Revised

May 10, 2002

Transparency in Regulation of Services [?]

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[?] Paper prepared for the PECC Trade Forum Meeting in Lima, Peru, 17-19 May 2002. The earlier version was presented at the APEC Group on Services meeting held on 19-20 February. The authors prepared this paper as part of Phase III of the PECC project on "Menu of Options for Voluntary Liberalization, Facilitation and Promotion of Economic and Technical Cooperation in Services Trade and Investment." This paper is an expansion of Stephenson and Yi (2001) presented during Phase II of the Menu of Options.

Transparency in Regulation of Services

Sherry Stephenson and Soonhwa Yi

I. Transparency in Domestic Regulation

The unique characteristics of services determine the nature of restrictions to trade in services. Services embrace the following personalities: a) they are intangible and non-storable; b) there is a high prevalence of regulatory intervention to counteract market failure and achieve non-economic social benefits; c) there generally must be proximity between consumers and producers; d) there is both capital and labor factor mobility associated with their trade. The restrictions to international services trade are in the form of non-tariff barriers, including domestic regulations which often adversely limit market access as well as the performance of foreign services providers in the domestic market.

As regulatory measures affecting trade in services are inherently non-transparent, regulatory transparency is an important component to facilitate such trade. Foreign service providers can only be made aware of laws, decrees and other regulations as well as administrative practices if and when they are made publicly available. In the absence of information on these measures, foreign service providers are handicapped in their access to third markets and crippled in operating their businesses.

Thus transparency provides an essential tool to service providers through making clear on the one hand the discriminatory elements present in the measures affecting services trade, and on the other hand, the regulatory requirements in place that govern the operation of all services providers in a given market. This includes making explicit the rationale behind regulatory decision-making, along with those procedures involved in administering, implementing, and enforcing regulations. Only when services providers have access to complete and transparent information on the conditions and constraints affecting their access to foreign markets, along with the requirements and the necessary competence, can they effectively engage in services trade.

This paper discusses the rational for transparency in the section 2 and encompasses economics of regulatory transparency in the services sector. Then it moves to the examinations of legal provisions on transparency and practices of regulatory transparency at both multilateral and regional levels. The paper stipulates several means to enhance regulatory transparency at both ex ante and ex post regulatory instruments. It attempts to conclude the paper with suggestions applicable to the APEC economies.

II. The Rationale for Transparency

The issues of transparency derives from a problem of imperfect or incomplete information. Transparency is "the opposite of secrecy"[2], as rooted in its connotations of purity and clarity. It encompasses "self –disclosure" or "regulation by revelation" upon global governance structures in trade, human right, environment and security. Under the broad terms, Finel & Lord (1999) equates transparency with a mechanism that facilitate the release of information about policies, capabilities, and preferences to outside parties, market and, international institutions. It is very well delivered by Greider (1987) the impact of the imperfect or incomplete information, who authored "Secrets of the Temple" that invoked an image of the high priests of monetary policy veiled behind marble walls in Washington, D.C., making mysterious decisions that affected the lives of all Americans. What is the underlying rationale for transparency in trade? A paper by the WTO Secretariat has set out four major ways in which transparency is useful in facilitating and liberalizing trade flows. [3]

First, transparency helps in promoting a rules-based approach to trade policy at the national level. A basic condition for the rule of law is that all legal requirements be published and made publicly available, and wherever possible, enforced only after those juridical persons under their purview have had a chance to become acquainted with them. The provisions concerning the impartial administration of such legal requirements and

[2] Florini (1998).
[3] See WTO WT/WGTCP/W/114, "The Fundamental WTO Principles of National Treatment, Most-Favoured-Nation Treatment and Transparency", background note by the WTO Secretariat, 14 April 1999.

the scope for review by an independent body of decisions concerning their application are also critical in this respect.

Second, transparency provides information to economic actors so that they can take maximum advantage of the opportunities created by legal rules, disciplines, and commitments, whether this concerns market access, treatment of service providers, protection of intellectual property or other relevant matters.

Third, transparency facilitates monitoring of compliance with obligations under the multilateral trading system and other international agencies and, through this means, helps to avoid disputes.

Fourth, transparency facilitates multilateral trade negotiations under the WTO as well as discussions on trade relations at the regional level such as those in APEC that promote the further liberalization of international trade.

Further, regulatory transparency is an important tool to foster fair and equitable competition in services trade through allowing equal availability and access to vital information. All potential economic actors should have the same potential access to information on measures affecting services trade so as to have an equal starting point in competing with each other. Otherwise, one party with privileged access to information would be advantaged with respect to others that do not have this access, and the result would distort market outcomes.[4]

Transparency tackles the issue of opacity costs that arise when firms ought to overcome the imperfect or imperfect information that should have been provided by an appropriate government/ regulatory body. As shown in Annex II, the higher level of opacity in policies and regulations, the higher transaction costs a firm should burden. The lack of transparency imposes a hidden tax, equivalent to levying average 24 percent incorporate income tax, let alone imposing a risk premium at the international capital markets.

The provisions of the three main WTO Agreements containing obligations for publication are GATT Article X; GATS Article III; and TRIPS Article 63.

[4] See Feketekuty, "Regulatory reform and trade liberalization", 2000.

