

Update of the Policy Framework for Investment

**Draft chapter:  
Investment policy**



## Context

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Since the PFI was developed in 2006, new forces have reshaped the global investment landscape, including the global economic and financial crisis, which started in 2008 and from which many economies have still not recovered, and the emergence of new major outward investors within the G20, the spread of global value chains. Numerous lessons have also been learnt through the use of the PFI, particularly in developing and emerging economies. To reflect new global economic fundamentals, an update of the PFI was launched in 2013 and is due for completion in 2015.

## Invitation to contribute

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Experts, business and civil society representatives, international organisations, and the general public are invited to contribute comments on this draft chapter. Comments should be sent to [investment@oecd.org](mailto:investment@oecd.org) by 31 December 2014.

A compilation of comments received will be published online at the end of the consultation period.

## Contact

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If you have any questions regarding the consultation, please email [investment@oecd.org](mailto:investment@oecd.org).

Find out more about the update of the PFI: [www.oecd.org/investment/pfi-update.htm](http://www.oecd.org/investment/pfi-update.htm)

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## HORIZONTAL POLICIES AND PRACTICES

1. An effective investment policy is grounded in strong institutions and effective public governance. Investors expect government to develop and implement policies, laws and regulations in a reliable and fair manner. Strong institutions help to maintain a predictable and transparent environment for investors that lowers risk and reduces the hurdle rate for any given project, thereby increasing the overall rate of investment. Firms need to know what the rules of the game are and require some assurance that those rules will not change once they have invested. This applies to all investors, but is particularly important for SMEs and foreign firms. In terms of public governance, the key pre-requisites for investment policy include respect for the rule of law, quality regulation, transparency and openness and integrity. Effective action across these dimensions will encourage investment and reduce the costs of doing business.

2. Investment policy is facilitated by an environment of trust. High levels of trust can facilitate compliance with laws and regulations, strengthen investor confidence and reduce risk aversion. However, on average only 40 percent of OECD citizens today report that they trust their government, while 57% feel that corruption is widespread in business (Gallup World Poll, 2013). This also reflects the legacy of the crisis, which stemmed from numerous regulatory failures and mismanagement not only by government but also by business, which had implications for trust. Regaining public trust will require governments to demonstrate that they are capable and reliable lawmakers and regulators, and that their decisions are fair and free from undue influence. Underlying trust is the expectation that public officials respect high standards of integrity; in particular that issues of conflict of interest are addressed rigorously, that lobbying guidelines are respected and that corruption and fraud in high-risk areas such as public procurement are effectively addressed.

3. Whole-of-government approaches to investment policy will improve outcomes and enhance the use of public resources. Investment policy - like competitiveness, climate change mitigation, managing demographic change and innovation - is an issue requiring policy responses that do not fit neatly within any single governmental department or agency. Investors increasingly expect public policies and services to be seamless and responsive to their needs, not defined by siloed administrative structures. Good government is now about joint action, where administrations work in a co-ordinated and collaborative manner across boundaries. Poor co-ordination can increase the risk of duplication, inefficient spending, lower-quality service, and contradictory objectives and targets, all of which can undermine investor confidence. “Whole-of-government” approaches to policy design and delivery are becoming a common objective for many public administrations as a way to integrate cross-disciplinary perspectives into policy, improve co-ordination, and facilitate resource sharing and has to be accompanied by single windows facilitating the investor interface with government. Investment policies, which have multiple objectives and involve many economic actors, from SMEs to multinationals, are a prime example of the need for a whole-of-government approach to reduce the back office complexity. Coherence is particularly important in regulation, which is one of the main pillars of an effective investment policy.

4. Inter-governmental coordination. The administrative burden on investors is exacerbated by overlapping and sometimes conflicting rules, procedures and regulations across ministries and levels of government, including between the central and provincial levels and sometimes between supranational and national authorities. Different countries will opt for different degrees of decentralisation, but OECD

country experience suggests that some central coordination and control is essential for successful regulatory governance.

5. Transparency and engagement can deliver better policies with more stakeholder support. Transparency is an essential component of good governance today. More open and inclusive policy-making processes help to ensure that policies will better match the needs and expectations of citizens and businesses. Greater participation of stakeholders in policy design and implementation leads to better targeted and more effective policies. The notion of “open government” is rapidly transforming the way public institutions work, both internally and with citizens and businesses. Soliciting investor views, along with those of other stakeholders, when developing or revising policies contributes to policy legitimacy and effectiveness. Moreover, policy is more likely to be sound and not produce unintended side effects if it is formed in a structured and transparent way that gathers input from all interested parties.

6. Innovation and improvement in policy design and delivery. The shift to open government provides an important incentive for the public administration to enhance its performance. Businesses, investors and citizens are all more able to assess the outcomes of public policy, comment on failures and poor performance and challenge the government to improve. Over time, this is becoming an important force for reform and modernisation in service delivery, making the most of new information and communication technologies. Non-government stakeholders are increasingly involved in designing and implementing policy, and even monitoring progress. Through websites, user-friendly data and information tools, governments can engage diverse actors in public policy implementation and evaluation. Investment policies should also benefit from innovative approaches across the policy cycle.

7. International cooperation can complement and even reinforce domestic efforts to improve the business climate. The more standards are harmonised or mutually recognised across countries, the more easily will firms be able to invest internationally or export. International trade and investment agreements can provide added transparency concerning the regulation of foreign investors in signatory countries. They can also provide policy predictability by locking in current policies or providing a mutually agreed mechanism to handle policy change. As in a domestic context, policy stability comes at a cost in terms of reducing flexibility if circumstances change. This trade-off is discussed in more detail in the investment and trade chapters.

## **Horizontal questions**

- 1. Are laws and regulations and their implementation and enforcement clear, transparent and readily accessible? Does this transparency cover procedural issues as well?*
- 2. How does the government ensure that laws and regulations do not impose an unnecessary burden on investors? Is there a built-in mechanism to periodically review these burdens? Are these burdens measured and quantified?*
- 3. How does the government reduce policy uncertainty and increase policy predictability for investors?*
- 4. Is there a review process for administrative decisions?*
- 5. Has the government established effective public consultation mechanisms and procedures, including prior notification requirements, before enacting new laws and regulations?*
- 6. In the exercise of its right to regulate and to deliver public services, does the government have mechanisms in place to ensure transparency of any discrimination against any group of investors and to periodically review their costs against the intended public purpose?*
- 7. What mechanisms exist to manage and co-ordinate regulatory policy across different levels of government to ensure consistency and a transparent application of regulations?*

