



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

A FRAMEWORK FOR INVESTMENT POLICY TRANSPARENCY*

Abstract

Transparency remains one of the top concerns of investors worldwide. In October 2003, the OECD Committee on International Investment and Multinational Enterprises adopted a “Framework for Investment Policy Transparency” to assist host OECD and non-OECD governments to properly address to this concern. The Framework contains fifteen user-friendly questions for conducting self-evaluation and sharing experiences among public officials. The Framework completes the work on public sector transparency conducted in 2003 with the support of the 38 adherent countries to the OECD Declaration on International Investment and Multinational Enterprises¹.

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1. Introduction

The following framework for investment policy transparency has been developed by the OECD Committee on International Investment and Multinational Enterprises (CIME) to assist both OECD and non-OECD governments' efforts to enhance transparency of their investment policy frameworks and to serve as a basis for experience sharing among public officials. It completes the analytical work conducted in 2003 by the Committee on public sector transparency with the endorsement by the 38 adherent countries² to the OECD Declaration on International Investment and Multinational Enterprises.

Fifteen questions are proposed to government officials. These questions aim to facilitate self-evaluations and reporting of policy developments. They also can support peer reviews and multi-stakeholder dialogue on investment policy transparency. While the focus is on the information gaps and special needs of foreign investors, they apply, in most instances, to domestic investors as well. The questions are supportive of a level playing field for all investors.

The framework underlines the importance of effective communication of meaningful information, prior notification and consultation of regulatory changes and uniform administration and application of laws and regulations. It also pays particular attention to capacity-building issues and the evolution of international transparency commitments.

None of the questions in the framework are intended to be prescriptive however. The CIME recognises that transparency arrangements necessarily reflect national culture, history and values, and of course, availability of resources and skills. These must be adapted to local circumstances in order to be effective. At the same time, public authorities can learn from each other's regulatory experiences (such as how others have dealt with the emergence of new communication technologies).

Looking ahead, the CIME recommends that governments remain attentive to the evolving needs of investors and continue to search for novel and pragmatic solutions to new problems, as they are encountered. Transparency remains a moving target – it can be progressively upgraded and enhanced over time as regulatory environments evolve.

2. Framework for Investment Policy Transparency

2.1. *Desirability and appropriateness of transparency for international investment*

Question 1: Are the economic benefits of transparency for international investment adequately recognised by public authorities? How is this being achieved?

The CIME has recently stated that transparency is one of the most effective actions that public authorities may take to meet (domestic and) foreign investor's expectations.³ In particular, it reduces business risks and uncertainties, helps combat bribery and corruption and ultimately promotes patient investment. Public authorities may not always be aware of these benefits or simply take them for granted. Conscious efforts are required to promote regulatory transparency.

2.2. *How to make “relevant” information available to foreign investors*

Question 2: What information pertaining to investment measures is made “readily available”, or “available” upon request to foreign investors?

Ideally foreign investors should be able to obtain easily meaningful information on all the regulatory measures which may materially affect their investments. Investment measures may include laws, regulations, international agreements, administrative practices/rulings, judicial decisions and/or policies. Their sheer number and increased complexity and the potentially broad ramifications of business operations, however, may not always make this possible. It is nevertheless in governments’ interests to provide “essential” information on how “to get a business started” and “operate it effectively”. Recent trends in government practices,⁴ international co-operative instruments,^{5,6} business circles,⁷ and independent analysis⁸ converge to suggest that foreign investors need to be informed, *inter alia*, about ownership and exchange control restrictions, administrative requirements, taxation, investment incentives, monopolies and concessions, access to local finance, intellectual property protection and competition policy as well as environmental and social requirements and corporate responsibilities.

Question 3: What are the legal requirements for making this information “public”? Do these requirements apply to primary and secondary legislation? Do they apply to both the national and sub-national levels? Is this information also made available to foreign investors in their countries of origin?