Transparency attributes to the efficient allocation of resources by ensuring that economic actors have sufficient information to identify risks and distinguish one firm's , or an economy's circumstances from another's.[5] Most importantly, transparency helps to inform market expectations, thereby creating credibility and accountability.

III. Economics Considerations for Transparency

The demands for transparency in domestic regulations in services are increasing in large part because of the increased role of services national economies. First, services account for 60 percent of the world's GDP.[6] The World Development Indicators publication (2001) shows that 119 out of the 132 listed countries have a share of services in GDP that exceeds their industry share. Singapore, for instance, has more than 60 percent of its GDP accounted for by services, and Hong Kong and the U.S. as much as 80 percent. Second, measurable services trade generates nearly one-third of word trade, disproving the ideas that services are basically non-tradable.[7] From 1990 to 1999, world trade in commercial services increased at an annual rate of 6.2 percent. The growth of services trade during this past decade has been especially outstanding in developing countries (with average annual growth rates of over 13 percent). As services output and trade increase, more people and businesses are affected by non-transparent regulatory practices.

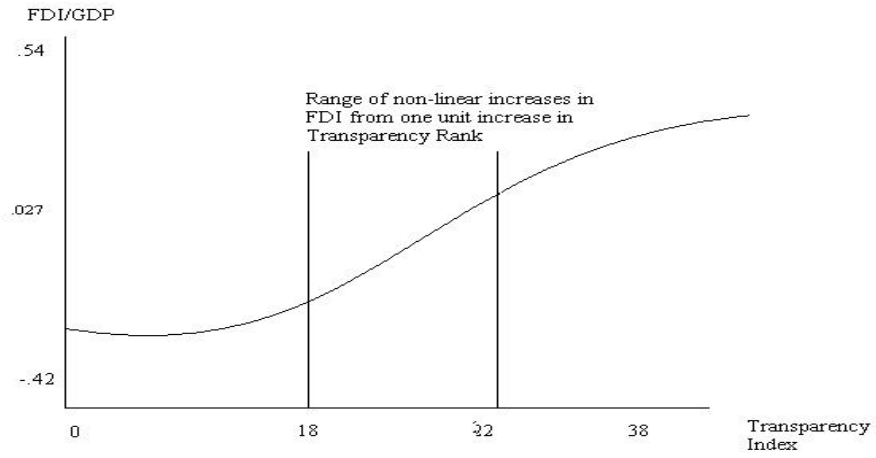
Where is the transparency most important in the context of the various modes of supply of services trade? Karsenty (2000) shows that on the basis of available statistics, mode 1 of cross-border trade and mode 3 of commercial presence are almost equally important and together represent close to 80 percent of total services trade.[8] Thus transparency in regulations affecting these two modes of supply is critical as the lack of transparency may affect the preference of services suppliers and thus the allocation of investment. Being closely related to accountability and certainty, transparency or its

[5] IMF (1998).
[6] World Bank (2001).
[7] WTO (2001)
[8] Karsenty (2000).

absence allows foreign service operators to assess if the domestic market holds accountability and certainty for their investment and trade decisions. This accountability and certainty are especially crucial for mode 3, as it often involves large amounts of capital investment. Once a firm is established in the market, it is difficult and costly to pull out. Therefore when faced with a choice between mode 1 and 3 and not having complete or adequate information about regulatory policies, a service provider one may opt for cross-border supply instead of an investment or commercial presence, even if the latter promises greater profit. This is particularly true in today's modern world when technology development facilitates services trade in the form of mode 1. Thus, opaque regulatory practices may serve to shift the pattern of services trade and deprive countries of needed sources of capital. Taking into account that foreign direct investment can bring with it significant positive benefits such as employment, inflow of physical capital and human capital, introduction of innovation and advanced technology, this shift results in the loss of possible welfare for the host economy.

Lack of transparency may influence the location of foreign direct investment (FDI) as well. Under the assumption that all market variables, other than the degree of regulatory transparency, are equal in two markets, a foreign service provider will most likely opt for the market with the higher degree of regulatory transparency and more complete and accurate information on the conditions affecting his operations that may facilitate transactions. Regulatory transparency affects a foreign services provider who already established his affiliate in the domestic market. Breslin (2000) notes that lack of transparency is the major reason why foreign investors consider leaving the market. Drabek and Payne (2001) attempts to measure the impact of the transparency on foreign direct investment. They estimate the extent to which transparency affects FDI under the assumption that the relationship between transparency and FDI inflows can be represented by a continuous function with constant properties. As Graph 1 shows, the relationship between transparency and FDI inflows are likely to be non-linear: the shift to higher levels of transparency may impact an economy's attractiveness of FDI.

Graph 1



Source: Drabek and Payne (2001).

Economies desirous to attract foreign direct investment in services thus are under pressure to make available accurate and up-to-date regulatory information. This is particularly the case for national and sub-national regulations which become transparent only when governments and their agencies publish or notify them. In economies where governments and their agencies are accustomed to withhold information, transparency is at a premium and the multilateral trading system or regional trading systems and groupings such as APEC may become important sources to encourage transparency in domestic regulations.