## SUPPLEMENTAL QUESTIONS

<b>Transparency</b>	<ul style="list-style-type: none"> <li>• How does the government promote awareness of the importance of transparency within government?</li> <li>• Are there legal requirements for transparency? Do they apply to both primary and secondary legislation? At both national and sub-national levels?</li> <li>• Does transparency also extend to rulings and judicial decisions?</li> <li>• How are laws and regulations made readily available, or available upon request, to foreign investors? Are official English or other foreign language translations of laws readily available? Do investment promotion agencies play a role in this regard?</li> <li>• How are the special difficulties of SMEs in obtaining information addressed?</li> <li>• Are exceptions to transparency, based on e.g. national security or confidentiality, clearly defined and delimited?</li> <li>• Are the criteria for the exercise of discretion by the procurement authorities clearly articulated and accessible to the public?</li> <li>• Is there a register of existing and proposed regulations?</li> <li>• Is regulatory material disseminated electronically?</li> </ul>
<b>Public consultation</b>	<ul style="list-style-type: none"> <li>• Are stakeholders normally notified and consulted in advance of the purpose and nature of regulatory changes of interest to them? What are the main avenues? Are notice and comment procedures codified?</li> <li>• Are opportunities for public consultation well-publicised, well-organised, highly accessible and well-timed?</li> <li>• Do consultations allow sufficient access for all interested parties, including SMEs and foreign investors?</li> <li>• Is there clear guidance to regulators on how consultations should be conducted?</li> <li>• Are other levels of government and line ministries also consulted?</li> </ul>
<b>Policy stability &amp; predictability</b>	<ul style="list-style-type: none"> <li>• What does the government do to enhance policy stability and predictability?</li> <li>• Does the government sign contracts with investors in particular sectors?</li> <li>• When rules change, are pre-existing rules grandfathered?</li> <li>• See also Chapters 1 and 3 on international investment and trade agreements.</li> </ul>

## ADDITIONAL RESOURCES

World Bank Doing Business Library

### **Principles, standards**

APEC-OECD Integrated Checklist on Regulatory Reform

OECD Framework for Investment Policy Transparency

Public Sector Transparency and the International Investor, OECD

OECD Reference Checklist for Regulatory Decision-Making

### **Tools, Guidance, Manuals**

Open Government: Fostering Dialogue with Civil Society, OECD 2003

Government at a Glance, OECD 2013

Citizens as Partners: OECD Handbook on Information, Consultation and Public participation in Policy-Making, OECD 2001

Consultation with Stakeholders in the Shaping of National and Regional Policies Affecting Small Business, European Commission

Business License Reform Toolkit, World Bank

### **Indicators and benchmarking**

Ease of Doing Business Indicators, World Bank

Worldwide Governance Indicators, World Bank

## INVESTMENT POLICY

1. Investment policy refers broadly to the set of policies shaping how investors are treated and their assets protected. It relates to a country's laws, regulations and practices that directly enable or discourage investment and that, if well crafted, enhance the public benefit from investment. While it can take many different regulatory and institutional forms and fall under the responsibility of many different ministries and government agencies, the overriding focus of investment policy remains the treatment of investors: public and private, domestic and foreign, small and large, and in both the formal and informal sectors. Investment policy should be consistent with national development plans and other strategies to ensure sustainable and inclusive development.

9. The way that investment policy is developed and amended is a key consideration of investment decisions. Investors will avoid or withdraw from investment destinations where policies are modified at short notice, where governments do not consult with industry on proposed changes and where laws, regulations and procedures are not clear, readily available and predictable.

10. Investment policy is sometimes embodied in a stand-alone investment law, although it is neither a guarantee of, nor a prerequisite for, a sound investment policy framework. The investment law may cover both foreign and domestic investors or there may be separate laws governing foreign and domestic investment. It often includes a list of sectors where investors face restrictions, whether in the law itself, in its implementing regulations or in a separate decree. This so-called negative list can include sectors where all private investment is prohibited or restricted, those sectors reserved to small and medium-sized enterprises (SMEs), and those where foreign investors face restrictions.

11. While there is no absolute need for a separate investment law – investment issues can be embodied in other legislation (e.g., the Constitution, laws regulating the behaviour of companies or sector-specific legislation) – an investment law may add transparency to the applicable investment regime. It may also serve as a tool for investment promotion by signalling to investors that the government has committed to provide a number of protection guarantees to investors and that the country is thus a safe investment destination. It can add clarity on investment protection and market opportunities, but it can also create uncertainty if inconsistent with other laws. International investment agreements (IIAs), discussed more in depth below, add a layer to a country's investment policy, by providing complementary protections to foreign investors from party countries.

### *Transparency and predictability*

12. Before turning to the various components of investment policy, it is worth recalling some of the key aspects of good governance described in the horizontal chapter. A fair, transparent, clear and predictable regulatory framework for investment is a critical determinant of investment decisions and their contribution to development. It is especially important for SMEs that tend to face particular challenges to entering, and abiding by the rules of, the formal economy. It is also important for foreign investors who may have to function with very different regulatory systems, cultures and administrative frameworks from their own. Uncertainty about the enforceability of lawful rights and obligations raises the cost of capital, thereby weakening firms' competitiveness and reducing investment. Moreover, such ambiguity in the legal system can also foster corruption, both where investors aim to define their rights through informal means

and systems and where government actors are able to take advantage of the lack of formal regulations to their advantage.

13. Governments can enhance the quality of the regulatory framework for investment by: consulting with interested stakeholders; simplifying and codifying legislation, including sector-specific legislation; drafting in clear language; developing registers of existing and proposed regulations; expanding the use of electronic dissemination of regulatory material; and by publishing and reviewing administrative decisions. The effective implementation of the regulatory framework for investment can also be improved by ensuring that officials responsible for applying regulations have adequate credentials, are well-trained, provided with fair salaries, and have sufficient resources for carrying out their tasks. Officials should be fully accountable for their actions, particularly those involving discretionary decision-making.

### **The components of investment policy**

14. Non-discrimination, investor protection and mechanisms for settling investment disputes are core investment policy issues that underpin efforts to create a quality investment environment for all. Approaches to investor protection and dispute settlement contained in IIAs are discussed separately at the end.

#### ***Non-discrimination***

15. Non-discrimination is a central tenet of an attractive investment climate. The non-discrimination principle provides that all investors in like circumstances are treated equally, irrespective of their ownership. It can feature as a general principle in the constitution or at lower regulatory levels, such as in the investment law, and may vary greatly in its scope of application. One of the expressions of the principle of non-discrimination in the context of foreign investment is the concept of national treatment, which provides that a government treat enterprises controlled by the nationals or residents of another country no less favourably than domestic enterprises in like situations. National treatment often features in bilateral investment treaties as one of the core standards of protection provided to foreign investors.

16. No government applies national treatment unequivocally, even in OECD member countries where restrictions on foreign investment tend, on average, to be lower than in other parts of the world. If other attributes of the investment climate are favourable, investors may still come even if they face some operational restrictions once established, although restrictions on foreign direct investment (FDI) have been found to result in less FDI overall. Beyond the impact on FDI, any policy that favours some firms over others involves a cost, notably less competition and hence lower firm-level efficiency. For this reason, exceptions to non-discrimination need to be evaluated with a view to determining whether the original motivation behind an exception (e.g. protection based on the infant industry argument) remains valid, supported by an evaluation of the costs and benefits, including an assessment of the proportionality of the measure. Broad consideration of the costs and benefits is especially important in service sectors that support a wide range of economic activities across the economy.

