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POLICY FRAMEWORK FOR INVESTMENT: USER'S TOOLKIT – DRAFT USER GUIDANCE ON THE PFI INVESTMENT POLICY CHAPTER

Session 1.1.: Investment policy

The PFI User's Toolkit project is in response to a need for specific and practical implementation guidance revealed from the experience of the countries that have undertaken projects using the PFI. Development of the Toolkit entails a process involving government users, co-operation with other organisations, OECD Committees with specialised expertise in the policy areas covered by the PFI and interested stakeholders. This document offers an initial draft of the guidance relating to the Investment Policy chapter of the PFI. It is distributed as part of the conference documentation for the relevant session in the programme at the Global Forum on International Investment. The views expressed in this paper do not necessarily represent those of the OECD or its member governments.

POLICY FRAMEWORK FOR INVESTMENT: USER'S TOOLKIT
DRAFT USER GUIDANCE ON THE PFI INVESTMENT POLICY CHAPTER

Investment policy in the PFI relates to a country's laws, regulations and practices that directly enables or discourages investment, and which enhance the public benefit from investment. They cover, for instance, policies for transparent and non-discriminatory treatment of investors, expropriation and compensation laws and dispute settlement mechanisms.

The quality of a country's investment policies directly influences the decisions of investors, be they small or large, domestic or foreign. Transparency, property protection and non-discrimination are core investment policy principles that underpin efforts to create a quality investment environment for all.

Investors are also concerned with the way that investment policy is formulated and changed. Investors will avoid circumstances 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, not readily available and un-predictable.

The PFI Investment Policy chapter identifies through eight questions the most important issues relevant for judging the effectiveness of a country's investment policies and practices. The issues are often directly relevant to the specific needs of foreign investors, but the issues apply in most instances to domestic investors as well. This section of the Toolkit offers the PFI user additional detail on why these investment policy questions are important, and specific guidance on the topics to scrutinise in order to form an opinion on how well a country's investment policies perform vis-à-vis good practices.

The eight PFI questions on Investment Policy relate to:

- Laws and Regulations
- Effective Ownership Registration
- Intellectual Property Rights
- Contract Enforcement and Dispute Resolution
- Expropriation Laws and Review Processes
- Non-Discriminatory Treatment for National and Foreign Investors
- International Co-operation and Periodic Review
- International Arbitration Instruments

Laws and Regulations

PFI Q:1.1 asks “What steps has the government taken to ensure that the laws and regulations dealing with investments and investors, including small- and medium-sized enterprises, and their implementation and enforcement are clear, transparent, readily accessible and do not impose unnecessary burdens?”

Rationale for the question

Investment involves many risks. Risks are associated with market demand, technology, competition, inflation, borrowing costs, weather and other factors. An attractive investment climate cannot avoid all these risks, but it should avoid unnecessary policy-induced risks and regulatory surprises. Businesses will interpret environments that contain unpredictable regulatory or legal changes as an additional risk. Some industries, such as oil extraction are lucrative enough that business is prepared to operate in more risky environments. But many other industries that operate on lower profit margins, particularly the manufacturing industries that are necessary for a diversified growth, have the ability to choose only the best, most stable locations to establish operations.

Two key features of high-performing investment policy regimes are transparency and predictability. Effective communication of meaningful information, prior notification and consultation of regulatory changes and uniform administration and application of laws and regulations reduces business risks and anxieties. This helps businesses to assess potential investment opportunities on a more informed and timely basis. It also helps combat bribery and corruption (See also PFI Policy Guidance on Public Governance). Public authorities may not always be aware of these benefits or take them for granted, but ultimately they promote patient investment.

Transparency and predictability are especially important for small- and medium-sized enterprises that face particular challenges relating inter alia to entering the formal economy. Transparent investment laws and regulations are also important for foreign investors who may have to function with very different regulatory systems, cultures and administrative frameworks from their own.

Key considerations

Availability of relevant information to investors Well functioning market economies depend on access to information. For investors this means being easily able to obtain meaningful information on all measures that may materially affect their investments. And to reassure all market participants that business operates on a level playing field, it also means that investment laws and regulations and their enforcement should be codified and clear to all.

This requires a consistent, predictable system of laws, policies, regulations and administrative practices, as well as information on rulings and judicial decisions. Their sheer number and complexity may not always make it possible to provide comprehensive information on all matters that may influence investor decisions however. It is nevertheless in governments’ interests to provide “essential” information on how to start a business and inform investors, inter alia, about ownership and exchange control restrictions, administrative requirements, taxation, investment incentives, monopolies and concessions, intellectual property protection and competition policy, as well as environmental and social requirements and corporate responsibilities.

Prior notification and consultation Involving investors and other stakeholders in the process of law and regulatory changes contributes to their legitimacy and effectiveness. It also reflects a commitment to professionalism and contributes to building trust between investors and the relevant stakeholders. Moreover, policy is more likely to be sound and not produce unintended side effects if it is formed in a structured and transparent manner that permits input from all interested parties. Prior notification and consultation is a process that begins with public hearings, policy papers outlining the reasons why changes

are needed, circulation of draft regulatory changes to all concerned stakeholders, and processes for revision and recirculation based on these public inputs.

Public appeals processes Public appeals processes serve to increase procedural transparency. Procedural transparency is important because it helps to avoid regulations that impose undue burdens and limits the discretionary power of officials. Procedural transparency can be institutionalized by systematically ensuring that changes in implementing regulations and administrative decisions are subject to an open, prompt and impartial public review and appeals process.

Policy practices to scrutinise

Based on these considerations and good practices the PFI user should form an assessment on the transparency of a country's investment laws and regulations.

Key issues for the reviewer are how information on investment laws and regulations, and changes in these laws and regulations is provided.

The following policy practices and criteria ought to be considered:

- Information on investment laws, regulations and administrative requirements is provided:
 - through a legally stipulated and codified system;
 - which applies to primary and secondary legislation;
 - at both national and sub-national levels of government; and
 - with exceptions and qualifications to making information available clearly defined and delimited.
- The PFI reviewer should be familiar with the various means and practices used to communicate and disseminate information on a country's investment laws and regulations. The measures available include the systematic use of print (e.g. official gazettes), government websites and other electronic communication technologies (e.g. on-line compendiums and e-gateways), as well as formal and informal contacts by government departments and regulatory agencies.
- While new communication technologies like the internet simplify and may improve the reach and speed of information dissemination between governments and stakeholders, the internet is not an end in itself. This means the PFI user needs to evaluate the frequency and timeliness of information updates. Moreover, the information offered needs to be clear and succinct; otherwise, it loses its value.
- The PFI user should also pay attention to how changes in investment laws and regulations are made. Modifications to laws and regulations are clear and transparent when based on:
 - a codified prior consultation procedure available and accessible to all stakeholders;
 - which applies to all ministries, whose decisions can materially affect the investment climate (e.g. tax authorities, customs assessors, foreign exchange and financial systems regulators, company/securities regulators, labour, environment and other sectors) with clear accountability procedures on how comments are handled;
 - communication of new laws and regulations is timely, widely disseminated and electronic information distribution systems are frequently updated; and

- because regulatory changes can come from many ministries or levels of government, the notification system should be coordinated.
- Whether procedural transparency practices satisfy requirements under international agreements or written into investment contracts to protect investment guarantee provisions, such as notification of regulation changes, responding to special enquiries and promptly respecting all requests for consultation. Exceptions and qualifications to transparency and accessibility should clearly be defined and delimited. Examples include protection of confidential information or commercial interests, national security and public order, and pursuit of monetary and exchange rate policies. The PFI user will have to take special care to assess that their application is limited to the minimum extent possible and to ensure that they are used within their legitimate purposes.
- There is a formal system for dealing fairly with unintended negative impacts of regulatory changes, and the reasoned decisions of the appeals process are publicly available. The PFI user should also pay attention to whether the regulatory institutions are designed and managed in a manner that avoids favouritism or accusations that decisions are politically motivated. This may entail introducing statutory delays for rendering decisions and the possibility of presenting additional facts and arguments.

Further resources and case studies

The following resources support the PFI user needing additional information on investment laws and regulations:

- The OECD Framework for Investment Policy Transparency helps governments to achieve greater investment policy transparency. The focus is on the information gaps and special needs of foreign investors, but they apply in most instances to domestic investors as well. The resource can serve as a basis for conducting self-evaluation and sharing experiences among public officials. See <http://www.oecd.org/dataoecd/15/13/16793978.pdf> A related report entitled “Public Sector Transparency and the International Investor” offers principles of good practice for enhancing public sector transparency. See: <http://www.oecd.org/dataoecd/36/42/18546790.pdf>
- The World Bank Cost of Doing Business project studies the cost, length and complexity of various aspects of the investment climate and provides a score of how long it takes in each country for business to complete key regulatory tasks. Longer and more complex processes are one measure of unpredictability and often of an indicator of lack of transparency. See www.doingbusiness.org
- The World Bank has a set of Guidelines on the Treatment of Foreign Direct Investment premised on the principles of equal treatment and open competitive markets. The Guidelines provide an international legal framework to promote the flow of private FDI and a complementary source on which national legislation governing the treatment of private FDI may draw, to the extent the Guidelines do not conflict with existing bilateral and multilateral treaties and other international instruments. See http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1999/11/10/000094946_99090805303082/Rendered/PDF/multi_page.pdf
- The World Bank Doing Business Law Library is the largest free online collection of business laws and regulations. It offers links to official government sources covering areas such as banking and credit law, labour law, tax law, trade law and bankruptcy and collateral laws, and is updated regularly. It is accessible from: <http://www.doingbusiness.org/lawlibrary>

- Business licenses, registrations, permits and inspections are in many of the laws and regulations that businesses and entrepreneurs need to consider in making their investment decisions. This link <http://rru.worldbank.org/Toolkits/BusinessLicenses/> is to a practical guide for development practitioners offering tools on how to reform business-licensing regimes at the national level.

