



TRANSPARENCY AND PREDICTABILITY FOR INVESTMENT POLICIES ADDRESSING NATIONAL SECURITY CONCERNS: A SURVEY OF PRACTICES

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Executive summary

Transparency is the cornerstone of a well-functioning regulatory process. Countries participating in the “Freedom of Investment” project have exchanged experiences and ideas about the transparency and predictability of security-related reviews of foreign investment proposals. This paper summarises the findings of these discussions.

Nearly all participating countries codify investment laws and by making them readily available to the people covered by them. However, transparency practices differ in other important respects. For example, countries have diverse approaches to deciding which investments should be subject to review. Most countries adopt fairly simple rules for making this decision. These often involve sectoral lists and/or other triggers (e.g. size of investment or control thresholds). One country noted that its list is very narrow and that it contains only sectors that are obviously relevant for national security. Another approach involves case-by-case consideration of investment proposals based on well-defined, publicly available criteria for assessing risks posed to national security. The time taken for completing reviews varies. The average statutory limit for first-stage reviews is a month and a half, but some have longer review periods or second stage reviews.

Transparency and predictability of investment review procedures are enhanced if: 1) it is clear, from a national security perspective, why particular investment proposals are subject to scrutiny; 2) clear, publicly-available guidance is provided to the review panel on how it is to assess investment proposals and this guidance is focused on essential security concerns; 3) investment review panels can call on relevant national security and sectoral expertise, as needed; and 4) decisions to block or otherwise restrict proposed investments are made public or are subject to other transparency mechanisms (e.g. reports to Parliament) while also protecting commercially sensitive or classified information.

Transparency/predictability – while it is in investors’ and governments’ interests to maintain confidentiality of sensitive information, regulatory objectives and practices should be made as transparent as possible so as to increase the predictability of outcomes.

Transparency is the “cornerstone of a well-functioning regulatory process.”¹ In 2003, the Investment Committee adopted a report on investment policy transparency². For the investment policy community, transparency consists of making relevant laws and regulations publicly available, notifying concerned parties when laws change and ensuring uniform administration and application. It also involves offering concerned parties the opportunity to comment on new laws and regulations, communicating the policy objectives of proposed changes, allowing time for public review and providing a means to communicate with relevant authorities. In addition, international cooperation complements national efforts to ensure policy transparency by defining common standards and providing support for multilateral peer review and capacity building. The Committee issued a “Framework for Investment Policy Transparency” that covers *inter alia*: publication avenues and tools; prior notification and consultation; and procedural transparency and fairness.

Participants in the project on “Freedom of Investment, National Security and ‘Strategic’ Industries” (henceforth, FOI project) have shared their experience with measures designed to enhance transparency and predictability in the context of security-related investment policies. Transparency was the focus of a special session in Roundtable VI held under the project in December 2007. In addition, participants’ responses to a questionnaire on transparency and predictability provide institutional information on the transparency measures used for investment policies. This paper summarises these exchanges of information and experience.

Tables 1-3 present institutional information relating to transparency and predictability. The Tables provide information about countries that have review processes for foreign investment. Thus, other countries - the many that rely only on non-investment policies to protect essential security interests - are not included in the Tables. Broadly speaking, the Tables show considerable variation in the transparency practices used for investment reviews the areas of prior notification and consultation and procedural transparency. In contrast, participating countries employ quite similar transparency practices in the areas of “publication avenues and tools” and in the handling of confidential information.

A more detailed description of transparency-related policies follows.

Publication avenues and tools. OECD good regulatory practices include codification of primary laws, publication of a consolidated register of all subordinate (or secondary) legislation and public access via internet. Most participating governments that have review processes appear to conform quite well to these norms. Codified law is the basis of all investment review policies described in participating country responses. In addition, most countries communicate primary and secondary legislation through centralised facilities such as national registers or gazettes. All cite use of the internet as a channel for communicating about policy. In addition, some (Australia, France, Germany, Japan, Romania, Spain, Turkey, the United States) have created special channels geared to serving the specific needs of international investors (e.g. contact points in responsible ministries and in diplomatic networks). These provide a less formal channel for explaining laws and policies to prospective foreign investors. Most countries whose national language is not English provide their legislation or descriptions of their policies in English. Some provide information in other languages as well. For example, Korea provides investment policy information in English, Chinese and Japanese.

¹ OECD (2005) *Taking Stock of Regulatory Reform: A Multidisciplinary Synthesis*.

² OECD (2003) *Public Sector Transparency and the International Investor*.

Prior notification and consultation. Prior notification and consultation with interested parties are integral parts of OECD good practices for public sector transparency – they can enhance the legitimacy and effectiveness of government policies. Many countries (Australia, Canada, Japan, Korea, Mexico, Romania, Spain, and the United States) have general laws requiring prior notification of proposed legislative changes and many (Australia, Canada, Japan, Korea, Romania, Spain and the United States) require consultations with interested parties as part of the legislative process. Russia holds consultations on investment matters, even though there is no general requirement to do so. Several countries (Korea, Latvia, Russia and Turkey) have formed advisory boards with foreign investors as members that participate in such consultations.