IV. Transparency : Legal Provisions and Revealed Regulatory Practice

IV. 1 Legal Provisions to ensure Transparency

Transparency is one of the basic GATT principles under the multilateral trading system, along with most-favored nation treatment (MFN) and national treatment. World Trade Organization (WTO) agreements attempt to make effective the principle of transparency in services trade in two major ways:

1. through the obligation to publish, or at least make publicly available at the national level, all relevant laws, regulations, and administrative requirements. Often linked with this are provisions relating to the impartial administration of such laws and regulations and the right of review of decisions taken under them; and

2. through the obligation to notify various forms of governmental action to the WTO and WTO members.

GATS features the concept of transparency in its Preamble: "Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization…". The GATS promotes transparency in services trade via several transparency requirements and through the national schedules of specific commitments. Several articles of the GATS contain notification requirements, namely Articles III, V, VI, VII, VIII, and IX. This section will only discuss transparency and notification requirements in Articles III and VI.

GATS Article III specifically sets out publication requirements, together with the several WTO notification requirements. Article III.1 requires its 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 Agreement. Its application is broader than some other GATS obligations: it applies all regardless of whether members made a specific commitment under the GATS, that is its application is at the domestic jurisdiction.

Article III.4 obliges WTO members to establish one or more enquiry points to provide specific information to other members, upon request, on relevant measures of general application which pertain to or affect the operation of GATS. Pursuant to this article, 84 enquiry points have been established and notified to the WTO as of 2001.[9] Most enquiry points, with an exception of three WTO members, are usually located in Trade Ministries but the contact person is often not an expert on domestic regulations or laws.[10] As such, the need for coordination between Trade Ministries and other ministries or departments within the administration, when handling enquiries from third countries, is in question. Poor coordination and delay in obtaining information would hinder the effective operation of the GATS Article III. In addition to enquiry points, some countries

[9] Each EC Member (15) has its own enquiry point. The list of enquiry point is available at http://www.wto.org.

maintain a web site.[11] However, such web sites are more focused on providing information on the GATS rather than on domestic regulations.

Article III.3 sets out annual notification to WTO of new, or changes to existing laws, regulations or administrative guidelines affecting services sectors where the Member has made specific commitments. Pursuant to the Article III.3, 119 notifications have made as of 2001. Most notifications specify the provision of the adopted legislation, which affect trade in services covered by notifying party's specific commitments. They give either the reference of the text or the national enquiry points. Again, this returns to the question of the utility of the enquiry point in the provision of legislation affecting trade in services.

The term "transparency" as such is not used in GATS Article VI but several requirements set out in its provisions in fact target the objective of creating more transparent regulatory decision making, implementation and enforcement. The provisions are following: a) all measures of general application affecting trade in services are to be administered in a reasonable, objective and impartial manner; b) review mechanisms are to be established; c) information is to be provided on the status of application; d) licensing and qualification requirements and technical standards are to be based on objective and transparent criteria, and they are to be not more burdensome than necessary or to constitute a restriction on the supply of the services; and e) adequate procedures on professional services and to be followed.

Most regional trade agreements set out obligations similar to the GATS provisions with respect to publication and notification of measures and the establishment of enquiry points.

IV.2 Revealed Regulatory Practice in the GATS

A type of revealed transparency in the GATS is constituted by the national schedules of specific commitments. The specific commitments disclose information on

[10] Kenya, Tunisia and Uganda are the countries that provide a number of sectoral enquiry points, such as enquiry points on telecom sector and financial and banking sector.
[11] For instance, Australia, Canada, New Zealand and EC.

market access limitations and national treatment qualifications and conditions for included sectors. However, as discussed earlier, the GATS provides a great deal of flexibility to WTO members in the way and content in which they set out specific commitments. Analyses of these commitments conclude that most countries scheduled only a limited part of their services sector.[12] While several commitments have been made in sectors considered to have low levels of restrictions (i.e. tourism, business services), a limited number of commitments have been made in other more sensitive sectors (such as health and education) so that little is known about the type of regulations present in many sectors. Additionally, the ability of members to schedule commitments at less than the regulatory 'status quo' means that those commitments in the schedules are not always representative of actual conditions in the marketplace.

Domestic regulations for those sectors committed which do not fall under the six different types of market access limitations and which do not violate the national treatment provision are not subject to specification (i.e. those measures that are non-quantitative and non-discriminatory). Thus the schedules do not provide information on domestic regulations which are subject to the disciplines of Article VI. Information about such regulations must therefore be sought through enquiry points.

Further, there is a criticism that the schedules are not user-friendly and that it is both difficult and confusing to read and interpret them. The confusion is to some extent due to the complexity of disentangling trade protection, overly restrictive approaches to national regulation, and the pursuit of legitimate public policy goals.[13] It also can be traced to the interweaving of market access and national treatment measures in the commitments. The six different types of market access limitations specified in Article XVI must be scheduled for all sectors inscribed in the schedule, if they are maintained, irrespective of whether the measures are discriminatory or non-discriminatory ones.[14]

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[12] See Bernard Hoekman (1996), "An Assessment of the General Agreement on Trade in Services," in *The Uruguay Round and the Developing Economie*s, edited by Will Martin and L. Alan Winters, Cambridge: Cambridge University Press.

[13] Feketekuty (2001), Improving the Architecture of GATS

[14] By including in market access non-discriminatory measures (those that restrict market access overall but do not discriminate against foreign suppliers), GATS went well beyond the GATT to cover some aspects of competition policy — defined broadly to include government regulation in specific sectors (Snape 1998, Snape and Bosworth 1996, Bosworth 2001).