Effective Ownership Registration

PFI Q: 1.2 asks “What steps has the government taken towards the progressive establishment of timely, secure and effective methods of ownership registration for land and other forms of property?”

Rationale for the question

Investors need to be confident that their ownership of, or right to use property is legally recognized and protected. Secure, verifiable and transferable rights to agricultural and other types of land and forms of property give an incentive for investors and entrepreneurs to shift into the formal economy, entitle the investor to participate in the eventual profits that derive from an investment and reduce the risk of fraud in transactions.

An essential part of any system designed to protect property rights is the creation and maintenance of a registrar of property ownership. A secure and verifiable system of property ownership rights carries an intrinsic economic value, as in itself it encourages new investment and the upkeep of existing investments. Land titles, for example, give an incentive to owners to promote productivity enhancing investments. Reliable land titling and property registrars also help individuals and businesses to seek legal redress in case of violation of property rights and offer a source of collateral, facilitating access to and better terms of credit; often in rural areas where barriers to credit are more pronounced.

Key considerations

The question focuses on tangible forms of property, like land, buildings and manufacturing plants. (Protection of intangible assets is covered in question 1.3, since they are often governed by separate laws.)

Access to the property-ownership registration system The PFI user needs to examine how well the property registration system performs, and if a formal system is not in place, consider the design plans to develop one. In this regard, it is desirable to evaluate accessibility to the property-ownership registration system. This involves identifying and examining the obstacles that may be deterring the ownership of certain classes of asset (e.g. small-sized or low-valued property) from being formally recognized, or types of investor from using the registrar system.

Another consideration bearing on accessibility is the ease and ability to retrieve from the property registrar information on the identity of the owner and the status of the ownership interest. This is useful for lenders who wish to establish if a property has already been offered as collateral, and for property owners who wish to pledge their property as collateral for credit.

Integrity of the property registration system Government authorities have a responsibility to build and maintain confidence in the security and accuracy of the property registration system. Here the PFI user should consider topics, such as how secure property registrars are, how well they avoid competing and fraudulent claims to ownership and whether users are confident in the accuracy of the property registrar. (See also Q1.4 and Q1.5 in this regard.)

In some countries, especially for immovable property, like land, an issue is the interplay between formal and traditional processes of recognizing property ownership. The point for the PFI user is not to make a

choice between one system and the other. Rather, it is to evaluate the vulnerability to conflicts between property titling methods that harm the overall integrity of the system.

Policy practices to scrutinise

Based on these considerations and good practices the PFI user should form an assessment on the effectiveness of a country's property ownership registration systems.

Key issues for the reviewer are to judge whether the property registration system is accessible to all and how well in operation the system performs.

The following policy practices and criteria ought to be considered:

- The share of property formally registered in a country or region. A low rate of property registration is a prima facie sign that the systems in place to register property are not functioning well. However, a low rate of property registration needs to be interpreted with care, especially in countries where property ownership is asserted and held through informal processes.
- To establish the reasons why property ownership titling is low, or limited to certain types of assets, the PFI user will need to examine details of the processes involved, including:
 - The fees charged and taxes levied to register or transfer a title to land and other forms of property. The structure of these costs. For example, are they proportional to the value of the property, or fixed in absolute terms, do they vary according to the type and planned use of the property being registered, and how do they compare with those in other countries at a similar level of economic development;
 - The time taken to officially register new, or transfer existing property titles. This will depend on the number and types of procedures required, on the number of agencies (e.g. are registries limited in scope by geographic area, by type of property, by type of filing entity, by legal jurisdiction or along supervising ministries) involved in the property registration process and when multiple agencies exist, whether they are linked by computer or feed into a central database. It also depends on whether the operational practices of the registrar office are capable of accepting and working with time saving technologies, such as digitised records and online internet-based property registration; and
 - The compliance costs of registering or transferring the title of property. This depends on the documentation requirements (e.g. providing proof of property surveys or tax payments), the number and complexity of regulatory requirements stipulated, taxes that are levied on property registration and transfer, how easily the documentation and information on all the property registration requirements is obtainable (e.g. via the internet) and whether electronic lodging is allowed. The time taken by a business or individual to register or transfer title is also a part of the cost of compliance.
 - Do foreign individuals or corporations have the same rights as nationals to own and register land, and if not do the restrictions depend on the type of land (e.g. rural, residential property or industrial real estate), or its intended use, and are the administrative and compliance procedures for foreigners more burdensome or costly than for nationals?
- When examining the practices of property registration offices it is important to obtain the views of their staff and management and users of their services. This helps to pinpoint potential problems with the organization and management of the property registration office (e.g. human resource capacity, information technology limitations).

- No single indicator sheds light on the integrity of the property registration system. The PFI user, however, can gain insights by examining the details of the dispute resolution process and their outcomes. Confidence in the system will depend on:
 - Whether entries in the registrar are open to public inspection and may be relied upon by third parties.
 - The ability to challenge the validity of an entry by filing an administrative appeal with the registrar itself, or by bringing a court action against the registrar. In this case, whether the registrar office, and when called for the judicial system, provides an equitable, inexpensive and timely system for resolving property ownership disputes;
 - The incidence of fraudulent or duplicate claims to assets;
 - The number of disputes and the efficiency and speed in which disputes are resolved; and
 - Analysis of the causes of dispute from court cases may also help to bring to light systemic weaknesses in the registrar system.
- Where traditional and formal property ownership systems co-exist, the PFI user will need to assess whether there are clear boundaries and rules that delineate between the two systems. For instance, is each system responsible for distinct, well-defined classes of property, or delineated on a geographic basis?

Further resources and case studies

The following resources support the PFI user needing additional information on effective ownership registration:

- One dimension of the World Bank Cost of Doing Business project covers the cost, relative to the value of the property, the number of procedures involved and the average time, measured in days it takes to register property. The information is updated yearly and is available for a large number of countries, facilitating cross-country comparisons. See www.doingbusiness.org.
- Even if property ownership rights are secure and verifiable, collateral laws may act to prevent banks from accepting business assets as collateral. The World Bank has produced a toolkit on how to design and reform collateral laws in ways that expand access to and on better terms to finance. Visit: <http://rru.worldbank.org/Toolkits/Collateral/>

Intellectual Property Rights

PFI Q: 1.3 asks “Has the government implemented laws and regulations for the protection of intellectual property rights and effective enforcement mechanisms? Does the level of protection encourage innovation and investment by domestic and foreign firms? What steps has the government taken to develop strategies, policies and programs to meet the intellectual property needs of SMEs?”

Rationale for the question

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 inter alia joint ventures and licensing agreements. In this way, successful innovations are in time diffused within and across economies, bringing higher productivity and growth.

Intellectual property rights have significant value. They deserve the same types of registration and protection systems as other forms of property (see question 1.2). But intellectual property right regimes need to strike a balance between society’s interests in fostering innovation and in keeping markets competitive and, especially in the case of essential medicines, in sufficient supply.

The intellectual property rights regime is not only a matter of concern to large firms and multinational enterprises, but also to small- and medium-sized enterprises (SME). SMEs are a driving force behind innovation, yet their potential to invest in innovation activities is not always fully exploited. SMEs tend to under utilise the intellectual property system. Measures that extend access to the intellectual property regime system may thus help to attract investment in research and development and to transmit the positive spillovers to society that such investment embodies.

Key considerations

The question focuses on the laws, regulations and instruments that give value to intangible forms of property. (The protection of tangible assets is covered in question 1.2.) The main formal IP instruments are patents, trademarks, copyright, new varieties of plants, industrial designs and geographic indications.

Access to, and use of the IP rights system The PFI user needs to examine the laws and regulations that are in place to protect ownership rights to intangible assets. This involves examining the level of protection and coverage that these laws provide, evaluating the efficiency of the registration process in terms of costs involved and time required and whether it is reliable and secure. Another consideration bearing on accessibility is the procedures for handling intellectual property that is registered in other jurisdictions.

SMEs require specific consideration, because they are a major source of innovation yet they tend to under utilize the formal IP protection system. The diverse composition and characteristics of SMEs (e.g. sectors, size, age) means that the obstacles SMEs face using the IP system are likely to differ (e.g. high costs, limited knowledge of the system and lack of legal and technical IP expertise), as well as their needs (e.g. use of certification and collective marks). Strategies to meet the IP needs of SMEs must, therefore, take into account the specific features and characteristics of the country’s population of SMEs.