17. Exceptions to national treatment are often enshrined in a negative list attached to the investment law, as well as in IIAs signed by the government. In the absence of such a list, foreign investors must look to sectoral legislation for guidance. The main types of restrictions faced by foreign investors are listed below:

- Approval mechanisms for foreign investors
- Foreign equity limits
- Key personnel (foreign managers, technical experts and board members)
- Profit and capital repatriation
- Land ownership for business purposes
- Branching limitations
- Reciprocity requirements
- Minimum capital requirements different from those for local companies
- Local content requirements
- Access to local finance
- Government procurement favouring locally-owned over foreign-established companies

18. Potential discrimination between foreign and domestic investors can work both ways. Investors may receive incentives for greenfield projects and expansions that are not available to domestic investors. Policy options to manage incentives responsibly are discussed in subsequent chapters of the PFI.

### *Securing land tenure*

19. Secure and well-defined land rights encourage new investments and the upkeep of existing investments as well as sustainable land management. They carry an intrinsic economic value by entitling investors to participate in any profits derived from their investment. Investors need to be confident that their land rights are properly recognised and protected and that they guarantee against forced evictions.

20. Tenure security does not necessarily require private ownership or a formal title. Simple land use rights, such as lease rights, can provide tenure security if they are clear, of specific duration and the contract cannot be unilaterally broken. Conversely, a formal land title may not provide tenure security if there are competing claims to the land plot, or if neighbours view the title as illegitimate and are likely to destroy one's property. Thus, tenure security is not so much derived from the legal status of the rights held, as from social consensus on the legitimacy of these rights and the reliability of mechanisms for arbitration should conflicts arise.

21. In order to provide for secure land tenure rights, the land administration should be accessible, reliable and transparent. The responsibilities of the central government versus local authorities should be clearly defined to promote efficiency, reduce corruption, and enhance law implementation and enforcement. If accompanied by appropriate capacity-building and financing mechanisms at the local level, the decentralisation of land rights allocation and administration can ensure higher accountability in land management and facilitate the involvement of local communities in the decision-making process and in consultations with investors, thereby enhancing transparency in land allocation decisions.

22. The land administration should actively contribute to land use planning in order to ensure sustainable investment and balanced territorial development and help reconcile the different objectives of land use. Land use plans should be developed at all government levels and updated regularly through wide public participation to minimise the risks of land disputes and to ensure that the priorities and interests of local communities are reflected. They should take into account the multifaceted economic, social, cultural, environmental and political roles played by land.

23. If properly undertaken, land rights registration can enhance land tenure security by recording individual and collective land tenure rights, thereby facilitating the transfer of land tenure rights and allowing investors to seek legal redress in cases of violation of their tenure rights. Land titles can allow land rights holders to use land as collateral to access credit. Land registers and land information systems should be properly maintained and publicised. If not properly maintained, land registers can increase the likelihood of land disputes rather than reducing it. Comprehensive and up-to-date land registers can cut the time to acquire land tenure rights, reduce corruption and facilitate tax collection.

24. Land rights registration should be carefully implemented to mitigate related risks. Indeed, by raising the land value, land registration can incentivise vulnerable households or individuals to sell their land, and care needs to be taken so that it does not deprive them of their livelihoods. Land rights registration should be non-discriminatory and provide tenure security not only to large investors but also to vulnerable groups, such as ethnic minorities, women, youth or the elderly, to have positive distributive impacts. It should identify the various types of existing tenure rights and rights holders through an inclusive consultation process and develop socio-culturally appropriate and locally-adapted ways of recording customary rights of local communities.

25. A dynamic land market may facilitate the circulation of land tenure rights among actors and drive labour mobility and structural transformation. However, it may not lead to economic efficiency, and even less to equity. For instance, a well-functioning land market can favour large-scale, better-capitalised farms and crowd out smaller farms that can ensure a more equitable revenue distribution. It can also facilitate speculation. Thus, regulations of the land market should facilitate access to land for those able to invest while promoting economic efficiency and a socially acceptable and environmentally-friendly land allocation and use. It should take into account the levels of inequality between actors, the economic strategies of more affluent actors and the investment alternatives at their disposal.

26. Acquiring land tenure rights is often a complex and slow process for large investors and measures to facilitate land acquisition can effectively facilitate investment. At the same time, appropriate safeguards should protect existing legitimate tenure rights to ensure, for instance, that large-scale land negotiations or transactions do not lead to the displacement, the loss of livelihoods, and more limited access to land for the local population. The legislation can provide for ex-ante and ex-post environmental and social impact assessments for land acquisitions exceeding a certain area to ensure that land allocation follows a transparent and inclusive process. Such assessments should be conducted in a transparent manner by independent agencies and fair, prompt and effective compensation should be paid to former land tenure rights holders. Ceilings on permissible land transactions could be introduced and transfers exceeding a certain scale strictly regulated, particularly through open and transparent consultations with local communities.

27. Land tenure rights constitute a common cause for conflicts, for instance between large investors and local communities due to disputes over land over which the latter had informal land use rights and due to the lack of transparency, especially on the conditions and process for land acquisition. Competent, efficient, transparent and independent institutions should be set up to resolve land disputes. Negotiation, mediation and arbitration can facilitate a fair and accessible justice.

## ***Protection of property rights***

### *Intellectual property rights protection*

28. Intellectual property (IP) rights give businesses an incentive to invest in research and development, fostering the creation of innovative products and processes. They also give their holders the confidence to share new technologies through, i.a. joint ventures and licensing agreements. In this way, successful innovations are in time diffused within and across economies, bringing higher productivity and growth.

29. Intellectual property has significant value and thus deserves the same types of registration and protection systems as other forms of property. But IP rights regimes need to strike a balance between society's interests in fostering innovation and in keeping markets competitive, with new products priced affordably.

30. The IP rights regime is of concern not only to large firms and multinational enterprises but also to SMEs. Although SMEs are a driving force behind innovation, their potential to invest in innovation activities is not always fully exploited. They tend to under-utilise the intellectual property system. Measures to make the system more accessible may thus help to attract investment in research and development and to transmit the positive spillovers to society that such investment embodies.

31. Foreign direct investment can be an important conduit for technology transfer among countries and the strength of the IP regime will influence the willingness of foreign technology holders to invest, particularly in middle-income countries where local companies are more likely to possess the capacity to be able illegally to copy such technologies and intangible assets. The empirical evidence suggests that where IP rights are strong, foreign companies are not only more likely to invest but are also more willing to share technologies with local partners and more likely to engage in local research and development.

