

COMMUNICATION FROM JAPAN

The following communication, dated 11 April 2002, has been received from the Permanent Mission of Japan.

TRANSPARENCY

I. INTRODUCTION

1. Transparency is a basic principle that is common and indeed crucial to all the WTO agreements, and takes a natural place in Paragraph 22 of the Doha Ministerial Declaration as an intrinsic element in consideration of an effective investment framework. At past Working Group meetings, Japan has submitted papers on transparency-related issues (WT/WGTI/W/75) and transparency disciplines in the WTO Agreements (WT/WGTI/W/87), specifically highlighting the importance of transparency. Section A of this paper focuses on cases demonstrating the importance of transparency to the investment environment. Section B identifies key points in considering transparency disciplines, while Section C moves on to consider means of securing transparency.

A. IMPORTANCE OF TRANSPARENCY TO THE INVESTMENT ENVIRONMENT

2. Transparency in the investment host country is a critical factor, which leads to the expansion of FDI inflows. A high degree of transparency encourages investors' investment decisions and attracts long-term, stable investment, boosting the social welfare and economic efficiency of the host country. Conversely, a lack of transparency can mean the loss of investment that would have profited the host country.

3. In fact, when investors are drawing up and finalizing their investment plans, instability and a lack of necessary information in reference to their economic activities in the host country are regarded as uneasy factors, and serve to discourage investment. A questionnaire survey on barriers to the investment activities of Japanese companies operating overseas ("FDI Strategies of Japanese Companies in the 21st Century: Current Status and Forecast", JETRO, December 2001) placed a lack of transparency at the top of the list (Annex 1).

4. Typical problems noted by Japanese companies in pursuing investment activities in host countries with inadequate transparency are as follows. Obviously, as these examples are drawn directly from actual business, they also involve aspects such as transparency problems combined with instability and unfairness in rules rather than just simple transparency problems alone.

- Governments provide very little information on investment-related laws and regulations, with information-gathering incurring additional costs.

- Investment-related laws and regulations are subject to frequent and sudden change, greatly disrupting business operations.
- Investment-related government enquiry points and the relevant government ministries are not clearly specified.
- The numerous ministries involved in the procedures required for investment activities result in unnecessary duplication and the additional burden this imposes. Such administrative inefficiency has a negative impact on business.
- Even where investment-related laws exist, they are not necessarily adequately enforced. Arbitrary interpretations are made among ministries, between central and local government and by individual government officials, with no uniform position. There are also many cases of unfair enforcement.
- Many of the relevant documents available are only written in the local language, which is extremely inconvenient. The translation process sometimes leads to differences in the government position and Japanese companies' interpretation. Translation also takes time, causing inconvenience in terms of reflecting the entry into force and amendment of laws in actual business.
- Related laws and ordinances are brought into force almost immediately after promulgation. Because the English translation process takes time, companies are not able to respond immediately upon notification.
- Information on statistics tends to be inaccurate and figures unreliable.
- Confidential information is sometimes leaked to other companies in the same business. Local companies under joint management with Japanese companies can also conduct a joint venture with other companies in the same business, and the lack of a confidentiality culture among local employees means that they are easily bribed.

5. As noted in the previous submission by Japan (WT/WGTI/W/87), the significance of transparency lies primarily in three points. Firstly, greater predictability can lessen investor's risk and boost investment. From the investor's perspective, a high degree of transparency is a critical issue in that it lends predictability to business activities. Countries with high levels of transparency inevitably enjoy an advantage in the selection of investment destinations. Secondly, lower risk means a higher quality of investment. In particular, faster administrative procedures for investment facilitate investment in areas subject to rapid change, such as investment in IT and other high technology areas that are subject to constant technological innovation. Thirdly, transparency affects domestic industry in that it encourages foreign investment and the according indirect stimulation of domestic industry and otherwise clearly facilitates the promotion of an active relationship between domestic industry and foreign investors.

B. SCOPE AND LEVEL OF TRANSPARENCY PROVISIONS

6. In considering the kind of transparency provisions that could be built into a future investment framework, particular attention should be given to the scope of rules and level of obligation.

1. Scope

7. Where trade disciplines are essentially confined to imports and exports, direct investment-related laws, regulations and administrative provisions range far more widely, making the delineation of scope that much more difficult. For example, in addition to laws and regulations on incoming foreign investment, direct investment is also regulated by licensing laws concerning factory establishment and operation, environmental standards regulations, employment-related laws, tax laws, competition laws, and securities and exchange laws. It would be worth considering attachment to the investment framework of an illustrative list of measures covered by the transparency provision as one possible option in order to clarify the scope of the transparency provision.

2. Level of obligation

8. The merits offered to both investors and host countries by a high degree of transparency were noted in Section A. For the investor, a highly predictable investment environment means a constant, stable business environment, saving on unnecessary costs. For the investment host country, greater predictability opens the way for more FDI, resulting in such economic benefits as capital transfer, technology and management know-how transfer, greater employment opportunity, the fostering of a skilled work force, and the improvement of the level of domestic industry.

