



Building Trust and Confidence in International Investment

**REPORT BY COUNTRIES PARTICIPATING
IN THE “FREEDOM OF INVESTMENT” PROCESS**

MARCH 2009



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ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

The OECD is a unique forum where the governments of 30 democracies work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

The OECD member countries are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The Commission of the European Communities takes part in the work of the OECD.

At the 10th roundtable on Freedom of Investment on 26 March, OECD and non-OECD governments reviewed recent policy measures and found no trend to date towards protectionism. They issued a report on building trust and confidence in international investment, that calls for renewed vigilance in resisting protectionist pressures and continued peer monitoring at the OECD. This report is intended for OECD and non-OECD Ministers at the meeting of the OECD Council at Ministerial Level on 24-25 June 2009.

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Executive Summary

The “Freedom of Investment, National Security and ‘Strategic Industries’” (FOI) process helps member and non-member governments to preserve and expand an open environment for international investment while also safeguarding essential security interests and taking action to recover from the current crisis. Discussions under the FOI process have been taking place since 2006 and ten FOI Roundtables have been held involving the 30 OECD members countries and, so far, 17 non-members. The following themes have emerged from these discussions:

No trend toward protectionism, but a need for reinforced vigilance in preserving freedom of investment

Investment protectionism remains a threat, but so far governments have, for the most part, resisted protectionist pressures. Indeed no recent examples have been observed of countries taking deliberate action to erect barriers to inward investment. Nearly all governments continue to welcome inward investment and some have recently taken measures to liberalise their investment policies.

OECD investment principles promote commitments to openness and non-discrimination in recipient country investment policies and, more generally, to transparent, accountable and effective public policy. The Roundtable participants completed guidance in October 2008 for investment policies addressing national security concerns. This guidance helps governments ensure that their security-related investment measures are effective in achieving their aims and are not disguised protectionism. It urges governments to use restrictive investment measures only as a last resort, when measures of general application are not adequate to address security concerns. If restrictive investment measures are deemed necessary for achieving security-related policy goals, governments should make such policies as non-discriminatory as possible and respect the principles of transparency, proportionality and accountability. Roundtable participants found it encouraging that several countries seem to have followed its guidance for recipient country investment policies relating to national security.

Reiterating commitments to openness and countering new forms of investment protectionism

All “Freedom of Investment” participants reiterated their commitments to open investment policy and noted that the current context creates new challenges for investment policy makers. Many governments have adopted measures to channel public sector investment and subsidies and they often have considerable discretion in their application. Under some programmes, they attach conditions to investment and subsidies that may discourage outward investment. If such measures are not carefully designed, there is a risk of a drift toward discriminatory policies that will ultimately be detrimental to a return to sustainable income and employment growth.

OECD investment principles provide for flexibility as governments shape their responses to economic crises. While acknowledging that governments are currently facing exceptional circumstances and that they may need to take exceptional measures, Roundtable participants also stress the need to ensure that such measures do not unduly impede investment flows or distort competition. Such measures should not be maintained longer than necessary and should be designed from the outset with an “exit strategy” in mind.

Strengthened peer monitoring

Preliminary indications suggest that governments are aware of the risks of “new investment protectionism” and are seeking to deal with the issues it raises (for example, by coordinating responses to the crisis). Roundtable participants have agreed to work toward enhanced peer reviews which would include more complete and readily accessible information on policy measures, supporting analysis on new forms of investment protectionism and deeper involvement of non-members as full partners in the Freedom of Investment process with equal rights and responsibilities as OECD members. Enhanced peer review will bring several benefits:

- It will make recent policy measures more transparent and increase pressures on participants to lead by example in protecting “freedom of investment” and respecting their international commitments;
- It will allow participating governments to learn from each other’s experiences at a time when many governments are actively seeking models for good policy practice.

Governments and businesses working together to enhance public and private responsibility

Roundtable participants call on governments to work hand in hand with business to rebuild trust and confidence in international investment and to ensure that international investors conduct business with integrity and transparency.

