

TOWARDS GLOBAL BEST PRACTICES FOR REGULATING FOREIGN INFLUENCE

Foreign Influence Transparency Initiative



"Money Laundering." Source: Jason Leung via Unsplash

INTRODUCTION

As the world continues to battle the COVID-19 pandemic, states are also waking up to the threats posed by a pandemic of a different kind: that of influence and interference campaigns orchestrated by foreign actors seeking to advance strategic and foreign policy objectives across international borders.¹ Through a mix of covert and overt interventions, these campaigns target a wide variety of stakeholders – ranging from policy-makers and elites to think tanks, academia, and the public at large. While not a new phenomenon, the threat from malign foreign influence has grown in scope, scale, and frequency alongside increasing globalization and technology developments.²

In response, states have begun considering, and implementing, new policy frameworks to counter these threats. These include deploying a variety of policy instruments ranging from foreign lobbying regulation to reforms that criminalize certain interference activities outright. Among these, an approach that has found increasing favor globally involves transparency-based foreign agent registration frameworks which intend to bring transparency to foreign influence campaigns by requiring individuals or entities ('foreign agents') engaging in certain types of activities on behalf of a foreign actor ('foreign principal') to register with the government and make disclosures concerning activities carried out under their principal-agent relationships.

1 On a related note, for an overview of the linkages between the COVID-19 pandemic and foreign influence flows, please see Foreign Influence Transparency Initiative, "What the COVID-19 Pandemic has Meant for Foreign Influence", Center for International Policy (June 25, 2021), www.internationalpolicy.org/program/Foreign-Influence-Transparency-Initiative.

2 Canada Security Intelligence Service, "Remarks by Director David Vigneault to the Centre for International Governance Innovation" (Feb 9, 2021), <https://www.canada.ca/en/security-intelligence-service/news/2021/02/remarks-by-director-david-vigneault-to-the-centre-for-international-governance-innovation.html>.

While the emergence of such frameworks is geographically dispersed and occurring largely independent of each other, there are points of convergence and parallels in approach and choice of policy instruments. At the same time, despite the proliferation of these frameworks, no meaningful analysis has focused on these developments through a transnational lens, or sought to develop any benchmarks for best practices.



Mask with 100 dollar bill. Source: Olga_art via Pixabay

Within this context, this Issue Brief aims to take the first steps to contribute to the fledgling discourse by highlighting key policy questions that the proliferation of these frameworks raise and will raise. In particular, the focus will be on issues that they must seek to resolve in order to offer balanced but effective outcomes in the modern democratic context.

Such study is important for two primary reasons. On one hand, any approach to foreign influence legislation may implicate important civil and political rights including the freedoms of speech and association - an interplay that has been little studied. Second, several states have attempted to use the threat of foreign influence to justify frameworks which target specific stakeholders, including civil society and the free press. Both these trends make it important to study these frameworks through international and comparative perspectives. After all, policy responses to foreign influence must not only effectively deter foreign influence but also ensure that they do not detract from the very democratic ideals they intend to shield from authoritarian interference.

FOREIGN INFLUENCE TRANSPARENCY FRAMEWORKS: A LAY OF THE LAND

This brief is primarily concerned with policy frameworks which are premised on bringing transparency to politically-related foreign principal-agent relations - including relationships covering advocacy, lobbying, and PR activities. However, this is scarcely the only type of policy instrument that can be deployed. Other options, which this brief does not analyze, include frameworks which prohibit certain activities - such as foreign election funding - or more generally acting on behalf of foreign powers in any capacity without disclosure to the concerned government.³

³ For example, see 18 USC 951 which relates to individuals acting as agents on behalf of foreign governments. See Department of Justice, "FARA Related Statutes", <https://www.justice.gov/nsd-fara/fara-related-statutes>.

Recent developments around transparency frameworks include those in the following states:

- The **United Kingdom** is in the advanced stages of introducing legislation to mandate the registration of foreign agents.⁴
- **Taiwan** has seen multiple foreign agent registration proposals being introduced yet all have stalled at various stages of the legislative process.⁵
- **Canada** is currently considering one foreign agent registration bill in the House of Commons.⁶
- **Australia** introduced the Foreign Influence Transparency Scheme (FITS) as part of legislation passed in 2018. FITS mandates registration and labelling requirements.⁷
- While the **Philippines** has had the Foreign Agents Act in place since the 1970s, it has not been implemented. Only recently have discussions begun to implement the framework.⁸
- Senior officials in **Estonia** (including the former Prime Minister) have questioned whether it is time for the country to enact a foreign agents law.⁹

While the stated objectives of all of the above frameworks are to counter malign foreign influence, they vary widely in their scopes and methods. In most instances, these frameworks consist of two primary mechanisms:

- A requirement that agents acting on behalf of foreign principals and engaging in a covered activity (e.g. advocacy or lobbying) register with a local authority and disclose the relationship and any activities conducted as a part of it; and
- A requirement that agents clearly label any material circulated on behalf of foreign principals as being on such party's behalf.