Under Article XVII on National Treatment, all types of discriminatory measures affecting the supply of services must be stipulated. Thus discriminatory quantitative measures may fall under both market access and national treatment provisions (depending if they are quantitative or non-quantitative in nature). The interweaving of market access and national treatment confuses the true nature of members' scheduled commitments and leads to different interpretation over the commitments, especially regarding commercial presence (mode 3).[15]

IV.3 Revealed Regulatory Practice in Regional Agreements

A considerable difference in the actual transparency provided to service operators in many regional agreements derives not from the normative provisions of the agreements which are similar to those of the GATS but rather from the negotiating modality they have adopted. While the GATS negotiations take place under the positive listing (bottom-up approach) for services sectors and the negative listing of measures, the focus of the negotiations is on the inclusion of commitments in national schedules and on the need to broadly determine their equivalency for the purpose of "reciprocity." This is much more difficult to do for services than for goods, since barriers to foreign service providers are not present in the form of quantifiable border measures such as tariffs and quotas, but in the form of discriminatory elements contained in domestic laws, decrees, and regulations. Under the negative listing (top-down approach), all sectors and measures are included under the disciplines of MFN, national treatment, and no local presence requirement, and all sectors and measures must be liberalized unless otherwise explicitly specified. Thus the focus of negotiations is on the content of the lists of reservations, or non-conforming measures, to ensure that these do not excessively compromise the liberalizing objective of the agreement.

Although neither of the two alternative negotiating modalities guarantees full liberalization of trade in services and is not presumed to do so unless this objective is explicitly set out by members to any given trade agreement, the "top-down" approach adopted by several regional trade agreements provides a great deal of information in a

[15] See Bosworth 2001, Low and Mattoo 2000, Mattoo 1997

transparent form on the existing barriers to trade in services (non-conforming measures), thus facilitating knowledge of foreign markets by national service providers.

In NAFTA, as in the CER and in several other bilateral free trade agreements in the Asia Pacific region, a 'negative list' approach to liberalization has been adopted. Members have been required to document all measures that did not fulfil national treatment and other basic obligations of the agreement. This approach to liberalization served to force a useful dialogue between the trade negotiating community and the regulatory community on the optimality of domestic regulatory regimes. When there was significant evidence of restrictive measures, regulators were asked simple questions – when was the measure late used? What was its objective? And are there alternative ways of achieving the objective? This process has proved to generate a very useful exchange of views and to improve the design and application of regulations.

Even without adopting a 'negative list' approach to services liberalization, transparency could be enhanced in services agreements if members compile and circulate "transparency" lists containing a non-binding description of measures restricting services trade. Such lists could provide a means to compare respective approaches to regulation, so that where considerable commonality exists, common ways of lessening the restrictive effects of these regulations could be devised. Documenting the kinds of practices that are maintained in APEC economies through the effective use of the electronic IAPs format agreed for services would go a long ways towards helping to bring about a more transparent environment for regulatory intervention in services sectors.[16]

V. Ways to Ensure Transparency

What is the most effective mechanism to ensure regulatory transparency? With respect to the normative content of services agreements as opposed to the modality chosen for carrying out liberalization, legal provisions should ensure that the need for an open, easily accessible and effective system is put in place to make information on regulations affecting trade in services available to service providers. It is the existing regulatory regime that is subject to the transparency obligation of the legal provisions. It

[16] Sauve (2001)

is observed that the effective regulatory transparency mechanism should operate both as ex ante as well as ex post regulatory instruments: that is, regulatory transparency is a process by which market players can participate in the process of designing new regulations and regulations can be disclosed and clarified. This section explores means to enhance regulatory transparency at both stages.

V.1 Design of Regulation

Transparency in formulating of regulations and policies is associated with objectives. The economic actors/ public may be uncertain about the their objectives. A regulation is transparent about objective, if the economic actors can accurately judge the regulator or policy maker's intentions.

V.1.1 Prior consultation

It is the prior consultation mechanism that provides the public (market players) with an opportunity to participate in formulating of regulatory instruments through the provision of their comments. The prior consultation mechanism can be composed of two processes of notice and comments. The key element for prior consultation is making the information publicly available at an early stage – an early notice - so as to provide enough time for public comments. A standard period for the submission of comments could be agreed. Both new and amended legislation at the national level as well as that developed by sub-national entities could be subject to comment.

There exists a prior consultation mechanism at the multilateral trading system. The TBT Agreement obliges WTO members to notify proposed or amended laws at an early stage in their drafting so as to allow reasonable time for other Members, without discrimination, to make comments in writing. Members should be prepared to discuss these comments upon request, and take these written comments and the results of these discussions into account before adopting regulations or procedures for conformity assessment and publishing them. The TBT Agreement further obliges a member to ensure that its standardizing bodies which accept the Code of Good Practice attached to the agreement notify their work programmes so that interested parties can be informed of the

standards they are preparing and can take into account comments received before finalizing these.

Practices of the prior consultation mechanism can be found at the national level as well. The OECD country reviews (2001) point out the systematic consultation with the public that is carried out in several APEC economies as per the following:

- Japan: Notice and comment procedure has been applied to almost all regulatory decision-making since April 1999. The standard period is one month.

- Korea: Ministries and agencies are obliged to hear the opinion of civic groups and interested parties through public hearings, notices and any other means.

