11TH ROUNDTABLE ON FREEDOM OF INVESTMENT, NATIONAL SECURITY AND "STRATEGIC" INDUSTRIES

Paris, France – 7 October 2009

Summary of Roundtable discussions by the OECD Secretariat

1. The "Freedom of Investment" (FOI) project is an inter-governmental dialogue forum for OECD and non-OECD governments which seeks to help recipient countries to maintain open international investment policies open and also to design effective responses to the genuine concerns that international investment might raise. Since 2006, the focus of these discussions has been investment measures relating to national security and more recently on the investment policy responses to the economic and financial crisis. Monitoring of policy measures of both OECD and non-OECD participants contributes to observance of international investment commitments, including those taken in the context of the G20.

2. This note summarises the views and information contributed by participants in the Eleventh Roundtable held under the FOI project. In addition to the 30 OECD members, Indonesia, the Russian Federation, South Africa, Brazil and the other 10 non-member adherents[1] to the OECD investment instruments participated in the eleventh Roundtable. Also participating were two representatives from China Investment Corporation, a sovereign wealth fund of the People's Republic of China.

Tour d'horizon of recent developments

3. The *Tour d'horizon* provides an opportunity for Roundtable participants to monitor, share information and express views and recommendations on recent investment policy developments. Discussions at the Eleventh Roundtable covered developments in a large number of countries, and Argentina, Australia, Brazil, Canada, People's Republic of China, France, Germany, Japan, New Zealand, the United Kingdom, and the United States responded to specific questions:

- **Australia – reforms to FIRB procedures**. In August 2009, Australia changed its screening procedure for inward investments. The Foreign Investment Review Board (FIRB) is responsible for this screening procedure. The changes:

[1] The eleven non-member adherents to the OECD Declaration on International Investment and Multinational Enterprises are: Argentina, Brazil, Chile, Egypt, Estonia, Israel, Latvia, Lithuania, Peru, Romania and Slovenia.

- Replace the four lowest thresholds for private business investment with the highest of these – a single threshold of 15 per cent in a business worth $219 million. This means private foreign investment in Australian businesses below $219 million can proceed without review.
- Index the new unified threshold on 1 January every year to keep pace with inflation and to prevent foreign investment screening from becoming more restrictive over time.
- Abolish the existing requirement that private investors notify the Government when establishing a new business in Australia valued above $10 million.

- **Australia – FIRB reforms and MFN**. The US-Australia Free Trade Agreement, which entered into force in 2005, establishes an AUD 953 million threshold for investments in non-sensitive sectors that might come under the scrutiny of the FIRB. The August 2009 change to FIRB procedures described above establishes a threshold of AUD 219 million. Australia was asked to explain why the threshold applicable to non-US investors is lower than the threshold applicable to US investors. In response, Australia noted that its recent policy changes represent a significant step toward liberalisation for foreign investors of all nationalities even though they preserve (but reduce) the more favourable treatment accorded to US investors. Roundtable participants also wished to know what the outlook is for Australia moving back into compliance with most-favoured-nation principles. Australia was not in a position to specify when it would be able to further change FIRB procedures so as to respect the MFN requirement.

- **Australia – mitigation agreements for PRC mining investments**. The FIRB recently concluded mitigation agreements with two state-owned enterprises from the People's Republic of China. Australia was asked to describe these agreements. The investments were both in the mining sector. When examining investment proposals, Australia tries to preserve community confidence in the investment system with continuing to welcome foreign investment. The FIRB works with investors to find out whether there are concerns and, if so, how they can be addressed. In a small number of cases, the FIRB imposes conditions on approvals. When doing this, the FIRB tries to develop a collaborative relationship with foreign investors and to avoid undue interference in the structure of the proposal or in management decisions. The culmination of this process can be that the investor makes undertakings regarding some aspect of the investment. Australia noted that, in the three cases in 2009 that involved such undertakings, the undertakings were proposed by the investor.

- **Brazil – airline investment liberalisation**. Brazil was asked to provide more information about its draft law that increases the maximum amount of foreign ownership in Brazilian airlines to 49% from 20%. Brazil answered that the draft legislation seeks to attract foreign investment and to enhance competition and the quality of services offered to Brazilian consumers.

- **Canada – consultations on implementing legislation.** Canada was asked about the consultations regarding its implementing regulations for the amendments to the Investment Canada Act (e.g. what are the major issues and expected outcomes). Canada answered that the proposed method for calculating "enterprise value" (which is to become the basis of the threshold for determining whether a net benefit review is required under the Investment Canada Act) attracted the most attention among the stakeholders who provided comments on the proposed regulations that were published in the Canada Gazette on 11 July, 2009.