The above frameworks also differ in how they operationalize these mechanisms. Some frameworks, like the U.S.'s Foreign Agents Registration Act (FARA), require detailed and periodic disclosures while others, including Australia's FITS, only require summary details around the relationship. In addition, the types of influence relationships or advocacy activities that these frameworks apply to vary widely. Despite these differences, the

4 UK Government, "Legislation to counter state threats" (May 13, 2021), <https://www.gov.uk/government/consultations/legislation-to-counter-state-threats>.

5 Chien Hui-ju and Jonathan Chin, "KMT sidelines foreign influence bill", Taipei Times (Mar 15, 2021), <https://www.taipeitimes.com/News/taiwan/archives/2021/03/15/2003753863>

6 Tarun Krishnakumar, "Is Canada's first proposed foreign influence legislation ruthless or toothless?", Policy Options (July 12, 2021), <https://policyoptions.irpp.org/magazines/july-2021/is-canadas-first-proposed-foreign-influence-legislation-ruthless-or-toothless/>.

7 Australian Government - Attorney-General's Department, "Foreign Influence Transparency Scheme", <https://www.ag.gov.au/integrity/foreign-influence-transparency-scheme>.

8 Tarun Krishnakumar, "The Paradox of the Philippines' Foreign Influence Legislation", Philippine Strategic Forum (April 29, 2021), <https://www.stratforumph.com/post/the-paradox-of-the-philippines-foreign-influence-legislation>.

9 Baltic News Service, "Ratas, Mikser question need for foreign agent law" (March 29, 2018) (accessed on subscription service; link not available).

underlying objective is that targets of foreign influence - as well as policymakers and the public in general - be made aware of its methods and means so that they may take suitable remedial action.

Another common trend is that most policy formulation processes surveyed above make some form of reference to the U.S.'s Foreign Agents Registration Act (FARA) - the long-standing U.S. transparency framework that was originally enacted in 1938 in response to the spread of Nazi propaganda. Even where frameworks take an approach different to FARA, policy documents or statements show that FARA and its transparency-based approach was a determinant in developing each state's own policy framework.



Justice Department officials testify at a hearing on foreign agent registration requirements. Source: C-SPAN

This commonality also supports the need for further study of these frameworks - particularly as this reliance on FARA may not necessarily be on solid footing. When FARA was first enacted, it was considered an “experiment” by its sponsor.¹⁰ Despite multiple amendments and reorientations over the years, the framework is commonly acknowledged to have several shortcomings - particularly as regards its scope and enforcement.¹¹ Therefore, while FARA may be a useful reference point or waystone, it is far from being a gold standard to emulate wholesale. While these specific deficiencies are not the focus here, some are briefly discussed below.

At the same time, the recent wave of policy developments has also seen states using the threats from foreign influence and interference to justify frameworks so narrowly tailored in their application (e.g. to NGOs or non-profits) that it is difficult to consider them as meaningful responses to foreign influence. In most cases, these frameworks cite FARA as a

¹⁰ Report on the Foreign Agents Registration Act, Prepared for the Committee on Foreign Relations of the United States Senate (August 1977), available on the website of Caplin and Drysdale at http://www.caplindrysdale.com/files/24416_1977_-_crs_report_-_fara_-_senate_committee_on_foreign_relations_comm_p_-_secured.pdf.

¹¹ Tarun Krishnakumar, “In Absence of Foreign Agents Registration Reform, DOJ Tweaks Could Make a Big Difference”, Just Security (March 31, 2021), <https://www.justsecurity.org/75589/in-absence-of-foreign-agents-registration-reform-doj-tweaks-could-make-a-big-difference/>.

model - leading to discourse around the framework's 'dual' life abroad.¹² For instance, criticism has targeted frameworks that have been enacted in Russia, Nicaragua, and Hungary as being attempts at silencing dissent rather than legitimate policy responses to foreign influence. In contrast, for any type of transparency framework to be truly effective, it must seek to address all sources and channels of influence in an evidence-based manner, as informed by assessments of specific threats and actors, while also seeking to minimize detrimental effects to civil society.

TRANSPARENCY FRAMEWORKS: LINGERING CONCERNS

At both policy and implementation levels, several concerns are raised by the emergence of foreign agent registration frameworks and their potential reliance on poorly-aging frameworks like FARA. These include the following:

“STATES LOOKING TO ENACT SIMILAR FRAMEWORKS MUST LOOK TO FARA SOLELY AS AN EXAMPLE OF ONE POTENTIAL APPROACH TO THE PROBLEM.”

