected interests. It is relatively more conceivable for regulatory authorities to ensure transparency and non-discrimination in the notice and comment procedure for the draft texts of prospective regulation, which would usually occur later in the process of developing a regulation.

65. Another question arises whether it would be feasible for regulators to conduct prior consultation for all types of measures. Exceptions for emergency measures could be considered in the case of possible GATS prior consultation requirements, along with exceptions for measures dealing with military and foreign affairs and measures of a minor or mechanical nature. It would also be important to continue the current practice in all relevant WTO disciplines related to prior notification and/or opportunity for comment (TBT, SPS Agreements and the Accountancy Disciplines) of focusing on measures which may significantly affect trade.⁹ As we see in the Australian case, these exceptions are expected to decrease the number of notice and comment procedures.¹⁰ While some of the regional trade agreements do not specifically exclude any particular type of measures from prior consultation, such obligations take a form ("to the extent possible") which allows the parties flexibility to exclude measures. In developing countries and some OECD Members, prior consultation does not cover all measures and is applied to specific types of measures in specific sectors. Any discipline on prior consultation realistically needs to have some limits on the scope of its application, taking account of the limitations authorities may face and the need to avoid overly burdensome procedures, in particular for developing countries¹¹.

66. Compared with prior consultation on subordinate measures, there are wider differences among country practices for prior consultation on legislative measures. As consultation is conducted in the legislative branch through elected representatives in any legislative framework, it is difficult to envisage effective WTO disciplines in this area.

(ii) Process for applications

67. While Article VI.3 of GATS requires authorities to make decisions within a reasonable time period and to provide information on the status of applications, more detailed procedural transparency requirements could be developed for GATS (as exist in the TBT/SPS Agreements, the Accountancy Disciplines and some regional trade agreements). They could include:

- Making publicly available information on which activities require a license and the criteria for obtaining a license;
- Publication of the standard processing period;

⁹ While both the SPS and TBT Agreements refer to regulations, which *may* have a significant affect on trade of other Members, the Accountancy Disciplines refer to "measures, which significantly affect trade in accountancy services".

¹⁰ See the Australian case in the section III. While measures not having impact on business could be different from those not affecting significantly trade, we expect measures not having impact on business would probably not affect significantly trade in services.

¹¹ For a more detailed discussion of possible limits on the scope of potential disciplines on prior consultation, see OECD "Trade in Services: Transparency in Domestic Regulation: Prior Consultation" [TD/TC/WP(2000)31/FINAL].

- Provision of information to applicants regarding all the documents and information they must supply in an application and notices of the deficiencies in application;
- Information on the reasons for rejection of an application;
- Notice of the facts or conduct warranting disciplinary action or sanctions and the nature and extent of disciplinary actions, as well as provision of a mechanism to respond to queries.

68. These requirements could be included in horizontal transparency disciplines, or tailored to different sectors to reflect the different needs and capacities of regulatory authorities in different sectors. While license procedures for trade in services are different from the conformity assessment in the TBT and inspection or approval in the SPS, these key elements could be shared and applied to both procedures.

69. Other types of disciplines on administrative actions or decisions are also found in the SPS and TBT Agreements and Accountancy Disciplines, which are not found in GATS. They include (i) non-discriminatory processing of submission or application for both domestic and foreign parties; (ii) avoidance of unnecessary information requirements for application; (iii) non-discriminatory treatment of confidential information; (iv) reasonable application fees; (v) reasonable requirement for authenticity of application materials. While these disciplines also facilitate trade in services by reducing burdensome administrative processes, they are related more to issues of non-discrimination and necessity, than to transparency.

(iii) Appeals and review process

70. Similarly, many of the suggested disciplines relating to the appeals stage of the regulatory process relate less to transparency *per se* and more to other aspects of good regulatory practice, such as non-discrimination (e.g., the ability to file complaints about inconsistent treatment of foreign and domestic suppliers, non-discriminatory sanctions in case of disciplinary procedures); fairness (e.g., disciplinary action may not be taken on the basis of violations of rules that were not in effect at the time the relevant activity took place); and the right of appeal (including against any sanctions imposed following a disciplinary hearing). However, elements related to transparency arise in the case of regulatory enforcement procedures, where the access of foreign suppliers to information can be particularly important. For example, requirements could include that the affected party be informed about any regulatory enforcement procedure; be given the opportunity to be heard; and have the opportunity to submit and review evidence. Additionally, procedures for disciplinary actions, including notification of violations, responses by the affected parties and explanation of decisions, and any procedures for appeal, could be made publicly available.

Options for enhancing transparency

71. This section examines some practical options for enhancing transparency under the GATS. It considers both ways in which the GATS disciplines might encourage the development of transparent procedures at the domestic level, as well as ways in which GATS transparency provisions requiring notification to the WTO might be made more effective. It considers both the introduction of new obligations and ways to enhance the implementation of existing obligations.

Improving domestic practices on transparency: reference paper on additional transparency requirements

72. Possible new transparency disciplines could establish a list of best practices to be implemented at the national level. This could take the form of an annex, applying across all sectors, or a reference paper which could be voluntarily inscribed against individual service sectors under Article XVIII additional commitments, and which could be accepted in full or in part. The more extensive the list of proposed practices to enhance transparency, the more likely that Members would seek to take a voluntary approach to inscribing such additional disciplines in their schedules, and the more likely that they may seek additional flexibility regarding sectors and disciplines included.

73. Box 3 below sets out examples of the sort of elements which could be included in a reference paper on transparency (the list is by no means exhaustive). They are suggested as horizontal disciplines, but without prejudice to the issue of whether sector-specific disciplines could be developed for some sectors.

Box 3: Examples of some possible elements for a potential reference paper on transparency

Prior consultation

- Prior comment procedures to be open to all interested parties, including non-nationals.
- Publication of the proposed measures, along with any relevant background material.
- Explanation of rationale behind measures on request.
- Time periods for prior consultation to be determined by national authorities but must be reasonable and sufficient to enable all interested parties to make an input.
- Authorities must give consideration to all comments received.
- Comments received and responses to comments all to be made public.

Licensing and authorisation

- Specify in writing the activities subject to licensing or authorisation requirements and publish the criteria and conditions for such requirements.
- Provide information to applicants regarding all the documents and information they must supply in an application.
- Provide notice of any deficiencies in the application.
- Publish the standard timeframe for the licensing and authorisation process.
- Publish the name of competent authorities and contact points for complaints.
- Provide, upon request, the reasons for rejection of an authorisation/application.
- Provide notice of the facts or conduct warranting disciplinary action or sanctions and the nature and extent of disciplinary actions, as well as provision of a mechanism to respond to queries.
- In case of disciplinary action, inform the affected party about the procedure and provide the opportunity to be heard and to submit and review evidence.
- Make publicly available the notification of the violation, along with the responses by the affected party and the explanation of the decision.

74. As noted above, consideration could also be given to creating any necessary sector-specific disciplines to "top up" the general reference paper approach. Further study of the regulatory experience at the sectoral level would be needed to determine the extent to which different sectors required sector-specific disciplines to "top up" a horizontal reference paper.

75. Consideration could also be given to the development of specific disciplines for mode 4, given the special situation of measures affecting trade in mode 4; i.e., that they are closely linked to broader immigration policies and measures (as recognised by the Annex on Movement of Natural Persons). Arguably, however, most of the areas of interest to mode 4 - such as provision of information on substantive requirements and criteria and procedures for applications; prior consultation on measures affecting mode 4 entry; timely responses for applications, or notification in the event of any delay; provision of statement of reasons for denial of application and availability of review/appeals procedures - could already be covered by a general reference paper on transparency. However, given that general immigration legislation does not fall under the GATS (see footnote 7 above), the scope of application of any transparency reference paper would need to be carefully identified. Nonetheless, it is worth noting that in some OECD countries, public notice and comment procedures are applied to measures relevant to entry, stay and work authorisation of natural persons. For example, the US immigration rules and regulations are subject to the Administrative Procedures Act (5 U.S.C. 553) and the Ministry of Justice in the Japanese government also adopts public notice and comment procedures for its measures on immigration control.

Improving transparency of scheduled commitments: standard forms for WTO notifications, economic needs tests and measures on mode 4

76. In general, the level of notifications under the GATS has been disappointing. In particular, there have been relatively few notifications under Article III.3 (annual notification to the Council for Trade in Services by a Member of the introduction of any new, or changes to existing, laws, regulations or administrative guidelines which significantly effect trade in services covered by its specific commitments). Some developing countries have also pointed to the lack of notifications under Article VII.4 (notification of mutual recognition agreements, including those under negotiation, in order to provide adequate opportunity for other Members to indicate their interest in participating in negotiations). In the case of Article III.3, it has been suggested that greater precision regarding the meaning of "significantly affect trade in services" could assist in generating a greater number of notifications. Similar calls for clarity have also been made regarding the scope of the general requirement for Members to publish "all relevant measures of general application pertaining to or affecting the operation of the Agreement" under Article III.1.

77. Further, notifications received do not always provide the required information in an easy to use format. Standard form notifications (along the lines of the SPS and TBT Agreements) could be developed to ensure greater consistency of information provided, as well as to allow for comparability between Members and to facilitate sharing of best practices. Standard form notifications do not add to existing obligations, but facilitate their implementation and could be considered (or improved) for some (but not necessarily all) GATS notification requirements, for example for Article III.3 and, in view of its importance for mode 4 trade, Article VII.4.

78. The standard form for Article III.3 notifications¹² could also include the name of the legislation/regulation or administrative guideline; a description of the purpose of the measure; and a contact point for further enquiries. Additionally, Members could be asked to provide a brief assessment of the trade effects of the measure. A standard form for Article VII.4(b) could include: the type of agreement; the parties to the negotiation; any industry advisory bodies involved or consulted; sectoral coverage; and a contact person for further information or to express interest in participating in the negotiations.