- **France – Strategic Investment Fund**. France was asked to provide an update on the activities of the *Fonds Stratégique d'Investissement* (Strategic Investment Fund, FSI) and, more particularly, on how the Fund pursues its mission to "aid national businesses". France noted that, since its establishment, the FSI has invested in ten companies. Seven of these were acquisitions of minority stakes in publicly-listed companies, and three were acquisitions of unlisted SMEs. At present, 50 additional requests by companies for FSI investments are pending, but due to confidentiality rules, France is not able to disclose applications that have been received from foreign companies. France informed the Roundtable that the public shareholders of the Fund – the State and the *Caisse de Depot* – have developed guidance for the Fund investments that authorises it to acquire, on a for-profit basis, minority-stakes in listed and non-listed enterprises. France pointed out that the FSI could also acquire stakes in foreign-owned companies, as the acquisition guidelines include the principle of non-discrimination. France also informed the Roundtable that the FSI will be covered in the annual report of the *Caisse de Dépot*. When asked whether the FSI has a policy in terms of how it purchases stakes in companies, France responded that it offers to buy shares from anyone without discrimination.

- **Germany** presented its amended investment review procedure. The amendments broaden the scope of German reviews to cover foreign investments in any sector that might threaten public order or security, while also streamlining review procedures. Germany was asked a follow up question relating to the fact that the new procedure places the burden of information gathering on the Ministry. Roundtable participants wanted to know how, in practice, the Ministry monitors what is going on. Germany responded that the Ministry has market monitoring capabilities, but only a limited staff to deal with this issue (3 public officials). These officials consult a public website for the weekly lists of acquisitions published by the competition authority. The Banking Supervision authority also provides information. Press clippings are another source of information. Germany was also asked whether it intended to report on the results of the new review procedure. **Germany** answered that it publishes some information on how legislation has been applied, but this will be of general nature, so as to protect business confidentiality interests.

- **Japan – reforms to notification and reporting procedures.** Japan presented recent changes to its notification and reporting procedures for reviewing inward foreign investment. The changes, which entered into force in April and June 2009, are as follows:

  - The prior notification requirement and *the ex post facto* reporting requirement for discretionary investments in shares of a listed corporation now apply to investment advisors who fall under the definition of foreign investors. (The said requirements were previously imposed on their client.)

  - A prior notification should be given within 6 months (previously within 3 months) before the day when the inward direct investment is intended to be made.

  - In order to facilitate the reporting procedure in connection with the prior notification, the reporting items have been aligned with those of the "large shareholding report" provided for in the Financial Instruments and Exchange Act.

  - An *ex post facto* report should be provided by the 15^{th} day of the month following the inward direct investment (previously within 15 days after the inward direct investment).

  - Certain business activities of the foreign investor (consent to the substantial change of a corporation's business purpose, establishment of a branch office, changes in the type of branch office, changes of the branch office's business purpose, etc.) became exempt from the *ex post facto* reporting requirement.

  - The examination period for a prior notification may be reduced to 5 business days when it is feasible, whereas previously, in a large number of cases, it took 2 weeks out of the prescribed period of 30 days for the authority to complete the examination.

- **New Zealand – streamlining inward investment review procedures**. New Zealand was asked to provide more information about the government's ongoing review of the Overseas Investment act to ensure that the screening regime promotes and encourages the flow of investment into New Zealand, while maintaining protection for sensitive assets.[2] The first stage of the review has been completed and resulted in the following changes:

  – Ministers have delegated greater decision-making powers to the Overseas Investment Office, which will be able to approve more investment applications. This change is expected to reduce the number of applications requiring a ministerial decision by 40 per cent and cut assessment times by around two weeks for those applications.

  – Several types of transactions of a minor, technical or temporary nature have been exempted from the Act. Examples include some underwriting transactions and sales within a group of companies with shared ownership. These transactions result in little or no change to the overseas ownership of sensitive assets.

- **New Zealand – other changes under consideration**. In addition to the changes just described, a second stage of consideration of the Overseas Investment Act is underway. Issues include: 1) Whether the thresholds determining which land and business investments are screened are set at the right level – so that only genuinely sensitive assets are screened; and 2) whether certainty for investors can be improved by removing some of the regulation making powers in the Act.

- **South Africa – foreign controlled security forces.** South Africa raised an investment issue relating to foreign controlled security forces. It noted that there are 200,000 police officers in South Africa while a recent report shows that there are an additional 400,000 employees of private security firms. These firms are, for the most part, owned by foreign companies. South Africa is currently reviewing alternatives for controlling this foreign ownership (it does not currently have an investment review process). Roundtable participants were unsure as to how their governments would react to such a policy challenge. One delegate stated that countries in South Africa's position would have to give careful consideration to both domestic concerns and international obligations.