- Mexico: No comprehensive law or government policy exists requiring consultation. However, consultation exists in some sectors and a wide variety of types of consultations are used to some extent.

- United States: Proposed regulations are published in the Federal Register and the public generally must be given a reasonable period of time for comment (usually a minimum of 30 days). [17]

The prior consultation procedure would help to ensure that new or amended legislation is more appropriate to trading conditions and better enforceable. The procedure should be practiced in a non-discriminatory manner. Further, it provides domestic and foreign service providers with the opportunity to obtain an advance picture of regulatory development and modifications, thus enabling them to better understand the markets with which they trade and comply with their requisites.

V.1.2. Regulatory Impact Analysis

It is observed that the prior consultation mechanism alone does not fulfill the transparency about objectives, as the mechanism often does not encompass quality

[17] Tompson , R. and Iida, K (2001), " Strengthening Regulatory transparency: Insights for the GATS from the Regulatory Reform Country Reviews", pp. 105-106, in *Trade in Services: Negotiating Issues and Approaches*, Paris: OECD.

control mechanism in checking that the regulatory agency made reasonable attempts to address the comments received. As such, regulatory impact analysis (RIA) can be an important complimentary mechanism to achieve transparency about objectives of regulations and policies. OECD (1997) notes:

> "RIA exposes the merits of decisions and the impacts of actions. For this reason, RIA is, in many countries, closely linked to processes of public consultation. Incorporation of RIA into consultation has enhanced the transparency of regulatory processes, provided quality control for impact statements, and improved the information on which decisions are based."

RIA is widely practiced by many governments, including member nations of OECD. The basic elements of the RIA can be composed of the issues which is subject to the need for RIA action, the desired objectives (intentions), alternative options to achieve the aforementioned objectives and an assessment of impact on economic actors of each option.[18]

Unlike the prior consultation mechanism, it is more desirable to set out the principles of RIA and carry out RIA at the national level. However, the elements can be incorporated as horizontal disciplines on domestic regulations at the multilateral or regional levels. This would assist the process of the objective and necessity test: contribution to the assessment of whether measures affecting services trade are based on objective and transparent criteria, and unnecessarily trade-distortive or trade-restrictive, i.e. the 'necessity' criterion set out in Article VI.4.[19]

Aforementioned the two mechanisms of the prior consultation and RIA would contribute to minimize the discretion of regulators or policy makers and to ensure the benefit of regulations outweigh costs.

V.2. Dissemination of Regulation

Regulations that are already implemented can be disseminated via means of publication, establishment of interactive enquiry points, and construction of central

[18] Findlay and Kim (forthcoming); Office of Regulatory Review, Australia (1998).
[19] The idea of combining transparency and necessity was proposed at the WTO by the EC (May 2001), "Domestic regulation: Necessity and Transparency", WTO S/WPDR/W/14.

coding system, all of which can be carried out both at the multilateral, regional or national levels.

V.2.1 Publication

Once designed through the processes of the prior consultation and regulatory impact analysis, they ought to be disclosed to the public. The current WTO requirements in the GATS for publication of measures affecting trade in services (Article III) are less exigent than disciplines in other WTO agreements such as those on Technical Barriers to Trade and Sanitary and Phytosanitary Measures. The requirements of Article III of the GATS do not mandate or indeed even encourage WTO members to make available for advance comment the texts of new laws, regulations, and administrative guidelines or amendments to existing ones prior to their publication. There is therefore no effective means for interested service providers to voice their opinions on the shape of such laws and regulations, though they may be the ones specifically targeted in terms of necessary compliance.

The GATS does not allow for foreign service providers to become acquainted with the text of new or amended laws and regulations, as there is no need to publish such measures until the date on which they become effective. Likewise, the GATS does not contain any provisions requiring the scope for review by an independent body of the application of such measures in its Article III provisions on transparency (though this is one of the requirements of paragraph 2(a) of GATS Article VI on Domestic Regulation that is currently being reviewed in the ongoing negotiations).

Explanation of the rational or justification of all measures affecting services trade should be published as well. GATS Article VI:4 requires that such measures be necessary for achieving the policy objectives and for ensuring the quality of the service. Transparent explanation of the rationale or justification of the measures demonstrates whether they are necessary and whether they are the least trade restrictive options to ensure the given objectives. Greater transparency in this sense could thereby help in avoiding services trade disputes.

Additionally, a government may also assist in facilitating transparency through the publication of a summary of domestic legislation, where it is written in a complicated fashion and in difficult legal terms Such summaries would provide services suppliers with a clear understanding of whether they are exempted from or subject to certain measures, thus fostering economic efficiency in services trade.

As stated earlier, publication of measures affecting services trade would play a major role in boosting competition and efficiency in services trade, especially in government procurement of services. Services are the largest category of public purchases in many countries where governments outsource these to the private sector.[20] In the bidding process efficiency would be increased through 'ex ante' and 'ex post' publications. In tendering procedures (ex ante), as stipulated in the WTO Government Procurement Agreement, a government should publish a list of qualified suppliers, whether domestic or foreign, to whom it must give equal opportunity to bid. It should also publish specific procedures and criteria for the procurement process so that potential bidders have access to the same information. In order to keep the procurement efficient (ex post), the government should establish independent regulatory bodies to audit the winner's business practices and publish the audits.[21]

An essential aspect of the publication of relevant rules, regulations, and administrative procedures is that such publication be carried out in a timely manner. Official publications and web sites should be updated on a regular basis as well to reflect changes and amendments. A newsletter would be a good example for such periodic updates.