Building trust and confidence in international investment

(Report by countries participating in the “Freedom of Investment” process)

The “Freedom of Investment, National Security and ‘Strategic Industries’” (FOI) process helps governments to preserve and expand open international investment policies while also safeguarding essential security interests. International dialogue under the FOI process (Box 1) is hosted by the OECD Investment Committee and takes the form of Roundtables¹ bringing together OECD members, the 11 non-member adherents to the Declaration on International Investment and Multinational Enterprises (including Argentina, Brazil and Chile) and other major non-members (including China, India, Russia, and South Africa). Sovereign wealth funds (SWFs) from China, Russia and Qatar have also participated. Participants are now ready to move onto the next phase of work.

Box 1. The “Freedom of Investment” process

The “Freedom of Investment, National Security and ‘Strategic Industries’” (FOI) process helps governments to preserve and expand an open environment for international investment while also safeguarding essential security interests and taking action to recover from the current crisis.

Organised as Roundtables with member and non-member participation, the FOI process provides:

- *Peer monitoring mechanisms.* Participants review each other’s investment policies using the OECD’s consensus-based “peer review” procedure that recognises each government’s responsibility for the policies implemented in its territory and its duty to respect its international commitments to open investment policies.
- *A multilateral forum for policy dialogue.* The Roundtables have explored various investment issues, including critical infrastructure protection, international investment in energy markets and ultimate beneficial ownership and the control of cross-border investment.
- *The development of guidelines for good policy practice.* OECD guidance on security-related investment policies (Annex) was completed, including guidance on recipient country policies towards sovereign wealth funds (SWFs).
- *A unique database on investment policy.* The investment policy positions of all OECD and non-OECD countries that adhere to the OECD investment instruments are already publicly available (including information on investment review procedures, sectoral restrictions and national security measures). The FOI process is helping to further develop this comprehensive inventory of policy information by harmonizing reporting procedures and extending coverage to non-members.

¹ Ten Roundtables have been held so far under the “Freedom of Investment” process.

I. Lessons learned to date

Monitoring policies - no trend toward protectionism, but a need for vigilance

The FOI Roundtables routinely perform vigorous and detailed reviews of investment policy developments in light of established OECD investment principles and the guidance for security-related investment policies. In part because of peer pressures in support of standstill commitments under the OECD investment instruments, these reviews have produced no evidence of an overwhelming move toward protectionism. Instead, they show complex trends that reflect the diverse pressures facing investment policy makers. On one hand, recipient countries genuinely want – indeed, compete for – foreign investment projects. They are reluctant to take protectionist measures that would undermine business confidence and several have recently taken steps to liberalise investment policies. On the other, all recipient countries have constituencies that may advocate for protectionist policies and these may be strengthened by the global crisis. Thus, policy makers are simultaneously pushed in two directions, toward both openness and protectionism. The FOI process seeks to make it easier for them to choose openness and more aware of the costs of ceding to protectionist pressures.

Many of the policy changes reviewed in the FOI Roundtables involve clarifications or refinements of existing investment review policies relating to essential security interests (e.g. France, Japan, and the United States). Australia published principles that set out the main factors that it considers in determining whether particular investments by foreign governments and their agencies are consistent with Australia's national interest. Germany is considering security-related revisions to its investment laws and has received extensive comments on its draft law from Roundtable participants. China has introduced new screening requirements on mergers and acquisitions by foreign investments in “major” industries having an impact on “national economic security”. A new Russian law entered into force in May 2008 which defines 42 sectors in which control by foreign investors will be subject to prior authorisation delivered by a special governmental commission (the new law improves the transparency and predictability of Russia's review procedure, but also expands its sectoral coverage). Thus, these policy measures present a mixed picture: some seem clearly motivated by a desire to improve the transparency and accountability of investment policies and to safeguard essential security interests. Others may leave investment policy mechanisms more exposed to protectionist influences.