- **United Kingdom – liquidity requirements for branches**. The United Kingdom was asked to provide more information on its introduction of liquidity requirements for branches of foreign banks. The new requirements ask branches to be self sufficient for liquidity purposes unless the UK Financial Services Authority certifies that they may not be. The UK was asked whether these liquidity requirements will be more stringent than those imposed on equivalent domestic institutions. The UK representative at the Roundtable referred participants to a UK Financial Services Authority report, which states: "Crucially, our regime does not discriminate against any foreign firms, regardless of their home country, but instead imposes similar standards on subsidiaries and branches of foreign firms as it does on UK firms' domestic operations".[3]

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2 The Terms of Reference and other background information for the review can be found at http://www.treasury.govt.nz/publications/informationreleases/overseasinvestment/review2009.

3 *Strengthening Liquidity Requirements*. October 2009. http://www.fsa.gov.uk/pubs/policy/ps09_16.pdf page 9.

Box: Presentation by Germany to the Eleventh FOI Roundtable

Amendments to the German Foreign Trade and Payments Act

The amended law, which entered into force on 24 April 2009, broadens the scope of German reviews to cover foreign investments touching upon public order or security and significantly streamlines review procedures. The new requirements are as follows:

Ministry responsible for gathering relevant information. The amended law does not require investors to seek authorisation or to notify or register. The German Federal Ministry of Economics and Technology is responsible for monitoring transactions that might fall under the scope of the law. In this regard, the Ministry receives information of the Federal Agency of Banking Supervision on a confidential basis. Other sources of information are the weekly lists of transactions published by the Federal Competition Agency.

Time limits for initiating a review. Investment reviews must be conducted within three months of the signature of the purchase contract, the publication of the decision to make a public offer or of the fact that control of the company has been acquired. The Ministry of Economics and Technology informs the companies concerned by means of an administrative act if it intends to exercise its right to conduct a review. If the Ministry does not exercise its right to review within the 3-month time period, the acquisition may not be examined thereafter. This means the authorities must quickly inform themselves and decide to take up a transaction for an assessment.

Information requirements once a review has been initiated. Only when the Ministry decides an investment should be reviewed must the investor submit information. The investor must submit all required information concerning the acquisition; a list of documents to be submitted was published in the Federal Gazette on 24 April 2009.

Possible outcomes and time limits for a review. The Ministry of Economics and Technology may subject the acquisition to certain conditions or order a prohibition within two months of receipt of the information. During the examination procedure, the legal effects of the contract are subject to the condition that the Ministry may, with the Federal Government's consent, impose orders or prohibit the acquisition. If the Ministry prohibits the acquisition, the legal effects of the contract are no longer valid.

Certificate of no objection. Investors may apply for a certificate of non-objection before signing a contract. This legally binding certificate confirms that, based on documentation submitted, the investment does not endanger public policy or public security. In a request for such certificate, only a general outline of the basic elements of the planned acquisition, the investor and his field of business must be given. This newly-introduced mechanism for investors to obtain legal certainty before the time limits for the examination expire has already proven to be widely accepted. If the Ministry has not launched a formal review within one month of receiving the investor's application in writing for such a certificate, the certificate is deemed to have been issued.

Coverage. In general, the law only covers acquisitions of resident companies by a purchaser established outside the European Community or European Free Trade Area. Branches and permanent establishments in an EU Member State owned by a purchaser from outside the EU/EFTA are not considered to be Community-resident. In order to avoid non-compliance with the law, investments by EU-based companies can be examined if a non-EU shareholder owns 25% or more of the voting shares of this company.

Review threshold. Reviews may only be conducted, provided that the transaction results in the purchaser obtaining at least 25% of the voting rights in the company and thus potentially holding a blocking minority. The voting shares held by third parties are also added to those held by the purchaser in cases where the third parties' voting shares are subject of a voting rights agreement intended to bring about the joint exercise of 25% or more of voting shares.

Public order or security. An acquisition may only be restricted or prohibited if it threatens Germany's public order or security. In accordance with the jurisprudence of the European Court of Justice, a genuine and serious threat affecting one of the fundamental interests of society must exist. Public security concerns the functioning of the State and its institutions, i.e. safeguarding a Member State's existence in the face of internal and external influences. The European Court of Justice has recognised the relevance of public security to protecting telecommunications and electricity services in times of crisis or safeguarding other services of strategic importance. These standards can be met in exceptional cases only. Other international obligations will be respected as well, e. g. specific commitments under the OECD Codes, GATS and bilateral agreements.

Recourse for the investor. If the Ministry should issue an order, the investor has the right challenge this decision in court.

Conclusion. Germany stressed that it warmly welcomes foreign investments. So far, no formal reviews of acquisitions have been started. Neither have there been orders and interdictions issued under the new legislation. Germany intends to apply its amended legislation only in very rare cases.