Enforcement and dispute settlement mechanisms As with tangible assets, for a market to function effectively, intellectual property rights must be secure, i.e. protected against fraud, counterfeiting and crime. Government has a responsibility to protect owners from violations of their IP rights and their citizens from abuses of IP rights. For the PFI user this involves paying attention to how IP rights are enforced and the mechanisms (e.g. special unit of the IP office, courts, special tribunals) to adjudicate disputes. The ability to protect IP rights is related to contract enforcement and dispute resolution, points that are also taken up in question 1.4.

An innovation policy framework An incentive to invest in research and development does not guarantee a country is successful in innovation. How effective the incentive that intellectual property protection gives to innovation depends on the country's broader innovation policy framework. The PFI user will, therefore, need to consider how IP laws and regulations fit within the country's overall innovation strategy. This involves examining the links between businesses with universities, especially the rules on IP ownership, royalty sharing and commercialization of IP rights, and the programmes in place to improve access to existing knowledge, especially among SMEs.

Policy practices to scrutinise

Based on these considerations and good practices the PFI user should form an assessment of a country's laws and regulations for the protection of intellectual property rights.

Key issues for the reviewer are how laws and regulations define IP rights and balance these rights with society's wider interests; how well the IP filing process performs; accessibility to, and utilization of the IP system by SMEs; and the effectiveness of IP enforcement and dispute settlement mechanisms.

The following policy practices and criteria ought to be considered:

- The extent that businesses and entrepreneurs are using the IP system and their filing success rate. When utilization is low in comparison to larger firms or on average relative to other similar economies, it is a sign that businesses have low confidence in the IP protection system. The filing success rate provides a summary measure of how well businesses are informed about IP filing requirements.
- A low utilization rate of the IP system needs to be interpreted with care however. It may reflect that businesses use alternative strategies to appropriate the value of their intangible assets, such as secrecy, exploitation of lead-time advantages and technical complexity. These less formal instruments can be supported through legislation on trade secrets and unfair competition (see Chapter 4). Trade secrets, for example, are recognized as intellectual property by the TRIPS Agreement.
- To establish the reasons why usage of the IP system is low, or limited predominantly to large enterprises, the PFI user will need to examine the policy practices and constraints that may be acting to limit access. The factors to consider are:
 - Availability of legal instruments and laws that protect ownership of all types of intellectual property. In countries that are signatories to the WTO TRIPS Agreement, whether national legislation has been enacted to comply with this Agreement.
 - The costs involved to file and obtain IP (e.g. application, publication and maintenance fees, translation costs when applying for protection in other markets), as well as those costs incurred to maintain and enforce IP rights;
 - The time required and the complexity of the filing system. This depends on the number and types of procedures needed, how easily information on the filing requirement is obtainable, the processes used by the IP office to examine, register and grant IP, physical accessibility, in terms of distance to the IP office and whether electronic filing is allowed.
 - The geographic coverage of intellectual property protection afforded to a business can be expanded cost effectively if the home country of the business signs onto international IP agreements administered by WIPO. Check to see, therefore, whether the country reviewed is a party to the Patent Co-operation Treaty for inventions, the Madrid system for trademarks

and the Hague system for industrial designs. And if not a signatory, probe into understanding the reasons that deter the country from doing so.

- Usage of the IP system by business depends also on the mechanisms and practices that are employed to raise awareness and understanding of all elements of the IP system. Areas that need to be considered include whether the IP office or its equivalent:
 - Organize information seminars and campaigns on IP and provide capacity building programmes on how to file for IP protection;
 - Produce practical IP guides and other information materials targeted to specific customer groups (e.g. start-up companies, inventors, researchers, government institutions, universities and businesses in specific sectors like bio-technology or agriculture);
 - Collect and disseminate case studies illustrating good practices in applying for and enforcing IP protection;
 - Facilitate the ease of procedural and administrative issues relating to the application process (e.g. help desks within IP offices, information kits, web sites and simplified procedures for granting IP protection to SMEs).
- The effective use of the IP protection system in promoting investment in innovation and the diffusion of successful innovation depend on policy practices that flank IP laws and regulations. For example, collateral laws that allows IP owners to pledge their IP as collateral. Care needs to be taken, however, not to enter domains that are being filled by commercial providers of business services. The PFI user should establish whether publicly funded activities address a market failure and serve to awaken a latent demand. Practices to examine include whether the IP office or its equivalent:
 - Transform on a regular basis information available in patent databases into more workable knowledge. For example, by compiling and disseminating technical information on recent patent filings in given technical fields and translating information in patent data bases into other languages;
 - Provide easy access to patent information. For example, through free on-line consultation of patent records, with functional search and analytical tools, holding information sessions on how to use and benefit from the public disclosure of patent information and by linking patent databases into patent libraries;
 - Promote close ties and collaboration between universities and businesses to commercialise inventions and new technologies. For example, by laws that enable universities to share royalties from jointly produced innovations.
- Balancing the goal of fostering innovation and investment in R&D and the public interest in terms of access to goods and services and knowledge. The point for the PFI user is not to make an assessment of what represents an appropriate balance. Rather, it is to evaluate the provisions in place in terms of how well they meet the governments' policy objectives. Practices include IP laws that limit the period of protection granted (normally 20 years for a patent); the use of special provisions defining circumstances when the state can use patents outside of normal patent protection rules on the grounds of the wider public interest; and provisions that require the inventor to publicly disclose how to make and use the invention.
- The PFI user also needs to pay close attention to the mechanisms in place to enforce a country's IP system and to resolve disputes. Mechanisms that limit the cost to business of enforcing and monitoring the use of their IP rights also help to raise accessibility to the IP system.

- Procedures exist for settling quickly IP disputes out of court. Examples that appeal to inventors/businesses with limited financial resources include expedited arbitration and pre- and post-grant opposition and or review procedures at IP offices. Greater use of arbitration and mediation and developing a market for IP insurance would also help reduce the costs of litigation.
- Fast and efficient procedures for hearing disputes in courts are also necessary (see also question 1.4). Jurisdiction for hearing IP disputes need to be clearly defined in law and each agency involved has well delineated responsibilities.
- Sanctions for IP law violations and procedures for the enforcement of sanctions or judgments exist. Whether these are determined taking aggravating and mitigating factors into account, such as the severity of violation, the resulting harm to the owner of the IP property, the benefits that the offender derived from the violation, prior violations, early admission of the violation, co-operation or refusal to co-operate with the investigation, and the economic and financial situation of the offender.
- Mechanisms might be available in principle to enforce IP rights, but experience often shows that the process can be limiting. It is, therefore, useful to examine the track record of enforcing IP rights and the outcomes of disputes. A proxy measure of performance is whether the country features on watch-lists for not enforcing adequately IP rights (e.g. US Trade Representative Special 301 reports). The reviewer should also consider what steps a country is taking to address concerns raised by the international community, or revealed by a poor enforcement track record (e.g. educational campaigns, specialized training for law enforcement officials and creation of specialized courts to deal with IP issues).

Further resources and case studies

The following resources support the PFI user needing additional information on intellectual property rights:

- WIPO is responsible for administering 24 international treaties covering intellectual property protection. These treaties ensure one international registration or filing will have effect in any of the relevant signatory States. Information on, including the text of these treaties can be found at: <http://www.wipo.int/treaties/en/>.
- The African Intellectual Property Organisation aims to foster the conditions favourable to valorising the results of research and development, encourage the transfer of technology and to make the IP legal framework attractive to private investment. They offer training courses, and their website provides tools, including guides to filing for IP and model applications, as well as access to a patent database. Visit <http://www.oapi.int/>.
- For a directory listing 189 country and 10 regional copyright and industrial property offices with information relating to the registration of intellectual property, contact information and links to their web sites visit: <http://www.wipo.int/directory/en/urls.jsp>.
- The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), covers five broad issues: i) how basic principles of the trading system and other international intellectual property agreements should be applied ii) how to give adequate protection to intellectual property rights; iii) how countries should enforce those rights adequately in their own territories; iv) how to settle disputes on intellectual property between members of the WTO; and v) special transitional arrangements during the period when the new system is being introduced.

For more detailed information on intellectual property and the TRIPS agreement, specific TRIPS issues, TRIPS work in the WTO and disputes concerning the TRIPS, visit the WTO TRIPS gateway site at: http://www.wto.org/english/tratop_e/trips_e/trips_e.htm.

