



Global Forum on International Investment

Encouraging Modern Governance and Transparency for Investment: Why and How?

17-18 November 2003
Johannesburg, South Africa
Hosted by the Government of South Africa

HOW TO ACHIEVE TRANSPARENCY FOR INVESTMENT

Marinus Sikkel

Chairman of the OECD Committee on International Investment and Multinational Enterprises

I. Introduction

Distinguished speakers, discussants and participants at the Conference:

First of all, I would like to express my sincere thanks to the South African government and the OECD for organizing this conference and selecting TRANSPARENCY as the central theme for this year's OECD Global Forum on International Investment, which takes place, as we all know, one year after the Johannesburg Summit on Sustainable Development.

My colleagues at the first session have eloquently underlined the determinant role that transparency plays in achieving effective public governance and encouraging private investment. They have also shown that transparency and predictability may perhaps even be more critical to foreign investors because they may have to cope with host country regulatory systems, cultures and administrative frameworks different from their own. It is not surprising that recent business surveys continue to rank transparency as a top priority for foreign investment. I could not have said it better than the Business and Industry Advisory Committee to the OECD (BIAC) which recently stated that:

“From a business point of view, transparency reduces risks and uncertainties, promotes patient investment, reduces opportunities for bribery and corruption, helps unveil hidden investment barriers and draws the line between genuine and less genuine policy objectives, assists investors dealing with underdeveloped rules, discourages conflicting requirements situations between home country or host country, contributes to the playing field among firms and facilitates sustainable development.”

Obviously, it is not enough to recognize the benefits of public sector transparency for investors – being domestic or foreign. Governments must also do what they can to make transparency a reality. **I will focus my presentation on how public authorities in our respective countries can pursue this objective, and on what recent OECD experience is in this area.**

The OECD Committee which I have the pleasure to chair – the Committee on International Investment and Multinational Enterprises (the CIME) – has spent considerable time in the last year on this issue. A brochure summarizing this work – “Transparency and the International Investor” – has, I believe, been made available to you.

More specifically last month, the CIME adopted a “Framework for Investment Policy Transparency” to assist governments to enhance the transparency of domestic investment regulatory frameworks and to support a multi-stakeholder dialogue in this area of high priority for investors.¹ Interestingly enough, this decision coincided, within a few days, with APEC Leaders’ endorsement in Bangkok of “Area Specific” Transparency Standards² and the release of two new statements by the NAFTA Free Trade Commission with a view to enhancing the transparency and efficiency of NAFTA’s investor-state-arbitration under Chapter 11 of the NAFTA Agreement.³ I am happy to see the large degree of consensus which is emerging on the importance of public sector transparency.

II. The Three Main Components of Investment Policy Transparency

Public sector transparency *vis-à-vis* investors is now broadly viewed in the OECD to involve the three following core policy objectives:

(a) *Effective communication of meaningful information that may materially affect an investment.* There is a vast array of “measures” which may materially affect an investment: laws, regulations, international agreements, administrative practices/rulings, judicial decisions and/or policies among others. Such measures may vary from sector to sector or even from firm to firm. Their large number and variety result, of course, from the increased complexity and demands of our societies. This also means, however, that governments face a huge task in communicating this information.

The work carried out under the auspices of the OECD investment instruments – namely the Codes of Liberalization and the Declaration on International Investment and Multinational Enterprises– has attempted to draw the line between what is reasonable and what is not. There is a broad consensus that at minimum foreign investors need basic information on how “to get a business started” and how to “operate it effectively”. They need to become acquainted with 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. These issues are the main yardsticks used by the various business climate assessments that you find on the market these days. They are extensively discussed in our “peer reviews” on foreign direct investment.

While the National Treatment instrument of the OECD Investment Policy Declaration calls for governments to be transparent, the OECD Guidelines for Multinational Enterprises, which is its other major instrument, sets forth recommendations transparency and disclosure by international investors.

¹ www.oecd.org/daf/investment.

² See APEC Leaders’ Statement to Implement APEC Transparency Standards of 21 October 2003 http://www.apecsec.org.sg/apec/news___media/media_releases/211003_areasptranspstdendorsed.html

³ These statements were issued on 7 October 2003 . See <http://www.ustr.gov/releases/2003/10/03-65.pdf>

OECD Ministers stated last year that they want the Guidelines to be used, together with the OECD Principles of Corporate Governance and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and other instruments, to promote integrity and transparency in the international economy.⁴ We will have the opportunity to discuss this further in Session 3 that will be devoted to the important subject of capacity building and partnerships.

(b) *Prior notification and consultation of regulatory changes of interest to investors.* Involving stakeholders in the process of regulatory changes – can help public authorities a great deal in devising better regulations, namely regulations responsive to public needs. This also helps build support for compliance and thus can enhance effectiveness of the new regulatory measures. Foreign investors too should be notified and be given timely opportunities to comment on the proposed regulatory changes that may affect their investments.

(c) *Procedural fairness.* This concept is understood as administering in a transparent, uniform, impartial and reasonably speedy manner the necessary licensing, permits, registration and other formalities for carrying on business. It also implies a right to complain or appeal and the existence of prompt and impartial review and remedies. As we all know, investors face various kinds of registration, authorisation or permit formalities. These can impose large costs on their business, both in time and money. They can also be a source of administrative discretion, red tape and corruption. Procedural fairness is an essential feature of good investment policy and practice.