### *Contract enforcement and dispute settlement*

32. The ability to make and enforce contracts and resolve disputes is fundamental if markets are to function properly. Good enforcement procedures enhance predictability in commercial relationships and reduce uncertainty by assuring investors that their contractual rights will be upheld promptly by local courts. When procedures for enforcing commercial transactions are bureaucratic and cumbersome or when contractual disputes cannot be resolved in a timely and cost effective manner, companies rely on less formal commercial practices. Traders depend more heavily on personal and family connections; banks reduce the amount of lending because they cannot be assured of the ability to collect on debts or obtain control of property pledged as collateral to secure loans; and transactions tend to be conducted on a cash-only basis. This limits the funding available for business expansion and slows down trade, investment, economic growth and development.

33. The court system has a fundamental role in enforcing contracts and in settling disputes, both among private actors and between an investor and the state, except for disputes settled through international arbitration. The efficiency, effectiveness, integrity and independence of courts are important considerations for all investors, including foreign enterprises and SMEs. The court system can be made more investor friendly by introducing, inter alia, streamlined court procedures at reasonable cost, the right to appeal and by having the enforcement of awards and execution of pecuniary obligations supervised by independent

courts. Many governments have created specialised commercial courts to handle business disputes, including investment disputes. Alternative dispute resolution mechanisms are also available, and increasingly used for hearing and settling investment disputes, including arbitration, mediation and conciliation. When disputes are settled through such mechanisms outside of the country, national laws should ensure that domestic courts recognise and enforce these decisions.

### *Expropriation*

34. A government retains the sovereign right to expropriate property for public purposes. When it does so, compensation should be timely, adequate and effective. The right to fair compensation and due process in the event of an expropriation is usually enshrined in the Constitution, domestic legislation, and IIAs.

35. Expropriation can take different forms. It can be direct, where an investment is nationalised or otherwise expropriated through formal transfer of title or outright physical seizure. It can also occur through interference by a state in the use of that property or in the enjoyment of the benefits even where the property is not seized and the legal title to the property is not affected. The determination, in judicial and arbitral awards, on whether governmental interference with the economic activity of an investor constitutes an indirect expropriation for which compensation should be paid is made on a case-by-case basis. Some recent agreements and legislation provide that, except in rare circumstances, non-discriminatory regulatory actions to protect legitimate public welfare objectives, such as public health, safety and the environment, are not considered to constitute expropriation.

### *International investment agreements*

36. The general purpose of IIAs is the promotion and protection of investments from one contracting party in the territory of the other contracting party. They provide for standards of treatment of investors and their investments, e.g. non-discriminatory treatment (most-favoured nation, national treatment), obligations on the protection of assets, including guarantees against expropriation and nationalisation without compensation, guarantee of fair and equitable treatment and full protection and security, and investor-state dispute settlement mechanisms.

37. Approaches to investment treaty-making vary across countries and over time, as well as between the most common bilateral investment treaties (BITs) and free trade agreements (FTAs) with an investment chapter. The PFI is not prescriptive and does not discuss whether or not governments should sign IIAs or what an agreement should look like. Rather, it looks at what measures should accompany any decision to offer specific protections to international investors. It also looks at ways to minimise the potential for investor-state disputes arising out of these agreements. When deciding to conclude IIAs, governments should first and foremost ensure that they have the capacity to implement IIA commitments and the ability to negotiate IIAs that ensure sustainable development objectives

38. The main goal of IIAs consists in ensuring greater policy stability and hence reduced political risk faced by foreign investors, by providing an additional layer of security to investors and granting them possible recourse to international investment arbitration to solve investor-state disputes. Investors crave policy stability and need some assurance that any dispute with the government will be dealt with fairly and swiftly. This may be particularly important in countries where investors might have concerns about the reliability and independence of domestic courts. This logic has led to the negotiation of hundreds of BITs

each year in the 1990s by the vast majority of countries, resulting in the signing of over 3,000 such agreements.

39. Such agreements may also help countries to improve their own domestic legislation covering investment by bringing it more into conformity with international standards, as well as promoting good governance more broadly.

40. At the same time, the presumed lack of state control over the proceedings of international investment arbitration is becoming an increasing concern. Arbitration can be costly for states that are sued, not only in terms of legal fees but also of the possible claims which can amount to hundreds of millions or even billions of dollars.

41. The proliferation of bilateral and regional investment treaties and the multiplication of ISDS awards have contributed to an increasingly complex international investment policy landscape. Fewer BITs are being signed and more efforts are being concentrated on regional trade agreements with an investment chapter. There is a global trend, in both developed and developing countries, towards refining and modernising the structure and content of international investment law and policy. There is also a growing awareness that some IIAs do not provide existing clarity of core provisions such as, inter alia, the definition of investment, fair and equitable treatment, and the procedural rules applicable to investor-state dispute proceedings.

42. Whatever approach a government adopts towards IIAs, there are complementary measures which can help to ensure that treaties are aligned with domestic priorities and which can help to reduce the risk of disputes to international arbitration. Governments also need to involve all relevant ministries in the negotiation process to ensure that all parts of government are aware of any commitments and to help point out any potential inconsistencies between those commitments and domestic legislation. As in all policy areas, governments should consult widely with all stakeholders, including foreign investors. The government can also offer ombudsman services to investors to try to resolve problems before they lead to disputes.

43. Governments should not rely on IIAs as a substitute for long-term improvements in the domestic business environment. Any active approach to international treaty making should be accompanied by measures to improve the capacity, efficiency and independence of the domestic court system, the quality of a country's legal framework, and the strength of national institutions responsible for implementation and enforcement of such legislation.

## **Key questions**

### **Overall Legal Framework for Investment**

- 1. Has the government established a clear and comprehensive legal and regulatory framework for the conduct of business and investment activities?*
- 2. How does the government ensure that the laws and regulations dealing with investment, their implementation and enforcement are consistent, clear, transparent, readily accessible and do not impose undue burdens?*
- 3. How does the government balance policy flexibility needs against efforts to increase legal stability and predictability and the objective of maximising the contribution of investment to development?*
- 4. Does the development of laws, treaties and regulations involve stakeholder consultations and are all relevant ministries and other public bodies involved?*

### **Non-discrimination and national treatment**

- 5. Consistent with its overall development strategy, has the government established non-discrimination as a general principle underpinning laws and regulations governing investment?*
- 6. Is the economic impact of remaining restrictions, including on attracting investment, periodically reviewed to assess their costs against their intended public purpose?*
- 7. Have the authorities explored other non-discriminatory means to secure their policy objectives?*
- 8. Are restrictions (e.g. screening, foreign equity restrictions, key personnel, profit repatriation) easily identifiable for investors and formulated in a transparent manner?*

