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**DIVISION ON INVESTMENT AND ENTERPRISE**

**Investment Policy Developments**  
**In G-20 Countries<sup>1</sup>**

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<sup>1</sup> The report is in response to UNCTAD's mandate to monitor investment policy developments and their implications for development. It is also meant to contribute to a joint effort by WTO, UNCTAD, OECD and IMF to respond to the 2 April 2009 G-20 Leaders' request for quarterly reporting on their adherence to maintain an open trade and investment regime and to avoid a retreat into protectionism. The summit called upon international bodies to monitor and report publicly on G 20 members' adherence to this pledge.

## Investment Policy Developments in G-20 Countries

### Report by the UNCTAD Secretariat

#### A. Background

1. In their 2 April 2009 summit, G-20 members pledged to maintain an open trade and investment regime and to avoid a retreat into protectionism (paragraph 22), reiterating the earlier commitment made at the Washington summit in response to the global economic and financial crisis. They also called on “the WTO, together with other international bodies, within their respective mandates, to monitor and report publicly on [the G-20 members] adherence to these undertakings on a quarterly basis” (paragraph 22, bullet 3). In the same vein, the G-20 also pledged to “take, at the same time, whatever steps we can to promote and facilitate trade and investment” (paragraph 22, bullet 4).

2. This is against the background of a continuing fall of global foreign direct investment flows. UNCTAD estimates suggest that the 2008 decline of 15% will worsen considerably in 2009, reaching a 50% decline in global inflows, 60% in inflows to developed countries, 40% in inflows to transition economies and 26% in inflows to developing countries.<sup>2</sup> This is also reflected in the estimated over 66% decrease in cross-border mergers and acquisitions expected for 2009.<sup>3</sup> Given the important role of G-20 members in global investment flows (they accounted for 86% of the global inflows in 2007-2008) the estimated decline is most likely to affect the G20 members the most.

3. UNCTAD is the mandated focal point within the United Nations for all matters related to foreign investment and development. It has over 30 years of experience and expertise in collecting data and undertaking research on trends in investment flows and policies, both nationally and internationally, with an emphasis on helping countries to make investment work for development.

4. The UNCTAD Commission on Investment, Enterprise and Development, in its first session on 4-8 May 2009, reiterated the secretariat’s mandate in this regard. It also endorsed UNCTAD’s involvement in this endeavor:

*“The Commission welcomes the recently reiterated commitments to refrain from raising barriers to – and to further promote – investment, and underscores the importance of fulfilling those commitments to mitigate the adverse impact of the global economic crisis. It also welcomes the call on international bodies to monitor and report on investment measures within their respective mandates, and encourages UNCTAD to collaborate with other relevant international organizations in this endeavour.”* (Paragraph 5)

#### B. Methodology and scope

5. In response to this call, the UNCTAD secretariat has compiled this interim report on policy measures in the area of investment taken by G-20 member countries (including the

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<sup>2</sup> Final data will be in the World Investment Report 2009, to be issued on 17 September 2009.

<sup>3</sup> See <http://www.unctad.org/Templates/webflyer.asp?docid=11666&intItemID=1528&lang=1>

individual member countries of the European Union).<sup>4</sup> The report contributes to UNCTAD's reporting in the context of its *World Investment Report* series. It also contributes to a joint effort by WTO, OECD, IMF and UNCTAD to respond to the 2 April 2009 G-20 Leaders' request for quarterly reporting on their adherence to their trade and investment policy commitments. The collection of related data and information is based on UNCTAD's established methodology of data compilation as applied in its annual report on changes in national investment-related laws and regulations for the *World Investment Report* series, as well as its ongoing research and data gathering activities in connection with its work on international investment agreements, investment promotion and facilitation, and investment policy reviews.