¹² A standard form is already in use for GATS notifications, covering the following elements: Member notifying; Article under which the notification is made; date of entry into force and duration; agency responsible for enforcement of the measure; description of the measure; Members specifically affected if applicable; and place from which texts are available.

79. OECD work¹³ has also proposed the development of a standard form notification to provide additional useful information on the operation of economic needs tests (ENTs). A standard form notification for ENTs could include: criteria¹⁴, duration of the measure, detail as to relevant administrative procedures (including provision for explanation of decisions, review of applications) and review of the need to maintain the ENT in question. It could also include information on costs and approximate processing time (with appropriate caveats as to the possibility of change). A further useful addition might be the inclusion of the economic or social policy objective sought to be achieved by the ENT. It should be noted however, that standard form notifications under the TBT and SPS Agreements include only a brief and general description of regulatory objectives (e.g., health, safety, environment etc). Alternatively, the approach in the Accountancy Disciplines (where a Member is required to inform another Member, upon request, of the rationale behind domestic regulatory measures in relation to legitimate objectives) could be considered. Indeed, some of the disciplines proposed in Box 3 could also help to make ENTs more transparent, in particular as ENTs are often a feature of licensing regimes. For example, clarification of the rationale behind the ENT and provision of reasons for denial of an application/authorisation could help both to give potential service suppliers a better sense of the general regulatory environment of the sector in which the ENT applied and to "flesh out" the operation of the ENT in their specific instance. Further study could explore the linkages between achieving greater transparency for ENTs and the types of disciplines under consideration in the WTO Working Party on Domestic Regulation.

80. A system of standard form notifications could also be considered for mode 4 covering, for each type of entry program related to GATS mode 4 entry: documentation required; method of lodgement; processing time and application fees (if any); length and validity of stay; sectors where any special conditions apply; possibility and conditions for extensions (including availability of multiple entry visas); rules regarding accompanying dependants; review and/or appeal procedures (if any); and details of relevant contact points for further information. This notification requirement could also take the form of a requirement to contribute to a web-site dedicated to providing information on the conditions applying to temporary entry of service providers. Members would be responsible for the accuracy of their information and for ensuring that it is updated on a regular basis.

Improving Enquiry Points

81. GATS enquiry points (mandated under Article III.4) are an avenue to provide specific information to other Members upon request on all measures of general application or international agreements pertaining to or affecting the operation of the agreement (per Article III.1) and all matters subject to notification under Article III.3 (laws, regulations or administrative guidelines which significantly affect trade in services covered by a Member's specific commitments). Additionally, Article IV.2 requires the establishment of contact points to facilitate the access of developing country service suppliers to information concerning commercial and technical aspects of the supply of services; registration, recognition and obtaining of professional qualifications; and the availability of services technology in Members' respective markets.

82. The WTO currently makes the postal addresses, telephone and fax numbers of all GATS enquiry points which have been notified available on the WTO website. However, enquiry points appear to be little used and often feature out of date information. While such contact points are designed to serve as a "one stop shop" for information, in reality the range and diversity of services sectors makes it difficult for them

¹³ See "The Scheduling of Economic Needs Tests in the GATS: Follow up Work", TD/TC/WP(2001)5/FINAL.

¹⁴ While the scheduling guidelines (MTN.GNS/W/164/Add.1) state that Members should indicate the main criteria on which the ENT is based, few have done so.

to fulfil this role. The contact point in the trade ministry (which normally has responsibility for WTO matters) is normally ill-prepared to field questions on the transport or telecommunications sectors. One option may be for Members to nominate sectoral contact points - i.e., nominated persons in each of the relevant agencies at the domestic level who can provide information on particular service sectors. A comprehensive list of these enquiry points could be compiled by the WTO. While any proposals to expand enquiry points would need to take account of the potential costs for Members, some countries currently provide such sector-specific enquiry points as part of regional arrangements (APEC Individual Action Plans require individual enquiry points for each service sector). Alternatively, trade ministries with responsibility for GATS enquiry points could establish their own network of contacts in other relevant ministries at the national level to facilitate timely responses to sector-specific enquiries.

83. Additionally, a special enquiry point for mode 4 could be considered. Given the importance of immigration policy to mode 4, and the fact that for the purposes of implementation, the relevant ministry is often the immigration authorities (in combination with the labour market authorities) creation of dedicated contact points within the trade or immigration ministries (or as a joint operation) could be considered. These contact points might also produce an annual report outlining any reports received of problems relating to mode 4, with a view to the future refinement of procedures. Alternatively, Members could simply be asked to create a one-stop information point (e.g., a web-site, government office) for information on mode 4 entry. Contact details for this point could be notified to the WTO, and perhaps listed on the WTO web-site, with links to Members' electronic schedules.

84. The effectiveness of even the single enquiry point could be increased where Members maintained a consolidated code of regulations. These typically cover all government regulations (beyond those affecting trade in services as required by the GATS) and are easily accessible to the general public - for example, via a website or government gazette. Consolidated codes at the national level can be useful in providing other WTO Members and business with an accurate reading of measures in place at the market. While perhaps less user-friendly than an enquiry point, information can be more comprehensive. A consolidated list of regulations would also allow readers to select for themselves the measures which may impact on trade, rather than that decision being made by the agency responding to the query. While they can be resource-intensive to construct, information and communications technology is reducing the cost of preparing and maintaining such codes.

Item in the Trade Policy Review Mechanism (TPRM) on transparency in domestic regulation

85. In keeping with the function of the TPRM as a mechanism for exploring the general context for, and formulation of, Members' trade policies, but without exploring their implementation of particular WTO commitments (the TPRM is de-linked from the Dispute Settlement System), trade policy reviews could include a section on regulatory transparency. While some might argue that domestic regulatory practices are not strictly speaking a trade policy, they have a clear impact on trade and their inclusion would provide trading partners with a better understanding of the context in which trade policy is made - one of the purposes of the TPRM. Additionally, transparency underpins all WTO Agreements and, indeed the TPRM itself. Inclusion of a section on transparency in domestic regulation in the trade policy review report prepared by the WTO Secretariat could usefully disseminate best practices amongst WTO Members, with the format of trade policy reviews also affording other Members the opportunity to ask questions about the operation of any domestic transparency mechanisms.

ANNEX I: TRANSPARENCY PROVISIONS IN WTO AGREEMENTS

GATT

86. Article X of the General Agreement on Tariffs and Trade (GATT) 1947 referred to in the GATT 1994 and Annex 1A requires that each WTO Member shall publish promptly all laws, regulations, judicial decisions and administrative rulings of general application in such a manner as to enable governments and traders to become acquainted with them. It also states that no measure of general application shall be enforced before it is published. Article XXIV also requires each WTO Member to take such reasonable measures as may be available to it to ensure observance of this obligation by the local governments within its territories.

87. It also requires the WTO Members to administer them in a uniform, impartial and reasonable manner and 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.

SPS Agreement

88. The Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) includes procedures for the prior notification of proposed measures, along with an opportunity for comment by other WTO Members. It should be noted that Annex A of the SPS Agreement defines the measures as all relevant laws, decrees, regulations, requirements and procedures and such measures cover both legislative measures and subordinate measures accordingly. The SPS Agreement, unlike the TBT Agreement, does not contain provisions related to measures by local governments, reflecting the fact that there are almost no SPS measures at the local level.

89. Article 7 of the SPS Agreement, with reference to provisions in Annex B of the Agreement, establishes disciplines on transparency. Obligations regarding prior notification and opportunity to comment are triggered in cases where an international standard, guideline or recommendation does not exist or the content of the proposed sanitary or phytosanitary (SPS) regulation is not substantially the same as an international standard, guideline or recommendation and where the regulation may have a significant effect on trade of other Members. In such circumstances, according to Annex B, paragraph 5 of the SPS Agreement, Members shall

- Publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;
- Notify other Members through the WTO Secretariat of the products to be covered together with a brief indication of the objective and rationale for the proposed regulations. Such notification shall take place at an early stage when amendments can still be introduced and comments taken into account;

- Provide upon request to other Members copies of the proposed regulation and, whenever possible, to identify the parts which in substance deviate from international standards, guidelines or recommendations;
- Without discrimination, to allow reasonable time for other Members to make comments in writing, discuss these comments upon request and take the comments and the results of the discussions into account.

90. A standard format has been agreed by WTO Members for SPS notifications. The items in this format are: agency responsible; products covered; regions or countries likely to be affected (to the extent relevant or practicable); title and number of pages of the notified document; description of content; objective and rationale (i.e., food safety, animal health, plant protection, protect humans from animal/plant pest or disease, protect territory from other damage from pests); whether a relevant international standard, guideline or recommendation exists (and, if so, deviations from it); relevant documents and language(s) in which they are available; proposed date of adoption; proposed date of entry into force; final date for comments; agency or authority designated to handle comments (national notification authority, national enquiry point, other); and the location where texts are available (address, fax number and e-mail address).

91. However, where urgent problems of health protection arise or threaten to arise for a Member (Annex B paragraph 6), Member may omit such of the steps provided for above as it finds necessary, provided that the Member:

- Immediately notifies other Members, through the Secretariat, of the particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s);
- Provides upon request, copies of the regulation to other Members;
- Allows other Members to make comments in writing, discusses these comments upon request, and take the comments and the results of these discussions into account.

92. Obligations related to local government bodies and non-governmental entities are set out in Article 13. Members are fully responsible for the observance of all obligations under the Agreement and are required to formulate and implement positive measures and mechanisms in support of observance of the Agreement by other than central government bodies. Members are also required to take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as local bodies in which relevant entities within their territories are Members, comply with the Agreement. Members are also required not to take measures, which have the effect of, directly or indirectly, of requiring or encouraging such local or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the Agreement. Members are also obliged to ensure that they rely on the services of non-governmental entities for implementing SPS measures only if these entities comply with the Agreement.

