International Chamber of Commerce
Policy and Business Practices

FOREIGN DIRECT INVESTMENT – PROMOTING AND PROTECTING A KEY PILLAR FOR SUSTAINABLE DEVELOPMENT AND GROWTH

Prepared by the ICC Commission on Trade and Investment Policy

Executive Summary

Investment, including foreign direct investment (FDI), plays an important role in determining a country’s economic prospects. ICC strongly supports FDI as an effective tool to foster economic growth and sustainable development, and calls on governments to both maintain and strengthen investment protection and promotion agreements. In the short and medium term, this can be done through high-standard bilateral and regional investment agreements, and in the longer term, through an equally high-standard multilateral framework on investment. Investment agreements should continue to include strong dispute resolution provisions, through investor-state dispute settlement (ISDS) with independent proceedings to settle investment disputes.

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Introduction

Investment drives economic growth, job creation and competitiveness, and thereby economic development. Foreign direct investment (FDI) can play an important supportive role in any economy. Successful economies at all levels of development tend to be those that both welcome and attract foreign investors. In today's integrated economy based on global value chains, FDI can significantly affect an economy's competitiveness. Foreign investors have multiple options and will seek the best investment opportunities – those with the best prospects for returns on investment, and with the lowest perceptions of risk. As a result, governments increasingly recognize that economies function best when the government creates an enabling environment and infrastructure, while the private sector allocates the investment in productive sectors.

The increasing level and expanding nature of international investment flows and associated transactions speak to the recognition by host governments — including in developing and emerging markets — of the contributions international investment make to their sustainable development. Businesses and governments in developing countries, as well as developed countries, are keenly aware of the importance of investment as a driver of growth. Businesses, large and small, based in developed economies, as well as in emerging and developing countries, all realize that investing globally is critical for growth and competitiveness. Many governments recognize the same realities – that no country, at whatever level of development, has sufficient domestic resources to go it alone. FDI is "win-win", benefitting the economies of both the home and the host nations. FDI flows take many forms, touch every sector of the global economy, and current FDI flows and patterns are far different from those of only a decade or so ago.

Importantly, FDI is no longer one-way, from the developed "North" to the developing "South." Countries like China, India and other emerging markets are major investors around the world. In 2014, 9 of the 20 largest investor countries were from developing or transition economies.[1] Developing Asia now invests abroad more than any other region, having invested $432 billion in the period of 2012 to 2014. FDI from developing economies, which have grown to make up over a third of global FDI flows also include increasing amounts of South-South FDI flows.

Eight policy pillars for investing in sustainable development

The International Chamber of Commerce (ICC), the world business organization, believes that investment broadly, and FDI specifically, can play a critical role towards realizing the sustainable development goals (SDGs). The Addis Ababa Action Agenda — agreed in July 2015 — places significant emphasis on mobilizing private finance to support implementation of the SDGs. Indeed,

[1] Hong Kong, China, Russian Federation, Singapore, Republic of Korea, Malaysia, Kuwait, Chile, and Chinese Taipei. United Nations Conference on Trade and Development, *World Investment Report 2015* (Geneva: UNCTAD, 2015), p. 5.

the scale of private sector investment required to support the SDGs is significant and cannot be taken for granted. The annual investment gap in key development sectors for developing nations is estimated at US$2.5 trillion annually.[2] Therefore, the private sector must be viewed as an essential partner in realizing the SDGs. Investment, specifically FDI, is a key tool for business involvement in sustainable development. ICC has adopted the eight fundamental policy positions enumerated below which, if implemented on a global basis, can help provide much-needed impetus to sustainable economic growth and job creation.

1. **Investment policy**

A strong investment climate is much more important than investment incentives in attracting FDI.

Nations, as well as sub-central governmental units, should focus on clear, non-discriminatory and well-implemented policies on taxation, protection of property (including intellectual property) rights, well-established rule of law systems (including labour and liability issues), and clean government. In doing so, countries create a climate that nurtures private investment, including FDI. Countries that fail to adopt sound pro-investment policies risk being left behind in the current — and future — competitive global economy.

2. **Investment protection**

ICC strongly supports the network of BITs and FTA investment chapters. ICC also supports comparable "gold standard" investment agreements around the world.

International investment agreements provide essential protections for investors putting their capital, intellectual property, management resources, and reputation at risk outside the security of their home markets. Strong bilateral investment treaties (BITs) and investment chapters in bilateral or regional free trade agreements (FTAs) are important tools to facilitate and protect FDI flows.

3. **Dispute settlement**

ICC strongly endorses the inclusion of effective and independent dispute resolution mechanisms in all investment agreements.

It is a reality that a small percentage of foreign investments result in disputes between the investor and the host government. It is crucial for investors to have direct access to independent and effective dispute settlement, outside of host government-controlled bodies. Adjudication should be timely and not subject to long host government-controlled judicial or regulatory processes. For these reasons, investment agreements have included investor-state dispute settlement (ISDS) provisions to ensure independent mechanisms to resolve such disputes. ICC supports increased transparency and the establishment of rules to avoid conflicts of interest in investor-state dispute settlement. Further developments should aim at ensuring the fair and efficient resolution of disputes.