- The World Intellectual Property Office maintains a comprehensive source of information on intellectual property issues for SMEs, which takes into account their special needs such as time and resource constraints. It brings together practical information and case studies on best practices for making intellectual property rights more accessible and relevant to SMEs. Visit <http://www.wipo.int/sme/en/>.
- The European Patent Office has produced a series of case studies that provide practical information on how SMEs manage their intellectual property. Visit <http://www.epo.org/topics/innovation-and-economy/sme-case-studies.html>
- The WIPO Arbitration and Mediation Center offers alternative dispute resolution options, in particular arbitration and mediation, for the resolution of international commercial disputes between private parties. The procedures offered by the Center are widely recognized as particularly appropriate for technology, entertainment and other disputes involving IP. For information on how it works, case examples, fees, contact information and background resources visit <http://www.wipo.int/amc/en/index.html>
- The Australian government has developed an IP toolbox offering to businesses practical information on the use and management of IP. While parts of the Toolbox are Australian content-specific, the guide is also a useful resource to all IP owners and managers. Visit <http://www.iptoolbox.gov.au/default.asp?action=article&ID=3>

Contract Enforcement and Dispute Resolution

PFI Q:1.4 asks “Is the system of contract enforcement effective and widely accessible to all investors? What alternative systems of dispute settlement has the government established to ensure the widest possible scope of protection at a reasonable cost?”

Rationale for the question

For markets to function properly, the ability to make and enforce contracts and resolve disputes is a fundamental requirement. Good enforcement procedures enhance predictability in commercial relationships and reduce uncertainty by instilling confidence in 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, economies rely on less efficient commercial practices. Traders depend more heavily on personal and family contacts; 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. Question 1.5 is related to this question. It deals with cross-border investments and concerns contract enforcement in the event of expropriation of assets.

Key considerations

Contract law are the rules set and administered by the state that determine when an agreement is enforceable, the grounds on which a breach of the agreement will be found and the consequences for breach. Contract enforcement is one of the pillars of the rule of law.

Effective contract enforcement. When two parties strike a bargain, there must be some mechanism to ensure that each party will stick to the terms. The main contract enforcement mechanisms are self-enforcement (e.g. posting bonds, ending a commercial relationship), reputation (e.g. risking a future commercial relationship), organizational (e.g. third party audits), technology (e.g. to monitor sales) and of course contract law. The PFI user needs to examine these mechanisms. From an economy wide perspective, the issue is not whether a contract can or cannot be enforced. Rather it is the cost of the various enforcement mechanisms and their efficacy in improving the confidence between contracting parties. To be effective, the costs of enforcement must not outweigh the gains achieved from increased contractual commitment.

Institutional requirements to support contract enforcement. Having a contract law on the books is not sufficient, however. The PFI user must also examine the role and the practices of the legal institutions that support the effective implementation of contract law. The legal institutions relate to the organization of courts, an independent and competent judiciary, the legal profession, the enforcement services and the process of law making itself. Their design is a crucial factor influencing equality of treatment between actors (e.g. small- and large-sized enterprises) and also bears on the cost of contract enforcement and thus the reliance and confidence that investors have in the system of contract enforcement.

Alternative dispute settlement processes. Exclusive reliance on formal systems of contract enforcement (i.e. litigation through the judiciary system) can be costly and slow. Alternative dispute resolution systems seek to resolve differences between parties through discussion in a timely and fair manner. The main examples are mediation and conciliation, often offered by industry bodies, specialized agencies or third party evaluators, conducted at the national or international level. Alternative dispute settlement processes often complement and sometimes supplement judicial contract enforcement procedures and can strengthen

contractual commitment at lower cost. The PFI user should, therefore, consider how well these alternative dispute resolution mechanisms function. This involves forming an assessment of the relative costs and efficacy of the alternatives available and the methods of involvement by the official sector to enforce settlement agreements.

Policy practices to scrutinise

Based on these considerations and good practices the PFI user should form an assessment on the effectiveness of a country's contract enforcement and dispute resolution system.

Key issues for the reviewer are how the contract enforcement system (i.e. contract law and supporting legal institutions) performs in terms of: securing committal between transacting parties; the enforcement of contracts at a reasonable cost; accessibility to all investors; and the options for and cost effectiveness of alternative dispute settlement mechanisms.

The following policy practices and criteria ought to be considered:

- The role of the rule of the law in the development and protection of contractual rights. Areas that need to be considered include whether:
 - The jurisdiction for hearing contractual disputes is clearly defined in law (e.g. for contracts involving foreign entities, government and state owned enterprises) and in which courts or arbitral tribunals (e.g. local, specialized, small-claim courts etc); each agency involved in contract enforcement has well delineated responsibilities and powers to order particular remedies to parties and if there are limitations on these powers (e.g. sovereign immunity) they are transparent; national laws and international conventions define the validity and enforcement of foreign judgments and arbitral awards; and clear rules exist on who can invoke the work of the court (e.g. government agencies, like the competition authority or third party beneficiaries of the contract).
 - The existence of distinct laws that underpin and support self-enforcement mechanisms. For instance, laws enabling and governing transactions secured by collateral, deposits, bonds and so on. These increase the effectiveness of a contractual promise by reducing the cost of enforcement and or the risk of unsatisfactory court adjudication and orders. The PFI user needs to examine if the institutional environment is able to recognize and enforce these practices. Is it, for example, legally possible to establish escrow accounts or liens?
- The implementation of contract enforcement mechanisms. While mechanisms might be available in principle to enforce contractual agreements, experience often shows that the process can be limiting, because it is expensive, slow or partial. The PFI user will need to examine the policy practices and constraints that may be acting to compromise the effective implementation and enforcement of contractual agreements. The factors to consider are:
 - The performance of the supporting legal institutions. This will involve assessing judicial expertise (e.g. technical capacity of judges to hear complex business disputes), the impartiality and independence of the courts and the integrity of the judiciary (e.g. adhering to codes of judicial ethics, evidence or strong perceptions of corruption). The court system (e.g. case load of judges, backlog of cases, level of funding, staff training); case management practices of the court system (e.g. time limits and sanctions on delaying tactics, use of information technology for filing and tracking cases, for implementing procedural and jurisdictional rules, and for recording and disseminating reasoned case histories); the ability of the courts to contribute to jurisprudence in the area of contract enforcement (e.g.

mandatory publication of decisions); and the track record of the legal system enforcing contractual agreements and settlements (e.g. do all types of parties duly obey court orders?).

- The costs involved by a plaintiff to enforce a contract. This will depend on court fees including taxes, expert fees, enforcement fees, costs of discovery and geographic accessibility to courts. Enforcement costs will also depend on the average length of time required to enforce a contract through the court system. This in turn is determined by the number and complexity 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 judgement period and to enforce the judgment. Also relevant for determining enforcement costs is whether procedural rules depend on the nature of the dispute and the court that is hearing the dispute (e.g. small-claim courts often have simplified procedures).
- When examining the practices of a country's contract enforcement and dispute settlement system, the point for the PFI user is not to make a choice between one judicial system over another. Rather, it is to evaluate the cost and effectiveness of different contractual enforcement mechanisms in the reviewed country's specific institutional context. In doing this, it is important to obtain the views of all the players. Since businesses are often the parties involved in disputes they can help pin point the possible practices, which deter accessibility, raise the cost and slow down the process of resolving commercial disputes. Similarly seeking the views of judges, lawyers etc. can help to identify reform needs (e.g. conflicts of law) and possible solutions that improve the efficiency of the courts in the enforcement of contractual rights and obligations.
- Other dispute settlement systems. The PFI user needs to assess the measures taken to encourage the use of other dispute resolution mechanisms (e.g. ICC, UNCITRAL, ICSID arbitration) and to examine the cost effectiveness of alternative options for hearing and settling disputes. The factors to consider are: whether all investors have the right to choose an alternative dispute settlement method (e.g. international commercial arbitration); and if not, the rules that determine access; the procedures concerning the enforcement of arbitral awards and how well they function (e.g. no significant additional cost to the plaintiff and prompt settlement); and the rules that determine final authority (e.g. consider no new evidence, time to appeal period) and whether they succeed in limiting the practice of "forum shopping": i.e. tactics used by a party to unduly delay the process of settlement by trying to have their case re-heard before the formal court system.

Further resources and case studies

The following resources support the PFI user needing additional information on contract enforcement and dispute resolution:

- The International Development Law Organisation (IDLO) provides developing countries with resources, tools and professional skills for establishing or strengthening the rule of law. They offer programmes specifically designed to improve legal frameworks and build capacity in commercial law, including contract enforcement. Visit: <http://www.idlo.int/english/External/IdloHome.asp>.
- One dimension of the World Bank Cost of Doing Business project covers contract enforcement. The indicators measure the efficiency of the judicial system in resolving a commercial dispute. The data are based on a payment dispute before local courts and relate to: i) the number of procedures involved; ii) the average time, measured in days it takes to enforce a contract from the moment a plaintiff files the lawsuit until payment and; iii) the cost entailed, relative to the value of the debt (assumed to be 200 per cent of the country's per capita income). The information is

updated yearly and is available for most countries, facilitating cross-country comparisons. See www.doingbusiness.org.