6. For the timeframe from 1 October 2008 to 15 June 2009, the report covers laws and regulations that either specifically address foreign investment (i.e. those related to investment liberalization, regulation, protection and facilitation/promotion) or that are related to the general legal framework within which foreign investors operate. In line with the dual G 20 pledge to avoid a retreat into protectionism (paragraph 22, bullets 1-2) and, at the same time, to take steps to promote and facilitate investment (paragraph 22, bullet 4), the report includes all foreign investment-related measures, regardless of whether they are restrictive or facilitating in nature. The report aims at offering a broad and comprehensive picture of relevant regulatory and legislative changes. Proposals, plans and suggestions for new laws and regulations that have so far only been announced but not enacted into actual laws or regulations at the time of this reporting have been excluded from the report. Furthermore, the current Report does not purport to evaluate the impact of the measures, given the fact that there is usually a time-lag for those fairly recent policy measures to make such an impact.

7. Individual stimulus packages and State aid measures are included in the category of investment related measures.<sup>5</sup> While their direct link with foreign investment might not be explicit, stimulus packages and State aid measures aim at improving the (economic) conditions in host countries, which in turn can improve the investment climate and affect the economic determinants of foreign investment. Similarly, by strengthening economic actors domestically, they can also encourage outward investment. The report includes such emergency measures, as well as certain rules governing stimulus packages and State aid – such as those developed at the European Union level – as part of the general legal framework within which foreign – and domestic – investors operate. The report does not, however, offer a detailed categorization and classification of such measures, nor does it focus on their possible discriminatory effect. Similarly, the report also stops short of including project- or company-specific measures, such as individual rescue packages (bail-outs) or decisions by governments to refuse approval of individual foreign investment undertakings that are based on existing laws and regulations.

### **C. Investment policy measures**

8. Overall, 167 policy measures have been undertaken, contained in laws and legislation adopted between 1 October 2008 and 15 June 2009 by the 42 countries surveyed.<sup>6</sup> (The

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<sup>4</sup> The European Union is the 20<sup>th</sup> member of the G20, represented by the rotating Council presidency and the European Central Bank. Hence, for purposes of completeness all member countries of the European Union have been included in this Report.

<sup>5</sup> If a package includes several investment-related elements, each of them is reported separately.

<sup>6</sup> These include Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, China, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, India, Indonesia, Ireland, Italy, Japan,

number includes five measures taken by the EU.<sup>7</sup>) Three countries did not take any measures in the reporting period. 40 (24%) are measures that specifically address foreign investment, and 127 (76%) are measures that are part of the general framework for the operations of foreign affiliates/foreign investments, including stimulus packages taken in response to the crisis (see summary table). 38 out of the 42 countries surveyed also engaged in international investment rulemaking.

### *1. Investment-specific policy measures*

9. Among the measures that are specific to foreign investment, 8 countries have taken measures concerning the entry of foreign investors (15 measures altogether). Five countries have undertaken measures aimed at facilitating investment flows (9 measures), and 7 countries have enacted laws and regulations that concern the operation of foreign affiliates (7 measures). Three countries have changed their relevant tax laws (9 measures).<sup>8</sup>

10. Concerning the **entry of foreign investors**, measures range from **opening up of previously closed sectors** of the economy to foreign investment and **removing/relaxing sectoral caps** for foreign investment, to **restricting private** (including foreign) **participation** in specific types of business (typically in highly sensitive sectors such as social and public services).

11. In the same category, countries have also taken measures aimed at **streamlining approval procedures**, e.g. by lowering the threshold for review of investment and acquisition projects, clarifying decentralized responsibilities for approval of foreign investment projects, or relaxing the review procedures for foreign investment in real estate.

12. Some countries have introduced **new criteria/tests for review** of investment projects, sometimes with a national security test for investments that raise national security concerns or ensuring that investment reviews would capture foreign investments made through complex investment structures. It should be noted, however, that some of these measures have been under preparation for some time, i.e. although enacted during the review period they were not necessarily taken in response to the economic crisis.

13. Some measures address the **facilitation** of foreign investment projects into a host country, whether, for example, in the form of granting specific incentives to investments in certain areas of a country, or facilitating the operation of companies in Special Economic Zones. Other measures aim at facilitating the **operation** of foreign investors. Some countries have enacted measures specifically aimed at encouraging **outward investment** by their domestic companies, e.g. in the form of simplifying approval procedures, providing financing for their internationalization or insurance for exports and outward investments.

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Korea (Republic of), Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Turkey, United Kingdom and United States.