The tenth FOI Roundtable, held in March 2009, undertook a first review of policy responses to the crisis from an investment perspective. While no measures have been enacted to restrict inward investment, there is a risk that certain measures will have the effect of discriminating against established firms on the basis of nationality (see Section II below).

Summaries of the peer reviews of policy developments are made public after every Roundtable.

Open investment policies benefit home and host societies

The FOI Roundtables explored the economic and societal benefits of foreign direct investment and urged countries to adopt policies that will allow them to reap these benefits fully. They agreed that, when supported by healthy policy environments, international investment:

- plays a key role – alongside domestic product and capital markets – in *the development of high performance business sectors capable of the*

sustainable creation of jobs and wealth. It does this *inter alia* by providing channels for enhanced competitive pressures, physical and human capital accumulation and dissemination of innovations.²

- *fosters conditions for more peaceful international relations.* Breakdowns of security and public order are more frequent in states where material standards of living are low. International investment, supported by healthy domestic policy environments, helps raise standards of living. Moreover, international investment reinforces bonds of mutual dependence among countries, thereby increasing the costs of international conflict. For example, the EU's Single Market and the OECD and its investment instruments have deepened economic integration among members and provided an economic and social reform agenda for non-members aspiring to join.
- *enhances security in other ways.* The Roundtables examined this in relation to energy security and concluded that open and competitive markets help to reduce national vulnerabilities to supply shocks in three ways. First, competitive markets (which, by definition, involve rivalry among incumbents and the threat of new entry) promote diversity of supply. Second, they provide incentives for making investments that enhance the market's ability to adapt to shocks (e.g. investments in surge capacity, stockpiles, and market information systems). Third, a broad international energy market connects numerous local markets and allows them to pool their supply risks, thereby providing insurance against supply disruptions.³

Be prepared for globalisation, but non-discriminatory policies are often most effective

Of course, greater openness also means greater exposure to risks originating in the global economy. National policy frameworks need to be able to cope with this exposure. A key finding of the FOI process is that countries wishing to enjoy fully the benefits of globalisation need to put effective policy frameworks in place – sectoral regulation, prudential controls, national defence and crime prevention strategies – that allow them to counter possible threats emanating from both domestic and foreign sources. In nearly all cases, these policies can be designed to treat domestic and foreign investors equally; that is, to observe the investment policy principle of non-discrimination.

If these basic policies are not in place, discriminatory investment policies can do little or nothing to take their place. For example:

- **Beneficial ownership.** Countries need to have in place securities market regulations that protect markets from penetration by criminal, politically-motivated or irresponsible actors, both domestic and foreign. Roundtable participants agreed that effective policies for obtaining information on beneficial ownership are essential to countering criminal activity or other abuses.⁴

² See Sections 2.1 and 2.2 of “Economic and other impacts of foreign corporate takeovers in OECD countries”, prepared for the fifth FOI Roundtable.

³ See “Competition, international investment and energy security”, prepared by the OECD Competition Secretariat for the sixth FOI Roundtable.

⁴ See “Identification of ultimate beneficiary ownership and control of cross-border investors”; prepared for the fourth FOI Roundtable.

- Critical infrastructure protection (CIP) involves managing risks related to natural events or human action (e.g. negligence, terrorism or sabotage). The authorities responsible for CIP expect private operators of such infrastructure to be active partners in ensuring its integrity. Assessments of reliability of these operators should be (and often are) based on criteria that do not discriminate against foreigners (e.g. whether or not a business, be it domestic or foreign, has a solid reputation for reliable service provision).⁵

Countries vary in their use of investment restrictions for protecting essential security interests

Many countries have broad national security and critical infrastructure protection strategies. These national strategies tend to embody a comprehensive approach to security risk management: they cover threats to the lives and livelihoods of citizens, the sources of which may be natural or human (e.g. terrorism, sabotage or negligence). They establish plans for prevention, preparedness, response and recovery that are designed to coordinate the actions of different parts of governments, as well as of businesses and individuals.