V.2.2 Notification

Notification of the introduction of any news laws, regulations or administrative guidelines that significantly affect trade in services, or any changes to existing ones, is also a requirement of GATS Article III as stated earlier. It should be pointed out that under the GATS, as in the case of regional trade arrangements in the APEC region, it is

[20] Evenett and Hoekman, "Government procurement of services and multilateral disciplines", 2000.

not necessary to notify all existing legislation affecting trade in services, but rather only new or amended legislation which significantly affects trade in services covered by a member's specific commitments under the GATS.[22] This is to lessen the administrative burden of such a requirement. Notification of new or amended legislation should ideally be accompanied by the text of such legislation, although this is not a requirement.

However an obligation for notification of new or amended laws and regulations, especially new legislation, is being actively discussed, in conjunction with the prior consultations mechanism drawn from the TBT agreement, in the GATS Working Party on Domestic Regulation.

V.2.3 National Enquiry Points

Perhaps the most serious deficiency at present of the transparency mechanisms, however, is the functioning of national enquiry points. It is a broadly-held view of services experts that the present system of enquiry points under the GATS is not working well. Though set out as one of the three means to fulfill the transparency requirements of Article III, the way in which the enquiry point system has been designed means that it is for all practical purposes not being used.

Discussion with service industry companies as well as with government services officials reveals that WTO members do not make use of the enquiry points, though many members have notified these to the WTO and though they are also available on the WTO web site. Two explanations might be suggested for this clearly unsatisfactory situation.

First, it is the private sector that trade services, not the government, yet the enquiry points under the GATS have been set up for access by governments only. Actual service providers – either individuals or firms – with a direct interest in obtaining

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[21] Realizing the important role of transparency in the area, the 1996 Singapore WTO Ministerial Conference established a multilateral work programme on transparency in government procurement for goods.

[22] a. In the NAFTA and Canada/Chile agreements, parties must notify all existing discriminatory as well as non-discriminatory quantitative restrictions affecting service providers as part of the treaty obligations.
b. Up to 2000, 135 notifications to the WTO Council for Trade in Services have been made: 17 notifications under Art. V(Economic Integration); 4 under Art. XXVII (k)(ii) (Definition); 33 under Art. VII:4 (Recognition); and 79 under Art. III:3 (Transparency, notification of the introduction of any new or any amended legislation).

this information to access foreign markets are not allowed to make use of the enquiry points.

Second, the broad-based nature of service activities means that several different sectors are involved in the provision of services at the national level. The WTO has developed an indicative list of 11 major service sectors and 154 sub-sectors for purposes of the negotiations (GNS/W/120). This implies that several different government ministries and/or agencies have competence over activities as diverse as banking, insurance, securities markets, telecommunications, transport, distribution, education, health, and environmental services, among others. All regulated service sectors will be under a government body responsible for both developing and implementing such regulations. In the case of professional services, various professional associations serve as the repository of information on the degree and competence requirements necessary to be able to exercise the profession at the national and/or state/provincial level.

The above two factors combined have resulted in a system that, although designed to enhance transparency, is neither timely, nor directed of use to those interested parties. One single national enquiry point will not in the large majority of cases have the information or expertise necessary to meet the needs of those third parties requesting such information on a given service activity. The enquiry point representative in question will therefore need to consult with the appropriate ministry or professional association in order to respond to the request. For an individual or private firm to use the enquiry point system, it must first be aware of its existence, then address its request for information on a specific service sector abroad to its own government, who must in turn request this information of the government body designated as the enquiry point in the foreign market. Clearly such a procedure is cumbersome at best, irrelevant at worst.

The specialized and highly diversified nature of service activities means that a different structure for a system of enquiry points would prove more helpful to meet the objectives of transparency and provision of information. Such notifications could be expanded to devolve responsibility for the notifications of new and amended laws, regulations, and administrative guidelines to each of those ministries or relevant bodies within each economy responsible for the service activity in question.

Development of such an expanded list of enquiry points on a national basis would also permit the enhanced interaction of these bodies and service associations, which itself would facilitate the creation of national Coalitions of Services Industries. These coalitions would be very helpful to the development of a services agreement at the regional level, particularly when sector-specific expertise will be required.

V.2.4 Central Registry System

An alternative to the establishment of enquiry points is to create web sites that are interactive and coordinate with national enquiry points to provide information on barriers to trade in services. The interaction and coordination between the websites and enquiry points could be immensely facilitated by establishing a central registry system containing information on actual regulations.[23] All measures affecting services trade at the national and sub-national levels could be included in the database which could be accessed through the central registry and provided upon request.

