

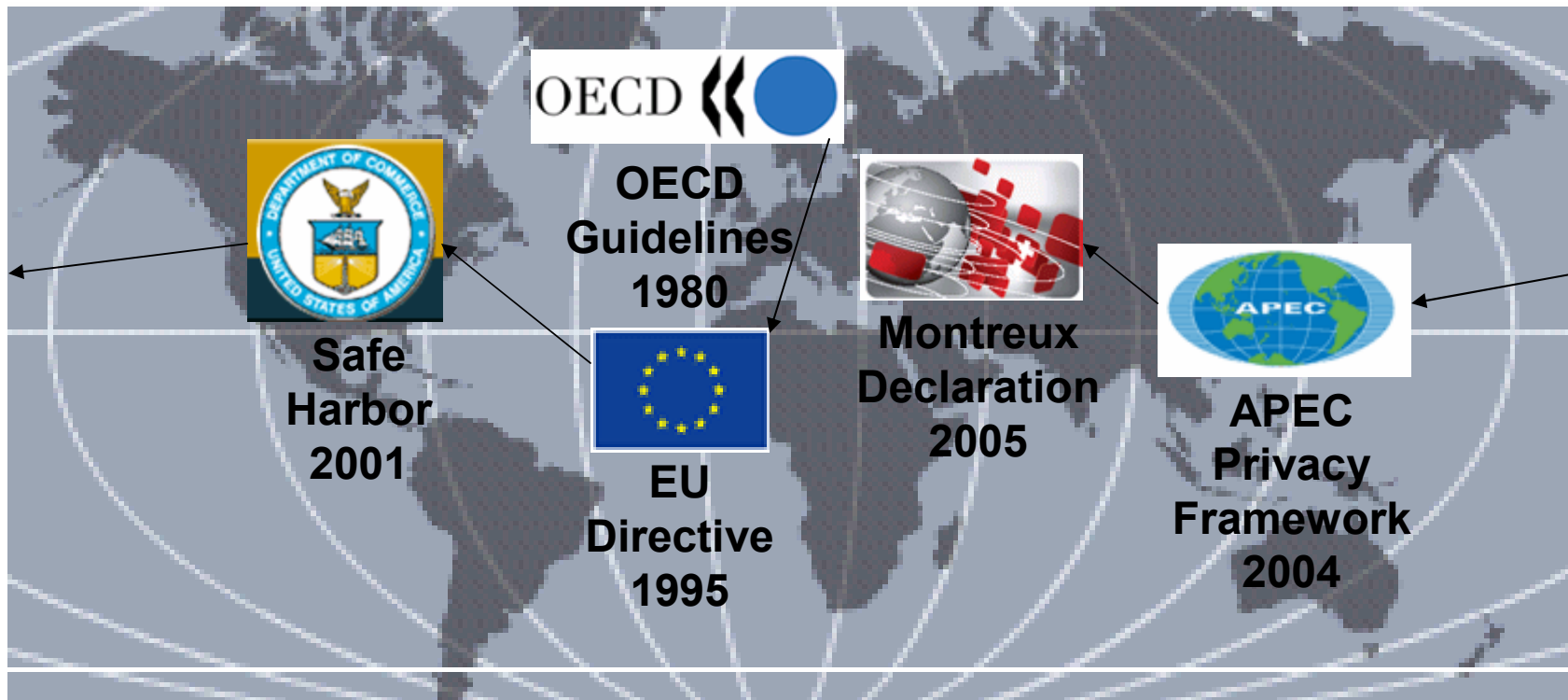
Wellbery Award Presentation

Roadmap for an International Safe Harbor

Is it time for an international privacy agreement?

- Companies: increasing compliance costs
- Governments: enforcement difficulties
- Citizens: falling confidence

Movement toward international frameworks



Has a critical mass of interest formed?

What would be the components of an agreement?

1. Overall statement of common purpose and expected gains.
2. Set of top-level common privacy principles.
3. Charter for a forum of enforcement, dispute resolution, and further development of standards.

Which countries to target?

Approach	Pros	Cons	Recommendation
Seek maximum number of countries as initial signatories	Total potential benefits are the greatest	Negotiations can last several years, delaying the realization of the benefits	
Start with a core group of like-minded countries and gradually add signatories	Quicker realization of benefits through shortened negotiations	Non-signatories are excluded, may resist joining, and present an ongoing source of divergent privacy legislation	+

Americas	Europe	Asia
Canada	European Economic Area members	Japan
United States		Australia
Argentina		

Common purpose?

1. **Citizens** want to be able to control the collection and use of their personal information.
2. **Businesses** want a free flow of information and customers that trust electronic transactions.
3. **Governments** want to protect the interests of their citizens.

What principles? What framework?