### **Access to land**

- 9. What efforts have been undertaken to ensure that the land legislation is clear and easily accessible to land users and that land management is efficient and transparent? How are land rights allocated, administered and protected at national and sub-national levels?*
- 10. What steps have been taken to improve land tenure security for domestic and foreign, large and small land users?*
- 11. What proportion of land has been mapped and/or formally registered (by land category)? How long does it take and how much does it cost to register land?*
- 12. Have land use plans been developed countrywide? What stakeholders are involved in negotiating them?*
- 13. What efforts have been made to support the development of a well-functioning land market while ensuring a fair and equitable access to land?*
- 14. What are the institutions and the mechanisms in place to resolve land conflicts?*
- 15. What measures have been taken to protect legitimate land tenure rights, including public, private, communal, collective, indigenous and customary rights?*

## **Intellectual property rights**

*10. Has the government ratified relevant international conventions and implemented laws and regulations to protect intellectual property rights, together with effective enforcement mechanisms?*

*11. How does intellectual property protection encourage innovation and investment by domestic and foreign firms?*

*12. How is the goal of fostering innovation and investment in R&D balanced against the public interest in terms of access to goods and services and knowledge?*

*13. Does the IP regime provide sufficient protection to encourage and secure technology transfers from foreign to domestic firms?*

*14. What strategies, policies and programmes have been developed to meet the intellectual property needs of SMEs?*

## **Contract enforcement and dispute settlement**

*15. Is the system of dispute settlement effective and widely accessible to all investors, including SMEs and foreign investors?*

*16. What alternative systems of dispute settlement, including arbitration, have been established in the country to manage commercial and investment disputes?*

*17. Has the government ratified and implemented international arbitration conventions for the settlement of investment disputes?*

## **Expropriation regime**

*18. What explicit and well-defined limits on the ability to expropriate has the government established in law and in practice?*

*19. What constitutional or legal safeguards guarantee that expropriation measures are taken only in a non-discriminatory manner, for a public purpose, under due process of law, and against fair compensation?*

*20. What judicial and administrative appeal mechanisms exist for reviewing or contesting decisions on the expropriation and on the amount of compensation?*

*21. How does the legal protection against expropriation provided in domestic laws compare with that accorded in investment treaties?*

## **Investment treaty policy**

*22. How are investment policy authorities working with counterparts in other economies to provide legal protection guarantees to foreign investors?*

*23. How does the government balance its sovereign right to regulate against the need to provide legal stability for investors?*

*24. Does the government attempt to assess the impact of its approach to IIAs on inward investment and on overall economic development?*

## SUPPLEMENTAL QUESTIONS

### 1.1. Overall legal framework for investment

<b>Legal framework</b>	<ul style="list-style-type: none"> <li>• What laws and regulations are in place to protect and regulate/ govern investment and business activities?</li> <li>• Is there a stand-alone investment law? If so, does it cover both foreign and domestic investment under the same umbrella? Does it provide for protection provisions? What regulations of investment does it set out?</li> </ul>
<b>Transparency and predictability</b>	<ul style="list-style-type: none"> <li>• Are there well established consultation mechanisms to enable investors and other interested stakeholders to participate in designing and monitoring investment laws and regulations?</li> <li>• How are legal amendments and draft bills made available to the public?</li> <li>• How are foreign and other investors informed about the formalities for registering a company?</li> <li>• What steps have been taken to ensure and monitor consistency among various regulations and legislations that constitute the investment regulatory framework?</li> <li>• Which institutions are involved in investment policy design and implementation? What are their respective roles?</li> </ul>

### 1.2 Non-discrimination and national treatment

<b>Establishing equivalent treatment</b>	<p><b><i>Domestic laws and regulations</i></b></p> <ul style="list-style-type: none"> <li>• Do the constitution, laws governing commercial activity, including the investment law if one exists, other relevant laws and regulatory practices enshrine the principle of non-discrimination?</li> <li>• If so, what is its scope and application (e.g. sub-national authorities apply national treatment)?</li> <li>• How much discretion do officials have in applying restrictions to foreign investment and are there safeguards in place to avoid non-arbitrary use of this discretion?</li> <li>• How does the government strike a balance between offering national treatment and preserving national interests, including the promotion of local enterprise development?</li> </ul> <p><b><i>International investment agreements</i></b></p> <ul style="list-style-type: none"> <li>• Is national treatment embodied in international investment agreements that the country is party to and, if so, at what stage (i.e. pre- or post-establishment) does it apply? Do these agreements grant most-favoured-nation treatment to investors and investments? If so, at what phase (i.e. pre- or post-establishment)?</li> <li>• Is national treatment dependent on a reciprocal commitment or deferred to a later date?</li> <li>• Are general exceptions to the principle of national treatment contained in IIAs (e.g. to maintain public health or to protect national security)?</li> <li>• Are there subject-specific exceptions (e.g. intellectual property, taxation conventions)?</li> </ul>
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	<ul style="list-style-type: none"> <li>• Are there sector-specific exceptions (e.g. specific industries, such as financial services and transport)?</li> <li>• Are exceptions based on an explicit, clearly defined and detailed rationale?</li> <li>• In international agreements signed by the country, does national treatment apply only to areas and industries identified in a 'positive' list (e.g. GATS agreements)?</li> </ul>
<p><b>The nature of exceptions to national treatment</b></p>	<p>Do any of the following restrictions apply to foreign investment: (if so, please provide sources)</p> <ul style="list-style-type: none"> <li>• screening procedures for FDI entry, whether across-the-board or sector-based?</li> <li>• more extensive licensing requirements for foreign investors than for domestic investors?</li> <li>• foreign equity ownership ceilings in different sectors?</li> <li>• limits on access for foreign established enterprises to local finance and incentives (e.g. tax concessions)?</li> <li>• restrictions on access to land for foreign investors? (see Question 1.3).</li> <li>• restrictions on legal establishment (e.g. subsidiaries or branches)?</li> <li>• limits on access to specific markets (e.g. public procurement, privatisations)?</li> <li>• performance requirements (e.g. local content rules)?</li> <li>• other discriminatory practices (e.g. nationality based restrictions on boards, limits on key personnel)?</li> </ul>
<p><b>Screening of foreign investment</b></p>	<p>If the government screens foreign investment,</p> <ul style="list-style-type: none"> <li>• Are the criteria for approval clear and measurable?</li> <li>• How much discretion does the authority have? Are measures in place to prevent and detect bribery for the purpose of influencing such discretion?</li> <li>• Do decisions have to be rendered within a specified time?</li> <li>• Are the criteria within the competence of the agency to assess?</li> <li>• Are the reasons for rejecting a project published?</li> <li>• Can the investor appeal the decision before an independent administrative or judicial body?</li> <li>• Are investor commitments monitored once the project is approved? If so, what is the sanctioning procedure when commitments are not met?</li> <li>• Are screening policies subject to periodic review of their effectiveness and necessity?</li> <li>• How does the government minimise the administrative burden for investors undergoing screening?</li> <li>• How many projects are rejected or modified each year on average?</li> <li>• Do pending screening processes suspend the investment?</li> </ul>