93. Disciplines on administrative decisions and actions such as control, inspection and approval procedures are set in Annex C of the SPS agreement. It should be noted that these control, inspection and approval procedures are often conducted by non-government entities under delegated power from the government. Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:

- Such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;

- The standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained;
- Information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances for contaminants in food, beverages or feed-stuffs;
- The confidentiality of information about imported products arising from or supplied in connection with control, inspection and approval is respected in a way no less favourable than for domestic products and in such a manner that legitimate commercial interests are protected;
- Any requirements for control, inspection and approval of individual specimens of a product are limited to what is reasonable and necessary;
- Any fees imposed for the procedures on imported products are equitable in relation to any fees charged on like domestic products or products originating in any other Member and should be no higher than the actual cost of the service;
- The same criteria should be used in the siting of facilities used in the procedures and the selection of samples of imported products as for domestic products so as to minimise the inconvenience to applicants, importers, exporters or their agents;
- Whenever specifications of a product are changed subsequent to its control and inspection in light of the applicable regulations, the procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the regulations concerned; and
- A procedure exists to review complaints concerning the operation of such procedures and to take corrective action when a complaint is justified.

TBT Agreement

94. Procedures for prior notification similar to the SPS Agreement are also found in the Agreement on Technical Barriers to Trade (TBT Agreement). Obligations regarding prior notification and opportunity for comment are triggered by Article 2 and 5 where a proposed technical regulation or mandatory conformity assessment procedure may have a significant effect on trade of other Members and is not in accordance with an international standard, or where no relevant international standard exists. While obligations regarding prior notification and opportunity for comment are similar to those in the SPS Agreement, there are some differences. . Articles 2.9.1 and 5.6.1 of the TBT Agreement state that Members shall publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested *parties in other* Members to become acquainted with it, that they propose to introduce a particular technical regulation (*italics added*). However, the corresponding provision in the SPS

Agreements refers only to "interested Members" (see paragraph 12). This wording reinforces the understanding in the TBT Agreement that a broad range of interests, beyond simply governments, should be informed of new measures.

95. The TBT Agreement also states that Members are fully responsible for the observance of all the provisions and requires Members to formulate and implement positive measures and mechanisms in support of observance by other than central government bodies. Members are also obliged not to take measures which require or encourage local government bodies or non-government bodies within their territories to act in a manner inconsistent with the Agreement. Members must also take such reasonable steps as may be available to them to ensure compliance by local government and non-governmental bodies within their territories. The Agreement also requires Members to ensure that technical regulations of local government, on the level directly below that of the central government, are notified, except for technical regulations the technical content of which is substantially the same as that of previously notified technical regulations of central government bodies of the Member concerned. As to administrative decisions or actions, Article 5.2 of the TBT Agreement has similar disciplines for conformity assessment procedures as in Annex C of the SPS Agreement. It should be noted that these control, inspection and approval procedures are often conducted by non-government entities under the delegated power from the government.

TBT Code of Good Practice

96. While the above disciplines apply to technical regulations, the Code of Good Practice in the TBT Agreement requires domestic standards bodies to undertake prior consultation on prospective standards. The Code requires, *inter alia*, that its adherents grant national treatment and MFN in terms of standards and use international standards where possible. Adherents are required to allow at least 60 days for submission of comments on draft standards prior to their adoption (this period can be shortened where urgent problems of safety, health or environment arise or threaten to arise). They must provide, upon request, a copy of the draft standard and take any comments received into account. If so requested, they shall reply to any comments received as promptly as possible, including an explanation why deviation from international standards is necessary. While Members must ensure that central government standardising bodies accept and comply with the Code of Good Practice, they need only take such reasonable measures as may be available to them to ensure that local government and non-governmental bodies do so. They must also not take measures, which would have the effect, directly or indirectly, of requiring or encouraging such standardising bodies to act in a manner inconsistent with the Code.

GATS

97. Article III requires Members to 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 the GATS. Members must 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. Members are also obliged to establish one or more enquiry points to provide specific information on any of its measures of general application to other Members, upon request. This procedure focuses on notification to the Council for Trade in Services or the enquiry points rather than direct exchanges between regulators and business or civil society.

98. Article VI.2 also requires that each Member have procedures for prompt, objective and impartial review upon request of, and appropriate remedies for, administrative decisions affecting trade in services,

although this does not require any Member to institute tribunals or procedures which would be inconsistent with its constitutional structure or legal system.

99. According to Article VI.3, where authorisation is required to supply a service subject to a specific commitment, the competent authorities are obliged to inform the applicant of the decision within a reasonable period of time, and to provide, on request and without undue delay, information concerning the status of an application.

100. Additionally, Article VI.4 mandates the development of any necessary disciplines for measures relating to qualification requirements and procedures, technical standards and licensing requirements to ensure that any requirements are, *inter alia*, based on objective and transparent criteria, not more burdensome than necessary to ensure the quality of the service and not in themselves a restriction on the supply of the service.

Disciplines for the Accountancy Sector

101. The Disciplines for the Accountancy Sector reached under the GATS in 1998 include provisions on transparency. According to the Disciplines (paragraph 6), when introducing measures significantly affecting trade in accountancy services, Members shall endeavour to provide an opportunity for comment, and give consideration to such comments, before adoption. Members shall inform another Member, upon request, of the rationale behind domestic regulatory measures in the accountancy sector, in relation to legitimate objectives as referred to in paragraph 2. Licensing requirements (i.e. the substantive requirements, other than qualification requirements, to be satisfied in order to obtain or renew an authorisation to practice) shall be pre-established, publicly available and objective.

102. Detailed disciplines on administrative actions and decisions, similar to the control, inspection and approval procedures in the SPS Agreement and the conformity assessment procedures in the TBT Agreement, are also developed:

- Members shall make publicly available, including through the enquiry and contact points, the names and addresses of competent authorities (i.e. governmental or non-governmental entities responsible for the licensing of professionals or firms, or accounting regulations). Members shall also make publicly available, or shall ensure that their competent authorities make publicly available, including through the enquiry and contact points: (1) where applicable, information describing the activities and professional titles which are regulated or which must comply with specific technical standards, and (2) information on technical standards.
- Members shall also make publicly available, or shall ensure that their competent authorities make publicly available, including through the enquiry and contact points: (1) requirements and procedures to obtain, renew or retain any licences or professional qualifications and the competent authorities' monitoring arrangements for ensuring compliance; (2) upon request, confirmation that a particular professional or firm is licensed to practice within their jurisdiction.
- Details of procedures for the review of administrative decisions, as provided for by Article VI: 2 of the GATS shall be made public, including the prescribed time limits, if any, for requesting such a review.

- Fees charged by the competent authorities shall reflect the administrative costs involved, and shall not represent an impediment in themselves to practising the relevant activity. This shall not preclude the recovery of any additional costs of verification of information, processing and examinations. A concessional fee for applicants from developing countries may be considered.
- Licensing procedures (i.e. the procedures to be followed for the submission and processing of an application for an authorisation to practice) shall be pre-established, publicly available and objective, and shall not in themselves constitute a restriction on the supply of the service.
- Application procedures and the related documentation shall be not more burdensome than necessary to ensure that applicants fulfil qualification and licensing requirements. For example, competent authorities shall not require more documents than are strictly necessary for the purpose of licensing, and shall not impose unreasonable requirements regarding the format of documentation. Where minor errors are made in the completion of applications, applicants shall be given the opportunity to correct them. The establishment of the authenticity of documents shall be sought through the least burdensome procedure and, wherever possible, authenticated copies should be accepted in place of original documents.
- Members shall ensure that the receipt of an application is acknowledged promptly by the competent authority, and that applicants are informed without undue delay in cases where the application is incomplete. The competent authority shall inform the applicant of the decision concerning the completed application within a reasonable time after receipt, in principle within six months, separate from any periods in respect of qualification procedures referred to below.
- On request, an unsuccessful applicant shall be informed of the reasons for rejection of the application. An applicant shall be permitted, within reasonable limits, to resubmit applications for licensing.
- A licence, once granted, shall enter into effect immediately, in accordance with the terms and conditions specified therein.

Reference Paper on Basic Telecommunications

103. The Reference Paper on Basic Telecommunications also contains provisions relevant to regulatory transparency.

- Signatories agree to refrain from various “anti-competitive practices” including non-transparent practices such as not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.
- Interconnection must be “ensured on terms, conditions and cost-oriented rates that are transparent”. The procedures applicable for interconnection must be publicly available and a major supplier shall make publicly available either its interconnection agreements or a reference interconnection offer.
- Universal service obligations shall be administered in a transparent, non-discriminatory and competitively neutral manner and shall not be more burdensome than necessary.

- Licensing criteria shall be publicly available and the reasons for the denial of a licence will be made known to the applicant upon request.
- Any procedures for the allocation and use of scarce resources will be carried out in an objective, timely, transparent and non-discriminatory manner.

104. The Reference Paper requires transparency for specific types of measures in telecommunications sector, such as technical information about essential facilities, universal service obligations, license criteria and the allocation and use of scarce resources (e.g. spectrum allocation). It should also be noted that basic telecommunication services may be provided by government or non-government entities, depending on the degree of privatisation in different countries. Therefore, some of the above requirements, such as those on technical information about essential facilities and interconnection, could be applied to the conduct of non-government entities.

ANNEX II: TRANSPARENCY PROVISIONS IN REGIONAL TRADE AGREEMENTS

European Union

105. The European Commission consults with invited stakeholders in various ways. Special interest groups identified by the Commission are consulted through formal procedures such as advisory groups, or through structured procedures such as specific networks or associations, or on an ad hoc basis. A “Green Paper” inviting comments from interested persons on policy options, including in public hearings, is another formal channel of consultation and involves also seeking comments from foreign parties. (However, the draft regulations that such papers may yield are not public).