- The Judicial Reform Index is a tool developed by the American Bar Association to assess how judicial institutions implement the rule of law. The JRI was conceptualized and designed on the basis of comparative legal traditions as well as international standards, such as the U.N. Basic Principles on the Independence of the Judiciary. The tool has been used to assess judiciaries in more than 15 countries in Europe and Eurasia through a prism of 30 indicators related to: quality, education and diversity of judges; judicial powers; financial resources; structural safeguards; transparency; and judicial efficiency. The tool could be applied in other countries. Care is needed, however, when drawing inferences from indicators alone, as they run the risk of oversimplifying or misleading the real situation. For details on the methodology and results of countries' judicial system reviewed to date visit: <http://www.abanet.org/ceeli/publications/jri/home.html>.
- One area of work of the United Nations Commission on International Trade Law (UNCITRAL) is International Commercial Arbitration and Conciliation. Their website offers UNCITRAL Model Laws on International Commercial Conciliation and International Commercial Arbitration, guidelines and procedural rules on their use, as well as a set of useful on-line resources. Visit: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html.
- The International Centre for Settlement of Investment Disputes (ICSID) is an international institution established under the Washington Convention. ICSID provides facilities for conciliation and arbitration of international investment disputes. Information on their services, how they function, their rules and regulations, a list of signatory countries, the text of the Washington Convention on the Settlement of Investment Disputes and a record of public ICSID Awards are available at: <http://www.worldbank.org/icsid/>.
- The World Bank has produced an Alternative Dispute Resolution Manual, which provides practical advice and an overview of good practices for projects introducing commercial mediation to any legal system. Using case studies, diagnostic and assessment tools, and stakeholder-specific marketing approaches, the manual provides strategies to overcome the challenges of building alternative dispute resolution programs. Visit: <http://rru.worldbank.org/Toolkits/AlternativeDisputeResolution/>

Expropriation Laws and Review Processes

PFI Q:1.5 asks “Does the government maintain a policy of timely, adequate, and effective compensation for expropriation also consistent with its obligations under international law? What explicit and well-defined limits on the ability to expropriate has the government established? What independent channels exist for reviewing the exercise of this power or for contesting it?”

Rationale for the question

In certain circumstances, governments have a legitimate need and the right to take private property for public purposes. In environmental emergencies, public authorities may need in the interest of public health to resettle people whose property is located in irreparably contaminated areas. To develop infrastructure, such as roads and power stations, governments may need to acquire land to place these assets. However, when a government expropriates property, a natural corollary of the protection of property rights is the need for timely, adequate and effective compensation. The right to fair compensation and due process is uncontested. It is also reflected in international customary law and international investment agreements. At the same time, some recent agreements provide that except in rare circumstances, non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, are not considered to constitute expropriations. Uncertainty about the enforceability of lawful rights and obligations should be avoided, because it will restrain investment by raising the cost of capital, weakening the competitiveness of business enterprise.

Key considerations

Defining the power to expropriate property. An initial consideration governments are encouraged to ask themselves is whether the public interest can be served by using public policy means other than expropriation. An example is giving government the right of first refusal on land transactions. If a government decides to expropriate land or other property, this decision ought to be motivated by a public purpose, observe due process of law, be non-discriminatory and guided by transparent rules that define the situations in which expropriations are justified and the process by which compensation is to be determined. This involves examining whether the country’s laws adhere to these principles and are in accordance with investment and investment-related treaties (e.g. investment guarantee treaties), which add to the predictability and legal enforceability of property rights against arbitrary expropriation.

Management of expropriation cases. While best practices for handling the expropriation of private property may be built into the statute book, experience may often reveal a gap with actual practices. The PFI user will need to examine the policy practices and constraints that may be acting to compromise the due process of law, including the implementation of timely, adequate and effective compensation for expropriation. In some expropriation cases, the modalities go beyond financial compensation, and thus need to be taken into consideration too. Land taken to build a hydroelectric project, for example, will typically involve resettlement issues.

Contesting expropriation decisions. In countries governed by the rule of law, the government is itself subject to the law. When an expropriation event is contested, the final say on the legitimacy of the expropriation, or the terms on which compensation is made should be handled by a court or other tribunal. The PFI user needs to consider these institutional arrangements. This involves examining: whether a court or tribunal – domestic or international - has the authority to review decisions regarding expropriation of property; the powers to give effect to its decisions; the restrictions, if any, on who has the right to contest an expropriation event; the modalities for filing an appeal or contesting an expropriation decision; and the technical capacity of the court or tribunal to hear contested expropriation cases.

Policy practices to scrutinise

Based on these considerations and good practices the PFI user should form an assessment on a country's expropriation laws and review processes.

Key issues for the reviewer are to evaluate the clarity and transparency of expropriation laws and modalities in terms of their ability to provide when necessary timely, adequate and effective compensation, their consistency with international norms and to examine whether independent channels exist to review, or for the parties to contest decisions to expropriate property.

The following policy practices and criteria ought to be considered:

- Defining the ability to expropriate private property. Areas that need to be considered include:
 - The laws that permit the confiscation of property and whether they expressly limit the conditions under which the government may expropriate private property for public purposes (e.g. nationalization) and legal standards exist for determining when an expropriation event has occurred. Specific features of the laws permitting expropriation to examine include whether: i) they are non-discriminatory (e.g. in terms of nationality); ii) they establish the right to adequate compensation; iii) they allow for a review process; and iv) 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).
 - It is not feasible to list every circumstance in which the State may take private property in the public interest. Rather the PFI user should establish whether efforts have been made by the authorities to define the concept and to place boundaries on the scope of the public interest. Expropriation motivated on political grounds, for example, is not in the public interest.
 - Regulations that de facto result in the expropriation of property. Regulatory actions may constitute expropriation because they may have the effect of denying an owner the ability to use or sell property or otherwise heavily encumber its use, reducing the economic value of the property. Many government decisions can affect the value of private property, however. It is clearly not the role of the PFI user to make judgments on whether the government is exercising its regulatory powers or acting to seize indirectly property. Rather, the PFI user needs to assess whether efforts have been made by the government to inform its agencies and provide guidance on how to distinguish practices that may constitute indirect expropriation. This may involve, for instance, collecting, synthesizing and communicating the reasoned decisions of case histories from conciliation commissions and arbitral tribunals. For events that were determined to be cases of indirect expropriation, the PFI user should examine whether the property owner was compensated, following the same modalities as for direct expropriation.
- Compensation modalities. The PFI user will need to examine the policy practices and constraints that may be acting to compromise the payment of timely, adequate and effective compensation for expropriation. The factors and criteria to consider are:
 - The median time taken to effect compensation following an expropriation event. There is no golden rule on the length of time taken, as it depends on many factors (e.g. complexity of the case). Comparisons with countries with similar cases can provide a benchmark.
 - The standard of compensation and methods of valuation. A criterion to assess whether compensation is adequate is how close the amount paid is to the current market value of the expropriated property immediately before the taking occurred. This then involves examining

the methods used to determine market value. In straightforward cases, such as land, there are usually prevailing market prices, but for unique or rarely traded assets, there is no readily available market price. In these cases the PFI user needs to assess efforts by the government to avoid arbitrary procedures, looking at what valuation techniques are used (e.g. book value), which factors are taken into consideration (e.g. value of intangible assets, depreciation, damage to property), the legal standards applied; and what practices are adopted (e.g. use of third-party expert valuations, payment of interest).

- The modalities of compensation payment. In addition to prompt payment, compensation should be effective. The PFI user needs to assess whether payments are fully realizable (e.g. paid in cash), and freely transferable (e.g. convertible into another currency, or payable in a hard currency). In some instances, non-pecuniary settlement is offered (e.g. resettling displaced persons). In these cases, the modalities to examine include: use of dialogue with those directly concerned; proximity to previous location; similar amenity value; and comparable quality of the substitute offered in compensation.
- Analyses of case law on expropriation and consultations with the stakeholders to gain their insights and experiences with the process. This will also help the PFI user to ascertain whether there are signs of potential problems (e.g. disproportionate number of cases in a specific sector, or involving foreign enterprises), shed light on the time taken to obtain compensation, the actual methods used to calculate compensation, and on the manner of expropriation (e.g. arbitrary or guided by due process).
- Independent channels to review or challenge expropriation measures. The PFI user needs to examine the mechanisms available and processes for contesting expropriation measures. The factors to consider are:
 - Whether the appellate body is independent from the agency ordering the expropriation; has the power to review and if necessary overturn government agency decisions regarding expropriation and compensation to owners of expropriated property; the grounds on which a decision can be challenged are clear and transparent (e.g. documented procedural rules); whether national laws recognize alternative dispute resolution systems (e.g. foreign-based conciliation commissions and arbitral tribunals) and honour and enforce their decisions.
 - The technical capacity of the court or tribunal to review expropriation measures. On this point, the policy practices to scrutinize are discussed in detail in question 1.4.