<p><b>Transparency and periodic review of discriminatory restrictions on foreign investment</b></p>	<ul style="list-style-type: none"> <li>• Is there a publicly available negative list of sectors and activities where foreign investors face restrictions? If so, is it subject to periodic review and is there a mechanism to reduce restrictions over time?</li> <li>• Is the negative list complete and with a sufficient degree of sectoral detail, including underlying laws and regulations?</li> <li>• What policy objectives are addressed by discriminating on the basis of ownership of project equity?</li> <li>• Does the government consider whether alternative policy instruments, such as support for SME development, could achieve the same goals more effectively?</li> <li>• Does the country benchmark the scope of discriminatory restrictions in its laws and in practice with other similar economies?</li> <li>• How does the country compare with other countries in the region or at a similar level of economic development in terms of its discriminatory measures?</li> <li>• Does it periodically review the list of restrictions based on an analysis of their costs and benefits or on a narrower regulatory impact analysis?</li> <li>• Does the government canvass the views of foreign and domestic investors and other relevant stakeholders on the relevance of restrictions?</li> </ul>
<p><b>Free transfer of funds</b></p>	<ul style="list-style-type: none"> <li>• Do restrictions on the transfers of investment-related capital and profits exist? If so, how do they operate?</li> <li>• To which types of transfer do they apply (e.g. profits, dividends, interest and royalty receipts, original capital, capital appreciation, proceeds from liquidation, payments received as compensation for property expropriation, settlement of disputes etc., and earnings of personnel engaged from abroad in connection with an investment)?</li> <li>• Do they apply to domestic as well as foreign investors?</li> <li>• Do the rules apply to both new and existing investments?</li> <li>• Are there formal notification procedures for capital transfers?</li> <li>• Do the rules apply both to inward and outward investment?</li> <li>• Under which conditions may new restrictions be imposed (e.g. a balance of payments crisis)?</li> <li>• Has the government reviewed these restrictions and their effect on attracting international investment?</li> <li>• Have investors complained of high costs (e.g. because of excessive exchange transaction charges) or unreasonable delays (e.g. because of numerous and complex verification procedures)?</li> <li>• What is the scope for arbitrary and discretionary decisions regarding the transfer of investment-related capital (e.g. on the choice of exchange rate values)?</li> </ul>

### 1.3 Land ownership and registration

<b>Land tenure security</b>	<ul style="list-style-type: none"> <li>• Are there any limits on the size of the land area allocated to land users? Are land tenure rights limited in time?</li> <li>• Are there any restrictions/conditions to land use by land category (such as cultivating certain crops on agricultural land)? What measures are taken if land rights holders do not comply with such conditions?</li> <li>• Do foreign individuals or corporations face specific restrictions to obtain land tenure rights? Do they have to comply with specific administrative procedures?</li> </ul>
<b>Land registration</b>	<ul style="list-style-type: none"> <li>• What are the challenges faced by the land administration to register the remaining land area? What procedures are required at national and sub-national levels to register land?</li> <li>• What agencies are responsible for developing land use plans and for registering land? Do they have clear and well-defined responsibilities to ensure smooth land use planning and registration?</li> <li>• How reliable and accurate is the land registry? Is it easily accessible?</li> <li>• How long does it take and how much does it cost to change land from one category to another?</li> <li>• What measures have been taken to ensure that all land users, including vulnerable groups, can register land?</li> </ul>
<b>Land market</b>	<ul style="list-style-type: none"> <li>• What measures have been taken to facilitate access to land?</li> <li>• Have some recent efforts been undertaken to promote transparent land management?</li> <li>• Are there restrictions to selling, transferring, leasing, bequeathing or mortgaging land tenure rights or using them as collateral? How long does it take and how much does it cost to sell, transfer, bequeath or mortgage land tenure rights?</li> <li>• Can land users easily access land use plans?</li> </ul>
<b>Land disputes</b>	<ul style="list-style-type: none"> <li>• What agencies are responsible for resolving land disputes? Do they have clear and well-defined responsibilities to ensure prompt land dispute resolution?</li> <li>• Do they face any challenges in providing an equitable, affordable and efficient system for resolving land disputes? How long does it take and how much does it cost to resolve land disputes?</li> <li>• What are the most common causes of land conflicts?</li> </ul>
<b>Responsible business conduct</b>	<ul style="list-style-type: none"> <li>• What measures are in place to ensure transparency and information disclosure related to land-based investments, including transparency of lease/concession contract terms?</li> <li>• What mechanisms are in place to conduct meaningful, effective and good-faith consultations with land rights holders, in particular indigenous peoples or local communities?</li> <li>• What measures are in place to minimise the physical and/or economic displacement of legitimate tenure right holders? Under what circumstances can the government expropriate land tenure rights holders?</li> <li>• What measures are in place to ensure prompt, adequate and fair compensation of land tenure rights holders in case of expropriation?</li> </ul>

	<p>How is the value of compensation, including the land value, determined?</p> <ul style="list-style-type: none"> <li>• What measures are in place to minimise adverse environmental impacts and promote sustainable land use?</li> </ul>
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## 1.4 Intellectual property rights

<b>Legal framework</b>	<ul style="list-style-type: none"> <li>• What laws and regulations are in place to protect ownership rights to intellectual assets?</li> <li>• How much protection and coverage do these laws provide? Do regulations and laws contain provisions that protect IP beyond the minimum requirements of the TRIPS agreement?</li> <li>• How does the country ensure that provisions of the WTO TRIPS agreements are properly enforced?</li> <li>• Is the country a party to international treaties and conventions on intellectual property, including patents and copyrights? If not, what deters the country from doing so?</li> </ul>
<b>Efficient registration</b>	<ul style="list-style-type: none"> <li>• How efficient is the registration process in terms of costs involved and time required? Is it reliable and secure?</li> <li>• What are the procedures for handling intellectual property registered in other jurisdictions?</li> <li>• How does the IP office facilitate procedural and administrative issues relating to the application process (e.g. availability of regional services, help desks within IP offices, information kits, web sites and online registration procedures)?</li> <li>• How much do businesses use the system and what is their filing success rate? Is usage restricted to large firms? Do universities and public research institutes seek intellectual property protection when engaging in innovation?</li> <li>• What are the costs of filing and obtaining IP (e.g. application, publication and maintenance fees, translation costs when applying for protection in other markets), as well as those incurred to maintain and enforce IP rights?</li> <li>• How long does it take to register IP rights?</li> <li>• Is there a strategy in place to help meet the specific needs of SMEs? Are there discount rates in place to support the registration and enforcement of IP rights by SMEs?</li> </ul>
<b>Awareness raising</b>	<ul style="list-style-type: none"> <li>• Does the IP office or responsible agency:</li> <li>• organise information seminars and campaigns on IP and provide capacity building on how to file for IP protection?</li> <li>• produce practical IP guides and other materials targeted to specific customer groups?</li> <li>• collect and disseminate case studies illustrating good practices in applying for and enforcing IP protection?</li> <li>• What programmes are in place to improve access to existing knowledge, especially among SMEs?</li> </ul>
<b>Enforcement and dispute settlement</b>	<ul style="list-style-type: none"> <li>• What mechanisms are in place to enforce a country's IP system and to resolve disputes? Do they limit the cost to business of enforcing and monitoring the use of their IP rights make the IP system more accessible?</li> </ul>