106. Another dimension of openness is public access to information on deliberations in the institutions of the Community. The European Parliament conducts its formal debates in public. The meetings of the Council are not public, and deliberations are covered by the obligation of professional secrecy, unless the Council decides otherwise by the appropriate voting rule. However, the Council periodically holds public debates, discloses votes when acting as a legislator and, in general, discloses the provisional agendas, minutes, and statements of its meetings when adopting legislative acts. The meetings of the Commission are not public and discussions are confidential.

107. In the area of technical regulations and standards on products, more systematic consultation is established by Directive 98/34/EC and subsequently Directive 98/48/EC extended the scope of the notification obligation to rules on information-society services.¹⁵ The notification procedure provides opportunities for comments by EU Member States on measures proposed by other EU Member States. The effectiveness of this mechanism is backed by an explicit standstill rule, and ultimately by infringement procedures. It was also extended recently to information-society services (See Box 4).

108. “Information society service” means any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. “Rule on services” means a requirement of general nature relating to the taking up and pursuit of service activities concerning the service provider, the services, excluding any rules, which are not specifically aimed at information society service. They could be legislative measures and subordinate measures, and also cover codes of good conduct and self-regulation if a Member State is a contracting party to them or they are referred to in government measures. In this case the code or self-regulatory measures will have to be notified to the Commission.¹⁶

109. The EU notification rule has enhanced the level of transparency in the sense that the Member States in the EU, as well as the Commission, have the opportunity to comment on proposed measures in this area (while this provides greater intra-EU transparency, it arguably does not directly benefit non-EU stakeholders). Furthermore, comments are not treated as confidential unless the Member State expressly asks that they should be confidential and justifies each such request. The web-site of the European

¹⁵ Directive 83/189/EEC was amended twice by 88/182/EEC and 94/10/EC.

¹⁶ See Directive 98/48/EC for these definitions.

Commission contains a database with all notified regulatory drafts and related non-confidential information, as well as a specific electronic address for receiving feedback from economic operators and users to allow them to participate actively in the analysis of the national drafts notified.¹⁷

Box 4: Notification obligations under Directive 98/34/EC

(technical regulations and standards on goods) and 98/48/EC (technical rules on information-society services)

In order to avoid erecting new barriers to the free movement of goods which could arise from the adoption of technical regulations at the national level, European Union Member States are required by Directive 98/34 (which codified Directive 83/189) to notify all draft technical regulations on products, to the extent that these are not a transposition of European harmonised Directives. This notification obligation covers all regulations at the national or regional level, which introduce technical specifications, the observance of which is compulsory in the case of marketing or use; but also fiscal and financial measures to encourage compliance with such specifications, and voluntary agreements to which a public authority is a party. Directive 98/48/EC recently extended the scope of the notification obligation to rules on information-society services. Notified texts are further communicated by the Commission to the other Member States and are in principle not regarded as confidential, unless explicitly designated as such.

Following the notification, the concerned Member State must refrain from adopting the draft regulations for a period of three months during which the effects of these regulations on the Single Market are vetted by the Commission and the other Member States. If the Commission or a Member State emit a detailed opinion arguing that the proposed regulation constitutes a barrier to trade, the standstill period is extended for another three months. Furthermore, if the preparation of new legislation in the same area is undertaken at the European Union level, the Commission can extend the standstill for another 12 months. An infringement procedure may be engaged in case of failure to notify or if the Member State concerned ignores a detailed opinion.

The incentive of countries to notify, and thus the efficiency of the system, has been strongly reinforced by the 1996 "CIA security" decision by the European Court of Justice.¹⁸ The decision established the principle that failure to comply with the notification obligation results in the technical regulations concerned being inapplicable, so that they are unenforceable against individuals.

Source: "Maintaining the single market: Directive 83/119/EEC-A commentary: A guide to the procedure for the provision of information in the field of technical standards and regulations," the European Commission. "VADE-MECUM TO DIRECTIVE 98/48/EC," Doc.S-42/98-En(def) the European Commission.

110. Regarding the procedures for general authorisations and individual licenses, the EU has established a common framework by the EU directive in the field of telecommunication services. The directive requires: publication of procedures, non-discriminatory and transparent procedures; reasonable time limits for decisions; reasonable opportunity to state views on refusals to grant, withdrawing, amending or suspending individual license. Furthermore, it also ensures notice of the reasons for such refusals, withdrawals, amendments or suspensions to an institution independent of the national regulatory authority and a procedure for appealing against such actions and non-discriminatory license fees proportional the cost incurred.¹⁹

111. Article 9 (Procedures for the granting of individual licences) in the directive includes the following provisions.

¹⁷ See "VADE-MECUM TO DIRECTIVE 98/48/EC," Doc.S-42/98-EN (def), the European Commission.

¹⁸ "CIA Security International vs. Signalson SA and Securitel SPRL," Decision of the European Court of Justice of 30 April 1996 (Case C-194/94).

¹⁹ See EU Directive 97/13/EC on a common framework for general authorisations and individual licenses in the field of telecommunication services.

- Where a Member State grants individual licences, it shall ensure that information concerning the procedures for individual licences is published in an appropriate manner, so as to be readily accessible. Reference to the publication of this information shall be made in the national official gazette of the Member State concerned and in the Official Journal of the European Communities.
- Where a Member State intends to grant individual licences:(i)it shall grant individual licences through open, non-discriminatory and transparent procedures and, to this end, shall subject all applicants to the same procedures, unless there is an objective reason for differentiation (ii) it shall set reasonable time limits; inter alia, it shall inform the applicant of its decision as soon as possible but not more than six weeks after receiving the application. In the provisions adopted to implement this Directive, Member States may extend this time limit to up to four months in objectively justified cases which have been defined specifically in those provisions. In the case of comparative bidding procedures in particular, Member States may further extend this time limit by up to four months.
- Where the beneficiary of an individual licence does not comply with a condition attached to the licence in accordance with the relevant provisions of this Directive, the national regulatory authority may withdraw, amend or suspend the individual licence or impose, in a proportionate manner, specific measures aimed at ensuring compliance. The national regulatory authority shall, at the same time, give the undertaking concerned a reasonable opportunity to state its view on the application of the conditions and, except in the case of repeated breaches by the said undertaking, where the national regulatory authority can immediately take the appropriate measures, to remedy any breaches, within one month starting from the intervention of the national regulatory authority.
- In the event of harmful interference between a telecommunications network using radio frequencies and other technical systems the national regulatory authority may take immediate action to remedy that problem. In such a case the undertaking concerned shall thereafter be given a reasonable opportunity to state its view and to propose any remedies to the harmful interference.
- Member States refusing to grant or withdrawing, amending or suspending an individual licence shall inform the undertaking concerned of the reasons therefor. Member States shall lay down an appropriate procedure for appealing against such refusals, withdrawals, amendments or suspensions to an institution independent of the national regulatory authority.

112. Article 11 (Fees and charges for individual licences)

- Member States shall ensure that any fees imposed on undertakings as part of authorisation procedures seek only to cover the administrative costs incurred in the issue, management, control and enforcement of the applicable individual licences. The fees for an individual licence shall be proportionate to the work involved and be published in an appropriate and sufficiently detailed manner, so as to be readily accessible.
- Notwithstanding paragraph 1, Member States may, where scarce resources are to be used, allow their national regulatory authorities to impose charges which reflect the need to ensure the optimal use of these resources. Those charges shall be non-discriminatory and take into particular account the need to foster the development of innovative services and competition.

North American Free Trade Agreement (NAFTA)

113. The “North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America”, covering both goods and services, entered into force on January 1, 1994. Chapter Fourteen (Telecommunication Services), Chapter Fourteen (Financial Services) and Chapter Eighteen (Publication, Notification and Administration of Laws) contain disciplines on transparency.

114. Article 1306 (Transparency) in Chapter Thirteen (Telecommunication Services) includes the following provisions.

- Further to Article 1802 (Publication), each Party shall make publicly available its measures relating to access to and use of public telecommunications transport networks or services, including measures relating to: (i) tariffs and other terms and conditions of service (ii) specifications of technical interfaces with the networks or services (iii) information on bodies responsible for the preparation and adoption of standards-related measures affecting such access and use (iv) conditions applying to attachment of terminal or other equipment to the networks (v) notification, permit, registration or licensing requirements.

115. Regarding financial services, Article 1411(Transparency) in Chapter Fourteen (Financial Services) includes the following provisions.

- In lieu of Article 1802(2) (Publication), each Party shall, to the extent practicable, provide in advance to all interested persons any measure of general application that the Party proposes to adopt in order to allow an opportunity for such persons to comment on the measure.
- Each Party's regulatory authorities shall make available to interested persons their requirements for completing applications relating to the provision of financial services.
- On the request of an applicant, the regulatory authority shall inform the applicant of the status of its application. If such authority requires additional information from the applicant, it shall notify the applicant without undue delay.
- A regulatory authority shall make an administrative decision on a completed application of an investor in a financial institution, a financial institution or a cross-border financial service provider of another Party relating to the provision of a financial service within 120 days, and shall promptly notify the applicant of the decision. An application shall not be considered complete until all relevant hearings are held and all necessary information is received. Where it is not practicable for a decision to be made within 120 days, the regulatory authority shall notify the applicant without undue delay and shall endeavour to make the decision within a reasonable time thereafter.
- Nothing in this Chapter requires a Party to furnish or allow access to: (a) information related to the financial affairs and accounts of individual customers of financial institutions or cross-border financial service providers; or (b) any confidential information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or prejudice legitimate commercial interests of particular enterprises.
- Each Party shall maintain or establish one or more inquiry points no later than 180 days after the date of entry into force of this Agreement, to respond in writing as soon as practicable, to

all reasonable inquiries from interested persons regarding measures of general application covered by this Chapter.