Legal requirements may derive from several sources (the constitution, laws and regulations, delegated regulatory powers...). They may also originate from public authorities at various levels of governments (central/federal, provincial, regional, municipalities). Moreover, it is not unusual nowadays for governments to take “pro-active” steps to inform foreign investors (including in their home countries) about prevailing investment conditions.

Question 4: Are exceptions/qualifications to making information available clearly defined and delimited?

The most common exceptions/qualifications to transparency are protection of confidential information or commercial interests, national security and public order, and pursuit of monetary and exchange rate policies. Special care should be given, however, to limit their application to the minimum extent possible and ensure that they are used within their legitimate purposes.

2.3. *Publication avenues and tools*

Question 5: What are the main vehicles of information on investment measures of interest to foreign investors? What may determine the choice of publication avenues? What efforts are made to simplify the dissemination of this information?

While culture and traditions and institutional capacity play a determinant role, there are various means of communicating regulatory information to foreign investors (official gazettes, communications by government departments or regulatory agencies, government websites, formal and informal contacts). Better public governance, new regulatory tools and

technologies are contributing to a more effective and simpler communication on public policy between governments and stakeholders.

Question 6: Is this information centralised? Is it couched in layman's terms? In English or another language? What is the role of Internet in disseminating essential/relevant information to foreign investors?

This may be done through national investment promotion agencies, special web sites online compendiums and e-gateways, special publications, etc. Even in this modern age, however, Internet is not an end in itself or automatic. It is a rapidly changing technology and environment, and for the information to remain "fresh", it must where feasible be collected and up-dated on a regular basis.

Question 7: Have special enquiry points been created? Can investment promotion agencies fulfil this role?

Because foreign investors may be in a disadvantageous position in comparison to national investors in understanding the domestic regulatory framework, they are bound to profit from special measures to make key information easily accessible and understandable to them.

Question 8: How much transparency is achieved via international agreements or by international organisations?

Transparency requirements under international agreements can provide a valuable source of information on domestic investment regulatory frameworks. Adhering governments may be called upon to notify regulatory changes, respond to special enquiries or requests for consultations, or subject themselves to peer reviews. International secretariats may also undertake their own studies on country policies.

2.4. *Prior notification and consultation*

Question 9: Are foreign investors normally notified and consulted in advance of the purpose and nature of regulatory changes of interest to them? What are the main avenues? Are these avenues available to all stakeholders?

Involving foreign investors and other stakeholders in the process of relevant regulatory changes can contribute to the legitimacy and effectiveness of the new regulatory investment measures. Allowing feedback through prior notification and consultation prior to actual decisions can help public authorities to devise better regulations and build support for compliance. Various notification and consultation avenues can be used. In addition to statutory notification or consultation requirements, governments may also take advantage of regular contacts with business associations or advice from business advisory bodies.

Question 10: Are the notice and comment procedures codified? Do they provide for timely opportunities for comment by foreign investors and accountability on how their comments are to be handled?

Better results are normally achieved when procedures are timely, transparent, open and accessible to all investors.

Question 11: Are exceptions to openness and accessibility to procedures clearly defined and delimited?

2.5. *Procedural transparency*

Question 12: What are the available means for informing and assisting foreign investors in obtaining the necessary licensing, permits, registration or other formalities? What recourse is made to “silent and consent” clauses or “a posteriori” verification procedures?

Registration, authorisation or permit formalities can impose large costs on business, both in time and money. These formalities may also be a source of administrative discretion, red tape and corruption. Every possible effort should thus be made to lighten the burden on business. It is important that they be administered in a transparent, uniform, impartial and reasonably speedy manner.

Question 13: What are foreign investors’ legal rights in regard to administrative decisions?

Procedural transparency also implies a right to complain or appeal and the existence of prompt and impartial review and remedies. This may involve providing a clear description or other necessary explanation of the administrative requirements, statutory delays for rendering decisions and the possibility of presenting additional facts and arguments.