<b>mechanisms</b>	<ul style="list-style-type: none"> <li>• What are the criminal and civil penalties for transgressing IP laws?</li> <li>• Does the country feature on watch-lists based on external perceptions of the extent of enforcement of IP rights (e.g. USTR Special 301 reports)?</li> <li>• Is the judicial system efficient to address IP disputes? Are there specialised courts to hear IP-related cases, with judges trained in IP law?</li> <li>• Are there procedures for settling IP disputes out of court?</li> <li>• To what extent is mediation available to settle IP-related cases?</li> <li>• Has the government created specific institutions for settling IP disputes? If so, how efficient are they and how many cases per year do they deal with? Are they commonly used by SMEs and other small entities?</li> <li>• Is there a market for IP insurance to help reduce the costs of litigation? If not, are there plans to develop one?</li> <li>• Does each agency involved have well-defined responsibilities?</li> </ul>
<b>A balanced innovation policy framework</b>	<ul style="list-style-type: none"> <li>• How do IP laws and regulations fit within the country's overall innovation strategy? Are IP institutions only in charge of the enforcement of IP protection, or do they also have a role in promoting innovation policies?</li> <li>• Does the government promote close ties and collaboration between universities and businesses to commercialise inventions and new technologies, e.g. by laws that enable universities to share royalties from jointly-produced innovations (see also the chapters on Investment Promotion and Facilitation and on Human Resources Development)?</li> <li>• Are there special provisions defining circumstances when the state can use patents outside of normal patent protection rules on the grounds of the wider public interest?</li> <li>• How does the government assess the effectiveness of its innovation framework in developing domestic R&amp;D capacity and new technology?</li> <li>• To what extent is the existing framework conducive to promoting technology transfer among firms (see also chapter on Investment Promotion and Facilitation)?</li> </ul>

### 1.5 Contract enforcement and investment dispute settlement

<b>Effective contract enforcement</b>	<ul style="list-style-type: none"> <li>• Is the jurisdiction for hearing contractual disputes clearly defined in law (e.g. for contracts involving foreign entities, government and state-owned enterprises) and in which courts (e.g. local, specialised, small-claim courts, administrative courts)?</li> <li>• Are any limits on jurisdictional and enforcement powers (e.g. prohibition on seizing state property to satisfy court judgments) transparent?</li> <li>• Do national laws define the conditions of validity and enforcement of foreign judgments and foreign arbitral awards? Please provide reference to the laws?</li> </ul>
<b>Institutional requirements to support contract enforcement</b>	<ul style="list-style-type: none"> <li>• Are there specialised commercial courts? If not, do judges have any special training to hear complex commercial disputes?</li> <li>• Are there independent surveys of the integrity and independence of the judiciary?</li> <li>• What is the degree of efficiency of the court system (e.g. case load of judges, backlog of cases, level of funding and capacity of judges)?</li> </ul>

	<ul style="list-style-type: none"> <li>• What are the case management practices of the court system (e.g. use of information technology for filing and tracking cases, for implementing procedural and jurisdictional rules, and for recording and disseminating reasoned case histories)?</li> <li>• Do courts enforce contractual agreements and settlements?</li> </ul>
<b>The cost of enforcing contracts</b>	<ul style="list-style-type: none"> <li>• What are the estimated costs of enforcing contracts, including e.g. court fees and taxes?</li> <li>• Are there small claims courts? If so, are they accessible to SMEs? Are they available at local level?</li> <li>• What is the average length of time required to enforce a contract through the court system?</li> <li>• What are the costs of pre-trial and trial procedures mandated by law (e.g. evidentiary standards, cooling-off periods) or court regulation (e.g. time limits for court actions and on the parties to present evidence) and procedural rules between the parties needed to file a case, during the trial and judgment period and to enforce the judgment?</li> <li>• Do procedural rules depend on the nature of the dispute and the court that is hearing the dispute (e.g. small-claim courts)?</li> </ul>
<b>Alternative dispute settlement mechanisms</b>	<ul style="list-style-type: none"> <li>• Do national laws recognise alternative dispute resolution mechanisms (e.g. foreign-based conciliation commissions and arbitral tribunals) and honour and enforce their decisions?</li> <li>• Are alternative dispute resolution mechanisms (e.g. arbitration, mediation, conciliation) for hearing and settling investment disputes encouraged?</li> <li>• Do investors have the right to choose an alternative dispute settlement method (e.g. international commercial or investment arbitration)?</li> <li>• What are the relative costs and efficacy of the alternatives available and the methods of involvement by the official sector to enforce settlement agreements?</li> <li>• How do rules on the procedures for commercial disputes prevent or limit practices of “forum shopping” and of dilatory measures?</li> <li>• Do practices or restrictions on agreements to arbitrate disputes hinder the use and effectiveness of international arbitration instruments (e.g. mandatory procedures for the conduct of arbitration proceedings, regulations that limit who can serve as an arbitrator)?</li> <li>• Can national courts interfere with pending arbitration proceedings (e.g. accepting to hear a dispute or an appeal to an award that the parties had agreed to submit to international arbitration)?</li> <li>• How clear is supporting national legislation (e.g. ambiguities which may affect arbitral efficiency)?</li> <li>• Does the government participate in intergovernmental forums that facilitate arbitration and other forms of dispute settlement between states (e.g. the Permanent Court of Arbitration)?</li> </ul>

## 1.6 Expropriation regime

<p><b>Defining the power to expropriate property</b></p>	<ul style="list-style-type: none"> <li>• Do laws that permit property confiscation expressly limit the conditions under which the government may expropriate private property for public purposes?</li> <li>• Do legal standards exist for determining when an expropriation event has occurred?</li> <li>• Does the law permitting expropriation discriminate, such as on the basis of nationality?</li> <li>• Does such a law establish the right to adequate compensation?</li> <li>• Does such a law allow for an appeals process?</li> <li>• Do procedures exist for calculating compensation (e.g. specifying the factors and methods that can be used, such as purchase price, resale value, depreciation, goodwill etc.)?</li> <li>• While it is not feasible to list every circumstance in which the state may take private property in the public interest, have the authorities made efforts to define the concept and to place boundaries on the scope of the public interest?</li> <li>• Does expropriation of land or other property by the government have to be for public purposes?</li> <li>• Does the government consider means other than expropriation, such as, for example, by giving government the right of first refusal on land transactions?</li> </ul>
<p><b>Compensation for expropriation</b></p>	<ul style="list-style-type: none"> <li>• How is the amount of compensation calculated?</li> <li>• Which factors are taken into consideration (e.g. the value of intangible assets, depreciation, damage to property)?</li> <li>• What legal standards are applied and what practices are adopted (e.g. use of third-party expert valuations, payment of interest)?</li> <li>• In cases where there is no readily available market price, how does the government avoid arbitrary procedures?</li> <li>• What is the median time taken to effect compensation following an expropriation event?</li> <li>• Does the government benchmark itself against peers in terms of the speed with which investors are compensated?</li> <li>• How is compensation paid? Are payments fully realisable (e.g. paid in cash) and freely transferable (e.g. convertible into another currency, or payable in a hard currency)?</li> <li>• When non-pecuniary settlements are offered (e.g. resettling displaced persons), does the government consult with those directly concerned? Are such persons resettled near to the previous location? Does the new location offer a similar amenity value and a comparable quality?</li> <li>• Are case histories of expropriation events brought to commissions or arbitral tribunals and consultations with stakeholders analysed to gain insights and feedback from the process?</li> <li>• Are there a disproportionate number of cases in a specific sector or involving foreign enterprises?</li> </ul>

