

**OECD ROUNDTABLE ON FREEDOM OF INVESTMENT,
NATIONAL SECURITY AND “STRATEGIC” INDUSTRIES**

PARIS, FRANCE – 30 MARCH 2007

SUMMARY OF FINDINGS

International investment is a key driver of growth and sustainable development. An open, non-discriminatory environment for international investment brings significant demonstrated benefits, including with respect to job creation, more efficient resource allocation, and social and environmental progress. Freedom of investment is a core value of the OECD, which has fostered progress in liberalisation in this area for more than 40 years.

In a number of OECD and other countries, concerns about international investment and, in particular, foreign takeovers of national enterprises are on the rise. Governments have reassessed their priorities in response to a changing international environment for national security. The protection of technologies considered vital to national sovereignty and competitiveness has also become an issue. Furthermore, the strong activity in cross-border mergers and acquisitions in recent years has fuelled growing concerns about jobs.

The access to energy and scarce raw materials has also gained added attention. With the price of hydrocarbons still high and the rapid industrialisation in a number of developing countries fuelling global demand for raw materials, the direct ownership of mineral-producing companies has become a political issue. Concerns may have been further heightened by apparently deliberate investment strategies in some countries to secure control over such resources.

The investment landscape is also changing with the emergence of a new group of active outward investors originating in developing and emerging economies. Where global players are not based in jurisdictions with appropriate standards of investment policy and business conduct, or where potential acquirers of national enterprises enjoy unfair advantages from foreign governments' financial support, there are legitimate concerns about a level global playing field. At the same time, discrimination on nationality grounds against newcomers might undermine the international trade and investment system. The long-standing commitment by OECD members to liberalise international trade and investment rules should be upheld.

Recent developments

Recent investment policy responses to these concerns have so far mostly focused on investment that could imperil security interests. Existing regulatory frameworks have been used in a small number of widely publicised cases to deter investment in the infrastructure and energy sectors of OECD countries, as well as investment by enterprises controlled by foreign states.

In addition, several countries have tightened their regulation and administrative practices in recent years [DAF/INV/WD(2006)12/REV3]. France and Germany have both introduced “closed lists” of sectors and activities which restrict access for foreign investors on security grounds. In the United States, Congress is considering tightening the procedures under the Exon-Florio security legislation.

Canada currently ponders the introduction of security provisions in investment legislation. Updating foreign investment regulations related to national security is also an issue now under examination in Japan.

Outside the OECD area, Russia is in the process of establishing a framework for addressing national security concerns in investment policy. China has introduced new screening requirements on mergers and acquisitions by foreign investors in “major” industries having an impact on “national economic security”.

Anti-trust regulation, financial supervision and other regulatory approaches not formally related to investment policy have also allegedly been employed to protect “strategic” enterprises. Private sector devices to prevent takeovers and other anti-competitive practices may also have been used selectively to discourage cross-border transactions. Devices with a degree of government involvement that can be used to a similar effect include the actions of publicly-owned banks and golden shares in privatised enterprises. As concerns about globalisation have moved up on the political agendas, elected officials have more frequently made statements about whether foreign takeovers of national enterprises are “welcome”. Even where legislatures have no direct responsibility for investment regulation, the prospect of having to operate amid hostility would be sufficient to deter many investors.

The need to maintain an open investment environment

Sovereign governments have a right, and an obligation, to take measures to protect the public interest – including safeguarding national security. As illustrated by recent international arbitral awards, the scope of exercising this right *vis-à-vis* foreign investors has defined limitations under customary international law [DAF/INV/WD(2006)14/REV1]. International investment instruments such as the OECD Code of Liberalisation of Capital Movements, as well as the bilateral and regional investment agreements to which most countries are party, allow governments a degree of freedom to self-judge their security needs.

It is in the interest of all participants in the international economy to limit restrictions on the freedom of investment to cases where security and other essential interests are concerned. Governments that would introduce excessive restrictions or voice hostility toward cross-border mergers and acquisitions could impose a non-trivial cost on their own economies and on others, and could also lead other countries to take similar measures.

