GUIDELINES FOR RECIPIENT COUNTRY INVESTMENT POLICIES RELATING TO NATIONAL SECURITY

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Investment Division

RECOMMENDATION ADOPTED BY THE COUNCIL ON RECIPIENT COUNTRY INVESTMENT POLICIES RELATING TO NATIONAL SECURITY

THE COUNCIL,

Having regard to Article 5b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Having regard to international agreements on investment, including the OECD Codes of Liberalisation of Capital Movements and of Current Invisible Operations; the Declaration by Adhering Governments on International Investment and Multinational Enterprises [C(76)99/Final] as last amended on 27th June 2000 [C/M(2000)17], the Third Revised Decision of the Council on National Treatment [C(91)147/FINAL], and the related Recommendations [C(86)55(Final), C(87)76(Final), C(88)41(Final),C(88)131(Final) and C(89)76(Final)];

Considering that investment policies for safeguarding national security are an important part of the investment policies in some countries;

Considering that guidance to help countries design and implement these policies, so that they achieve their national security goals with the smallest possible impact on investment flows, is needed;

Noting that the following guidance is not meant to alter existing rights and obligations under the aforementioned international agreements;

On the proposal of the Investment Committee;

I. RECOMMENDS that, if governments consider or introduce investment policies (including measures) designed to safeguard national security, they should be guided by the principles of non-discrimination, transparency of policies and predictability of outcomes, proportionality of measures and accountability of implementing authorities, as set forth in the guidelines attached hereto as an Annex to this Recommendation, of which it forms an integral part.

II. INVITES non-Members to adhere to this Recommendation and to take part on equal terms with Members in its follow up.

III. INSTRUCTS the Investment Committee, working with its non-Member partners in the context of the "Freedom of Investment, National Security and 'Strategic Industries'" Roundtables, to ensure the necessary follow up to this Recommendation, including through peer monitoring.

ANNEX
GUIDELINES FOR RECIPIENT COUNTRY INVESTMENT POLICIES RELATING TO NATIONAL SECURITY

1. *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 investment which pose a risk to national security.

2. *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.

3. *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.

4. *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.