The question on the creation of the central registry system arises around its feasibility in practice because it involves possibly an immense financial and human capital costs.[24] The answer could depend on the size and development of an economy. If a government has relatively a small size of economy, it is likely that it has less complicated and less amount of regulations than a bigger size of economy and thus that it would be relatively easy to create a central registry system. If a government is highly equipped with technological and economical development, it would be much easier for it to create the registry than other government with a weak technological and economical background. When a government has a large territory, it may be possible to establish the central registry at each state or provincial level. Canada, for instance, has carried out the on-line registry of regulations at the provincial level. The registry of regulations was created in 1977 by the Regulations Act (R.S.N.S 1989, Chapter 393), and is part of legal services division of Department of Justice. Responsible offices at the state level are in charge of filing and recording regulations and publishing them in the bi-weekly issues of

[23] OECD TD/TC/WP (99)43/FINAL, "Strengthening Regulatory Transparency: Insights for the GATS from the Regulatory Reform Country Review", 12 April 2000.

the Royal Gazette that is electronically available at the website. The duties of the Registry also include the indexing and consolidation of all existing regulations at the state level. [25]

An interactive central registry system could prove more effective and beneficial than the establishment of enquiry points because the function of an enquiry point depends on being able to access relevant regulations through appropriate coordination between regulatory authorities and the enquiry point, while this coordination would be ensured through a systematic organization of such information in a central registry. Additionally, a central registry could prove more effective than enquiry points when foreign service providers are allowed to have direct access to the registry to request information on service regulations in that particular market.

V.3 Sector-Specific Transparency Requirements

Some sector-specific transparency requirement provisions exist in both multilateral instruments such as the WTO Telecommunications Reference Paper and the WTO Disciplines on Accountancy.[26] At the regional level there are also some sector-specific transparency disciplines contained in specific chapters of the agreements. For example, there are transparency provisions contained in the financial services chapter of NAFTA and in other free trade agreements that stipulate the following: a) publication of measures affecting financial services; b) availability of regulatory requirements; c) report on the situation of application request; d) adoption of 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 country; and e) the right not to disclose confidential information. Such sector-specific transparency provisions may prove extremely useful because regulatory practices can vary among services sectors. One of the papers prepared under the Menu of Options project, Phase III, considers the benefits of developing a horizontal approach and provisions for regulatory transparency with

[24] During the discussion of this paper at the GOS meeting held on 17-18 February, 2001, APEC member economies expressed their concern on the feasibility of the central registry system in practice.
[25] Web sites of such registry at the state level are http://198.166.215.5/just/regulations/ (Nova Scotia), and http://inter.gov.nb.ca/justice/asrlste.htm (New Brunswick), for instance.

those of developing various sector-specific agreements with transparency provisions included.

VI. Revealed Regulatory Transparency within the APEC: E-IAPs

In the context of the APEC, there has been significant progress in improving regultory transparency in services by means of publication of electronic Individual Action Plans (e-IAPs) that have been in active since November 2000.[27] The e-IAPs in services inform market access requirments[28] on the 13 services sectors (business, communications, constructions, finance, distribution, education, environment, recreational and sports, tourism, health, transport, energy, and others) by member economies. It should be noted that the coverage of the services sectors in the APEC e-IAPs is broader by including energy sector than in the WTO GATS which does not cover the sector.

The e-IAPs cover not only current market access requirments but also measures to be implemented in the future by sector. The latter is simlar to the pre-commitment mechanism of the basic telecom services of the GATS. By stipulating future meausres, the e-IAPs creat accountability and predictability.

A noble aspect of the APEC e-IAP is that it provides contact points. The contact points are on a sectoral basis and accessible by the public - any individuals, services providers, policy makers and governments. This is value-added, taking into account that the enquiry points set out under the WTO are generally, except a few cases, a single central enquiry point and not accessible by the public. The sectoral e-IAP and the sector-

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[26] Please see Annex for the provisions on Transparency in the Reference paper on the Basic Telecommunications and in the Disciplines on the Accountancy Sector.

[27] The e-IAPs are accesible by all interested parties and can be browsed from the APEC e-IAP web site, http://www.apecsec.org.sg.

[28] Such as policies, laws, regulations, administrative rulings, licensing, certification, qualification and registration requirements, technical regulations, standards, guidelines, procedures and practices relating to trade in services.

based contact points can be interactive. This would reduce the lag time between enquirers and information providers.

Improvement of E-IAPs

The publication of e-IAPs by APEC member economies is a very effective way to ensure regulatory transparency. In order to faciliate the e-IAPs, it is desirable that member economies fill in and submit the IAPs in a consistent and timely manner, and upload them to the web site. When policies are changed, member economies should be able to access the web site and update the changes as early as possible. Tthis would result in a same effect as the notification requirement as stipulated in the WTO. On the other hand, it would go beyond the WTO notification requirement by the instantaneous update on the web site.

With a view to facilitating the contact points interactive with the e-IAPs, it is recommended that all APEC member economies provide the sector-based contact points. The contact points shall be more enhanced and centralized if the contact points of the APEC professional services directory that was a deliverable of the APEC GOS would be linked to the sector-based contact points. It will increase the effectiveness of the contact points in services.

The expanded list of contact points on a national basis would enhance the interaction of government bodies, professional bodies, and service business associations. Taking into account that the services business associations have an in-depth knowledge on business regulations, it is valuable to create national coalitions of services industries. The national coalition of services industries would have an important role to play in provision of regulations as well as in contributing to designing economically efficient regulations.

Once having a central registry system ready and making it electronically available – using web sites, a member economy may link the web site to the e-IAPs by sector. It is observed that when stipulating regulations in a sector, some member economies link the regulations to a relevant web site that contain more detialed information. This manner can

be adopted for the linkage between e-IAPs and the central registry system. This would make the e-IAPs more complete towards the regulatory transparency within the APEC.