- **Strategic use of investment initiatives?** Recent news announcements suggest that at least one private company has attempted to use Canada's investment reviews under the *Investment Canada Act* as a strategic tool to gain competitive advantage in auctions held to dispose of Nortel's assets during bankruptcy proceedings. Press reports also suggest that a U.S. company may have attempted to use the U.S. review process in order to influence the outcome of an auction of assets of Nortel. Canada and the United States were asked if they consider that their investment reviews are susceptible to strategic use by domestic firms. Canada responded that the government did examine the national security implications the sale to Ericsson but found that there are no grounds to believe that this transaction could be injurious to Canada's national security based on all of the information available. The United States noted that the Committee on Foreign Investment in the United States (CFIUS) is a voluntary process. However, CFIUS does have the authority to request a filing although the large majority of filings are voluntary requests. The US referred to the procedural rules for reviews undertaken by CFIUS which are designed to make strategic use difficult or impossible, notably by defining the parties that can trigger a review (there are specific procedural guidance for CFIUS reviews of hostile takeovers). The United States stressed that companies that are competing for assets are free to say what they want in the press, but that does not determine CFIUS decisions. The United States suggested that it might be of interest to know if others countries experiences with respect to the question of strategic use of investment review procedures in their countries.

Foreign state immunity

4. State controlled investors – such as state-owned enterprises, sovereign wealth funds and public pension funds – have expanded their foreign investments in recent years. Discussions at the "Freedom of Investment" Roundtables have stressed the significant benefits that such investments can bring to home and host societies, but have also noted that such investments can raise concerns. One of these concerns is related to the doctrine of foreign state immunity, under which one State is not subject to the full force of rules applicable in another State.

5. This doctrine has a long history in international law and is firmly anchored in national practice. As noted in an earlier scoping paper on foreign government controlled investors there is considerable variation in national practice.[4] The eighth FOI Roundtable, held in October 2008, noted that state immunity was not a well understood topic and asked for additional background on national practices, as well as the principles set forth in international treaties and conventions.[5]

6. David Gaukrodger, an international legal consultant, prepared a background paper at the request of the OECD Secretariat in order to support the discussion at FOI Roundtable XI; this document was also made available for comment to members of the 8-9 October, 2009 inaugural meeting of the International Forum of Sovereign Wealth Funds in Baku, Azerbaijan and the issue of state immunity was raised at the meeting. Argentina noted that there are few international fora that can deal with issues such as State immunity and South Africa stressed the importance of cooperation with the International Forum on Sovereign Wealth Funds on this matter.

7. As noted in the background paper, the doctrine bars a national court from adjudicating or enforcing certain claims against foreign States. At one time, States enjoyed "absolute" immunity – all proceedings against foreign states were barred without their consent. As States became more involved in

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4 "Foreign Government-Controlled Investors and Recipient Country Investment Policies: A Scoping Paper". Paper prepared by the OECD Secretariat for the Freedom of Investment Roundtables, January 2009. http://www.oecd.org/dataoecd/1/21/42022469.pdf

5 See Summary of XIII FOI Roundtable. 8 October 2008. http://www.oecd.org/dataoecd/14/5/41675491.pdf

commercial activities, many jurisdictions began to apply a "restrictive" theory of immunity at least in cases brought by private parties. Under the restrictive approach, courts continue to recognise immunity for "sovereign" acts, but deny immunity for "commercial" acts. One purpose of the commercial exception is to protect the legitimate expectations of business partners that engage in commercial transactions with foreign States. The restrictive approach is now widely reflected in case law, national statutes and international conventions, although it cannot yet be said to be universally recognised.

8. The commercial exception that forms the core of the restrictive approach generally applies both to immunity from jurisdiction (barring a State's courts from judging the actions of another State) and to immunity from execution (barring a State from taking coercive measures against another State's assets for the purpose of enforcing a judgement).

9. The background paper also points out that, although the restrictive approach is now widely recognised, countries show wide divergences in implementation of the doctrine. For example, national laws define the foreign State differently. Different jurisdictions use varying approaches both to foreign state-owned enterprises and to foreign central banks; the latter have been increasingly singled out by major jurisdictions for reinforced immunity in recent years.

10. Roundtable participants agreed that the discussion and background paper had enhanced understanding of the issue. However, the discussion also reaffirmed the finding of the earlier FOI Roundtable that the issue is highly complex and that practice among countries is far from uniform. The discussion revealed uncertainty about whether and how this discussion could be carried forward in a fruitful manner. Some delegates questioned whether providing further institutional detail on such a complex question would succeed in clarifying the matter; it might simply render it more obscure. Other favoured continued exploration of the matter based on a survey on national practices to be sent to Roundtable participants. Roundtable participants agreed that the OECD Secretariat would revise the background paper in light of the Roundtable discussion and subsequent written comments with a particular focus on policy considerations relating to sovereign wealth funds.