Further resources and case studies

The following resources support the PFI user needing additional information on expropriation laws and review processes:

- International Centre for Settlement of Investment Disputes (ICSID) is an autonomous international institution established under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The purpose of ICSID is to provide facilities for conciliation and arbitration of international investment disputes between states and investors, including expropriation. Information on ICSID rules of procedure and arbitral awards are available at: <http://www.worldbank.org/icsid/>.
- The United Nations Commission on International Trade Law (UNCITRAL) has a general mandate to further the progressive harmonization and unification of the law of international trade. One area of the Commission's work is International Commercial Arbitration and Conciliation. Their website offers UNCITRAL Model Laws on International Commercial Conciliation and

International Commercial Arbitration, guidelines and procedural rules on their use, as well as a set of useful on-line resources. Visit: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html

- The International Court of Arbitration of the International Chamber of Commerce (ICC) is an international arbitration institution providing for international commercial arbitration and alternative dispute resolution mechanisms. The website offers information on the ICC's work, arbitration rules and guidelines on the ways in which the ICC Rules of Arbitration can most effectively be used. Visit: **Error! Hyperlink reference not valid.**<http://www.iccwbo.org/court/>
- Lex Mercatoria, an online law site dedicated to the provision of information on international commercial law, have compiled a comprehensive set of resources on international commercial arbitration and other dispute settlement channels. Visit: <http://www.jus.uio.no/lm/arbitration/toc.html>
- The link below is to an OECD Investment Committee paper on “‘Indirect Expropriation’ and the ‘Right to Regulate’ in International Investment Law”. The paper surveys the factual elements of information on jurisprudence, state practice and literature on this matter. It presents the issues at stake and describes the basic concepts of the obligation to compensate for indirect expropriation; reviews whether and how legal instruments and other texts articulate the difference between indirect expropriation and the right of the governments to regulate without compensation; and attempts to identify a number of criteria which emerge from jurisprudence and state practice for determining whether an indirect expropriation has occurred. <http://www.oecd.org/dataoecd/22/54/33776546.pdf>
- The Investment Treaty Forum at the British Institute of International and Comparative Law is a centre for discussion and research in public international law and international commercial arbitration. The Forum facilitates debate among lawyers, senior business managers, policy advisers, academics, government officials and other specialist practitioners. The Forum also plays a role in the encouragement of dialogue with state representatives. Part of this work involves reviewing each of the arbitral awards where the issue of damages was discussed. The thrust of each case summary is on issues related to the award of monetary compensation. These case study summaries are available to Members of the Institute's Investment Treaty Forum and accessible from: <http://www.biicl.org/itf/>
- The Political Risk Insurance Center (PRI-Center) is an information portal providing a searchable database of Web-based documents on political risk environments; on legal issues related to arbitration, mediation and other investment dispute resolution and prevention mechanisms; research findings and analyses of political risk issues and their relationship to foreign direct investment. <http://www.pri-center.com/>

Non-Discriminatory Treatment for National and Foreign Investors

PFI Q:1.6 asks “Has the government taken steps to establish non-discrimination as a general principle underpinning laws and regulations governing investment? In the exercise of its right to regulate and to deliver public services, does the government have mechanisms in place to ensure transparency of remaining discriminatory restrictions on international investment and to periodically review their costs against their intended public purpose? Has the government reviewed restrictions affecting the free transfer of capital and profits and their effect on attracting international investment?”

Rationale for the question

Non-discriminatory treatment concerns the notion of "national treatment", which provides that a government treat investments controlled by the nationals or residents of another country no less favourably than domestic investments in like situations. National treatment does not require identical treatment, but equivalent treatment. Equivalent treatment is when a different regime applies to non-residents as compared to residents to place them on an equal footing (e.g. for prudential purposes). Non-discriminatory treatment also means that an investor or investment from one country is treated by the host country “no less favourably” with respect to a given subject matter than an investor or investment from any third country (referred to as Most Favoured Nation or MFN in international agreements) in like situations. Reciprocally, non-discriminatory treatment does not call for providing advantages to foreign investors.

The application of these principles towards investment varies considerably across countries, partly because a states right to regulate sometimes involves discriminating against foreign investors. Policies that favour some firms over others (i.e. any policies that derogate from national treatment or MFN) involve a cost, however. They may result in less competition (see also the chapter on Competition Policy) distorting resource allocation, impede linkages between MNEs and local suppliers and slow the diffusion of technological innovations. These effects act as a disincentive to all investors and give a negative perception about a country’s receptiveness towards investment. This is why exceptions to non-discrimination, especially in sectors that play a central role in the development of an economy (e.g. financial and telecommunication sectors) need to be periodically re-evaluated to determine whether the original motivation and national benefits behind an exception remain valid and outweigh the costs borne by consumers, suppliers and investors.

The ability to transfer investment-related capital, including repatriating earnings and liquidated capital, is important for any firm to be able to make, operate, and maintain investments in another country. At the same time, governments sometimes need to limit these economic freedoms in order to address serious balance of payment difficulties. Since measures that restrict the free transfer of capital may adversely affect inflows of international investment, deter domestic companies from accessing international capital markets to fund investment and encourage inefficient and non-transparent practices such as transfer pricing, restrictions on the transfer of funds also need to be reviewed periodically. Governments have authority to take any measure required to prevent evasion of their laws and regulations.

Key considerations

Establishing non-discriminatory treatment The PFI user needs to consider how and to what extent the country’s laws and regulations apply the non-discrimination principle governing investors and investments. This involves making a factual evaluation of the scope of national treatment and a stocktaking of the situations in which national treatment applies, or more often compiling a list outlining the number and scope of exceptions from the operation of national treatment. It is also necessary to consider how well in practice the laws and regulations operate, and the interactions with the concepts of MFN and fair and equitable treatment.

Transparency and periodic review of discriminatory restrictions on international investment The PFI user also needs to consider instances where discrimination in investment policy - either inadvertent or, intended – represent the best option for meeting particular policy objectives. Here, it needs to be recognized that there is a tradeoff between offering national treatment as a means of increasing investment and qualifying national treatment as a means of promoting local enterprise development. While peer practices can offer insights on how to evaluate the trade-offs, the actual balance will depend on country specific conditions, levels of development and the objectives of each host country. For the PFI user the basic consideration is to ask and evaluate whether the present level and form of exceptions to national treatment contribute to promoting their goals and economic development more generally; whether alternative policy instruments could achieve the same goals more effectively; and how exceptions to national treatment operate as a disincentive to investment.

Free transfer of funds The PFI user needs to consider the types and the coverage of a country's restrictions on the transfers of investment-related capital, as well as the key features of how they operate. This information will help the PFI user to analyse both the channels and how capital transfer restrictions impact on the ability of a country to mobilize international investment. It is not always possible, however, to identify a measurable impact on investment flows; often the impact may not materialize immediately, but affect future investment flows. The PFI user should, therefore, consider the effect of specific capital transfer provisions on investment expenditures and planned expenditures in consultation with all the parties concerned.

Policy practices to scrutinise

Based on these considerations and good practices the PFI user should form an assessment of non-discriminatory treatment for national and foreign investors.

Key issues for the reviewer are whether national laws and regulations treat foreign investors operating in the host country comparably to domestic investors; grant foreign investors treatment comparable to other foreign investors operating in the host country in like circumstances; whether discriminatory practices between domestic and foreign and among foreign investors are transparent; to identify any restrictions which impede the free transfer of capital and profit; and to assess whether they act to deter investment.

The following policy practices and criteria ought to be considered:

- The legal framework establishing non-discrimination as a general principle governing investment. Areas that need to be considered include:
 - Whether a country's constitution, laws governing commercial activity, including the investment law if one exists, other relevant laws and regulatory practices enshrine the principle of non-discrimination; their scope and application (e.g. sub-national authorities apply national treatment); if discrimination can be exercised through discretionary powers, and if so are there safeguards in place to avoid abuse of discretionary power; at what phase national treatment is embodied in international investment agreements that the country is a party to (i.e. pre- or post-establishment); whether these agreements grant most-favoured-nation treatment to investors and investments; how strictly treatment is compared to national investors (e.g. "same as", "as favourable as" or "no less favourable"); and whether national treatment is dependent on a reciprocal commitment to the standard or deferred to a later date (as is done, e.g. in the Energy Charter Treaty).
- No country unequivocally applies national treatment. Laws and regulations and international agreements rightly allow a country to make qualifications. While it is not the role of the PFI user to pass judgement on the exceptions, it is important that where exceptions exist and when the

scope of national treatment is limited that these are transparent and clearly defined in law. This requires identifying:

- General exceptions (e.g. to maintain public health, the protection of national security); subject specific exceptions (e.g. intellectual property, taxation provisions in bilateral tax treaties); and country-specific exceptions (e.g. specific industries, such as financial services and transportation). It is also important to understand whether exceptions are based on an explicit and clearly defined rationale (e.g. public order, economic development, such as infant industries); and if exceptions are notified to international organizations or in the context of investment or trade agreements (e.g. OECD National Treatment Instrument, or Article 6 TRIMS agreement); and the key features of their design (e.g. indefinite duration, or for a defined time period). Alternatively, and in some international agreements national treatment extends only to those areas and industries identified in a ‘positive’ list (e.g. TRIMs and GATS agreements).
 - The nature of the exceptions. For instance: across-the-board screening procedures for FDI entry, more burdensome licensing requirements for foreign investors than for domestic investors, sectoral foreign equity ownership ceilings, denial of access for foreign control-established enterprises to local finance and incentives (e.g. tax concessions), legal establishment (e.g. subsidiaries or branches), denial of access to specific markets (e.g. public procurement, privatizations), performance requirements (e.g. local content rules) and other discriminatory practices (e.g. nationality based restrictions on boards, limits on key personnel).
 - How the country compares with other countries in the region, and or a similar level of economic development in terms of its discriminatory measures. The factors to consider are whether the country benchmarks the scope of national treatment in their laws and in practice with other similar economies; periodically reviews the list of exceptions based on an analysis of their costs and benefits, or a narrower regulatory impact analysis (see Q 10.3); and if reviews canvass the views and observations of national and international investors and other relevant stakeholders.
- The free and full repatriation of capital and profits from investments. The PFI user needs to examine a country’s practices and restrictions on the transfer of investment-related capital, their key features and their impacts on investment decisions. This requires identifying:
 - The scope of provisions allowing for the free transfer of funds. For instance, rules apply both to inward and outward investment, or whether different rules are in force depending on the direction of the investment flow; whether rules apply to both existing and new investments; the types of investment-related capital and their coverage (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); and the conditions that are attached to the transfer of investment-related capital (e.g. convertibility requirements)
 - The principle exceptions and qualifications attached to the transfer of funds. The PFI user needs to be aware of provisions which effectively excuse a country from fulfilling obligations on the free transfer of capital that it has committed itself to, as well as the conditions under which new restrictions may be imposed (e.g. a balance of payments crisis); the form of these qualifications on the free transfer of capital (e.g. for a fixed duration in length, formal notification procedures, imposed on a discriminatory basis); and the types of transfer they apply to.