Generally, national security and critical infrastructure protection strategies, if they mention restrictive investment policies at all, assign them a small role relative to those of national defence, law enforcement, and sector-specific regulatory policies.⁶ Indeed, many countries make little or no use of restrictive investment policies to achieve national security goals.

The countries that have such policies use three types of policy instrument: 1) investment reviews that use national security as a criteria for potentially restricting investments, 2) outright bans (for example, prohibitions on any foreign investment in sectors using nuclear materials); and 3) powers given to sectoral regulatory authorities. Policies and practices in this area vary widely.⁷ The challenge for designing security-related investment policies is to avoid unnecessarily restrictive measures, while ensuring that security-related goals are achieved.

Security related investment policies are a “last resort”

OECD investment principles recognise the right of countries to take those restrictive investment measures needed for the protection of “essential security interests” and the “maintenance of public order”⁸. Participants in the FOI process have developed guidance for the design and implementation of security-related policies (Annex). This guidance helps governments ensure that their security-related investment measures are effective in achieving their aims and are not disguised protectionism. In particular, it urges governments to use restrictive investment measures only as a last resort, when measures of general application are not adequate to address security concerns. If restrictive investment policies are deemed necessary

⁵ See “Protection of ‘critical infrastructure’ and the role of investment policies relating to national security”; prepared for the seventh FOI Roundtable.

⁶ See “Protection of ‘critical infrastructure’ and the role of investment policies relating to national security”; prepared for the seventh FOI Roundtable.

⁷ See reviews of policy settings made in the three FOI background papers on transparency/predictability, proportionality and accountability.

⁸ See, for example, Article 3 (‘Public order and security’) of the OECD Codes of Liberalisation; <http://www.oecd.org/dataoecd/21/23/38072327.pdf>

for achieving security-related policy goals, the guidance urges governments to make such policies as non-discriminatory as possible and to respect the principles of transparency/predictability, proportionality and accountability.

Learning to work together with mutual trust and confidence

Recent OECD data suggest that, while aggregate FDI flows in the OECD region are down over the 2007-2008 period, investments from non-OECD countries have grown in relative importance. Investments by SWFs and other government-controlled entities have been the subjects of active debate in recipient countries. Likewise, the non-OECD investors have had to adapt to different ways of conducting business in OECD countries. Inter-governmental dialogue provides opportunities for shared learning, increases mutual understanding and contributes to well-informed policy development.

One example of shared learning involving the FOI process is the parallel development of two sets of guidance relevant for SWFs – the OECD guidelines for recipient country policies towards SWFs was developed as part of the FOI process while the International Working Group of SWFs developed guidance for the institutional framework and investment operations of SWFs themselves (the *Santiago Principles*). These complementary sets of guidance show that OECD and non-OECD governments can work together to formalise thinking about good policy practice in ways that allow the participants to engage in international investment with greater confidence and trust. Roundtable participants have stressed the importance of continuing to work together in the ‘follow up’ phase of work on both sets of guidance. So far, three SWFs have participated in the FOI Roundtables.

Although 17 non-members have participated at least once in the Roundtables so far, the FOI process needs to do more to attract the active participation of major non-member countries. Roundtable participants agree that one of the priorities for future work will be to create the conditions in which non-members are both willing and able to be fully engaged partners, with equal rights and responsibilities in the OECD investment dialogue (see Next Steps below).

II. Investment Policy, Risks of Protectionism and the Global Crisis

The “Freedom of Investment” project began in 2006 at a time of heightened concerns about national security, but widespread support and confidence in open markets. A 2007 global opinion poll⁹ showed that “overwhelmingly, the surveyed publics see the benefits of increasing global commerce and free market economies.” In 17 of the 35 countries for which data were available, support for free markets had risen substantially over the 2002-2007 period, while declines were registered in just five countries.

The crisis has undermined public confidence in institutions, both public and private

The global crisis has altered the political climate for investment policy-making. It has imposed hardships on millions of people and heightened the public’s fears and anxiety (e.g. about jobs and pensions). It has undermined confidence in economic institutions, both public and private.