116. Chapter Eighteen (Publication, Notification and Administration of Laws) also includes the following Articles on any matter covered by the NAFTA.

- Article 1801 (Contact Points) Each Party shall designate a contact point to facilitate communications between the Parties on any matter covered by this Agreement.
- Article 1802 (Publication): 1. Each Party shall 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 Parties to become acquainted with them. 2. To the extent possible, each Party shall: (a) publish in advance any such measure that it proposes to adopt; and (b) provide interested persons and Parties a reasonable opportunity to comment on such proposed measures.
- Article 1803 (Notification and Provision of Information): 1. To the maximum extent possible, each Party shall 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 this Agreement or otherwise substantially affect that other Party's interests under this Agreement. 2. On request of another Party, a Party shall 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. 3. Any notification or information provided under this Article shall be without prejudice as to whether the measure is consistent with this Agreement.
- Article 1804 (Administrative Proceedings): With a view to administering in a consistent, impartial and reasonable manner all measures of general application affecting matters covered by this Agreement, each Party shall ensure that in its administrative proceedings applying measures referred to in Article 1802 to particular persons, goods or services of another Party in specific cases that: (a) wherever possible, persons of another Party that are directly affected by a proceeding are provided 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; (b) such persons are 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 proceeding and the public interest permit; and (c) its procedures are in accordance with domestic law.
- Article 1805 (Review and Appeal): 1. Each Party shall establish or maintain judicial, quasi-judicial or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Agreement. 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. 2. Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceeding are provided with the right to: (a) a reasonable opportunity to support or defend their respective positions; and (b) a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority. 3. Each Party shall ensure, subject to appeal or further review as

provided in its domestic law, that such decisions shall be implemented by, and shall govern the practice of, the offices or authorities with respect to the administrative action at issue.

Free Trade Agreement between Canada and Chile

117. Canada and Chile signed the “Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile” on February 6, 1997. It entered into force on July 5, 1997, covering both goods and services. Chapter L (Publication, Notification and Administration of Laws) includes the following Articles:

- Article L-02 (Publication): Each Party shall 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 Party to become acquainted with them. To the extent possible, each Party shall (a) publish in advance any such measure that it proposes to adopt; and (b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.
- Article L-03 (Notification and Provision of Information): To the maximum extent possible, each Party shall notify the other Party of any proposed or actual measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect the other Party's interests under this Agreement. On request of the other Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure, whether or not the other Party has been previously notified of that measure.
- Article L-04 (Administrative Proceedings): similar to Article 1804 (Administrative proceedings) in the NAFTA.
- Article L-05 (Review and Appeal): similar to Article 1805 (Review and Appeal) in the NAFTA.

Economic Partnership between the EU and Mexico

118. The European Community and its Member States and the United Mexican States signed the “Economic Partnership, Political Co-ordination and Co-operation Agreement” in February 1995. It entered into force in July 2000, covering trade in services, investments and related payments, protection of intellectual property rights and dispute settlement.

119. Chapter III (Financial Services) includes the following provisions in its Article 20 (effective and transparent regulation):

- Each Party shall make its best endeavours to provide in advance to all interested persons any measure of general application that the Party proposes to adopt in order to allow an opportunity for such persons to comment on the measure. Such measure shall be provided by means of an official publication; or in other written or electronic form.
- Each Party's appropriate financial authority shall make available to interested persons its requirements for completing applications relating to the supply of financial services. On the

request of an applicant, the appropriate financial authority shall inform the applicant of the status of its application. If such authority requires additional information from the applicant, it shall notify the applicant without undue delay.

- Each Party shall make its best endeavours to ensure that the Basle Committee's "Core Principles for Effective Banking Supervision," the International Association of Insurance Supervisors' "Key Standards for Insurance Supervision" and the International Organisation of Securities Commissions' "Objectives and Principles of Securities Regulation" are implemented and applied in its territory. The Parties also take note of the "Ten Key Principles for Information Exchange" promulgated by the Finance Ministers of the G7 Nations, and undertake to consider to what extent they may be applied in bilateral contacts.

Free Trade Agreement between Mexico, Colombia and Venezuela²⁰

120. The "Treaty on Free Trade between the Republic of Colombia, the Republic of Venezuela and the United Mexican States", covering trade in goods and services, was signed in September 1990 and entered into force in January 1995.

121. Chapter X (General principles on trade in services) includes Article 10-03 (trade in services):

- At the time of its entry into force each party will publish readily all laws and administrative measures of general application that affect the functioning of this chapter except in emergency situations, which have been put in effect by governmental institutions of the party or by non-governmental entity of the party.
- When it is not feasible or practical to publish information of the paragraph 1, that information will be made publicly available in other way.
- Each Party will promptly inform other Parties, at least annually, of the establishment of new laws or administrative directives that should affect considerably the trade in services covered by its specific commitments by this chapter, or by the modifications of specific commitments introduced by them.
- Each Party will promptly answer all specific requests for information on all the measures mentioned in the paragraph 1. Likewise, each party will establish one or more enquiry points to facilitate provision of specific information to other requesting Parties on all these questions, as well as of information that they are obliged to provide according to the paragraph 3.

122. Chapter XII (Financial Services) includes the following provisions in its Article 12-10(Financial Services):

²⁰ Other FTAs negotiated by Mexico also make reference to transparency: Mexico - Nicaragua (Financial services, Telecommunications, Investment); Mexico - "Northern Triangle" (Financial services, Telecommunications, Investment); Mexico - Bolivia (Financial services, Telecommunications, Chapter XVII on Transparency); Mexico - Costa Rica (Investment); and Mexico - EFTA (Financial services).

- Each Party will ensure that any measures on matters related to this chapter should be published officially or there should be written information on the address of the regulatory authorities.
- The regulatory authorities of each Party will make available the regulatory requirements to submit a request for the supply of financial services.
- On request of the applicants, the regulatory authority will report on the situation of the application. When the authority needs additional information, it will communicate to the applicant without unjustified delay.
- The regulatory authorities of each Party will adopt, within 120 days, an administrative resolution with regard to a complete request for investment in a financial institution or for a lender of financial cross-border services of another Party. The authority will report the resolution to the interested party without delay. The request will not be considered complete until all the hearings are conducted and all the necessary information is received. When it is not possible to make a decision within 120 days, the regulatory authority will communicate this to the interested party without unjustified delay.
- Nothing in Chapter XII forces a Party to allow access to: a) Information related to the financial matters of individual clients of financial institutions or of lenders of financial cross-border services; or b) Any confidential information which could impede the application of the law, or be contrary in some another way to the public interest, or damage commercial legitimate interests of certain companies.

123. Chapter XXI (Transparency as General Provisions) includes the following articles:

- Article 21-01 (Enquiry Point): Each Party will designate an enquiry point to ensure communications between the Parties on any subject in this Treaty. When a Party requests information, the enquiry point of another Party will indicate the person responsible for the subject and will provide the support to ensure communications with the requesting Party.
- Article 21-02 (Publication): Each Party will ensure that its laws, regulations, procedures and administrative resolutions of general application that address any subject in this Treaty are published and made available to the Parties and interested bodies. Each Party will make an effort: a) to publish any measures in advance; and b) to offer the Parties and any interested bodies a reasonable opportunity to comment on the measure.
- Article 21-03 (Provision of Information): On all measures that the Party considers could substantially affect the interests of other Party in the context of the treaty, each Party will communicate, as much as possible, with any other bodies with an interest in the subject. Each Party, on request, will provide the other Party prompt answers on its questions related to any measures if it is done without damage of the Party and they had not communicated on the matter previously. The communication or provision of information should be done without prejudging if the measure is non-compatible with this Treaty or not.
- Article 21-04 (Guarantees of Hearing in the Legal Process): Each Party reaffirms the guarantees of hearing in the process of their respective legislation. Each Party will maintain judicial or administrative courts and procedures.

124. Chapter XI (Telecommunications) includes the following provisions in its Article 11-10 (Transparency):

- Each Party will make available for the public and the other Parties information on the measures related to the access to public telecommunications services and networks including:
 - (a) Tariffs and other terms and conditions of the services
 - (b) Specifications of the technical interfaces with the services and networks
 - (c) Information on the regulatory authorities responsible for the elaboration and adoption of the measures relative to technical standards that affect the access to the networks
 - (d) Conditions applicable to the connection of terminal equipment to the public telecommunications services
 - (e) Requirements on permit, registry, or license.

Closer Economic Partnership between New Zealand and Singapore

125. New Zealand and Singapore signed the “Agreement between New Zealand and Singapore on a Closer Economic Partnership” on 14 November 2000. It entered into force on 1 January 2001, covering both trade in goods and services. Article 69 (Transparency) includes the following:

- Article 69-1: Each party shall promptly make all laws, rules, regulations, judicial decisions and administrative rulings of general application pertaining to trade in goods and services and investment; shall promptly make available administrative guidelines which significantly affect trade in services covered by commitments; and shall endeavour to make available promptly administrative guidelines which significantly affect trade in goods and investment.
- Article 69 -2: Each party shall endeavour to provide opportunity for comment by the other party on its proposed laws, rules, regulations and procedures affecting trade in goods and services and investments if it is of the view that any such proposed laws, rules, regulations and procedures are likely to affect the rights and obligations of either party under this agreement.
- Article 69 -3: Each party shall respond promptly to all requests by the other party for specific information on any of its measures of general application. Each party shall establish one or more enquiry points to provide specific information upon request on all such measures.
- Article 69-4: In view of the importance of transparency of domestic legislation and procedures affecting trade in goods and the supply of services and in investment to the operation of this agreement, the parties shall discuss any concerns which may arise in this area at the reviews referred to in Article 68, in order to address means of overcoming such concerns.²¹

²¹ Article 68 states that Ministers of both the Parties shall meet within a year of the date of entry into force of this Agreement and then biennially or otherwise as appropriate to review the operation of this agreement.