Question 14: To what extent “one-stop” shops may assist foreign investors fulfil administrative requirements?

Administration simplification and reduction programme, “one-stop” service shops and application of new technology may be additional means to enhance procedural transparency.

2.6. *Capacity building*

Question 15: What efforts are being made to address capacity building bottle-necks?

Setting transparency goals and drawing on other country experiences go hand in hand with improvements in administrative structures, staff training and investment in new technologies.

NOTES

1. See the OECD report on *Public Sector Transparency and the International Investor* [www.oecd.org/dataoecd/36/42/18546790.pdf].
2. Thirty OECD members and 8 eight non-members: Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania and Slovenia.
3. “Assessing FDI Incentive Policies: a Checklist”, *International Investment Perspectives*, OECD, 2003.
4. For example, the new French Government Agency for International Investment provides key information for doing business in France including setting up (formalities, legal structure, partnerships and commercial real estate), taxation employment and financial assistance (investment and job creation, innovation, training activities, incentives overview). See <http://www.afii.fr>, KISC, Korea’s Investment Promotion Agency, as part of its services as a one-stop window, provides foreign investors with key information about Korean foreign investment regimes, including investment procedures, tax incentives, foreign investment zones, labour and industrial complexes for the exclusive use of foreign investors. Moreover, all procedures pertaining to the investment process from investment registration to factory establishment can be initiated through KISC. See <http://www.kotra.co.kr>
5. Adherents to the OECD Declaration on International Investment and Multinational Enterprises are under the obligation to notify their exceptions to national treatment after establishment. These are classified under five main categories: investment by established foreign-controlled enterprises, official aids and subsidies, tax regulations, access to local bank credit and the capital market, government procurement. These measures may include general authorisation or licensing requirements, limitations or acquisition or expansion of activities, ceilings on foreign ownership, grants or financial assistance for specific activities, higher or special taxes, public works projects reserved to local firms, etc. Peer reviews conducted under the Declaration may also examine national foreign exchange regulations, the companies’ law, employment and labour relations, intellectual property rights protection, competition law, money laundering, anti-corruption measures, international commitments, national security and public order measures, monopolies and concessions.
6. The World Bank Group is an important source of information about developing countries’ legal and regulatory environments. Its Foreign Investment Advisory Service (FIAS) undertakes diagnostic studies to identify a country’s main policy impediments to productive foreign direct investment. The issues typically identified include prohibitions on foreign investment in many sectors or locations; restrictions on the share of foreign ownership in the equity of domestic companies; difficult administrative approval processes; restrictions on repatriation of dividends and capital; taxes; the character and functioning of legal systems; and problems foreign firms have in gaining access to land and bringing in technical and managerial staff. <http://www.fias.net/services.html>. In the context of the preparation of the yearly World Investment Report, UNCTAD prepares, on an annual basis, an inventory of new regulatory changes relating to foreign direct investment with the assistance of member governments. The information sought, preferably in English, pertains to eight broad categories of measures: foreign ownership, sectoral restrictions, approval procedures, operational conditions, foreign exchange, promotion (including incentives), guarantees, and corporate regulations. Special themes (such as privatisation, intellectual property) may be examined in greater depth. Legal sources of the policy changes have also been compiled.

7. BIAC and the International Chamber of Commerce have recently underlined that all national provisions affecting rights of entry and post-investment operations such as sectors restricted to domestic investors, conditions applying to joint ventures, and taxation should be made publicly available. See ICC Policy Statement regarding a WTO investment agreement, Document 103/234 rev7 Final EN, 7 March 2003.
8. In the area of foreign direct investment, the Heritage Foundation's Economic Freedom index focuses on foreign investment codes, restrictions on foreign ownership of business, restrictions on the industries and companies open to foreign investors, restrictions on performance to companies, foreign ownership of land, equal treatment under the law for both foreign and domestic companies, restrictions on repatriation of earnings, and availability of local finance. See <http://www.heritage.org/research/features/index/2002/>.