A. Lack of Evidence-based Review and Tailoring

As noted above, a lingering concern is the lack of dedicated study around the role or efficacy of transparency-based frameworks in general. In other words, there does not seem to have been any measure of interdisciplinary scientific study to consider the most effective ways in which transparency can be used to counter malign influence. When FARA was enacted, it was based largely on anecdotal evidence with legislative history suggesting that only limited efforts have been subsequently made to review it regularly and strengthen its foundations.

While there is little doubt that FARA has enabled unparalleled insights into otherwise hidden principal-agent relationships,¹³ there are a number of concerns around the framework's application to modern threat actors and vectors. Within this context, states looking to enact similar frameworks must look to FARA solely as an example of one potential approach to the problem. Reliance on FARA in place of localized and evidence-based approaches to counter-influence legislation may lead states down an erroneous path, and could even serve to stymie democratic processes in some cases.

¹² International Center for Non-Profit Law, “FARA’s Double Life Abroad” (May 2021), <https://www.icnl.org/post/analysis/faras-double-life-abroad>.

¹³ For e.g. see the several country and issue-specific reports by Ben Freeman and others at the Foreign Influence Transparency Initiative (FITI) which have been enabled by data made available under FARA at www.internationalpolicy.org/program/Foreign-Influence-Transparency-Initiative.

B. Collateral Impacts on Rights

By mandating registration and disclosure, a typical transparency-based framework is premised on shining a spotlight on otherwise non-public or confidential relationships. These frameworks may also expressly or impliedly label certain individuals or entities as ‘foreign agents’ (or some variant of the term). In addition to potential pejorative connotations, such labelling may affect other reputational aspects of the agent - including, for example, in relation to receiving donations or funding.



Budapest Parliament in Hungary. Source: Peter via Flickr

In addition, the framework implicates the freedom of expression inasmuch as it may require agents to prominently label material circulated on behalf of foreign principals. Given these potential effects, a transparency framework must be the product of careful tailoring so as to minimize collateral impact on the civil and political rights of affected parties. In addition, a framework enacted without strong evidentiary foundations carries the risk that it may be struck down by a constitutional court for impinging on protected rights without any proven countervailing benefits.

C. Enforcement Concerns

A transparency-based framework must also imbibe safeguards to ensure consistent and fair enforcement. The reputational effects of being labeled a ‘foreign agent’ - including being prosecuted for being one - are substantial and may have chilling effects on expression or capital flows.¹⁴ Ensuring robust oversight and insulation of enforcement mechanisms from political influence will remain key to even-handed enforcement that counters malign influence while not undermining the legitimacy of the framework in question. At the same time, states should be permitted to ensure prioritization of enforcement against certain threats or channels. Some approaches, which tend to restrict the application of frameworks to certain foreign states, may be counterproductive and undermine trust in the fairness of the framework as a whole.¹⁵

Alongside such safeguards, in order for the framework to be effective in practice, it must

¹⁴ For a discussion of a court decision striking down Hungary’s ‘foreign agent framework’ on similar and other grounds, please see Tarun Krishnakumar, “Designing Frameworks to Counter Foreign Influence: The Impact of the ECJ’s Decision in *European Commission v. Hungary*”, *Harvard Journal of International Law* (Online) (October 2020), <https://harvardilj.org/2020/10/designing-frameworks-to-counter-foreign-influence-the-impact-of-the-ecjs-decision-in-european-commission-v-hungary/>.

¹⁵ For example, Canadian bill C-282 adopts such an approach.

be accompanied by a well-resourced enforcement machinery that ensures consistent and comprehensive application of the framework. The lack of such resourcing creates a perilous scenario where under-compliance with the framework in question may lead to governments and other stakeholders underestimating the level of malign foreign influence present.

THE WAY AHEAD FOR TRANSPARENCY FRAMEWORKS



NATO Secretary General Jens Stoltenberg at the inauguration of the European Centre of Excellence for Countering Hybrid Threats. Source: NATO via Unsplash

For all these reasons, the proliferation of foreign agent registration frameworks deserves further attention and scientific consideration from an interdisciplinary standpoint. This attention must not only focus on issues such as those highlighted above, but also fundamental questions around the role and effectiveness of these frameworks in practice. While only time-tested scientific evidence can ensure the effectiveness of such frameworks, the following measures may be considered as key enablers towards more effective and balanced policy responses:

A. International Cooperation and Exchanges

Like-minded democracies should look to enhance exchanges of evidence and cooperation to evolve optimal policy responses to malign foreign influence and interference campaigns. This includes sharing learnings around foreign agent registration frameworks and, in particular, their efficacy. Towards this objective, some work has already begun in the form of collaborations such as the European Centre of Excellence for Countering Hybrid Threats, based in Finland.¹⁶ However, most engagement in such fora has been at a higher level of abstraction - at the policy level. These debates do not often filter down to the brass tacks of how to structure foreign influence legislation or best practices in enforcement.