Asia Pacific Economic Co-operation Forum (APEC)

126. The APEC Individual Action Plan (IAP) process has also made progress on transparency in domestic regulation. While IAPs do not establish a discrete set of disciplines on transparency, participation in the IAP process yields a high degree of transparency. In addition to covering the prompt publication of all relevant measures and updating of new measures, IAPs require individual enquiry points in each services sector, an assessment of progress since the previous year and a statement of planned further improvements. The IAPs do not specifically address prior comment; however, the sector-specific enquiry points are designed to facilitate contact between economies' service suppliers and regulatory agencies.

ANNEX III: REGULATORY PRACTICES AT THE NATIONAL LEVEL

Japan

127. Public notice and comment procedures are applied to proposed statements of an administrative body of the national government which are of general applicability and related to formulating, amending and repealing subordinate measures.²² At the time of notification of the proposed measure, regulatory authorities must specify the period of time for comment that shall be determined, with about one month as a guiding standard, taking account of the time span considered to be necessary for the public to submit comments and information. Regulatory authorities should give due consideration to comments received and are required to make publicly available those comments and their views on them. Measures of local governments are outside the scope of the public notice and comment procedures. It should be noted that solicitation by the Public Advisory Councils (Shingikai) of public comments on their draft reports and recommendations could be considered as equivalent to public comment procedures.

128. Such procedures can be omitted in the following cases according to the judgement of regulatory authorities; however, they are held accountable for their judgement on the omission and are obliged to explain its rationale:

- Urgent problems that arise or threaten to arise;
- International treaties and commitments which do not allow for any discretion of regulatory authorities;
- Measures that are of a minor or mechanical nature and do not substantially alter existing arrangements;

129. For about 60 % of the 331 items posted for public comment regulatory authorities' views on comments received are made publicly available. It is also noteworthy that about 96% of all items were conducted over the Internet.²³

130. Regarding the legislative measures, public notice and comment procedures are not carried out for the draft bills proposed by the cabinet to the Diet. However, all legislative proposals by the cabinet or the parliamentary members are made publicly available on the Internet site by the Diet before being enacted as legislative measures. In addition any one has access to the minutes of the parliamentary discussion through

²² See “Kisei no Settei mataha Kaihai ni kakaru Iken Teishutu Tetsuduki (Public Comment Procedures for Introduction or Amendment of Regulations),” Decision of the Cabinet, Government of Japan, 1999.

²³ See “Kisei no Settei mataha Kiahai nikakaru Iken Teishutsu Tetsuduki no Jisshi Jyoukyo ni tsuite (Survey on the implementation of the notice and comment procedure regarding introduction of or modification of regulation),” The Ministry of Public Management, Home Affairs, Posts and Telecommunications(MPHPT), Government of Japan, July 2001.

the same Internet site and this facility would enable interested parties to react to any legislative proposals and provide input to the parliamentary deliberations through elected representatives.

131. The Public Advisory Councils (Shingikai) established by ministries and agencies, which often discuss the introduction or modification of legislative or subordinate measures, are also in principle required to be open to the public or at least to publish the record of the discussion. Where a record is not disclosed to the public, the reason must be explained to the public. The recent survey of 167 advisory councils found that all advisory councils reviewed at least opened the meeting to the public or made a report of the substance of the meeting publicly available.²⁴

132. Regarding administrative decisions, Japan also enacted Administrative Procedure Law in 1993. It basically covers administrative actions or decisions on license applications and those adversely affecting a particular person. It legally requires regulatory authorities to comply with the following requirements.

- To make the criteria on license or any other type of authorisation publicly available;
- To endeavour to make publicly available the standard period of time for decisions on applications for licenses or any other type of authorisation;
- When taking administrative decisions adversely affecting specific parties, to endeavour to make publicly available the criteria for such actions, explain the reasons for such actions and provide an opportunity for defendants to demonstrate their positions.

133. It is noteworthy that the Japanese Administrative Procedure law does not require a uniform standard period for administrative decisions on license applications, reflecting the variety of an agency's workload and the nature of licensing applications. Rather, it merely requires regulatory authorities to make the standard period transparent to provide greater predictability on the administrative process.

134. According to the survey of the implementation of the Administrative Procedure Law, 88% of 4,935 licence or other authorisations already make technical criteria publicly available and 79% of the regulations establish a standard period of time for processing. In addition, 73% of 3411 statutes for sanctions already set criteria for sanctions.²⁵

United States

135. The Administrative Procedures Act (APA) requires authorities to publish the following federal subordinate measures:

- Substantive rules of general applicability adopted as authorised by law, and statements of general policy or interpretations of general applicability formulated and adopted by law

²⁴ See “Singikai to no Kokai to no Suishin Jyokyo ni Kansuru Follow up Chosa Kekka (Survey on the disclosure of the advisory councils to follow up the implementation of the cabinet decision) ,” The Management and Co-ordination Agency (MCA), Government of Japan, October 1999.

²⁵ See “Gyosei Tetsudukiho no Seko Jyokypo nikansuru Chosa Kekka (Survey on the administration of the Administrative Procedure Law),” The Management and Co-ordination Agency (MCA), Government of Japan, April 2001.

- Statements of the general course and method by which its function are channelled and determined, including the nature and requirements of all formal and informal procedures available.

136. The APA also mandates a notice and comment procedure, under which an agency publishes a proposed measure falling under the above categories and any interested parties -- national or non-national -- must be given a reasonable period of time for comment (usually a minimum of 30 days). Comments received are made public via the establishment of a legal rule making "record," which contains all factual materials received and potentially relied upon in the regulatory decision. Although agencies retain ultimate discretion in determining the extent to which to consider and respond to a particular comment, they must explain the factual and logical basis for their decision. The formal record may be also used in subsequent court litigation.

137. The APA permits the use of the "good cause" exception when an agency finds that the notice and comment procedures are "impracticable, unnecessary or contrary to the public interest."²⁶ The agencies most frequently indicated that some kind of emergency made prior consultation impracticable or contrary to the public. In other cases, agencies suggested that prior consultation was unnecessary because the action being taken was non-controversial and technical in nature. However, when agencies issue final rules without prior consultation, the APA requires them to provide an explanation of their use of the exceptions when the rule is published in the Federal Register. In addition, regulatory authorities' use of the exceptions is subject to judicial review and the courts can and sometimes do determine that the regulatory authority's reliance on exceptions was not authorised under the APA.

138. Regarding legislative measures, all legislative proposals by the executive branch and the members of Congress are made publicly available by the Library of Congress on its Internet site before being enacted as legislative measures. In addition any parties have access to the Congress record through the same Internet site. This facility enables interested parties to react to any legislative proposals and to provide input to the parliamentary deliberations through elected representatives.

139. Regarding administrative decisions the APA also requires that regulatory authorities shall make decisions on license applications within a reasonable time. In addition, the withdrawal, suspension, revocation or annulment of a license is lawful only if the licensee has been given (1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements.²⁷ However, there is no maximum period of time set for these decisions on license applications. Nor is notice of the reasons before denial of applications or hearings before decisions on applications generally required, although there are cases where they are required by specific statutes.²⁸

²⁶ See US General Accounting Office, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, August 1998.

²⁷ See the APA, Sec. 558 (c).

²⁸ See "Attorney General's Manual on the Administrative Procedures Act," the United States Department of Justice Tom. C. Clark, Attorney General, 1947 and US Security Exchange Act of 1934, Section 15(Registration and Regulation of Brokers and Dealers), b.1B, stating "the Commission shall by order grant registration or institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be completed in one hundred twenty days of the date of the filing of the application for registration."

See also "Changes to the H-1B Program," Immigration and Naturalisation Service, Department of Justice. "American Competitiveness in the Twenty-First Century Act (A21) " does not mandate any processing

Canada

140. Regarding subordinate measures of the federal government, regulatory authorities in the central government which are proposing new requirements, or changes to existing requirements, are required to carry out timely and thorough consultations with interested parties. The draft regulation, with a Regulatory Impact Analysis Statement (RIAS), should be pre-published to give various interested groups and individuals a final opportunity to review and comment on a regulatory proposal and to compare the final draft proposal with previous consultation drafts.²⁹

141. However, certain types of regulations may be exempt from pre-publication and regulatory authorities may also request an exemption from pre-publication under limited circumstances. When claiming an exception, the regulatory authority must justify and document the exception. Regulations that may be exempted from pre-publication include:

- Regulations that respond to emergencies where there are major risks to health, safety or security;
- Regulations that are economically or politically sensitive, where prior consultation would cause demonstrable adverse effects or undermine the intent of regulations, such as regulations affecting subsidy changes and interest rate changes;
- Insignificant technical changes in regulations.

142. Notice of proposed regulations and amendments must be sufficient to make changes and to take comments from consultees into account. Regulatory authorities must clearly set out the processes they use to allow interested parties to express their opinions and provide input. In particular, authorities must be able to identify and contact interested stakeholders, including, where appropriate, representatives from public interest, labour and consumer groups. If stakeholder groups indicate a preference for a particular consultation mechanism, they should be accommodated, time and resources permitting. Consultation efforts should be co-ordinated between authorities to avoid duplication and reduce the burden on stakeholders. Regulatory authorities should consider using an iterative system to obtain feedback on the problem, on alternative solutions and, later, on the preferred solution. Consultations should begin as early as possible in order to get stakeholder input on the definition of the problem, as well as on proposed solutions.

143. Regarding the legislative measures, the decision to address a matter through legislative measures is made by the cabinet on the basis of information developed by a Minister's department. The information must be accurate, timely and complete. In providing it, a department should analyse the matter and alternative solutions, engage in consultation with who have interest in the matter and analyse the impact of the proposed legislative measures.³⁰ In addition, all legislative proposals are made publicly available by Parliament of Canada on its Internet site before being enacted as legislative measures. This facility enables interested parties to react to any legislative proposals and to provide input to the parliamentary deliberations through elected representatives.

times for application, but it does indicate that it is the sense of Congress that adjustment applications should be completed in no more than 180 days and non-immigrant petitions should be processed in no more than 30 days.