<sup>7</sup> Measures taken by the individual member countries of the EU are listed separately in the tables 1 and 2. It is noteworthy in this regard that the EU has issued new guidelines for applying its State aid rules (including for their specific application to the financial sector) and for implementing stimulus packages, and also plays a role in monitoring compliance. The corresponding approval measures taken by the European Commission are not included in the table separately.

<sup>8</sup> Under the UNCTAD methodology, one measure might fall into several categories, e.g. facilitation and entry; facilitation and operation; etc.

14. Several **taxation measures** identified have a direct bearing on foreign investments, such as, for example, those that harmonize the fiscal status of “foreign-invested” enterprises within the overall tax regime. Measures taken with regard to taxes levied on overseas investors in relation to dividends are also noteworthy in this regard.

## ***2. Investment-related policy measures***

15. Among the measures related to investment, 11 countries enacted laws and regulations that concern the general legal framework for the operation of companies, including foreign affiliates (17 measures). Seven countries adopted new taxation measures (7 measures) and 33 countries enacted State aid measures and/or stimulus packages in response to the crisis (98 measures).

16. Measures aiming at regulating or clarifying the **general legal framework** that are also applicable to foreign investors in their operation in the country include, for example, modifications of the laws on bankruptcy and corporate law. These contribute to the transparency and predictability of the legal framework that constitutes an important determinant for foreign investment in host economies.

17. A number of **taxation measures** relate to the overall framework for economic activity, and are therefore also relevant to the operation of foreign investors. These range from lowering the corporate tax rate to changes in withholding tax and tax bonuses.

18. The relevance of **State aid** measures or **economic stimulus packages** enacted in response to the financial and economic crisis has already been alluded to above. Briefly, such measures impact on foreign investment as they usually apply to all established companies in a given jurisdiction, including foreign affiliates, and have the effect of improving the economic conditions in host countries, which in turn might improve the host countries investment climate. In addition, such measures strengthen economic actors domestically, which in turn might strengthen their ability to engage in outward investment. Some stimulus packages also include support to the operations of overseas subsidiaries.

19. Some countries have shown a particularly strong legislative and regulatory activity during the reporting period. These activities relate to changes in the general legal framework and the attendant specific adjustments and transition arrangements required for the implementation of such new regimes or a streamlining of general investment procedures which predate the onset of the crisis.

## ***3. International investment rule-making***

20. Apart from their national investment-specific and investment-related policy measures, G-20 member countries have also been engaged in international investment rule-making. During the reporting period, 38 out of the 42 countries surveyed concluded 27 bilateral investment treaties (BITs), 36 double taxation treaties (DTTs) and 11 other international investment agreements (IIAs).<sup>9</sup>

21. The **27 BITs**, which G 20 member countries signed during the reporting period, exhibit important differences, depending on the key signatory countries involved. Most BITs

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<sup>9</sup> As of June 2009, there were over 2,700 BITs, 2,800 DTTs and 270 free trade agreements or economic cooperation agreements containing investment provisions, making a total of nearly 5,770 IIAs.

were concluded by European countries, which typically do not include pre-establishment rights in their IIAs. Four BIT were concluded by Canada, whose approach is characterized, amongst others, by including important clarifications and novel provisions aimed at balancing investment protection with other legitimate policy objectives.<sup>10</sup> Also China and India – two emerging economy Members of the G 20 – signed BITs; a development reflecting their growing role as capital exporting countries. Moreover, three of these countries' IIAs are South-South agreements, demonstrating the increasing importance of South-South economic cooperation in the field of FDI.

22. The **11 other IIAs** involving G 20 member countries include **FTAs with investment provisions**, such as the January 2009 Trade and Investment Cooperation Agreement between Iceland and the United States (establishing an institutional framework to monitor trade and investment relations); the February 2009 EPA between Japan and Switzerland (offering protection and liberalization); the April 2009 FTA between China and Peru (including protection and liberalization); the December 2008 EPA between Japan and Viet Nam (which includes the provisions of the November 2003 BIT between Japan and Viet Nam) or the October 2008 FTA between China and Singapore (covering cooperation and promotion issues).