⁹ The Pew Global Attitudes Project, “World Publics Welcome Global Trade, But Not Immigration: A 47 Nation Pew Global Attitudes Survey”. October 4, 2007.

Faced with rising public fear and distrust, governments are now necessarily focused on restoring national economic and employment growth and financial stability. Although they recognise that open markets will ultimately contribute to a sustainable recovery, domestic economic and political pressures might make them less mindful of their international commitments to openness. In this context, there is a risk that countries will be tempted to adopt “beggar thy neighbour” policies, including investment protectionism in various guises and unfair incentives to attract or retain investments. For the investment policy community, the immediate challenge is to counter such pressures and to promote the adoption of investment policies that are open, transparent, non-discriminatory and that effectively address legitimate recipient country concerns.

High level policy makers have acknowledged the dangers of protectionism and reaffirmed their commitment to openness. For example, the G20 Leaders Declaration on the World Economy and Financial Markets (Washington 15/11/2008) states: “(...) we underscore the critical importance of rejecting protectionism and not turning inward in times of financial uncertainty. In this regard, within the next 12 months, we will refrain from raising new barriers to investment or to trade in goods and services (...)”. Similarly, in a February 14, 2009 statement, the G7 recognised the continued need for openness: “An open system of global trade and investment is indispensable for global prosperity. The G7 remains committed to avoiding protectionist measures, which would only exacerbate the downturn [and] to refraining from raising new barriers...” These commitments will have to be followed-up and the OECD’s peer review mechanism offers an effective monitoring framework for such follow-up. FOI participants are both willing and able to provide such monitoring and have already begun to do so.

So far, FOI discussions have noted that, under OECD investment instruments (and many others international agreements as well) countries are accorded flexibility in taking action in the fact of economic and financial crises. The OECD Codes of Liberalisation ask countries taking exceptional measures to “do so in such a way as to avoid unnecessary damage which bears especially on the financial or economic interests of another Member and, in particular, shall avoid any discrimination between other Members¹⁰.”

An initial review of responses to the crisis in the financial and automobile sectors has produced the following findings:

- *Avoiding discrimination in crisis-response policies is both possible and desirable.* Rescue programmes using public funds need to be designed to accomplish their stated aims (e.g. stimulating domestic growth and employment). Implementing domestic stimulus and sectoral support programmes is complicated by open borders for trade and investment. Although these may mean that countries can benefit from other’s stimulus or support measures, it also means that the benefits of domestic stimulus or support may “leak” to other countries. Many programs have safeguards to manage these leakages. Some capital assistance programmes are not available to incorporated foreign-controlled financial institutions. For most of the programmes surveyed, foreign controlled institutions are eligible to participate in capital support and loan programmes. In designing policies with broad eligibility criteria, governments seek to reduce the distortions created by crisis response policies.
- *Governments have considerable discretion in allocating funds to companies.* Although eligibility for these programmes is often designed to be non-

¹⁰ Article 7 of the Codes of Liberalisation.

discriminatory, a certain amount of discretion for policy makers is inevitable in deciding whether a particular company receives support and in determining the amount of support. How governments use this discretion is an important determinant of the size and nature of distortions created by these policies. OECD peer reviews have a long history of dealing with this type of policy; in the context of policy responses to the current crisis, they could be used to shed light on how discretion is being used in different national contexts and to promote good practices in crisis-related measures (e.g. ensuring that such measures are not maintained longer than necessary).

Governments and business need to work together to restore confidence in economic institutions

Earlier Investment Committee work notes the “mutual dependence of business and society – a business sector cannot prosper if the society in which it operates is failing and a failing business sector inevitably detracts from general well-being. ‘Corporate responsibility’ refers to the actions taken by business to nurture and enhance this symbiotic relationship. ... societies can also act to nurture this relationship by providing such services as law enforcement, appropriate regulation [and] investment in the many public goods used by business ...”¹¹ If this relationship of mutual dependence is to work for the benefit of both business and societies, the rights and responsibilities of each need to be clarified and understood.

