

**COMMUNICATION FROM THE EUROPEAN COMMUNITY
AND ITS MEMBER STATES**

The following communication, dated 25 March 2002, has been received from the Permanent Delegation of the European Commission.

CONCEPT PAPER ON TRANSPARENCY

1. Paragraph 22 of the Doha Ministerial Declaration mentions, inter alia, transparency as one of the issues to be clarified in the Working Group on the Relationship between Trade and Investment, in the period until the Fifth Ministerial Conference. The issue of transparency has already been addressed in a number of papers presented in this Working Group since 1997.¹ In this context, this submission aims at outlining the EC view on the main elements of transparency that could be included in a multilateral framework on FDI.

I. WHAT IS TRANSPARENCY ?

2. Transparency means information. Making available relevant information for all interested operators is essential in order to enable them to make investment decisions. Information on both the substance of the rules and on the process (i.e. the way in which the rules are applied) is equally important. The notion of transparency is closely linked to the principle of fairness as well as economic efficiency and legal security. In the international trade and investment area the legal requirement of transparency on host countries means, in general terms, the requirement of making available the relevant "rules of the game" in force in their territory. The "rules of the game" cover the relevant laws and regulations as well as the procedural rules and formalities regarding investment.

II. WHY IS TRANSPARENCY IMPORTANT ?

3. Ministers of WTO Members have recognised "... the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross border investment, particularly FDI ...".² The reason is that greater transparency encourages higher flows of FDI, by reducing investor perceptions of risk, and a multilateral benchmark for transparency provides an objective benchmark for overcoming this sort of obstacle to FDI.

4. Improving transparency is not only in the interest of investors (domestic and foreign) and host countries, but also of all other stakeholders such as, for instance, home country outward investment promotion agencies, third country governments, employees, shareholders, etc.

¹ See, for instance WT/WGTI/W/70 (Korea); WT/WGTI/W/75 (Japan); WT/WGTI/W/87 (Japan); WT/WGTI/W/90 (Hong Kong, China).

² Doha Ministerial Declaration, paragraph 20.

5. We believe that “making available the rules of the game” should be seen as complementary to investment promotion efforts in host countries and to good internal governance. Transparency, in fact can be enhanced in a pro-active way, by disseminating information, in order to promote investment opportunities in potential host countries.

6. The TN SOFRES Business Survey, conducted for the EC Commission in April 2000 among some of the biggest EU companies³, showed that lack of transparency on local legislation and rules was considered the most frequent hindrance to investment by 71 per cent of the companies.

7. This is particularly important for developing economies who seek not just more capital but also technology transfer, management and other know-how. The lack of transparency in any given country means a lost opportunity to attract more investment.

8. In general, transparency is an essential element of good governance. Even the process of improving the transparency of its investment regime could represent, for any country, an opportunity for further rationalising investment rules and procedures, to the benefit of domestic and foreign operators. This process could also be seen as an opportunity for developing countries to promote the improved conditions for foreign investment in their territory. According to UNCTAD more than 90 per cent of the investment measures applied by host countries in the last few years have been towards more liberalisation. Thus, it would be important to disseminate this information as widely as possible.

III. PROBLEMS CAUSED BY THE LACK OF TRANSPARENCY

9. Lack of transparency deters potential investors from entering markets.⁴ When companies are unsure about the existing legal regime on investment in a certain country, they tend to overestimate the risk associated with that country well beyond reality. And risk is costly. In general terms, the lack of information distorts economic decisions, including the decisions to invest in a certain activity or in a given country. Thus a non-transparent business environment will distort the allocation of capital, creating unnecessary costs and wasting opportunities.

10. Uncertainty on the exact rules governing any stage of investment in a given host country prevents investors from developing long-term business plans. Needless to say, this kind of lack of transparency does not favour the needed transfer of capital and technology to the host country. Moreover, improving transparency of the investment regime benefits all investors, domestic and foreign. Lack of transparency hampers business opportunities particularly in developing countries where suppliers of goods and services could potentially develop their businesses and create jobs, as a complement to domestic and foreign investments. In fact, deterred FDI might not even be the most damaging effect of lack of transparency on the growth potential of a host country. Other negative effects on productivity, domestic investment and growth could be quantitatively more important than deterred FDI.

11. Lack of transparency, however, is not only a problem concerning the legislation and rules that constitute the investment regime, but is often related to the application of the rules. This can be equally costly for businesses and harmful in terms of deterred investment for the host economy. Moreover, the lack of clear rules is often the environment where private, secret and possibly corrupt deals and practices tend to prosper. Even when practices are not corrupt, the lack of transparency produces the inevitable perception that they might be affected by corruption.

³ See <http://europa.eu.int/comm/trade/miti/invest/surveys.htm>.

⁴ See the PriceWaterhouseCoopers Report: Investigating the Costs of Opacity: Deterred Foreign Direct Investment, 2001.