Practices relating to procedural transparency and fairness. Table 3 on the transparency and predictability of review procedures for investments has three parts. Table 3a deals with the transparency of the initial phase of the decision – that is, with the decision as to whether a particular investment is subject to a review procedure. Table 3b presents information about what happens during the evaluation that leads up to a decision regarding the investment (e.g. approval, denial, mitigation). Table 3c looks at “ex post” transparency – that is, what happens after a review procedures has been completed.

Deciding to review an investment proposal (Table 3a). Some countries have relatively simple rules for deciding which investments are, in principle, subject to a review. For example, France, Germany and Japan have sectoral lists and all proposed investments of companies operating in those sectors are, in principle, subject to review. Most countries have thresholds linked to the size of the investment or to degree of control and any investment that exceeds those thresholds is, in principle, subject to review. The United States take the view that, because of the complexity of the interaction between international investment and essential security interests, it is not possible to establish simple rules for determining in advance which proposed investments should be reviewed. Under US policy, prospective investors can voluntarily notify the relevant authority (CFIUS) of their proposed investment or the government agencies can raise concerns about prospective investments. In order to increase the predictability of such decisions – that is, to help prospective investors understand whether their investment proposal requires approval – some countries (France and Germany) issue preliminary “opinions” on whether an investment is subject to review.

The evaluation procedure (Table 3b).

- *Evaluation guidelines.* Once the decision to subject an investment proposal to an approval process has been taken, the degree to which that process is guided by publicly-available evaluation criteria also influences the transparency and predictability of the proceedings. For example, if the guidance is non-existent or very broad, it might leave considerable discretion to the officials charged with making the evaluation, which could undermine the transparency and predictability of the procedure. The United States notes that, under its policy, such guidance (which is publicly available) guarantees a narrow focus to the evaluation process – only, narrowly-defined security interests can be grounds for blocking investments or seeking mitigation.
- *Time limits and tacit assent.* Generally, countries that have review procedures also have time limits on the length of the procedure. France and Germany, for example, impose a time limit of 2 months and 1 month, respectively. Japan allows a maximum of 30 days for its reviews. In other cases, these limits foresee the possibility that an evaluation might take place in several phases. For example, Russia allows for a 3-month initial assessment period with a possibility of a 3-month extension. Korea allows for a 15-day limit with a possible extension of a further 15 days. The United States allows for a 30 day initial assessment period, and a possible 45 day follow up review and 15 days in the case where the President announces a decision. Most countries also apply a “silence means assent rule” – if the investor does not hear from the reviewing agency within the designated assessment period, the investment is implicitly authorised. The United

States notes that, although this rule is not provided for in US legislation, its investment review board notifies investors at the end of its 30 day initial review period.

- *Confidential and classified information.* All countries take steps (e.g. criminal penalties for divulging confidential information) to protect privacy and commercially sensitive information acquired in the course of the evaluation procedure. In addition, many countries report using classified information in the course of their evaluations. France notes that, since classified information is used for evaluation purposes, all officials involved in the procedure have appropriate security clearances and that measures are taken to ensure that “a culture of security” exists among those officials.

Ex post disclosure and transparency (Table 3c). Ex post reporting – or disclosure of policy outcomes – is key to rendering policy processes accountable. For security-related investment reviews, transparency measures need to protect commercially sensitive and classified information while also providing an adequate basis for accountability. The United States and Korea report that they make a public disclosure when the approval process results in the blocking of an investment. The agency in charge of Australia’s screening programme issues an annual report that describes screening outcomes in broad statistical terms (e.g. number of cases considered, outcomes, average number of days used to process cases). In addition, it describes particular case outcomes without mentioning the names of the investors concerned. Japanese and US policies require that reports be made to the Diet and the US Congress, respectively.

Table 1. Publication Avenues and Tools

Country	Publication of laws/ management of government information		Communication channels			Other languages in which texts are made available
	Codified, primary legislation	Secondary legislation	Internet	National register/ gazette	Contact points in responsible ministry/agency	
Australia	Yes	Yes	Yes	Yes	Yes	
Canada*	Yes*	Yes*	Yes*	Yes*		
France	Yes*	Yes	Yes	Yes	Yes	English, Spanish
Germany	Yes	Yes	Yes	Yes	Yes	English
Italy	Yes					
Japan	Yes	Yes	Yes	Yes	Yes	
Korea	Yes		Yes	Yes		Chinese, English, Japanese
Mexico	Yes		Yes	Yes		
Poland	Yes		Yes	Yes		English
Romania			Yes		Yes	English
Russian Federation	Yes		Yes	Yes		English
Spain	Yes		Yes	Yes	Yes	English
Turkey	Yes	Yes	Yes	Yes	Yes	English
United States	Yes	Yes	Yes	Yes	Yes	

*Canada foreign investment review policy does not include national security considerations.