The global crisis has underscored the need for governments and the business community to clarify these rights and responsibilities in many fields. The OECD investment instruments shed light on their investment dimension – they promote open investment policies, appropriate policy frameworks and responsible business conduct. Through them, governments commit to non-discriminatory investment policies and to well designed and carefully enforced regulatory frameworks. On the corporate responsibility side, the *OECD Guidelines for Multinational Enterprises* help international business to operate with integrity and in harmony with home and host societies.

Thus, the OECD investment instruments provide a sound starting point for renewed dialogue on appropriate public and private sector roles in the economy. While preserving and enlarging open investment policies, future work will strengthen and clarify commitments to: 1) continual improvement in policy frameworks that help countries benefit from investment and prevent abuses; and 2) urging business to conduct itself with due regard for agreed norms for responsible business conduct.

III. Next steps – Building trust and confidence in international investment

The global crisis has imposed heavy costs, but it also provides an opportunity to move forward on a positive agenda of building confidence and trust in international investment. The OECD, with its comprehensive approach to investment policy and responsible business conduct, is well placed to deliver on this positive agenda. For almost 50 years, it has promoted liberalisation and made it more difficult for countries to slip back into protectionism. Its investment instruments also commit governments to “continual improvement in both domestic and international policies with a view to improving the welfare and living standards of all people” and to encouraging “the

¹¹ *Corporate Responsibility: Private Initiatives and Public Goals*. OECD 2001. Preface.

positive contributions of multinational enterprises” and to “minimising the difficulties to which their various operations may give rise”.¹²

Future work under the FOI process will continue this tradition of strong commitment to open markets and close attention to the roles and responsibilities of the public and private sectors. The work on responsible business conduct (via ongoing follow up on the *OECD Guidelines for Multinational Enterprises*) and improved domestic policy frameworks (via follow up on the *Policy Framework for Investment*) will continue to evolve in their usual institutional settings (the Investment Committee’s Working Party and cooperation programmes with non-members). The difference will be that greater efforts will be made to integrate the messages from these other areas into the messages developed as part of the FOI process.

Next steps will include:

- *Enhancing peer monitoring.* The OECD investment peer monitoring process promotes governments’ observance of agreed norms for investment policy, while also respecting their responsibility to set public policy in their territories. All FOI Roundtables include a session on peer monitoring of investment policy developments. Participants have agreed to strengthen this peer monitoring through: 1) more thorough and timely notification of policy measures by participating countries; 2) more thorough question and answer sessions; and 3) publishing accounts of the discussions. Future work will put these agreed changes into practice for more robust peer monitoring. The Roundtables will also monitor observance of commitments made by FOI participants in the November 2008 G20 Leaders’ Declaration.
- *Locking in open investment policies.* The Investment Committee is sending to OECD Council an update of all Members’ positions under the *OECD Codes of Liberalisation* to ensure they live up to their legal commitments, including to standstill, avoidance of “precautionary reservations” under the *Codes* and elimination of reciprocity. This report will be completed by Spring 2009.
- *Making non-members equal partners in the Freedom of Investment process.* Although, to date, 17 non-member countries have participated in FOI Roundtables, deepening mutual engagement would greatly enhance their contribution. There is no technical impediment to adherence of non-members to the *Codes of Liberalisation* and for them to enjoy the guarantees of national treatment provided by the *Codes* for their investors in other signatory countries. Steps will be taken to facilitate such adherence, giving non-members the same rights and obligations as members. Development of OECD investment instruments will be done as an inclusive process involving non-members as equal partners. The development of a possible “Recommendation on Recipient Country Investment Policies relating to National Security” will provide an occasion for associating non-member countries more formally with outputs of the FOI process. With regard to peer monitoring under the FOI process, Roundtable participants have already agreed to invite non-member governments that might feel that their investors have been adversely affected by an FOI participant’s investment policy measure. They will also seek to deepen cooperation and communication with the Heiligendamm Dialogue Process, which brings together G8 and major emerging economies (China, Brazil, India, Mexico and South Africa).