12. In general, if policies and regulations concerning FDI are inconsistently applied and arbitrarily changed, or impose excessive time-consuming procedures, the scope and the nature of activities of foreign investors is likely to be negatively affected. For instance, it has been observed that when investors lack confidence in the host country's legal system, foreign direct investment, when it occurs, may be structured to make sure that the proceeds of the venture are immediately moved off-shore rather than invested in the host economy.

13. In sum, a non-transparent investment climate in any given host country does not allow foreign investors to take full advantage of the economic opportunities that could be expected from their venture abroad. This, in turn, will impede the positive feedback between FDI and growth in the host economy that would occur in a more transparent environment.

IV. HOW TO IMPROVE TRANSPARENCY

14. Finding a solution for all forms of lack of transparency of the business climate goes well beyond the scope of this paper and of what is needed within a trade and investment agreement. We will focus on the provisions that are commonly included in trade and investment agreements.

15. The Working Group on the Relationship between Trade and Investment has analysed in detail some of the existing provisions on transparency that have been adopted in international trade and investment instruments. These can be summarised in the following categories.

A. PUBLICATION OF RULES AND MEASURES RELATED TO THE AGREEMENT

16. GATT Article X:1, TRIPS Article 63(1) and GATS Article III:1 require WTO Members to publish all measures (e.g., "laws, regulations, judicial decisions and administrative rulings of general application"; "all relevant measures of general application which pertain to or affect the operation of this Agreement").

B. TIME LIMIT FOR PUBLICATION

17. The requirement concerning the deadline for publication can vary between a point in time when the measures enter into force or in advance in order to guarantee that business disposes of sufficient time to adapt to the new legislation. Hence, the provision can stipulate to publish any measure "promptly" (GATT Article X). This term can be specified by an additional phrase "at the latest by the time of their entry into force" (GATS Article III). A more ambitious approach requires any measure to be published in advance and provide a reasonable opportunity to comment any new measures (NAFTA article 1802).

C. NOTIFICATION

18. In addition to publication, Members may be required to notify their relevant measures to the WTO Secretariat, as in TRIPS Article 63(2) and GATS Article III. In some cases, as in the TBT Agreement Article 2.9, Members are required to notify the regulations before their adoption.

D. CREATION OF ENQUIRY POINTS AND RESPONSE TO REQUESTS

19. Article III.4 of the GATS requires all WTO Members to establish enquiry points. These enquiry points have the task of providing specific information and to respond promptly to questions and enquiries by other Members, related to the agreement.

E. ADMINISTRATIVE PROCEDURES

20. While substantive transparency consists of the publication of all relevant governmental measures, the concept of transparency can also include the procedures followed in the implementation of rules, for instance when authorisation procedures are required. Procedural transparency is mentioned in GATS Article VI.3 which requires Members to disclose information regarding the status of applications for authorisations in the context of service provisions.

F. EXEMPTIONS

21. Notwithstanding the requirements to publish any relevant measures, parties can be exempted from applying transparency provisions for certain reasons. For instance, GATS Article III stipulates that the requirement to publish relevant measures at the latest by the time of their entry into force can be waived in emergency situations. Moreover, GATT Article X and GATS Article III bis provide for exemptions to transparency provisions in cases where disclosure of confidential information would impede law enforcement, or would be contrary to the public interest, or which would harm legitimate commercial interests of public or private enterprises.

V. PROPOSAL FOR TRANSPARENCY PROVISIONS IN A MULTILATERAL FRAMEWORK ON INVESTMENT

22. In our view there is no logical reason for which direct investments in the primary, e.g., mining, and secondary, e.g., manufacturing, sectors should not benefit from at least the same transparency provisions that already apply for direct investment in the services sectors (i.e. “commercial presence”). FDI needs transparency in all areas. It is desirable, therefore, to develop transparency provisions in a multilateral framework that would at least match what is applicable for investors in services. This would not require WTO members to set up any new administrative machinery or to commit additional budgetary or staffing resources.

23. Beyond this, the EC believes that transparency should not only be seen as a set of requirements for the host country, although it is eventually the host country that benefits the most from increased FDI. A new multilateral investment framework, in our view, provides the opportunity to set transparency provisions also in a pro-active meaning. For instance, facilitating the dissemination of information on the investment regime of countries, in order to promote them vis-à-vis potential investors.

A. THE STARTING POINT

24. Transparency provisions for investment should include, at least, the following elements:

Publication: Each member should publish, or otherwise make publicly available, all relevant measures of general application which pertain to or affect the operation of the Agreement. This should include measures affecting the establishment, expansion, withdrawal, operation of investment and international agreements pertaining to FDI.

Notification: a notification procedure should apply for any new or changes to, existing laws, regulations, judicial decisions, and administrative procedures which significantly and directly affect FDI. A standard proforma could be created to ensure consistency in the notifications, as in the TBT Agreement. This would make sure that all notifications cover the same important areas such as scope of measure, rationale, timing, contact for further details, etc.

Deadline: publication should be made promptly, and at the latest by the time of the entry into force of the relevant measures. Generally speaking transparency increases if the measures are made

public earlier. Better regulation, as well as better transparency is achieved by early public awareness of a prospective measure. Transparency also implies the need to tackle the problem of uncertainty caused by policy changes. Thus, making available information on possible reforms affecting investment will increase predictability of rules.