²⁹ See Statutory Instruments Act (RS 1985, c.S-22) and "Government of Canada, Regulatory Policy," Privy Council Office, Government of Canada, April 2001.

³⁰ See "Cabinet Directive on Law-making," Privy Council Office, Government of Canada, March 1999.

*Australia*³¹

144. Regulation impact statements (RIS) are required for all cabinet proposals on legislative measures, as well as subordinate measures, affecting business set by the federal government. The RIS consists of several elements such as the problem or issues which give rise to the need for action, the desired objectives, a consultation statement (the process and results of consultation) and a recommended option.

145. In general, an RIS should be prepared for at least two stages in the regulation-making process. The initial draft RIS is prepared to inform the most critical and potentially influential stakeholders, and is not generally made public at this stage. The second RIS may be the same as the first or a refinement. Its purpose is to make transparent to the public and Parliament the basis for choosing a particular regulatory approach.

146. Preparation of the RIS is not mandatory for a regulation where:

- There is an urgent need for government actions due to public health and safety emergencies. (A RIS needs to be prepared after regulatory action has been taken.)
- It is a regulation of a local state or self-governing territory that applies in a non-self governing territory.
- It involves consideration of specific Government purchases
- It is excluded from consultation in the Legislative Instruments Bill 1998. Exclusions are provided for legislative instruments that gives effect to specific Budget decisions, application order proposals made under section 111A of the Corporations Law of the Australian Capital Territory, and those that provide solely for commencement of all or part of enabling legislation
- It is not likely to have a direct, or a substantial indirect, effect on business and is not likely to restrict competition, or is of a minor or mechanical nature and does not substantially alter existing regulatory requirements.
- It is required in the interests of national security or merely meets an obligation under an international agreement.

147. If there is any doubt as to whether or not a regulatory review or proposed regulation qualifies for an exemption, the matter should be referred to the Office of Regulation Review (ORR), which decides whether a RIS should be prepared.

148. According to a recent survey, the central government introduced 159 bills into Parliament in 1999-2000 including 205 policy proposals. Of these, nearly two thirds were exempt from the RIS process, either having no impact on business or satisfying one of the above exceptions to the RIS process. The remaining 80 proposals triggered the RIS requirements and all were accompanied by an RIS when tabled in Parliament.

³¹ See "Regulation and its Review 1999-2000," Office of Regulation Review, Productivity Commission, the government of Australia, 2000. See also "Regulatory Impact Analysis in Australia," S/WPDR/W/15, Communication from Australia to the WTO, 2001.

149. On the other hand, delegated legislation is categorised into two forms in the survey: disallowable instruments, which are tabled in Parliament and are subject to review by the Senate Standing Committee on Regulations and Ordinances (SSCRO), and non-disallowable instruments, that are not subject to parliamentary scrutiny. In 1999-2000, of the 1758 disallowable instruments reported to the ORR, 591 were deemed to have no impact on business; 1068 impacted on business but were subjected to a RIS exception and 9 were not assessed. This left only 90 that required an RIS, out of which RISs were prepared for 82 proposals when they were tabled publicly to Parliament. Out of the 105 non-disallowable instruments reported, 22 triggered the RIS requirement, out of which the RISs for 21 proposals were prepared. While there is no obligation to make the RISs for non-disallowable instruments public, the ORR encourages them to be made so. The ORR notes that some agencies now place RISs on their web-site.

United Kingdom

150. Public consultation in the UK is generally undertaken for legislative measures and subordinate measures. Although there is no general legal requirement for consultation, some laws require consultation in specific cases. Various approaches for prior consultation, such as public notice and comment procedures, meetings with representatives of different interests and questionnaires/surveys are used, depending on different cases or circumstances.

151. The UK government recognises public notice and comments procedure as an important tool for prior consultation and established the “Code of Practice on written consultation” in 2000. Though the code does not have legal force and cannot prevail over statutory or other mandatory external requirements (e.g. European Community Law), it should otherwise be regarded as binding UK departments and other agencies, unless Ministers conclude that exceptional circumstances require a departure. The code includes the following principles on transparency, non-discrimination and accountability,

- Timing for consultation should be built in to the planning process from the start so that it has the best prospect of improving the proposals concerned and so that sufficient time is allowed at each stage;
- Documents should be made widely available, with the fullest use of electronic means;
- Sufficient time should be allowed for considered responses; twelve weeks should be the standard minimum for a consultation;
- The results should be made available, along with an account of the views expressed and reasons for the decision.

Mexico

152. In accordance with the Federal Administrative Procedures Law, all regulatory proposals must be sent to the Federal Regulatory Improvement Commission (COFEMER) and made public at least 30 working days before they enter into effect. This is applicable to proposed laws, implementing rules, decrees, agreements, technical standards, and any other general administrative proposal that imposes compliance costs on citizens or businesses. The proposal must be accompanied by a Regulatory Impact Assessment (RIA), in which the objectives, rationale, alternatives, benefits and costs of the proposal must be presented and discussed. Both the proposals and their RIAs are public documents, available through COFEMER's web page (www.cofemer.gob.mx). All of COFEMER's opinions and judgments are also public.

153. While public consultation requirements differ among government agencies, any opinions sent to the COFEMER must be taken into account in its review of proposed regulations. The comments are considered on a non-discriminatory basis, equally accessible to foreign or national individuals or companies. The entire review process, based on analysis and transparency, is clearly stipulated in the Federal Administrative Procedures Law. While COFEMER does not have the power to veto regulations, ministries and regulatory agencies must clearly justify disagreements with COFEMER's judgments.³²

154. More detailed public consultation requirements are included in the Federal Law on Metrology and Standards which requires proposed technical standards to be published in the *Diario Oficial de la Federación*, open to public comment for at least 60 days, and for the regulatory agency to publish its response to public comments before the final standard is published.

155. Regarding administrative decisions or actions, the authorities in general must complete administrative decisions within the three months and any deficiencies in application materials must be notified within the first third of the response period.

Korea

156. The government recognises that prior consultation occurs at two stages; an initial consultation to determine general views prior to the development of proposals, followed by consultations on a more detailed draft of a proposed measure. At the initial stage, ministries are expected to consult with strongly affected parties prior to the drafting of new regulation. The consultation also includes communication with foreign firms, for example, through foreign trade associations, to ensure non-discrimination.

157. Korea also has enacted the Administrative Procedure Law in 1996, which requires pre-announcement of measures, including enactment, amendment or abolition of legislative measures and subordinate measures. Except in cases of urgency or damage to the public interest, the regulatory authorities shall preannounce the draft measures and grant requests to view the full text of proposed measure. The length of pre-announcement periods must be a minimum of 20 days. There is a general requirement to respect comments received.

158. Regarding administrative decisions and actions, the Act also requires regulatory authorities to make public available technical criteria and the standard processing period for administrative decisions. Regulatory authorities are required to explain the reasons for any administrative decisions and to provide relevant parties with an opportunity to submit arguments regarding administrative decisions.

Netherlands

159. The Dutch government is reducing the importance of advisory councils and tripartite consultation mechanisms whose rigid structure risks neglecting legitimate "outside" interests, including those of foreign countries. Prior consultation through different stages of preparation is discretionary and initiators can choose who will participate. However, consultations are said to be open to affected and interested parties, be they domestic or foreign, and they appear in practice to be administered in a non-discriminatory way. Public notice and comment procedure is increasingly, though not widely, used in the later stage. Some laws

³² See "Mexico's Federal Regulatory Improvement Programme: Towards a New Form of Governance," Comisión Federal de Mejora Regulatoria (Federal Regulatory Improvement Commission), the Government of Mexico, July 2001.

require pre-publication of regulatory proposals and an invitation for comments from all members of the public.

Spain

160. Public consultation is a constitutional requirement in Spain and regulatory authorities use several consulting methods such as consultation with organised groups or public notice and comment procedures. For some types of measures, like land use or municipal rulings, public notice and comment procedures are mandatory, for others it is suggested as an option for the regulatory authorities.

161. For subordinate measures, regulatory authorities are required to provide a reasonable period for public consultation, which in general must not be less than 15 working days.³³ In addition, many sectoral laws have established advisory and consultative bodies with explicit mandates to review proposals of legislation and subordinate measures. While regulators have discretionary power in deciding who amongst domestic and foreign parties is to be consulted, they must answer all comments received.

Denmark

162. There is no standardised procedure on consultation with the public and the choice of participants in the early process is at the discretion of regulatory authorities. Development of major legislation is often conducted by a government-appointed preparatory committee, bringing together a wide range of groups with significant interests in the legislative proposal. The composition of committees is at the discretion of the government. There has been some decline in the use of the committee process over the last two decades.

163. However, foreign trade partners have not raised concerns about the system of consultation since it is conducted in a non-discriminatory manner. Most recently, all ministries are required to post draft legislative measures on the Internet at the time they are made available for comment prior to finalisation for submission to Parliament. The committee process for legislation is not generally used for subordinate measures. Public notice and comment procedures are widely used in the preparation of “substantially important” subordinate measures, although there is no formal and systemic requirement for this.

Hungary

164. The Act on legislation regulates the public's right to participate in the rule making process and stipulates that any persons or social organisations that need to comply with the measure should be involved in the preparation of a “legal rule.” Although the law does not distinguish among “legal rules,” in practice, consultation is mainly used for proposed legislative measures and some important subordinate measures. No general criteria exist to determine how consulted persons are selected or to define the additional material to be attached to the legal draft. There is no requirement for publishing written comments or for providing and publishing the ministry's answers. Foreign parties have the same opportunities as domestic constituencies to participate.