¹²

Quotes from the Preamble of the *OECD Guidelines for Multinational Enterprises*.

- *Improving investment policy information.* The investment policy positions of all OECD and other countries adhering to the OECD investment instruments are already publicly available. This includes investment review procedures, sectoral restrictions and national security measures. The FOI process will improve this comprehensive repertoire of policy information by harmonising reporting procedures and extending coverage to non-OECD countries.
- *Renewing the message on responsible business conduct.* An update of the *OECD Guidelines for Multinational Enterprises* could be launched in 2010 on the occasion of the 10th anniversary of their last revision. Such an update would need to be preceded by careful consideration of whether and how the Guidelines need to be reviewed and would need to seek the views of business, trade unions and civil society. If agreed by adhering countries, the update could transmit a renewed message from the international policy investment community on responsible business conduct. OECD work shows that OECD and non-OECD countries share commitments to international standards in such areas as transparency, anti-corruption, labour and environmental management. This shared commitment to fundamental principles could provide a basis for close association of new non-OECD countries to this update.
- *Exploring issues raised by new forms of investment protectionism.* Further analytical work undertaken in support of FOI discussions will shed light on 1) the investment policy implications of the growing government role in the economy (e.g. greater government investment and subsidies), including its effects on inward and outward investment flows; 2) exit strategies for investment policies after the crisis; and 3) information needed for effective investment policy implementation, including information on beneficial ownership.

References

Political declarations and legal instruments: OECD legal investment instruments can be accessed on the OECD website at www.oecd.org/daf/investment/instruments.

- OECD Codes of Liberalisation of Capital Movements, 1961
- OECD Declaration on International Investment and Multinational Enterprises and related Decisions, including National Treatment, 1976-2000
- OECD Declaration on Sovereign Wealth Funds and Recipient Country Policies, 2008
- OECD Recommendation on Recipient Country Investment Policies Relating to National Security, 2009

Background documents. Freedom of Investment documents are available on the OECD website at www.oecd.org/daf/investment/foi, unless specified otherwise:

- Security-related terms in international investment law and national security strategies, May 2009
- Investment policies and economic crises: lessons from the past, April 2009
- Foreign government controlled investors and recipient country investment policies: A scoping paper, January 2009
- Transparency and predictability for investment policies addressing essential security interests: A survey of practices, April 2008
- Proportionality of security-related investment instruments: A survey of practices, May 2008
- Accountability of security-related investment policies, October 2008
- Protection of “critical infrastructure” and role of investment policies relating to national security, May 2008
- Competition, international investment and energy security, April 2008
- Identification of ultimate beneficiary ownership and control of cross-border investors, March 2007
- Economic and other impacts of foreign corporate takeovers in OECD countries, *International Investment Perspectives, OECD, 2007*
- Essential Security Interests under International Investment Law, *International Investment Perspectives, OECD, 2007*
- Summary reports of OECD Roundtables on Freedom of Investment, National Security and “Strategic” Industries
- Consultations on Freedom of Investment, National Security and “Strategic” Industries: Submissions by BIAC www.biac.org and TUAC www.tuac.org

Annex

OECD GUIDANCE FOR RECIPIENT COUNTRY INVESTMENT POLICIES RELATING TO NATIONAL SECURITY

Non-discrimination – Governments should be guided by the principle of non-discrimination. In general governments should rely on measures of general application which treat similarly situated investors in a similar fashion. Where such measures are deemed inadequate to protect national security, specific measures taken with respect to individual investments should be based on the specific circumstances of the individual investments which pose a risk to national security.

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.