I would like now to say a few words on how these core policy values have been implemented in OECD countries.

III. Transparency enhancing measures in OECD countries

Considerable progress has been made in recent years in raising the level of regulatory transparency in OECD countries. The improvements can largely be attributed to the reforms carried out to improve regulatory quality – by reducing unnecessary obstacles to competition, innovation and growth, while ensuring that remaining regulations efficiently serve important social objectives. The 1995 OECD Council Recommendation on Improving the Quality of Government Regulation and subsequent work have played a major supporting role in this area.

Here are some examples of the benefits that these reforms have brought to investors in several OECD countries. *Legislative simplification, legal codification and the creation of central registers* have cut down the cost of obtaining information on relevant laws and regulations. *Central enquiry points* have helped investors better understand government rules and their implementation. *Public consultation and the use of prior notice* and comment procedures have provided more regular inputs to regulatory proposals. Cumbersome regulatory or administrative requirements have been “*re-engineered*” to reduce formalities, administrative discretion, red tape and corruption. “*One-stop*” *clearing shops* have been created. There has also been a distinctive trend away from *ex ante* controls to *ex post checking* or *silence is consent* clauses and appeal rights have been reinforced. New technologies such as *Internet* have been put to use in practically every area of public communication.

In addition, prompted by increased competition for mobile investments, OECD governments have multiplied *specialized services to foreign investors* to compensate perceived disadvantages such as language barriers or more limited knowledge of local institutions. Guiding foreign investors through domestic regulatory systems has become a central function of investment promotion agencies. Politicians and government agencies have intensified their contacts with foreign chambers of commerce or business

⁴ See <http://www.oecd.org/dataoecd/52/38/2958609.pdf>, page 2.

associations. Special efforts have been made to publish information about the regulatory environment in English. In some cases, foreign investors have been given direct access to the decision-making process through special advisory bodies or through official consultation procedures.

Translating domestic practices into international commitments

The other striking trend in investment policy transparency I would like to bring to your attention is the emergence of international transparency obligations in favour of foreign investors. While the first wave of bilateral investment treaties (BITs) – those negotiated in the 1970s and 1980s – are mostly silent on this subject, several BITs negotiated since, regional agreements such as NAFTA and the new generation of bilateral trade/economic agreements⁵ contain specific obligations on transparency.

As a general rule, these agreements reproduce the core transparency obligation of various WTO Agreements⁶ to “publish promptly” relevant measures, to “notify” non-conforming measures, to respond promptly to “requests” for information by contracting parties and to establish “enquiry points. They have, however, created new international commitments. For example the US-Singapore Free Trade Agreement and US-Chile Free Trade Agreement contain stronger obligations on “prior notification and consultation” and the “uniform, impartial and reasonable administration” of rules and regulations. These agreements also provide for a top down approach for the scheduling of individual country liberalisation commitments. The EU-Chile Agreement, on the other hand, has, for the first time, introduced in an investment agreement, the concept of a policy dialogue with representatives of civil societies “in order to keep them informed on the implementation of the Agreement and gather their suggestions for its improvement”. And as I have indicated before, APEC has recently raised the issue of transparency at the highest political level possible.

Transparency is vital to the functioning of international investment agreements. They also provide a powerful avenue to anchor and promote greater transparency at the national level.

A framework for investment policy transparency

I would like to end my presentation by saying a few words on CIME’s “Framework for Investment Policy Transparency”. This Framework is intended as a user-friendly policy tool. It provides – by means of 15 simple questions – helpful clues about how transparency can be put into practice. The questions are based on the three main components of transparency concepts discussed before. They can be used by OECD and non-OECD governments alike to conduct self-evaluations, report on policy developments, engage in policy reviews or develop a multi-stakeholder dialogue on investment policy transparency.

Here are some examples of the questions: Are the economic benefits of transparency, adequately recognised? What are the main vehicles of information on investment measures of interest to foreign investors? What determines the choice of publication avenues? Are foreign investors normally notified and consulted in advance of the purpose and nature of regulatory changes of interest to them? What are the available means for informing and assisting foreign investors in obtaining the necessary licensing, permits,

⁵ In particular, the Agreement between Singapore and Japan for a New-Age Economic Partnership, the Australia-Singapore Free Trade Agreement, the Association Agreement between the European Community and Chile, the United States-Singapore Free Trade Agreement and the United States-Chile Free Trade Agreement.

⁶ The Agreement on Trade in Services (the “GATS”), the Agreement on Trade-Related Investment Measures pertaining to goods (TRIMS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (Trips), GATT Article X and the GATT Agreements on the Application of Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT).

registration or other formalities? What recourse is made to “silence is consent” clauses or “a posteriori” verification procedures?

This is not a prescriptive framework however – it does not propose universal policy recipes. Far from imposing a “one-size-fits-all” solution, it recognizes that individual country transparency arrangements must reflect national culture, history and values, and of course, availability of resources and skills. It also assumes that transparency is a moving target which can be progressively upgraded and enhanced over time as regulatory environments evolve and new means – for example INTERNET - emerge.

Conclusion

Ladies and gentlemen, let’s not fool ourselves. Investment policy transparency is not an easy topic. It should not be taken for granted. It requires conscious efforts, dedication, perseverance and even imagination on the part of our governments. The rewards are, however, substantial, both in terms of the incremental investment these efforts can generate and the better governance they can bring to our societies.

Thank you.