	<ul style="list-style-type: none"> <li>• How does the government ensure adequate compensation for land acquisitions and resettlement as part of large-scale investment projects (e.g. mining, hydropower, agriculture and plantations)?</li> </ul>
<b>Regulatory actions tantamount to expropriation</b>	<ul style="list-style-type: none"> <li>• Regulatory actions may constitute expropriation by denying an owner the ability to use or sell property or otherwise heavily encumber its use, thus reducing its economic value. Does the government help to alleviate this uncertainty by providing guidance to government agencies on how to distinguish practices that may constitute indirect expropriation?</li> <li>• Does the government collect, synthesise and communicate the reasoned decisions of case histories from conciliation commissions and arbitral tribunals?</li> <li>• For events that were determined to be cases of indirect expropriation, was the property owner compensated, following the same modalities as for direct expropriation?</li> </ul>
<b>Independent channels to review or contest expropriation decisions</b>	<ul style="list-style-type: none"> <li>• Are there administrative and judicial review processes available to review expropriation decisions?</li> <li>• Does a court or tribunal, whether domestic or supranational, have the authority to review decisions regarding expropriation of property and to give effect to its decisions?</li> <li>• What restrictions, if any, exist on who has the right to contest an expropriation event?</li> <li>• What are the modalities for filing an appeal or contesting an expropriation decision?</li> <li>• What is the technical capacity of the court or tribunal to hear contested expropriation cases?</li> <li>• Is the appeals body independent from the agency ordering the expropriation? Does it have the power to review and if necessary overturn government agency decisions regarding expropriation and compensation to owners of expropriated property?</li> <li>• Are the grounds on which a decision can be contested clear and transparent (e.g. documented procedural rules)?</li> </ul>

## 1.7 Investment treaty policy

<b>Investor treaty strategy</b>	<ul style="list-style-type: none"> <li>• With which countries have bilateral investment treaties (BITs) and Free Trade Agreements with an investment chapter been signed by the government?</li> <li>• Is the country party to regional investment agreements?</li> <li>• Are major investor countries covered? What is the proportion of FDI inflows that is protected by IIAs?</li> <li>• Have IIAs been ratified and if not, why not?</li> <li>• How has the government evolved in its approach to treaty policy and treaty formulation?</li> <li>• Does the government integrate sustainable development and other public welfare considerations into new treaties (e.g., provisions on RBC, labour rights, environmental and public health policies, etc.)?</li> <li>• Who has authority and responsibility for initiating negotiations?</li> </ul>
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	<ul style="list-style-type: none"> <li>• Is there a dedicated unit responsible for evaluating the experience with existing agreements? Does it inform the government's position vis-à-vis new agreements?</li> <li>• How does the government strengthen the capacity within its public service for treaty negotiation?</li> <li>• Has the government developed a model BIT and, if so, how has this evolved over time?</li> <li>• Some of the topics covered in other questions in this chapter (e.g. Questions 1.5, 1.6 and 1.8) and in other chapters (e.g. trade-related investment measures, Question 3.5) relate to provisions of international investment agreements.</li> </ul>
<b>Investor protection</b>	<ul style="list-style-type: none"> <li>• Do IIAs signed by the country provide for a definition of the type of investment that they cover? Do they explicitly exclude certain forms of investment?</li> <li>• What standards of treatment does the government provide through its IIAs?</li> <li>• Do IIAs contain national treatment and most-favoured-nation treatment clauses? (see 1.2)</li> <li>• Do they contain Fair and Equitable Treatment and Full Protection and Security clauses?</li> <li>• Do they contain a provision on expropriation? (see 1.6).</li> <li>• Are there important variations, between IIAs signed by the country, in the degree of protection granted to foreign investors?</li> <li>• Do IIAs contain an investor-state dispute settlement provision? If so, does it contain sufficiently detailed language on the conduct of the proceedings? To which international arbitration fora does it give access (e.g., ICSID arbitration, ad hoc arbitration under UNCITRAL rules, etc.)?</li> <li>• Have there been investor-state disputes based on dispute settlement provisions of IIAs submitted to international arbitration?</li> </ul>
<b>International arbitration instruments</b>	<ul style="list-style-type: none"> <li>• Has the government ratified the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID or Washington Convention) and the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards?</li> <li>• If the country is not a party to ICSID, is the ICSID Additional Facility used?</li> <li>• Does the country use other international arbitration fora (e.g. the ICC, the SCC, etc.)?</li> <li>• Has the government introduced national legislation and procedural rules so that foreign arbitral awards are recognised and enforced by local courts without undue delay?</li> </ul>
<b>Transparency</b>	<ul style="list-style-type: none"> <li>• How do IIAs signed by the government address the issue of transparency, including procedural transparency?</li> <li>• Has the government committed to apply the UNCITRAL Rules on transparency to already existing investment treaties?</li> <li>• When the parties agree, are the outcomes of awards involving the country communicated widely (e.g. posted on relevant government websites)?</li> </ul>

<b>Building capacity</b>	<ul style="list-style-type: none"><li>• How does the government strengthen its expertise in handling international dispute settlement instruments and managing the cases brought before international forums?</li></ul>
<b>Effective compliance with IIAs</b>	<ul style="list-style-type: none"><li>• How does the government ensure consistency between the commitments in IIAs and domestic legislation?</li><li>• What efforts are made to communicate to government agencies the implications of IIAs for their areas of responsibility (e.g. implementation guides)?</li></ul>

## **ADDITIONAL RESOURCES**

### **OECD**

Investment treaty law, sustainable development and responsible business conduct: a fact finding survey (2014)

Investor-state dispute settlement: A scoping paper for the investment policy community (2012)

Dispute settlement provisions in international investment agreements: a large sample survey (2012)

Environmental concerns in international investment agreements: a survey (2012)

OECD FDI Regulatory Restrictiveness Index

### **UNCTAD**

Investment Policy Framework for Sustainable Development (2012)