9. The highest possible level of obligation should therefore be secured in any future investment framework.

10. In terms of the level of transparency provisions, firstly, it will be important to identify exactly which measures will be subject to the said provisions. Existing agreements address transparency as follows. (Annex 2 illustrates which areas are included in which agreements.)

- Publication of the related domestic laws, regulations and systems;
- Notification and provision of information;
- Responses to requests for the supply of information;
- Establishment of enquiry points;
- Domestic judicial and complaints procedures;
- Administrative procedures.

Secondly, consideration should be given to how rigorously these provisions will be pursued.

11. The transparency provision in the GATS provides a useful reference in this regard. As members are already committed to transparency under the GATS, they are likely to be reasonably open to this approach, which would also impose no major burden. In other words, any new investment framework should secure at least the same level of transparency as in the GATS.

12. GATS deals with transparency in Article 3. More specifically, members are obligated 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 (Article 3.1). Members must also notify the Council on Trade in Services promptly and at least annually of the introduction of any new, or changes to existing laws, regulations or administrative guidelines which “significantly affect” trade in services covered by specific market access and national treatment commitments under the GATS (Article 3.3). They are also required to establish one or more enquiry points. However, a provision is also included which allows flexibility for developing countries on this point (Article 3.4). Article 3 bis also stipulates that nothing in the GATS shall require any Member to provide confidential information, the disclosure of which would be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

13. Among the existing WTO agreements, the Agreement on Technical Barriers to Trade provides an ideal model in terms of the level of obligation. The TBT Agreement stipulates that whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall notify other Members through the Secretariat and allow reasonable time for other Members to make comments in writing. An annex to the agreement sets the time period in question at 60 days. While 60 days might seem short, according to the 2001 Report on the WTO Consistency of Trade Policies by Major Trading Partners, the rate of TBT compliance in 1999 was 61 per cent, 49 per cent in 2000, demonstrating that the obligation can be met to quite a significant extent.

C. RELATIONSHIP BETWEEN SECURING TRANSPARENCY AND TECHNICAL ASSISTANCE AND CAPACITY BUILDING

1. Specific means of securing transparency

14. Even where the investment framework defines the scope and level of transparency obligations, a key issue will in fact be implementation—how members will secure the transparency of investment-related information. Consideration will therefore need to be given to specific means of ensuring the effectiveness of transparency provisions.

15. A number of options are possible in this regard according to the circumstances of the particular Member country. Here we present the approach taken by Japan to date, which has also been indicated in the previous Japanese paper (WT/WGTI/W/87 “Improving Transparency”).

16. Japan’s approach is of course not a universally applicable panacea, and there may well be better methods. In any case, such specific methods are closely related to the above-mentioned specific level of obligation to be imposed under transparency provisions, and as such are an issue which member countries will need to consider in parallel with discussion on substantive provisions.

Japanese approach to date:

- **Enquiry points for inward investment:** JETRO (Japan External Trade Organization) provides investment-related information as the enquiry point for inward investment as a whole. The Bank of Japan, its offices and the relevant ministries and agencies deal with queries concerning the Foreign Exchange and Foreign Trade Law. Ministry of Foreign Affairs is the enquiry point in relation to GATS.
- **Formulation of Administrative Procedures Law:** the Administrative Procedures Law was formulated in October 1994, securing rules for prompt, fair and transparent administrative procedures.
- **Public comment procedures:** in March 1993, procedures for the submission of views on the formulation, amendment and elimination of regulations were adopted by Cabinet resolution.
- **Formulation of Information Disclosure Law:** this law was promulgated in May 1999, establishing rules for the disclosure of administrative documents.
- **Use of the Internet:** the various ministries and agencies are providing information via the Internet, in addition to which the Administrative Management Bureau within the Ministry of Public Management, Home Affairs, Posts and Telecommunications serves as a gateway for the government as a whole (<http://www.e-gov.go.jp/>).
- **Office of Trade and Investment Ombudsman (OTO):** established in January 1982. Deals with complaints on specific regulations that are obstructing imports and investment in Japan.