Approach	Pros	Cons	Recommendation
Framework based on OECD Guidelines	<ul style="list-style-type: none"> • Continuity with past agreement • Less language to negotiate 	<ul style="list-style-type: none"> • OECD principles don't explicitly address all signatory privacy principles 	
Framework based on new, synthesized set of principles	<ul style="list-style-type: none"> • All signatory privacy principles addressed 	<ul style="list-style-type: none"> • More language to negotiate 	+

International Safe Harbor

Proposed	OECD	EU	Montreux	Safe Harbor	APEC	Canada	Australia	Japan
Public Disclosure	Openness	Notification	Transparency					Disclosure
Individual Notification	Purpose Specification	Information Given to Data Subject	Purpose specification	Notice	Notice	Identifying Purposes; Openness	Openness; Use & disclosure; Collection	Specifying purpose of use
Individual Consent	Collection Limitation	Data Processing Legitimate Right to Object	Individual participation	Choice	Choice	Consent		Cease use
Preventing Harm			Lawful & fair processing; Nondiscrimination		Preventing Harm		Anonymity; Identifiers	
Use Limitation	Use Limitation	Special Categories of Processing	Purpose limitation; proportionality		Uses; Collection Limitation	Limiting Collection; Limiting Use, Disclosure, & Retention	Sensitive information	Limits on purpose of use
Individual Access	Individual Participation	Right of Access	Right of access	Access	Access & Correction	Individual Access	Access & correction	Corrections
Data Accuracy	Data Quality	Data Quality	Accuracy	Data Integrity	Integrity	Accuracy	Data quality	Data accuracy
Data Security	Security Safe-guards	Confidentiality and Security	Data security	Security	Security Safeguards	Safeguards	Data security	Security
External Transfer	Free Flow & Legitimate Restrictions	Transfer to Third Countries	Transborder flows of personal data	Onward Transfer			Transborder data flows	
Policy Governance	Account-ability	Judicial Remedies; Codes of Conduct; Supervisory Authority	Responsibility; Independent supervision & legal sanction	Enforce-ment	Account-ability	Challenging Compliance; Account-ability		Processing grievances; Personal information protection policy

What negotiating forum?

Option	All target signatories are members	Forum has reliable record facilitating enforceable multilateral agreements	Data protection is within its competence	Recommendation
OECD	Yes	Mixed record	Yes	
APEC	No	Mixed record	Yes	
WTO	Yes	Proven record	Probable	+
UN	Yes	Mixed record	Yes	

How would countries join the agreement?

Option	Pro	Con	Recommendation
Signatories bring national laws into conformity by a certain date	Signatory laws are brought to the highest common denominator	Would require legislative action in several signatory countries with a long delay and uncertain result	
Signatories join the agreement as they are able	Entry-into-force would be swift for those countries meeting the standards	Possible long delay until all target countries meet the standards and join the agreement	
Signatories mutually recognize each other as adequate destinations for personal data	Entry-into-force would be swift	Possible long delay until all target countries meet the standards	
Signatories recognize as locally compliant companies that adhere to the agreement's standards	Entry-into-force would be swift; actual privacy protection would be incentivized to increase swiftly	Most administration required, with potentially thousands of "parties" to the agreement	
Signatories can recognize as locally compliant companies or entire countries that adhere to the agreement's standards, at the signatories' discretion	Entry-into-force would be swift; actual privacy protection would be incentivized to increase swiftly; signatories retain enforcement flexibility	Significant administration required	+

How to enforce the agreement?

Option	Pro	Con	Recommendation
National-level enforcement	Countries retain flexibility to enforce in their own manner	Multinational companies will face diverging approaches to enforcement, reducing the benefits of harmonization	
International authority	Enforcement is harmonized	New administration costs for signatories	
Individual complaints	Administration costs are minimized	Individuals may not be sufficiently informed to effectively police the agreement	
Hybrid	Countries retain flexibility to enforce within the parameters and dispute-resolution process of an international governing authority; individuals are given a way to express their voice	New administration costs for signatories	+

Pareto analysis

Signatories	Citizens	Companies	Governments
Canada	Will enjoy greater privacy protections by companies in signatory countries, such as the US, without losing current protections	<ul style="list-style-type: none"> • Multinational companies will enjoy lower technical, legal, and administrative costs complying with a consistent global standard • Nationally focused companies will have the option of not entering the agreement and will thereby avoid new compliance costs 	<ul style="list-style-type: none"> • Governments will retain flexibility to enforce at the local level within parameters set by the international authority • Governments will gain a new mechanism, via the international authority, of influencing the activities of multinational companies operating within their borders and with their citizens • Governments will incur new costs to fund the international authority, perhaps funded by fees charged to multinational companies joining the agreement
United States	Will enjoy greater privacy protections enjoyed by citizens in other countries, such as Canada, without losing current protections		
Argentina	Will enjoy greater privacy protections by companies in signatory countries, such as the US, without losing current protections		
European Economic Area			
Japan			
Australia			
South Africa			

Aside: Privacy declared a universal human right?

Approach	Pros	Cons	Recommendation
Propose privacy as a human right	Extends the EU philosophical basis for privacy to the US and others	Creates controversy in the US, possibly delaying agreement	
Remain silent on privacy as a human right	Avoids controversy in the US	Misses an opportunity to extend the EU philosophical basis for privacy to the US and others	+