³³ See the Government Law on the Legal Regime of Public Administration and Common Administrative Procedures (50/1997), the Government of Spain.

Czech Republic

165. No explicit obligation exists to consult with society on draft legislative measures or subordinate measures unless stipulated in law. The Legislative Rules nevertheless provide discretion to ministries to consult “if deemed necessary ” with interest groups and society at large and some ministries actually use their web-sites to present draft legislative or subordinate measures. While the regulatory authorities more often consult with interested parties and sometimes publish comments at their web-sites, there is no set of criteria as to who is consulted, the period of consultation and the disclosure of the results. As public consultation tends to concentrate on getting the views of domestic producers, the participation of foreign firms in consultation processes largely depends on the specific efforts of each authority.

166. Regarding administrative decisions or actions, the Administrative Procedures Act stipulates the manner and the period of time within which administrative authorities must provide answers and resolutions to an applicant. In particular, the administration has to decide in 30 days (within 60 days for more complex inquiries) when a citizen asks for an administrative decision.

Poland

167. There is no general obligation upon the government to consult with the public prior enacting legislative or subordinate measures. Consultation is systematic for some groups and their right to be consulted is guaranteed by the law. Where it is not specified in the law, consultation is at the discretion of the responsible ministry. However, an increasing number of legislative or subordinate measures requires a consultation with specific groups, and the Rules of Procedure of the Council of Ministers indicate that the drafter may consult non-governmental organisations if their scope of activity covers the matter concerned.

168. The system leaves to the proponent ministries ample discretion when deciding whether to consult, with whom, in which time frame and the documents to be consulted. No specific standards exist to ensure that the ministry provides official reasons for accepting or rejecting the comments, in a general or specific way, of parties that were consulted.

169. Sectoral legislation often requires that authorities consult with traditional representative bodies. A notable feature of this consultation is the selectivity of those that are required to be consulted. The approach of specifying a list of ‘consulted bodies’ tends to leave out non-specified groups, which cannot express an interest in an issue if they cannot justify the relevance of the new rule. In a few cases, Poland started to use ‘notice and comments’ mechanisms. Despite the growing formal and informal consultation, no specific rules and standards exist to ensure that authorities provide official responses for accepting or rejecting comments of consulted parties.

Chile³⁴

170. Regarding standards-related subordinate measures a few ministries and institutes already conducts prior consultation on draft standards. The Agricultural and Cattle Service in the Ministry of Agriculture conducts public consultation on selected draft phytosanitary measures. The National

³⁴ As information on developing countries (Chile, Argentina, Brazil, and Hong Kong) is limited as compared to the OECD Member countries, these studies focus on written prior-consultation in electronic means or through Internet sites. While they may conduct non-discriminatory prior-consultation through other means, those cases would be negligible given limited administrative capacities of developing countries.

Standardisation Institute (INN), the agency responsible for the implementation of standards in Chile, more regularly conducts public consultation on its draft standards.

171. In telecommunications sector SUBTEL (Secretariat of Communication in the Ministry of Transport and Communication) established the Consultative Committee of Telecommunications (CCT), where SUBTEL discusses technological, administrative and operational topics. It includes a wide representation of the companies in the sector.

172. There is no specific article in the Chilean Constitution referring to prior consultation on domestic regulations. Article 62 of the Constitution of Chile establishes that legislation may originate in the House of Representatives (Cámara de Diputados), the Senate or from proposals presented by the President or any of the Congress members. In the case of subordinate measures Article 32.8 of the Constitution gives the president full authority and he is only required to consult with the relevant ministers. This seems to suggest that the Chilean Constitution is neutral with respect to prior consultation on draft measures.

173. Furthermore the Free Trade Agreement between Chile and Canada requires the regulatory authorities, to the extent possible, to provide interested persons and the other Party a reasonable opportunity to comment on proposed measures. While there are limits ("to the extent possible") on this requirement, this agreement suggests that prior consultation on draft measures with foreign parties could exist in some cases.

Argentina

174. The Government of Argentina adopted the program "Letter Commitment with the Citizens" in 2000, which aims to improve regulatory governance and facilitate the participation of citizens in the policy making process by promoting greater transparency and accountability, including via prior consultation.

175. In line with this commitment, the Parliament already makes all draft bills and the status of deliberations publicly available in advance so that any citizen can represent their views and participate in the legislative process. Any citizens can send their opinions by E-mails to the parliament. The National Constitution of Argentina allows the Congress to put legislative proposals under popular consultation if necessary. (Article 40) The Government has also established the web-site "INFOLEG, " the comprehensive database of legislative and subordinate measures. These initiatives are also promoted as one of elements in the National Plan of Modernisation of the State. The Constitution (Article 42) also stipulates that the legislation will establish effective procedures to facilitate the participation of consumers and users for the prevention and resolution of conflicts.

176. In telecom sector, according to the mandate of the constitution, the procedure is established in Decree No.1185/90 and Resolution S.C. No.57/96. While this procedure also allows the regulatory authorities to hold public hearings on proposed measures, the Secretariat of Communication often adopts public notice and comment procedures through its Internet site on a range of measures such as spectrum management allocation, regulation on telecommunication facilitates in real estate, number portability etc. Most public notices are posted with draft texts of proposed measures. In some cases, English versions are also posted so that comments from foreign parties can be taken into account. The procedure laid out in Resolution S.C. No.57/96 requires regulatory authorities to consult with wide range of interests such as service providers, clients, unions, professional associations and business chambers. The Resolution also states that comments by the consulted interested parties will not bind regulatory authorities and that regulatory authorities have the ultimate discretion in determining subordinate measures.

177. Regarding administrative decisions, the government is planing the following tasks to increase transparency in public management as part of their efforts to modernise public administration.³⁵

- Establishment of procedure that guarantees effectively the transparency of the actions by administration;
- Enacting the Law of Access to the Information to make civil participation more effective;
- Establishment of general procedures that guarantee control on the discretion of government employees;
- Implementation procedures that guarantee the impartiality of employees.

Brazil

178. As part of efforts to promote E-government, the process for formulating some legislative and subordinate measures is being made more transparent. Experimental public notice and comment procedures on the measures listed below, which aim to receive suggestions and to take them into account in formulating measures, have been recently conducted by electronic means. Most of these public notices are also posted on the web-site, along with draft texts of proposed measures.

- The Ministry of Communication and National Agency of Telecommunication (ANATEL)-Draft measures on universal service, distribution on radio channels and technical regulation on terminal equipment. Comments could be provided using the electronic form provided through the Interactive Public Consultation Monitoring System established at the web-sites. The Ministry sometimes makes publicly available the comments received and explains how it takes into account suggestions for the final measures. An English version is posted for some of the proposals so that comments from foreign parties can be taken into account.
- The National Agency of Sanitary Monitoring- (i) Draft subordinate measures setting regulatory requirements for the virtual sale of pharmacy products by electronic means (ii) Draft subordinate measures on good manufacturing practice for the production of medicine.
- Ministry of Mines and Energy- (i) National Agency of Energy and Electricity(ANNEL)-Draft subordinate measures on the sharing of infrastructure among different sectors (telecommunication, electricity and oil) (ii) National Agency of Oil(ANP)-Draft subordinate measures on specifications of natural gas to be sold commercially in the country
- Ministry of Justice- Draft subordinate measures regulating technicians for the manufacture and assembly of vehicles.

Hong Kong

179. Selective public notice and comment procedure by electronic means, which aim to receive suggestions and to take them into account in formulating measures, have been recently introduced,. In 2000 the Securities and Futures commission issued 12 papers on draft legislative and subordinate measures

³⁵ See “Approval of the National Plan of Modernisation of the National Public Administration, ” National Decree 103/2001, the Government of Argentina.

for public consultation. The Office of the Telecommunications Authority (OFTA) also adopts public notice and comment procedures on their legislative and subordinate proposed measures. While these public notices for comment take the form of consultation papers, they include detailed description of measures comparable to draft texts.

India

180. Regulatory authorities, especially independent regulators, in sectors such as telecommunications, securities and exchange, banking supervision and electricity, adopt public notice and comment procedure in formulating some measures.

- The Telecom Regulatory Authority of India (TRAI)- released a number of consultation papers and also a summary of comments on its web-site, making them publicly available in a non-discriminatory way. While these public notices for comment take the form of consultation papers, they include detailed descriptions of the measures comparable to draft texts. Issues addressed are: universal service, competition on domestic long distance communications obligations, license terms and conditions for various services (satellite mobile communication, public trunk radio, radio paging, etc), accounting separation and tariffs. Some of the consultation papers are extensive, including discussion on various alternatives and their policy objectives.³⁶ TRAI also has a more structured dialogue with NGOs and consumer organisations; those organisations are required to register to TRAI to participate open house discussions, share data and information for discussion and maintain two-way communication with the regulatory authorities.
- The Central Electricity Regulatory Commission (CERC)- adopted similar practices as TRAI and released consultation papers on license terms and conditions and regulation on interstate transmission system and tariffs.
- The Securities and Exchange Board of India (SEBI)- often constitute Committees for studies on specific regulatory issues (e.g. regulation on market derivatives, eligibility of market participants, etc). Under the mandate set by the SEBI the Committees usually submit a draft report, which is made publicly available on the web-site, with the intention of inviting comments or suggestions from market participants or experts before finalisation. Specific comments from external experts are in some cases made publicly available.
- The Reserve Bank of India (RBI: bank supervision authority) - adopts similar practices as the SEBI and sets up a committee or study group on regulatory issues (bank financing of equities, capital adequacy framework based on Accord to the Basle Committee). Draft reports by these committees are also made publicly available on the web-site with the intention of inviting comments or suggestions from market participants.

³⁶

See “Consultation Paper on Global Mobile Personal Communications by Satellite,” TRAI, the Government of India, 1999.