2. Technical assistance and capacity building

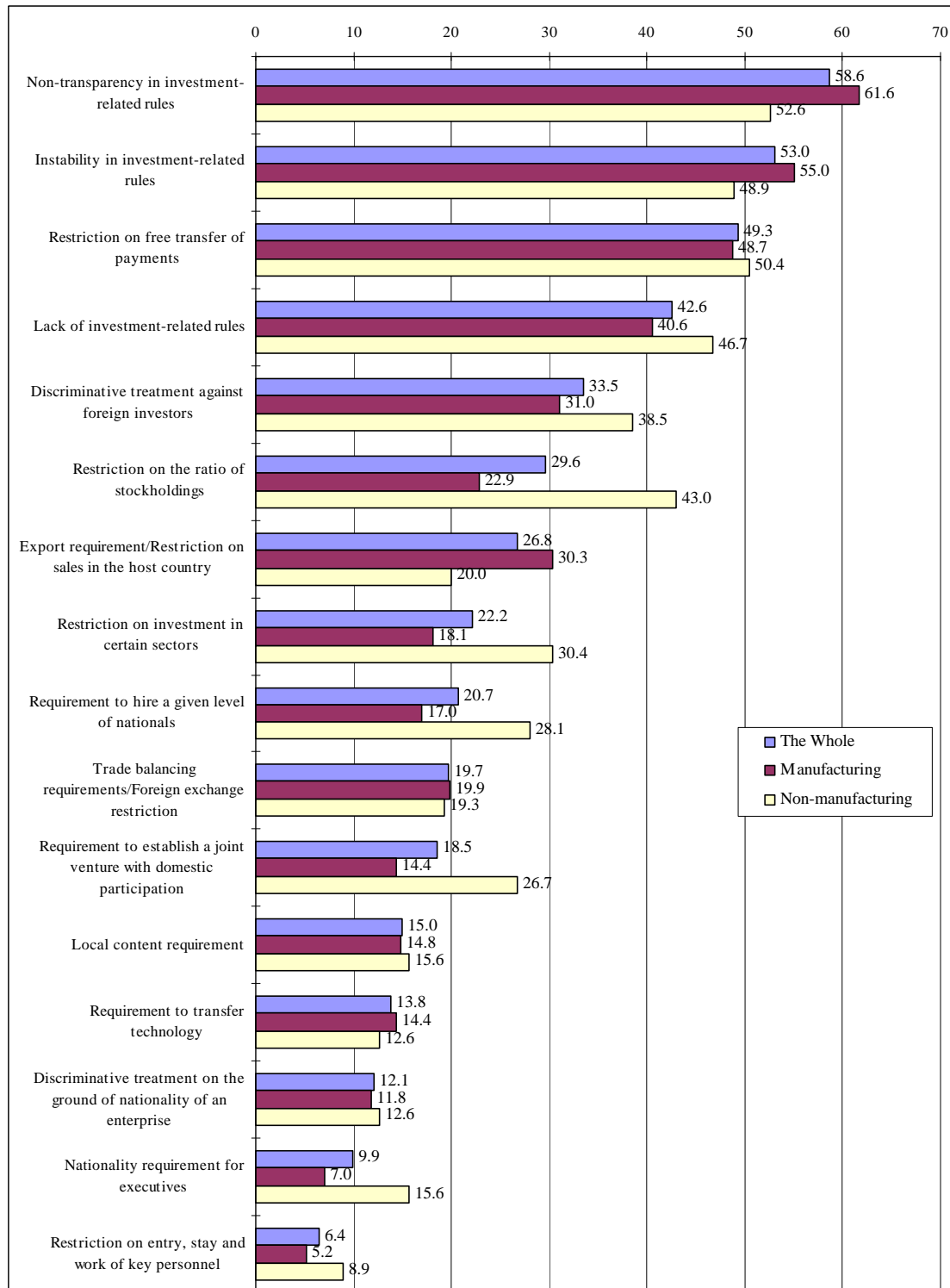
17. Many developing countries rely on attracting investment to enable stable economic operation, but while they understand that transparency needs to be secured as a key factor in attracting investment, they frequently lack the necessary resources and technical capacity. One means of rectifying this situation would be to pursue a technical assistance and capacity building programme within the WTO framework that was linked to securing transparency.¹ It would be particularly effective to engage in specific considerations that were linked to concrete methods for securing transparency. A number of programs are currently under consideration or implementation through cooperation with international organizations, particularly UNCTAD, to promote technical assistance

¹ The same proposal has been made in a Korean submission (WT/WGTI/W/70 “A Benefit of Multilateral Investment Rules: Enhanced Transparency”).

related to investment rules. Japan would like to see WTO-based, bilateral and various other types of programs being utilized to provide efficient technical assistance without unnecessary duplication.

ANNEX I

PROBLEMS FACED BY JAPANESE ENTERPRISES
IN HOST COUNTRIES



ANNEX II

TRANSPARENCY PROVISIONS IN THE EXISTING AGREEMENTS

	GATT	GATS	TBT	TRIMs	SCM	TRIPS	GPA	NAFTA
Publication of the related domestic	X:1	III:1	II:9.1 II:11 V:6.1 V:8			LXIII:1	XIX:1	1802
Notification and provision of		III:3	II:9.2 V:6.2 XV:2	V:1 VI:2	XXV:1	LXIII:2	XIX:5 *1	1803
Responses to request for the provision of information		III:4	II:5 II:9.3 V:6.3 X:1	VI:3	XXV:8,9	LXIII:3	XIX:2,3	1801 1803
Establishment of enquiry points		III:4	X:1					1801
Domestic judicial and complaints	X:3	VI:2					XX	1805
Administrative procedures		VI:3.4						1804
Confidential	X:1	III:bis				LXIV:4	XIX:4	

*1 Provision of an annual basis statistics on the procuraments covered by the

GATT: General Agreement on Tariffs and
GATS: General Agreement on Trade in
TBT: Agreement on Technical Barriers to
TRIMs: Agreement on Trade-Related Investment
SCM: Agreement on Subsidies and Countervailing
TRIPS: Agreement on Trade-Related Aspects of Intellectual Property
GPA: Agreement on Government
NAFTA: North American Free Trade