- The impact of restrictions on investment decisions. Factors to consider are: whether the country’s policies on the transfer of funds result in unreasonably high costs (e.g. because of excessive exchange transaction charges); unreasonable delays (e.g. because of numerous and complex verification procedures); and the scope for arbitrary and discretionary decisions regarding the transfer of investment-related capital (e.g. on the choice of exchange rate values).

Further resources and case studies

The following resources support the PFI user needing additional information on non-discriminatory treatment for national and foreign investors:

- OECD member countries have committed themselves to maintaining and expanding the freedom for international capital movements and current invisible operations under the legally binding OECD Codes of Liberalisation. It is an instrument applicable to all OECD member states, which collectively represent the majority of foreign investors. To contribute to a better understanding of the principles and procedures of the OECD Codes, a User’s Guide to the Codes has been produced. It provides detailed explanations of the coverage of the Codes and serves as a manual for Code users. It is accessible from: www.oecd.org/daf/investment/instruments
- The OECD Declaration on International Investment and Multinational Enterprises includes an instrument on National Treatment. It consists of two elements: a declaration of principle and a procedural OECD Council Decision, which obliges adhering countries to notify their exceptions to National Treatment, and established follow-up procedures to deal with such exceptions. The website: www.oecd.org/daf/investment/instruments offers information on the National Treatment Instrument, how it works, a list of exceptions to National Treatment by each of the 40 countries adhering to the OECD Declaration on International Investment and Multinational Enterprises and a list of other measures having a bearing on the investment climate.
- The link below is to an OECD Investment Committee paper, which provides a methodology for measuring regulatory restrictions on inward foreign direct investment. The paper calculates a summary measure of restrictiveness for OECD countries and extends the approach to 13 non-member countries. The methodology covers three broad categories of restrictions: limitations on foreign ownership, screening or notification procedures, and management and operational restrictions. The FDI restrictiveness indicator captures statutory deviations from "national treatment". <http://www.oecd.org/dataoecd/4/36/37818075.pdf>.
- The link below is to an OECD Investment Committee paper on “Fair and Equitable Treatment Standard in International Investment Law”. The article surveys factual elements of information on jurisprudence, literature and state practice related to the fair and equitable treatment standard. It examines the origins of the standard and its use in international agreements and state practice, its relationship with the minimum standard of international customary law; and the elements of its normative content as identified by arbitral tribunals <http://www.oecd.org/dataoecd/22/53/33776498.pdf>.
- The link below is to an OECD Investment Committee paper on “Most-Favoured-Nation Treatment in International Investment Law”. The article surveys jurisprudence and related literature on MFN treaty clauses in investment agreements. It defines the MFN clause, traces back its origins and provides some examples of such provisions in the two major types of model investment agreements in existence (the “North American model” and the “European model”). It then summarises relevant aspects of the extensive work carried out by the International Law

Commission between 1968 and 1978 on MFN clauses and describes recent arbitral awards on the scope of application of MFN treatment clauses resulting from disputes under investment treaties. <http://www.oecd.org/dataoecd/21/37/33773085.pdf>

- This link http://www.wto.org/English/thewto_e/whatis_e/tif_e/agrm6_e.htm gives access to the pages of the World Trade Organisation website dealing with the General Agreement in Trade in Services (GATS). The GATS agreement covers all internationally traded services and defines four ways of trading. The third way - mode 3 - is when a foreign company sets up a subsidiary or branch to provide services in another country. The website provides technical and non-technical information about the GATS agreement, including the application of the Most-Favoured-Nation and National Treatment Principles.
- The IMF compiles in close consultation with national authorities The Annual Report on Exchange Arrangements and Exchange Restrictions. It tracks for each country in a tabular format exchange measures in place, the structure and setting of the exchange rate, arrangements for payments and receipts, procedures for resident and non-resident accounts, mechanisms for import and export payments and receipts, controls on capital transactions, and provisions specific to the financial sector. <http://www.imf.org/external/pubs/cat/longres.cfm?sk=19313.0>

International Co-operation and Periodic Review

PFI Q:1.7 asks “Are investment policy authorities working with their counterparts in other economies to expand international treaties on the promotion and protection of investment? Has the government reviewed existing international treaties and commitments periodically to determine whether their provisions create a more attractive environment for investment? What measures exist to ensure effective compliance with the country’s commitments under its international investment agreements?”

Rationale for the question

International investment agreements promote cross-border investment. They can do this by reducing restrictions on sectors closed to international investment, by offering investors minimum levels of protection based on international legal standards (e.g. against expropriation), and by making the rights and obligations of the parties more stable and predictable. Although the government loses some policy flexibility, risks and uncertainties faced by investors are reduced, helping to mobilize additional investment. Wider country coverage of international investment agreements is thus one of the elements underpinning an attractive investment environment.

A country’s investment climate is not static in the sense that once established it will be good for all time. Terms of trade, technologies and policies in other countries change continuously. This means two things. First, a country’s competitiveness can change even when a government has made no changes in its own rules. Second, a country’s policy practices and regulations (e.g. performance requirements) can quickly become outdated vis-à-vis prevailing best practices. Both points underscore the need for a country to review periodically provisions under their international investment agreements to ensure they play fully their role in promoting investment, and to ascertain their effective implementation.

Key considerations

The international legal framework for attracting FDI Some of the topics covered in other questions in this chapter (e.g. Expropriation Laws and Review Processes, Q1.5; Non-discriminatory Treatment for National and Foreign Investors, Q1.6; and International Arbitration Instruments, Q1.8) and in other chapters (e.g. trade-related investment measures, Q3.5) relate to provisions of international investment agreements (IIA). For this question, the main consideration for the PFI user is not to revisit these issues, but to make an overall assessment of how well they and other IIA provisions in existing agreements perform in terms of providing an environment conducive to cross-border investment. It also involves reviewing efforts made by the authorities to expand the coverage of a country’s IIA and their compliance with them. The related area of international tax co-operation is covered in question 5.9.

Policy practices to scrutinise

Based on these considerations and good practices the PFI user should form an assessment of international co-operation and periodic review.

Key issues for the reviewer are to take stock of the international legal framework for attracting FDI and to assess the efforts being made to review and further develop international investment co-operation and their effective implementation.

The following policy practices and criteria ought to be considered:

- Coverage of international investment agreements. The PFI user needs to take stock of the existing investment treaty network and their status. This involves identifying the bilateral investment treaties (BIT) the country is a signatory to, and whether they have been ratified. If the country is a

signatory to a BIT, but has not ratified the agreement, the PFI user needs to probe into understanding the reasons that have prevented the country from doing so. It also involves taking stock of other international agreements that facilitate cross-border investment (e.g. regional investment agreements, concession agreements, the Energy Charter Treaty, TRIMs and GATS: see also the Trade Policy Chapter, bilateral tax treaties: see also the Tax Policy chapter and treaties covering intellectual property: see also question 1.3). Calculating the proportion of FDI inflows, which are protected by IIAs offers a summary measure of the coverage of a country's IIAs. Cross-country comparisons need to be interpreted with care, however, since the scope of IIAs can vary widely (e.g. because of the definition of investment used, or the extent of sectoral exceptions).

- Expanding international investment agreements. The PFI user needs to understand the strategic approach of the country towards international investment co-operation. This involves examining the institutional arrangements in place. For example, who has authority and responsibility for initiating negotiations, is there a dedicated unit responsible for evaluating the performance of existing agreements and how do new agreements incorporate the lessons drawn from existing international co-operation. The latter might involve, for instance, countries developing and modifying a model BIT in light of emerging best practices. Review processes should also involve regular interaction with relevant stakeholders and the partners to international investment agreements. These parties are often well placed to provide rapid feedback on emerging trends or problematic areas, as well as giving their perceptions about the investment climate. There is no golden rule on the frequency a country should review its international treaties and commitments. It will depend, inter alia, on the number of treaties, their average vintage and the specific issues that have emerged between the parties (e.g. in arbitration).
- Effective compliance with international investment agreements. The PFI user needs to examine details of the IIA compliance processes. This involves identifying gaps between commitments made and actual compliance. In some agreements (e.g. TRIMs) there are transitional periods and notification requirements. It also involves assessing whether the authorities responsible for implementation have the expertise and capacity to ensure commitments are enforced and examining efforts to communicate to government agencies the implications of IIAs for their areas of responsibility (e.g. implementation guides).