Recent studies indicate that host countries can benefit significantly from cross-border mergers and acquisitions [DAF/INV/WD(2006)15/REV2]. The benefits are largely similar to those of greenfield investment and therefore the case for discriminating between “new” investment and takeovers of existing enterprises is weak. The positive effects on the targeted enterprise, including higher productivity and wages, are well documented. The evidence of broader, societal benefits from cross-border corporate investment is also strong, but their full realisation depends on the policies in the host country, including the degree to which national authorities make timely structural reform efforts.

Shared views of regulatory challenges

To address these challenges and help all countries reap the benefits from an increasingly interdependent global economy, OECD has embarked on a project entitled "Freedom of Investment, National Security and 'Strategic' Industries". Initially, a fact-finding phase mapping existing regulatory approaches to security and other essential interests was organised with the participation of Brazil, China,

the Russian Federation, South Africa and several other non-OECD governments. Private sector practitioners were invited to provide their perspectives.

Based on the discussions so far, it is fair to conclude that while regulatory national practices vary and there is no generally accepted definition of "security", common principles exist [DAF/INV/WD(2006)13/REV1]. For instance, following decades of investment liberalisation with the OECD in the driving seat, relatively few OECD countries maintain discriminatory general screening and authorisation procedures. However, a large majority of the countries participating in the project do take into account the protection of security and other essential interests in their investment policies and maintain sectoral restrictions to this effect.

Participating countries agree that sound investment policies need to be guided by the principles of regulatory proportionality; predictability; and accountability [DAF/INV/WD(2007)5]. The first principle is that restrictions on investment should not be more costly or more discriminatory than needed to achieve the security objectives and they should not duplicate what is, or could be, better dealt with by other regulation. The second principle is that, while it is in the interest of both investors and national administrations to maintain confidentiality of sensitive information, regulatory objectives and practices should be made as transparent as feasible so as to increase the predictability of outcomes and eliminate sources of misunderstanding. The third principle is that while improper political interferences in the normal exercise of regulatory power have to be avoided, procedures for parliamentary oversight or judiciary redress should ensure accountability.

A more recent challenge for regulators is the emergence of a large number of international corporate and investment vehicles [DAF/INV/WD(2007)4]. As documented by work of other OECD bodies, these may complicate the identification of ultimate beneficiary ownership and control, with potential implications for security assessments. Their use moreover affects the relevance of nationality as a main criterion for such assessments. To better understand the nature of ownership and control, while avoiding unnecessary restrictions on nationality grounds, enhanced international co-operation to this effect may be helpful.

Moving ahead

The twin challenges facing decision makers are to understand the potential costs to their own economies and the global economy of unnecessarily restrictive policies to achieve security objectives and to bring all important economies into this discussion.

Building on the now-completed fact-finding phase of the project, one way of addressing both issues is to establish an enhanced mechanism for regular dialogue and review among national investment authorities. The tasks of such a mechanism could include:

- Discussions of regulatory frameworks in OECD and non-member countries and regular reporting, contributing to the highest degree of cross-country transparency around national investment regulation and practices.
- The development of shared understanding on how accepted principles of sound investment policies translate into practice, taking advantage of OECD analysis and long-standing experience with investment policy as reflected in the OECD investment instruments and the Policy Framework for Investment.

REFERENCE DOCUMENTS

Freedom of Investment, National Security and “Strategic” Industries: Synthesis of the Inventory of National Practices [DAF/INV/WD(2006)13/REV1]

Freedom of Investment, National Security and “Strategic” Industries: Inventory of National Practices [DAF/INV/WD(2006)12/REV4].

Procedural aspects of investment regulation regarding security and other essential interests [DAF/INV/WD(2007)5].

Economic and other impacts of foreign corporate takeovers in OECD countries [DAF/INV/WD(2006)15/REV2].

Essential Security Interests Under International Investment Law [DAF/INV/WD(2006)14/REV1].

Identification of Ultimate Beneficial Ownership and Control of a Cross-Border Direct Investor [DAF/INV/WD(2007)4].

OECD Roundtable I on *Freedom of Investment, National Security and “Strategic” Industries*, 21 June 2006, Summary: www.oecd.org/dataoecd/48/14/37156967.pdf

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