25. WTO Members could endeavour to publish and notify proposed measures on FDI in advance, in order to allow interested Parties to become acquainted with them. For instance, if WTO Members are consulting on proposed laws that would substantively affect foreign investors they may find notifying the WTO as a useful way of broadening the scope of that consultation and thus helping to ensure that any potential problems are discovered before enactment.

Enquiry: Members should be required to respond promptly to all reasonable requests by other Members for specific information on any of its measures of general application.

26. Transparency can only be effectively implemented if it contains provisions that guarantee that requests for information will be satisfied. The creation of one-stop-shops such as enquiry points (new or existing ones) in all the host countries for requests of information concerning investment seems to be the best solution to facilitate and to grant transparency for all WTO Members. The WTO Secretariat could keep an updated list of addresses (physical and virtual) of the Enquiry points.

27. Obviously, appropriate flexibility on the timing for setting up these Enquiry points (if they are new), and technical assistance, should be foreseen for developing countries.

Procedural transparency: Members shall ensure that all measures affecting FDI are administered in a reasonable, objective and impartial manner. Each member shall maintain or establish judicial, arbitral or administrative tribunals or procedures for prompt and impartial review and remedy of administrative decisions affecting FDI.

28. Transparency should be ensured by providing for the right of Members to be informed about any administrative steps and authorisations that are necessary for the establishment, expansion and operation of FDI. In these cases, applicants should have the right to be informed of the decisions that have been taken since the request for authorisation, within a reasonable period of time. Licensing requirements should be based on objective and transparent criteria.

Exemptions may be needed in certain cases, in order to preserve confidential information and public interest. However, the potential of abusing certain exemption provisions should be taken into account and it has to be defined under which circumstances and on what grounds should exemptions be granted.

B. IMPROVING TRANSPARENCY AT MANAGEABLE COST

1. The role of new technology (e-government)

29. Any mechanism to ensure transparency can be applied more easily and at a lower cost by using new electronic information technologies. The use of websites, electronic databases and E-mail can play a significant role in improving transparency in a cost-friendly and effective manner. Ideally, all investment relevant laws and a consolidated code of regulations, could be made available on a database, contact addresses could be put on websites, and public comment procedure prior to the adoption of new legislation including all stakeholders could be run electronically. This would imply regular up-dates of the information contained and guaranteed access to the electronic information.

30. Needless to say, the use of new technologies will necessitate governmental authorities that have the facilities to use them. In order to put such mechanisms gradually in place WTO Members would need to assess the infrastructure and training resources that would be required.

2. Assistance for developing countries to increase transparency and promote investment opportunities

31. In order to increase the potential benefits, some of the transparency mechanisms could also be used by host countries, in a positive manner, as a way to inform on the investment regimes and promote the investment opportunities in their territory.

32. The question of identifying the domestic laws and regulations that are of most immediate interest to prospective investors and especially the dissemination of this information, should be an important element of investment promotion.

33. It is objectively difficult for any country to identify and list all the domestic laws and regulations that may be relevant to the operation of foreign investors (or of domestic investors too, for that matter). These laws and regulations are usually scattered in different legislative and regulatory texts (even where some of them are collected in an “investment code”) and are the responsibility of different branches of government or, in many countries, of independent agencies or sub-national governments. A developing country could need help in financing and training the human resources to comb through such domestic laws and regulations, and to devise suitable, effective and non-cumbersome ways to disseminate the relevant information on its investment regime and to promote investment opportunities in its territory.

34. Technical assistance for the specific goal of improving transparency could build on existing projects and offer support to officials and investment promotion agencies from developing countries in terms of know-how as regards (i) identification of national legislation concerning investment, (ii) dissemination of information, and (iii) strengthening the capacity to upgrade regulatory frameworks and to maintain this upgrading. In this context, the existing activities of the World Association of Investment Promotion Agencies (WAIPA⁵), the World Bank (MIGA⁶, FIAS⁷), and UNCTAD could also be very useful.

35. WTO Members could try to make the most of these instruments in order to: (i) improve their capacity for investment promotion and dissemination of information; (ii) at the same time, to comply with transparency provisions that a multilateral investment framework could include.

36. In order to obtain effective results, any technical assistance and capacity building activity should be demand-driven and fully owned by each individual recipient country. Developing countries should therefore be invited to articulate their precise needs in this area.

⁵ <http://www.waipa.org>.

⁶ The MIGA Agency, part of the World Bank group, aims at encouraging foreign investment by providing investment insurance against non-commercial risks in developing countries. MIGA is also involved in programs, dissemination of information on investment opportunities, and technical assistance that enhances national investment promotion capabilities.

⁷ The Foreign Investment Advisory Service (FIAS) helps developing and transition country governments design initiatives to attract foreign direct investment. FIAS advises on laws, policies, incentives, institutions, and strategies. It helps countries increase the amount of investment they receive - and the benefits this investment produces.