Further resources and case studies

The following resources support the PFI user needing additional information on international co-operation and periodic review:

- UNCTAD's programme on International Investment Agreements has developed resources that aim to help developing countries to participate as effectively as possible in international discussions or negotiations on investment at the bilateral, regional, plurilateral and multilateral levels. Resources include databases on bilateral investment treaties and a collection of treaty-based investor-State dispute settlement cases, which were disclosed by the parties or arbitral institutions, articles on key concepts and issues relevant to international investment agreements and recent trends and developments in international investment rule making. These resources are accessible from:
<http://www.unctad.org/Templates/StartPage.asp?intItemID=2310&lang=1>
- The World Bank website <http://icsid.worldbank.org/ICSID/FrontServlet> (then click on bilateral investment treaties under *Quick Locators*) provides a database of bilateral investment treaties and ICSID arbitral awards. It is a good place to start when verifying what investment

agreements have been signed. The database, however, is not conclusive. UNCTAD also maintains a database of bilateral investment treaties at: <http://www.unctadxi.org/templates/DocSearch.aspx?id=779>

- This link http://www.wto.org/english/tratop_e/invest_e/invest_e.htm gives access to the pages of the World Trade Organisation website dealing with trade and investment. It provides technical and non-technical information about trade and investment at the WTO, including reports from the WTO Working Group on the relationship between trade and investment, notification of TRIMs that have been eliminated, documents on dispute settlement involving the TRIMs agreement and a handbook on TRIMs notification requirements.
- The United Nations unit responsible for international trade law is the UN Commission on International Trade Law (UNCITRAL). Their website includes useful information, including model laws concerning various aspects important to international trade and investment. These include the 1985 UNCITRAL Model Law on International Commercial Arbitration, the Model Law on Electronic Commerce, Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts. These are available at <http://www.uncitral.org/uncitral/search.html?q=model+law>.
- The link below is to the electronic version of the OECD Model Tax Convention on Income and on Capital. The model is widely used by countries when negotiating bilateral tax agreements. These agreements are entered into by countries to clarify the situation when a taxpayer might find himself subject to taxation in more than one country. http://www.oecd.org/document/17/0,3343,en_2649_33747_35035793_1_1_1_1,00.html.

International Arbitration Instruments

PFI Q:1.8 asks “Has the government ratified and implemented binding international arbitration instruments for the settlement of investment disputes?”

Rationale for the question

International arbitration instruments provide a binding mechanism for the resolution of disputes between a host country and an investor, typically relating to commitments made in international investment agreements (see question 1.7). Most international investment agreements contain provisions for international arbitration (in limited instances contingent upon provisions on the exhaustion of local remedies). They afford domestic businesses collaborating in cross-border joint ventures and international investors doing business with government recourse to a usually cost effective, prompt, flexible, impartial and confidential channel for dispute settlement. While international arbitration instruments should normally be perceived as a last resort, their existence as an option provides a credible form of reassurance to investors and signals a government’s commitment to the rule of law and to observe its investment treaty obligations. They thereby bolster the confidence of investors that their property is secure (see also questions 1.2 and 1.4) and contribute to establishing a reliable and stable environment for investment.

Key considerations

Making international arbitration instruments operational. The preferred arbitration instrument for resolving disputes specified in investment treaties is the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention, also known as the Washington Convention). In order for a dispute to be brought before it, there must be a written agreement to arbitrate, most often in the form of a dispute settlement clause in an investment treaty. For non-ICSID arbitral awards, reference should be made to the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards. It makes, subject to certain exceptions, arbitral awards rendered in one party to the Convention enforceable in any other party to the Convention. For these Conventions to function properly and credibly, however, they require the country to be a signatory to and to ratify the Conventions, as well as national legislation and procedural rules so that foreign arbitral awards are recognized and enforced by local courts.

Improving how treaty arbitration functions. International arbitration not only helps to improve the effectiveness of dispute settlement, it can also help to avoid recourse to international arbitration in the first instance. This depends in part on the practices of international arbitration. Publication of arbitral awards, for instance, would contribute to the development of a public body of jurisprudence, as well as promoting the public acceptance of international investment arbitration. Higher visibility, more generally, helps to demonstrate national commitment to honouring instruments of international arbitration. The PFI user should consider issues such as how to promote among all the parties transparency in international investment arbitration and what steps the authorities are taking to improve their capacity and to develop their expertise in handling cases before international arbitration.

Policy practices to scrutinise

Based on these considerations and good practices the PFI user should form an assessment of international arbitration instruments.

Key issues for the reviewer are to examine: whether the state is a signatory to international arbitration instruments; that local laws and practices recognize and enforce foreign arbitral awards; and the efforts being made to improve how treaty arbitration functions.

The following policy practices and criteria ought to be considered:

- The implementation of international arbitration instruments. The PFI user needs to know whether:
 - The government has signed and ratified the major international arbitration conventions (e.g. Washington and New York Conventions) and regional arbitration conventions (e.g. the Olivos Protocol for the Settlement of Disputes in Mercosur, the ASEAN Protocol on the Dispute Settlement Mechanism). And in cases where a country is not a party to ICSID, if recourse to the ICSID Additional Facility is available.
 - The government has taken the steps needed to make operational its commitments under the international and regional arbitration conventions. This involves assessing whether national legislation, regulations and enforcement systems are in place so that parties can choose to commit themselves irrevocably to arbitrate disputes internationally and so that foreign arbitral awards are recognized and enforced by local courts and without undue delay.
 - 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); whether national courts interfere with valid arbitrations (e.g. accepting to hear a dispute or an appeal to an award that the parties had agreed to submit to international arbitration); and the clarity of supporting national legislation (e.g. ambiguities which may affect arbitral efficiency).
- How treaty arbitration functions. The factors to consider are:
 - The efforts by the government to promote the transparency of international arbitration without compromising confidential business and government information. For instance: when the parties agree are the outcomes of awards involving the country communicated widely (e.g. posted on relevant government websites); does the government participate in intergovernmental organizations that facilitate arbitration and other forms of dispute settlement between states (e.g. the Permanent Court of Arbitration).
 - The initiatives adopted by the government to strengthen its expertise in handling international dispute settlement instruments and managing the cases brought before international forums.
 - Whether the government and business organizations regularly draw lessons from the public body of jurisprudence aimed at enhancing the effectiveness of international investment arbitration. Where possible, the PFI user should also try to obtain the views and practical experiences of parties, which have invoked international arbitration.

Further resources and case studies

The following resources support the PFI user needing additional information on international arbitration instruments:

- The International Centre for Settlement of Investment Disputes (ICSID) is an international institution established under the Washington Convention. ICSID provides facilities for conciliation and arbitration of international investment disputes. Information on their services, how they function, their rules and regulations, a list of signatory countries, the text of the Washington Convention on the Settlement of Investment Disputes and a record of public ICSID Awards are available at: <http://www.worldbank.org/icsid/>.

- Lex Mercatoria, an online law site dedicated to the provision of information on international commercial law, have compiled a comprehensive set of resources on International Commercial Arbitration and other Dispute Settlement. Visit: <http://www.jus.uio.no/lm/arbitration/toc.html>
- The link below is to an OECD Investment Committee paper on “Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures”. The paper surveys the issues related to transparency and third party participation in investor-state dispute settlement procedures. It examines the way in which the current rules apply to these issues, describes the steps taken to improve the transparency of the system at the governmental level, by the arbitral Tribunals and the ICSID and examines the perceived advantages as well as the challenges of additional transparency. <http://www.oecd.org/dataoecd/25/3/34786913.pdf>.
- The UN held a conference on the status of the New York agreement and prepared a useful set of papers that outline the purpose and the experiences of various countries using the international system for enforcing foreign arbitral awards. This paper, “Enforcing Arbitration Awards under the New York Convention: Experience and Prospects” can be found at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>
- International Treaty Arbitration (ITA) is a resource for lawyers, academics, government officials, researchers and members of civil society who are interested in international investment law. ITA provides through its website: access to all publicly available investment treaty awards; information and resources relating to investment treaties and investment treaty arbitration; and links to further resources. Visit: <http://ita.law.uvic.ca/about.htm>.
- This link <http://www.unctad.org/jia-dbcases/> gives access to a database of Treaty-based investor-state dispute settlement cases that are pending or which have been concluded. Only those claims that were disclosed by the parties or arbitral institutions are included.
- The International Council for Commercial Arbitration (ICCA) website includes a comprehensive set of on-line resources relating to international treaties and conventions on arbitration, national arbitration law and national, regional and international institutions involved in arbitration.

Visit: http://www.arbitration-icca.org/directory_of_arbitration_website.htm.