In terms of filling in e-IAPs, it is observed that the information criteria varies by member economy. It is because the current e-IAPs format fails to set out a uniform format. For example, some economies provide informaiton by mode of supply, while some do not. It would be more effective if a harmonized format would be developed.

In order to further enhance transparency, member economies may also include a description of any regulatory measures that have a horizontal effect on all services sectors which will enhance predictability of the market. If the e-IAP can be filled in and submitted annually in a complete form and maintained up-to-date, this will be the best practice in the regulatory transparency.

In order to improve e-IAPs, some member economies may be in a need for technical assistance and capacity building in completing the e-IAPs. The capacity building and technical assistance could be provided by private sector (who will be the major beneficiary of the regulatory transparency), international institutions, or individual governments. If this exercise were accomplished, the APEC would be a leader in the area of regulatory transparency.

Regulatory transparency can be beneficial to all member economies. Enhanced transparency that would be achieved by means of completeing e-IAPs will facilitate the onging WTO services negotiations. The completed e-IAPs would inform member economies where and what type of regulations stand in their respective economy. This readily avaialble informaiton on regulation will help member economies to question why the regulations are necessary and what their objectives are, as observed at the NAFTA negotiations. The awarness will equip member economies with effecitive liberalization in services: how to liberalize and what to liberalize.

Transparency can be viewed as a additional administrative burden to member economies. E-IAPs uses the advent of new technology, internet and is designed to minimize the costs of transparency. Nevertheless, there is a need for the technical assistance and capacity building in this area, such as collecting all regulations over the

thirteen sectors at both national and sub-naitonal levels and creating central registry system. Member econmomes should work together so that the beneefits of transparency via e-IAPs outweigh the costs. Transparent regulatory system within the APEC will probably improve investment, productivity and the APEC economy as a whole.

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ANNEXI: Sectoral Provisions on Transparency

I. Reference Paper of the WTO Agreement on Basic Telecommunications.

- Provision on a timely basis to other services suppliers of technical information about essential facilities and commercially relevant information necessary for the provision of services

- Procedures for interconnection must be publicly available and major suppliers shall make publicly available either their interconnection agreements or a reference interconnection agreement.

- Universal service obligations shall be administered in a transparency, non-discriminatory and competitively neutral manner and shall not be more burdensome than necessary.

- Licensing requirements shall be publicly available and reasons for denial of a license are to be made available to an applicant on request.

- Any procedures for the allocation and use of scarce resources will be carried out in an objective, timely, transparent and non-discriminatory manner.

II. The Disciplines on Domestic Regulation in the Accountancy Sector (1998, WTO S/L/64)

- Members shall make publicly available, or shall ensure that their competent authorities make publicly available, including through the enquiry and contact points.

- Where applicable, information describing the activities and professional titles which are regulated or which must comply with specific technical standards.

- Requirements and procedures to obtain, renew or retain any licenses or professional qualifications and the competent authorities' monitoring arrangements for ensuring compliance.

- Information on technical standards.

- Upon request, confirmation that a particular professional or firm is licensed to practice within their jurisdiction.

- Members shall inform another Member, upon request, of the rationale behind domestic regulatory measures.

- 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.

ANNEX2: Opacity Index

The Effects of Opacity

Economy	O-Factor	Tax-Equivalent (%)	Opacity Risk Premium (Basis Points)
Argentina	61	25	639
Brazil	61	25	645
Chile	36	5	3
China	87	46	1,316
Chinese Taipei	61	25	640
Colombia	60	25	632
Czech Republic	71	33	899
Ecuador	68	31	826
Egypt	58	23	572
Greece	57	22	557
Guatemala	65	28	749
Hong Kong	45	12	233
Hungary	50	17	370
India	64	28	719
Indonesia	75	37	1,010
Israel	53	19	438
Italy	48	15	312
Japan	60	25	629
Kenya	69	32	848
Lithuania	58	23	584
Mexico	48	15	308
Pakistan	62	26	674
Peru	58	23	563
Poland	64	28	724
Romania	71	34	915
Russia	84	43	1,225
Singapore	29	0*	0*
South Africa	60	24	612
South Korea	73	35	967
Thailand	67	30	801
Turkey	74	36	982
UK	38	7	63
Uruguay	53	19	452
USA	36	5	0*
Venezuela	63	27	712

Notes:
O-Factor is the score of an economy based on the survey responses. High numbers indicate a high degree of opacity and low numbers indicate a low degree of opacity.

Tax Equivalent shows the effect of opacity when viewed as if it imposes a hidden tax. For example, the number 30 indicates that opacity in that economy is equivalent to levying an additional 30-percent corporate income tax.

Risk Premium indicates the increased cost of borrowing faced by economies due to opacity, expressed in basis points (100 basis points = one percentage point). On average, economies with more opacity tend to have to pay a higher interest rate on the debt they issue. For example, a score of 900 would indicate that economies need to pay international investors an extra 9 percent on their sovereign debt due to opacity. Some opacity premiums in this tabulation are higher than the actual interest rate at which the corresponding

economy is able to borrow. This apparent anomaly, discussed on p. 20, is explained by certain capital markets dynamics and by hidden subsidies.

* Where zero (0) is reported in the table, that economy served as the benchmark level of opacity for the calculations.

Source: PricewaterhouseCoopers, (2001)