In addition, much can also be achieved by transnational exchanges at the enforcement and implementation levels. In the absence of clear evidence around the efficacy of frameworks like FARA, only concerted study can help determine the optimal approach to using transparency to counter foreign influence.

¹⁶ The European Centre of Excellence for Countering Hybrid Threats, <https://www.hybridcoe.fi/>.

B. Learning from Analogous Frameworks

At the same time, research and cooperation in countering malign influence and interference does not need to start from scratch. Several analogues already exist. Learnings from international efforts including those against illicit financial flows (such as the Financial Action Task Force), terrorist financing, and money-laundering can serve to inform counter-influence legislation and cooperation. For instance, malign influence through non-traditional sources (such as the private sector) can be exposed or deterred through the robust implementation of transparency-based mechanisms such as Know Your Customer (KYC) norms, transaction reporting, and beneficial ownership registries - all of which may help expose hidden capital flows or relationships. Therefore, in developing best practices to counter malign influence, the starting point may not be as far off as it may initially seem.



Currency reflection. Source: Jason Leung via Unsplash

C. Best Practices and Conceptual Modelling

Alongside state to state cooperation, there is also a need for deeper comparative and analytical study of transparency-based frameworks to malign foreign influence and interference. While one such model is briefly discussed below, only the evolution of best practices and minimum standards can ensure that frameworks do not contain gaps in scope or coverage.

An Interest-based Approach to Implementing Transparency Frameworks

One model to establish a baseline for transparency based registration frameworks is to adopt an interest-based approach to ensure evidence-led policy. This involves:

- First, understanding and mapping the various channels through which foreign influence can manifest in any given state's context. From this analysis, the targets of foreign influence can be distilled into various groups (e.g. policy makers, the media, and the general public).

- Next, the various stakeholders who may have an interest in becoming aware of a foreign influence relationship may be mapped. For example, where a target of influence is the public, stakeholders who have an interest in being aware of such campaigns would include the public itself (to inoculate itself), executive wings of government (like law enforcement and counterintelligence), and the legislative wing (to craft legislation or allocate funds to counter such campaigns).
- Finally, based on the above, create a framework which addresses all the channels identified and ensures transparency which benefits all those who have an interest. Through such an approach, a state can ensure that its transparency-based approach to countering foreign influence satisfies a minimum baseline of influence relationships that must be within the scope of legislation. This transparency also helps ensure that all possible stakeholders who have an interest in a specific channel of foreign influence have the ability to access information about it.

This merely provides one possible way for thought processes aiming to conceptualize transparency frameworks across states and contexts.

D. Localized and Contextualized Responses

At the state implementation level, a transparency-based framework must be informed by realities on the ground. This includes particular threat patterns, vulnerable channels that may be exploited, and public media consumption patterns. At the same time, a transparency-based framework must seek to be respectful of democratic principles. Prior to being implemented, it must ensure minimal impairment of civil and political rights of individuals and entities that may be affected. Overreach in these areas may end up sowing further discord in society - something that may itself be the objective of a foreign adversary.



"Print is Alive:" Media consumption. Source: Bank Phrom via Unsplash

E. Understand the Limits of Transparency Frameworks

Finally, all parties concerned must also be distinctly aware of the limits of transparency and the frameworks that seek to deploy it against malign influence and interference campaigns.

Transparency-based frameworks may throw light on - and thereby deter - certain types of activities - such as influence through lobbying, advocacy, or think tank funding. However they are not a panacea and, for instance, do not address all types of illicit influence activities



European Union Parliament. Source: Marius Oprea via Unsplash

like traditional espionage or foreign misinformation campaigns. Based on specific threats relevant to a state, an effective response may require broader legal reforms (e.g. relating to criminal prohibitions around foreign interference or election funding) and a whole-of-government approach that involves relevant stakeholders in academia, private sector, and law enforcement. Many common channels of influence - including those in specific sectors such as finance or academia - may not trigger registration or reporting requirements under a typical framework. This means that a foreign agent framework must be seen as just one part of an interlocking set of protective measures.

Alongside their role as policy recommendations, the above also point to areas where further research and study are needed.

CONCLUSION

As the above sections of this Issue Brief have sought to demonstrate, the proliferation of transparency-based responses to foreign influence campaigns raise several complex questions for policy making. On one hand, the threat to modern democratic processes and institutions from malign foreign influence is a clear and present danger, while, on the other hand, an overly intrusive policy response may prove to be ineffectual or, worse, exacerbate the very societal divisions that adversaries seek to exploit.

These complex interplays require deeper thinking, interdisciplinary analysis, and the collation of global best practices. Only such a concerted and broad-based approach can truly help ensure that these frameworks are effective in achieving their stated purposes. Towards this end, it is hoped that this Issue Brief will serve as a starting point for further discussions and discourse around these issues.