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Transparency Obligations and Challenges for Negotiators

Submitted by: Australia



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Australian Government

Department of Foreign Affairs and Trade

TRANSPARENCY OBLIGATIONS AND CHALLENGES FOR NEGOTIATORS

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INTRODUCTION TO TRANSPARENCY OBLIGATIONS

- FTAs often have cross-cutting transparency rules in a standalone chapter
 - and chapter-specific transparency provisions
- Typical cross-cutting transparency provisions include:
 - Publication
 - Administrative proceedings
 - Review and Appeal
 - Provision of Information
- What are the purposes of these rules?

Article 28.2 Publication

1. Each Party shall ensure that its **laws, regulations, procedures, and administrative rulings of general application** with respect to any matter covered by this Agreement are promptly published, **including on the internet where feasible**, or otherwise made available in a manner that enables interested persons and the other Party to become acquainted with them.
2. With respect to any measure referred to in paragraph 1 that a Party proposes to adopt, each Party shall, to the extent it considers appropriate:
 - (a) **publish in advance** the proposed measure or information concerning the nature of the proposed measure; and
 - (b) provide interested persons and the other Party with a **reasonable opportunity to comment** on the proposed measure or information.
3. To the extent possible, when introducing or changing the laws, regulations, or procedures referred to in paragraph 1, each Party shall endeavour to provide a **reasonable period** between the date when those laws, regulations, or procedures, proposed or final, in accordance with its legal system, are made publicly available and the date when they enter into force.
4. Each Party shall, with respect to a **regulation of general application adopted by its central level of government** respecting any matter covered by this Agreement that is published in accordance with paragraph 1:
 - (a) promptly publish the regulation on a single official website or in an official journal of domestic circulation; and
 - (b) if appropriate, include with the publication an explanation of the purpose of and rationale for the regulation.

APEC INVESTMENT TRANSPARENCY STANDARDS

1. (a) Each Economy will ensure that its laws, regulations, and progressively, procedures and administrative rulings of general application respecting matters in Section C of Part One of the Osaka Action Agenda are promptly published or otherwise made available, for example via the Internet, in such a manner as to enable interested persons and other Economies to become acquainted with them.

PUBLICATION – CHALLENGES

- To what extent does your domestic system align with the obligations?
- Are trade-relevant laws, regulations, procedures and administrative rulings of general application promptly published?
- Are regulations by the central level of government published on an official website?
 - With an explanation and rationale?
- Is there a general practice of publishing measures in advance?
 - Might be a matter of policy
 - Not always possible to publish every measure in advance eg urgent health measures
 - Might be a legitimate need for flexible language

PUBLICATION – CHALLENGES (CONT)


- How can negotiators balance transparency obligations with the need to protect confidential and sensitive information?
- How do cross-cutting transparency obligations interact with chapter-specific transparency obligations?
 - Seek to avoid unnecessary duplication or inconsistency

Article 28.3 Administrative Proceedings

1. Each Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application with respect to any matter covered by this Agreement are **administered in a consistent, impartial, and reasonable manner**.
2. With a view to administering in a consistent, impartial, and reasonable manner the measures referred to in paragraph 1 with respect to any matter covered by this Agreement, each Party shall **ensure in its administrative proceedings applying these measures to a particular person, good, or service** of the other Party in specific cases, that:
 - (a) whenever possible, a person of the other Party that is directly affected by a proceeding is provided with **reasonable notice**, in accordance with domestic procedures, of 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 issue in question;
 - (b) a person of the other Party that is directly affected by a proceeding is afforded a **reasonable opportunity to present facts and arguments** in support of that person's position prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit; and
 - (c) it follows its domestic procedures in accordance with its laws.

ADMINISTRATIVE PROCEEDINGS – CHALLENGES

- How can we ensure all levels of government act in a reasonable, objective and impartial manner?
 - Giving ‘reasonable notice’ of when proceedings are initiated
 - Giving a description of the nature of the proceeding, legal authorities, the issue
- Are chapter-specific provisions appropriate?
 - Might want chapter-specific transparency provisions to address the resolution of specific disputes
 - Eg telecommunications disputes



Article 28.4 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, if warranted, correction of a final administrative action with respect to any matter covered by this Agreement. Those 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, with respect to the tribunals or procedures referred to in paragraph 1, the parties to a 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 its laws and regulations, the record compiled by the relevant authority.
3. Each Party shall ensure, subject to appeal or further review as provided for in its domestic laws and regulations, that the decision referred to in paragraph 2(b) shall be **implemented** by, and shall govern the practice of, the office or authority with respect to the administrative action at issue.

REVIEW AND APPEAL - CHALLENGES

- How to ensure judicial, quasi-judicial and administrative tribunals are impartial and independent?
 - Impartiality / independence from the authority entrusted with administrative enforcement
 - Ensuring no substantial interest in the outcome
 - Ensuring parties to a proceeding have a reasonable opportunity to support / defend positions
 - Ensuring decision is based on evidence and submissions
 - Ensuring the tribunal is bound by the decision it takes
- Reflect these obligations in domestic rules eg court procedure rules

Article 28.5 Provision of Information

1. If a Party considers that any proposed or actual measure may **materially affect** the operation of this Agreement or otherwise **substantially affect** the other Party's interests under this Agreement, it shall, to the extent possible, **inform** the other Party of the **proposed or actual measure**.
2. On request of a Party, the other Party shall **promptly provide information** and **respond to questions** pertaining to any proposed or actual measure that the requesting Party considers may affect the operation of this Agreement, whether or not the requesting Party has been previously informed of that measure.
3. A Party may convey any request or provide information under this Article to the other Party through their contact points.
4. Any information provided under this Article shall be without prejudice as to whether the measure in question is consistent with this Agreement.

PROVISION OF INFORMATION – CHALLENGES?

- Is there a process in place to ensure agencies responsible for new or existing measures to consider trade law implications of those measures?
- It is not a very onerous obligation
- Reaffirms the importance of ongoing communication with trading partners



Article 28.6
Accessible and
Open
Government

To the extent possible, each Party shall endeavour to ensure that information published by its central level of government with respect to any matter covered by this Agreement is accessible in **open, machine-readable formats**.

QUESTIONS?



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