- ***Codification and publication.*** Primary and subordinate laws should be codified and made available to the public in a convenient form (e.g. in a public register; on internet). In particular, evaluation criteria used in reviews should be made available to the public.
- ***Prior notification.*** Governments should take steps to notify interested parties about plans to change investment policies.
- ***Consultation.*** Governments should seek the views of interested parties when they are considering changing investment policies.
- ***Procedural fairness and predictability.*** Strict time limits should be applied to review procedures for foreign investments. Commercially-sensitive information provided by the investor should be protected. Where possible, rules providing for approval of transactions if action is not taken to restrict or condition a transaction within a specified time frame should be considered.
- ***Disclosure of investment policy actions*** is the first step in assuring accountability. Governments should ensure that they adequately disclose investment policy actions (e.g. through press releases, annual reports or reports to Parliament), while also protecting commercially-sensitive and classified information.

Regulatory proportionality - Restrictions on investment, or conditions on transaction, should not be greater than needed to protect national security and they should be avoided when other existing measures are adequate and appropriate to address a national security concern.

- ***Essential security concerns are self-judging.*** OECD investment instruments recognise that each country has a right to determine what is necessary to protect its national security. This determination should be made using risk assessment techniques that are rigorous and that reflect the country's circumstances, institutions and resources. The relationship between

investment restrictions and the national security risks identified should be clear.

- *Narrow focus.* Investment restrictions should be narrowly focused on concerns related to national security.
- *Appropriate expertise.* Security-related investment measures should be designed so that they benefit from adequate national security expertise as well as expertise necessary to weigh the implications of actions with respect to the benefits of open investment policies and the impact of restrictions.
- *Tailored responses.* If used at all, restrictive investment measures should be tailored to the specific risks posed by specific investment proposals. This would include providing for policy measures (especially risk mitigation agreements) that address security concerns, but fall short of blocking investments.
- *Last resort.* Restrictive investment measures should be used, if at all, as a last resort when other policies (e.g. sectoral licensing, competition policy, financial market regulations) cannot be used to eliminate security-related concerns.

Accountability – procedures for internal government oversight, parliamentary oversight, judicial review, periodic regulatory impact assessments, and requirements that important decisions (including decisions to block an investment) should be taken at high government levels should be considered to ensure accountability of the implementing authorities.

- *Accountability to citizens.* Authorities responsible for restrictive investment policy measures should be accountable to the citizens on whose behalf these measures are taken. Countries use a mix of political and judicial oversight mechanisms to preserve the neutrality and objectivity of the investment review process while also assuring its political accountability. Measures to enhance the accountability of implementing authorities to Parliament should be considered (e.g. Parliamentary committee monitoring of policy implementation and answers or reports to Parliament that also protect sensitive commercial or security-related information).
- *International accountability mechanisms.* All countries share a collective interest in maintaining international investment policies that are open, legitimate and fair. Through various international standards, governments recognise this collective interest and agree to participate in related international accountability mechanisms (e.g. the OECD notification and peer review obligations in relation to restrictive investment policies). In particular, these help constrain domestic political pressures for restrictive and discriminatory policies. Recipient governments should participate in and support these mechanisms.
- *Recourse for foreign investors.* The possibility for foreign investors to seek review of decisions to restrict foreign investments through administrative procedures or before judicial or administrative courts can enhance accountability. However, some national constitutions' allocation of authority with respect to national security may place limits on the scope of authority of the courts. Moreover, judicial and administrative procedures can be costly and time-consuming for both recipient governments and investors, it is important to have mechanisms in place to ensure the effectiveness, integrity and objectivity of decisions so that recourse to such procedures is rare. The

possibility of seeking redress should not hinder the executive branch in fulfilling its responsibility to protect national security

- *The ultimate authority for important decisions (e.g. to block foreign investments) should reside at a high political level.* Such decisions require high-level involvement because they may restrict the free expression of property rights, a critical underpinning of market economies, and because they often require co-ordination among numerous government functions. The final decision to prohibit (or block) an investment should be taken at the level of heads of state or ministers.
- *Effective public sector management.* Broader public sector management systems help ensure that the political level officials and civil servants responsible for security-related investment policies face appropriate incentives and controls for ensuring that they exercise due care in carrying out their responsibilities and are free from corruption, undue influence and conflict of interest.

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