23. Finally, G20 member countries are also participants in **regional integration processes**, which are active in investment rule-making. Indonesia, for example, is an ASEAN member, and as such party to the February 2009, ASEAN Comprehensive Investment Agreement (ACIA).<sup>11</sup> The ACIA sets out rules for investment protection and pre-establishment national treatment and most-favored-nation treatment, according to a positive list approach. ASEAN also concluded an FTA with Australia and New Zealand, with an investment chapter containing pre-establishment national treatment. Saudi-Arabia is member of the Gulf Cooperation Council (GCC) and as such is party to the FTA with Singapore in December 2008.<sup>12</sup> The EC 27 concluded an Economic Partnership Agreements (EPAs) with Cote d'Ivoire and with the CARIFORUM countries, which aim at the progressive, reciprocal and asymmetric liberalization of investment, through commercial presence.

24. Each of these agreements presents a step towards increasing the predictability and stability of an open investment framework and hence offers an important contribution to the G20 objective to avoid receding into investment protectionism. However, the different configurations at the regional level and the substantial divergences in the details of the provisions also increase the potential for overlaps, gaps and inconsistencies.

#### **D. Overall policy trends and prospects**

25. Overall, these investment policy developments paint a comforting picture. Both nationally and internationally, G20 member countries have taken investment measures that are non-discriminatory in nature and most have refrained from measures that are restrictive towards inward and outward investments. Few measures could be characterized as being “restrictive” towards foreign investment as they allow for greater control over the entry or the

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<sup>10</sup> This includes clarifications on e.g. the meaning of indirect expropriation or provisions on e.g., the protection of human health or the environment or cultural aspects.

<sup>11</sup> The ACIA replaces the 1998 Framework Agreement on the ASEAN Investment Area and the 1987 ASEAN Agreement for the Promotion and Protection of Investments.

<sup>12</sup> This FTA includes an agreement by the parties to deal with investment issues through the negotiations of further BITs.

operation of foreign investments. It is worth noting that in the case of member countries of the EU, the approval by the European Commission of the economic stimulus packages submitted by the member countries is based on a set of guidelines on the application of State aid rules and relief packages, including avoidance of any discrimination amongst EU member countries or distortive effects on competition.

26. Indeed, a substantial number of policy changes surveyed were directed at facilitating investment. The crisis has galvanized G-20 members to promote and facilitate FDI and to create clarity and stability concerning their investment frameworks. Furthermore, a number of G20 member countries have further encouraged their companies to venture abroad, and to support their foreign affiliates in times of economic crisis. For example, some stimulus packages include support to the business activities of overseas subsidiaries.

27. However, there is no room for complacency. Indeed, a number of areas exist where caution in terms of protectionist dangers and investment distortions appears warranted.

- First, the **economic stimulus packages** put in place by several countries do not expressively exclude foreign affiliates from their scope and also generally improve the economic determinants for foreign investment. However, much depends on their implementation and the discretion left to local governments. These could discriminate against foreign investors and their investments in a “hidden” way. Indeed, there is scope for what can be labeled “**smart**” **protectionism**, for example, using the gaps in international regulations to discriminate against foreign investors and/or products. This could include favoring products with high “domestic” content in government procurement – particularly in huge public infrastructure projects, de facto preventing banks from lending for foreign operations, invoking “national security” exceptions that stretch the definition of national security, or moving protectionist barriers to sub-national levels that are outside the scope of the application of international obligations (e.g. in procurement issues).
- Secondly, there are the potential **distortive effects** of stimulus packages that can arise from the measures' subsidy-like nature. Akin to subsidies, stimulus packages may effectively create advantages for domestic sectors and put foreign players at a disadvantage. In the same vein, their focus on improving domestic economic conditions may also result in divestments abroad, and see the withdrawal of foreign investment from developing countries.
- Thirdly, there are the dangers arising out of the **spreading of the crisis** to less affected sectors and its further intensification across all countries – including non-G-20 members. This also implies the potential possibility of protectionist pressures arising out of **retaliation** and the fact that, given the close relationship between trade and investment, barriers to one can affect the entry and operation of the other.
- Finally, some of the bail-outs and State aids could give rise to increased protectionist tendencies in the **aftermath of the crisis**. Once the global economy is on its way to recovery, the exit of the State from many bailed-out flagship industries will cause a boom of private investment, including foreign investment. This could trigger a **possible new wave of economic nationalism** to protect “national champions” from foreign takeovers.