Table 2. Prior notification and consultation

Country	Comprehensive , national legislation on:		Consultations held for investment policies, but no legislative requirement	Special arrangements for consultation with foreign investors	Notes
	Prior notification	Consultation			
Australia	Yes	Yes			
Canada*	Yes*	Yes*			
France					No consultations with foreign investors.
Germany					The relevant legislation affects only a small number of specialised defence companies, so consultations are unlikely to be necessary.
Italy			Yes		Regular consultations with foreign investors
Japan	Yes	Yes			The Government held consultation in order to amend its inward direct investment legislation, with the new regulations taking effect as of 28 September 2007.
Korea	Yes	Yes		Yes	Invest Korea operates an advisory council composed of 33 foreign investors in order to collect evaluations and suggestions on a biannual basis regarding Korea's regulatory and foreign investment policies.
Latvia		Yes	Yes	Yes	Dialogue between Latvia and foreign investors takes place within the Foreign Investors Council in Latvia (FICIL). FICIL's members are large investors and seven foreign chambers of commerce.
Mexico	Yes				
Poland					No regular consultations with investors
Romania	Yes	Yes			
Russian Federation			Yes	Yes	The Draft Law on Strategic Sectors was elaborated in cooperation with the foreign investors present in the Consultancy Council on Foreign Investments under the aegis of the Government of the Russian Federation.
Spain	Yes	Yes		Yes	The practice of the relevant authority is to consult with sectoral associations and Chambers of Commerce where all those concerned are represented, including foreign investors.
Turkey				Yes	The main forum for consulting with foreign investors is the Investment Advisory Council. The Council's members include CEOs of some leading multinational companies and the World Bank. The Coordination Council for the Improvement of the Investment Environment in Turkey provides a platform for dialogue with foreign and domestic investors.
United States	Yes	Yes			

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Table 3a. Procedural transparency and predictability – The decision to review an investment proposal

Country	Published list of sensitive sectors triggers investment review procedure?	Other criteria used to decide whether an investment should be reviewed	Advance consultations - - Can investors ask for preliminary “opinions” on application of authorization procedure?	Notes
Australia	No	Process triggered by an investment size threshold	No	
Canada*	No *	Process triggered by an investment size threshold		
France	Yes		Yes	
Germany	Yes	Process also triggered by investment size threshold	No	Investor has a duty to notify authorities
Italy	Yes (defence)	Process may depend on reciprocity criteria		
Japan	Yes	Negative and positive lists	Yes	Investor has a duty to notify authorities when the investment size threshold is more than 10 per cent or when the investment is unquoted.
Korea	No		No	Guidance on investment restrictions are regulated by subordinate laws
Mexico	Yes	Review triggered by 49 % control threshold	No	No practical experience with screening using national security criteria
Poland	Yes (only real estate and airport management)		No	Permits for foreigners are managed by sector-specific ministries
Russian Federation	Yes		No	
Spain	Yes (defence and armaments)	There is also a control threshold for screening	No	Applications to invest in defence and armaments are filed with Defence Ministry
United States	No	Yes, foreign government control	No	Notification by investors is voluntary

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Table 3b. Procedural transparency and predictability – screening procedures

Country	Screening evaluation guidelines exist and are public	Time limit for consideration of cases	Silence means assent?	Confidentiality - Protection of commercially sensitive information	Notes
Australia	Yes	30 days + 10 day possible extension	Yes	Yes	General screening rule: investment should not be contrary to the national interest.
Canada*	Yes*	45 days + 30 day possible extension*	Yes*	Yes*	General screening rule: the investment should be in the national interest.
France	Yes	2 months	Yes	Yes	
Germany		1 month	Yes	Yes	
Italy				Yes	Screening normally takes 3 months.
Japan	No	30 days	Yes	Yes	Review period can be shortened to 14 days if there are no problems – most are handled in under 14 days.
Korea		15 days + 15 day possible extension		Yes	
Mexico		35 or 45 business days, depending on which law applies	Yes	Yes	
Poland		14 days + 2 month possible extension		Yes	For time limits, the general Code of Administrative Practice applies
Romania		30 days (from general legislation on silent tacit approval)	Yes,	Yes	There is an exception to “silence means assent” for certain sectors
Russian Federation	Yes	3 months + 3-month possible extension	No	Yes	
Spain	Yes	6 months	Yes	Yes	
United States	Yes	90 days = 30 day review + 45 day investigation, if required + 15 days for President to make announcement	No	Yes	Guidance on evaluating investment proposals is underpinned by a narrow definition of essential security interests.

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Table 3c. Procedural transparency and predictability – Ex-post disclosure/reporting

Country	Public announcement of outcome	Other <i>ex post</i> reporting mechanisms		Notes
		Reports to Parliament or legislative bodies	Annual report?	
Australia			Yes	The annual report provides general information (investors are not named) on the number of approval applications received, number of enquiries handled, numerical characterisation of decisions taken and of time taken to process applications.
Canada*				
France				
Germany				
Korea	Public announcement of any decision to restrict investments			
Japan				Japan's review process has never been used to block an investment.
Latvia				
Mexico				
Poland				
Romania				
Russian Federation				
Spain				
United States	Yes, if President decides not to authorise an investment.	Yes	Yes	

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