4. **Sectoral restrictions**

ICC calls on governments to avoid sectoral discriminations in the negotiation or implementation of investment treaties or investment chapters in free trade agreements.

A disturbing trend among some governments is the proposal of sectoral limitations on substantive provisions or access to dispute settlement arbitration. Certain proposals appear politically motivated and governments should be aware that such limitations have a direct impact on the inflow of FDI and undermine core rule-of-law-principles. Discrimination against certain products or sectors should be avoided.

[2] United Nations Conference on Trade and Development, *World Investment Report 2014* (Geneva: UNCTAD, 2015), p. xi

5. State-owned enterprises (SOEs)

ICC encourages governments around the world, at all levels of development, as well as relevant intergovernmental organizations, to devote greater attention and resources to the emerging issues of SOEs, especially ensuring level playing fields when SOEs compete with private sector firms.

As in trade and other broad policy areas, State-Owned Enterprises (SOEs) raise several important concerns in the investment area. SOEs, and more broadly state-championed enterprises, can enjoy a range of preferential benefits, which give them clear advantages when competing with private firms, domestic or international, for investment opportunities. SOEs may receive direct or indirect subsidies, favourable tax treatment, preferential treatment, or even exemption from regulations applied to private investors. It is important to ensure level playing fields when SOEs compete with the private sector, including in investment and trade areas.

6. National security reviews

ICC calls upon all governments to refrain from abusing "security" provisions in FTAs and BITs for protectionist purposes, simply to block or discriminate against foreign investors.

One feature of most BITs and FTA investment chapters is a broad "national security" or "essential security" exception, allowing each partner government to invoke security provisions to trump open investment commitments. It is long-established standard practice for governments to have various essential security procedures in their trade and investment agreements. While these exceptions may be inevitable, their use needs to be limited, transparent and without discrimination. Business, as well as many economists, have complained that abuses of the national security FDI reviews in some countries can interfere with market efficiencies, deny companies legitimate investment opportunities, and can be abused for protectionist purposes. National security reasons should be the exception used in extremely rare circumstances where the relationship to real national security concerns is clear and obvious to any neutral observer. Furthermore, national security or essential security exceptions should be applied in a transparent, fair and non-discriminatory manner.

7. "Forced Localization" provisions

ICC calls upon governments to avoid "forced localization" provisions which have serious negative repercussions on both the investor and on the host country's competitiveness and attractiveness as an investment destination.

One particularly troubling development businesses are increasingly confronting around the world is governments attempting to condition investment approvals on localization commitments such as local procurement, research and development commitments, export quotas or similar requirements, sometimes referred to as "performance requirements". By imposing onerous or extraneous conditions on foreign investors, governments risk forgoing beneficial future FDI because of a perceived poor investment climate.

8. Multilateral framework on investment

ICC supports progress towards an eventual multilateral framework on investment that would provide one clear set of rules for investors, governments, and relevant stakeholders.

ICC has repeatedly noted that the varying breadth and depth of coverage of the international investment agreement (IIA) regime contributes to policy uncertainty, thus making investment predictability increasingly difficult for businesses. In the long term, global business is cognizant of the need for rethinking how investment should be governed in the decades to come. However, previous failed attempts of the 1990s should be a reminder of the need to lay a proper foundation before engaging in negotiations on international investment at the multilateral level. Thus, the current negotiations at the bilateral and regional levels are necessary first steps toward addressing the overly-cumbersome spaghetti bowl of agreements through which businesses must currently attempt to sift through in setting their long-term investment strategies. Current regional negotiations present a potential opportunity to consolidate the IIA regime and provide increased predictability for business. In this regard, the Trans Pacific Partnership (TPP), Transatlantic Trade and Investment Partnership (TTIP), and the Regional Comprehensive Economic Partnership (RCEP), might be particularly constructive. ICC endorses these and similar efforts to negotiate high-standard bilateral, regional and plurilateral investment agreements.

A multilateral investment promotion and protection regime only makes sense if it is high-standard in terms of coverage, definitions, scope of protections, market-opening provisions, and strong dispute settlement provisions; which build on the provisions contained in most current investment agreements. While ICC is aware that high-standard multilateral rules on investment are a long-term effort, ICC strongly supports starting the preparatory work towards this end. Global business is actively engaged in discussions on this subject, with the objective that the IIA landscape will eventually reflect a high-standard multilateral regime that businesses can rely upon to generate sustainable growth.

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The International Chamber of Commerce

is the world's largest business organization with a network of over 6.5 million members in more than 130 countries. We work to promote international trade, responsible business conduct and a global approach to regulation through a unique mix of advocacy and standard setting activities—together with market-leading dispute resolution services. Our members include many of the world's largest companies, SMEs, business associations and local chambers of commerce.

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