## E. Policy implications

28. These issues raise the question of what further policies are needed to enable the potential of foreign investment to contribute to economic and social development, with a view to achieving sustainable global recovery.

- First, effective **promotion of foreign investment** is needed more than ever. While this is particularly the case for developing countries, foreign investment as a means to finance the recovery and (re)-achieve growth and stability also matters for the developed world. Intensified investment promotion efforts, both as regards inward and outward investment, are called for, as is the continued dismantling of visible and hidden investment obstacles. A special focus has to be put on retaining existing investment in times of crisis.
- Secondly, international investment agreements (IIAs) have a role to play in ensuring predictability, stability and transparency of national **investment regimes**. Moreover, policy makers should consider strengthening the investment promotion dimension of IIAs through effective and operational provisions. Investment insurance and other home country measures encouraging outward investment are cases in point where continued international cooperation can be useful.
- Thirdly, the current discussions aimed at an in-depth **institutional reform** of the global financial system suggest that governments need to address the interaction between the global financial system and the international investment regime (consisting of over 5,600 international investment and investment-related treaties). The latter regulates both global long-term and short-term capital movements. The two systems need to be coherent with each other, as the two types of capital flows are closely interwoven and interrelated, with a view towards ensuring long-term, sustainable and development-friendly solutions to the crisis.
- Finally, there is need to ensure that current endeavours against investment protectionism do not remain one-off initiatives. Instead, collective efforts to refrain from investment protectionism should continue beyond the current crisis. This will be particularly necessary when the current crisis begins to ease and the expected exit of public investment could trigger new tendencies of economic nationalism. Hence, there might also be value in extending the G-20 commitment for refraining from protectionism beyond its current 2010 time line. **Continuity regarding the current monitoring** of and reporting on policy trends as undertaken by UNCTAD and other relevant international organizations (within their mandate) would also go a long way in offering policy makers information, guidance and advice, with a view towards long term and sustainable recovery.

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Summary table of national and international G-20 policy measures

Country	Measures							
	Specific investment measures				Investment related measures			IIAs
	Entry	Facilitation	Operation	Investment specific taxation measures	General legal framework	Stimulus package /State aid	General taxation measures	
Argentina			•			•	•	•
Australia	•	•				•		
Austria						•		•
Belgium (a)						•		•
Brazil			•			•		
Bulgaria								•
Canada (b)	•	•			•	•	•	•
China (c)	•	•	•	•	•	•	•	•
Cyprus								•
Czech Republic						•		•
Denmark						•		•
Estonia						•		•
Finland						•		•
France						•		•
Germany	•				•	•		•
Greece						•	•	•
Hungary					•	•		•
India (d)	•	•	•					•
Indonesia		•	•				•	•
Ireland						•		•
Italy						•		•
Japan				•		•	•	•

Country	Measures							
	Specific investment measures				Investment related measures			IIAs
	Entry	Facilitation	Operation	Investment specific taxation measures	General legal framework	Stimulus package /State aid	General taxation measures	
Korea, Rep. of	•					•		
Latvia						•		•
Lithuania								•
Luxembourg (e)						•		•
Malta						•		•
Mexico (f)	•		•			•		
Netherlands					•	•		•
Poland				•	•			•
Portugal					•	•		•
Romania					•			•
Russia					•	•	•	•
Saudi Arabia					•			•
Slovak Republic						•		•
Slovenia						•		•
South Africa			•			•		•
Spain						•		•
Sweden						•		•
Turkey					•			•
United Kingdom						•		•
USA	•					•		•
European Union (g)						•		•

- (a) Five of Belgium's international investment agreements were concluded by the Belgium-Luxembourg Economic Union.
- (b) The entry measure has also been counted as a facilitation measure.
- (c) Three entry measures have also been counted as facilitation measures.
- (d) One entry measure has also been counted as an operational measure.
- (e) Five of Luxembourg's international investment agreements were concluded by the Belgium-Luxembourg Economic Union.
- (f) The entry measure has also been counted as a facilitation measure.
- (g) IIAs of the EU are the Economic Partnership Agreements (EPAs).