



**International Chamber of Commerce**

*The world business organization*

## **Policy statement**

### **ICC's expectations regarding a WTO investment agreement**

Commission on Trade and Investment Policy, 7 March 2003

#### **Introduction**

Worldwide economic integration requires business to produce and market goods and services on a global scale, by integrating the skills of people and various assets - tangible (e.g., land and resources), intangible (e.g., intellectual property) and monetary (e.g., stocks). In this process, trade and investment have become indistinguishable parts of a single strategy. Indeed, companies trade to invest and they invest to trade.

Therefore, ICC fully supports the aim of WTO investment negotiations towards the establishment of a legally binding, comprehensive multilateral framework of rules for investment that would provide for better market access, greater transparency and high standards of investment protection worldwide. Such a framework should reflect in a balanced way the interests of home and host countries, and take due account of the development policies and objectives of host governments, as well as their right to regulate in the public interest, without discriminating against foreign investors.

Currently, international investment activity is governed by over 1800 bilateral investment treaties (BITs), regional agreements, such as the North American Free Trade Agreement (NAFTA), and to a varying extent by multilateral agreements in the WTO on Trade-Related Investment Measures (TRIMS), Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the General Agreement on Trade in Services (GATS). These instruments have proven useful and flexible in meeting the needs of business and host countries.

However, given the growing importance of international investment - for investors, home, and especially host countries - ICC believes that a multilateral framework of WTO rules on investment would contribute to transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment (FDI). The purpose of such a framework would be to increase the quantity of investment, encourage its more efficient allocation and create a level playing field for developing countries wishing to attract a growing share of investment inflows to underpin their economic growth, and by doing so to make a positive contribution to their human and institutional development. In view of the overarching objective of the Doha Development Agenda agreed at the 4th WTO Ministerial Conference in 2001, which is to address as a priority the concerns of developing countries, it is essential for WTO members to forge a consensus on both the desirability and the elements of a multilateral framework for FDI that are to be negotiated after the Cancun Ministerial Conference in September 2003.

ICC hopes to contribute to building this consensus with this policy statement on ICC's objectives for WTO investment negotiations and the requirements of a multilateral framework of rules on investment.

#### **Building on the results of Doha**

In preparation for the WTO Ministerial Conference in Doha, Qatar, ICC recommended in its policy statement that

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"Governments should take the opportunity of new WTO trade negotiations to begin a process towards establishing high-standard rules by developing a framework of multilaterally-agreed principles for FDI, commencing with transparency, non-discrimination, and national treatment (including to address the more favourable treatment of foreign investors than of local enterprises). Such principles would complement and support the competitive process of autonomous liberalization currently being pursued by a growing number of developing countries."

The Doha Ministerial Declaration did not launch investment negotiations, as ICC had hoped. Nonetheless, it states that "negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations." ICC therefore expects negotiations to start in earnest immediately following the Fifth WTO Ministerial Conference to be held in Cancun (Mexico) from 10-14 September 2003.

Moreover, ICC was encouraged by the commitment of Members to clarify in the WTO Working Group on the Relationship Between Trade and Investment the issues of: "scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between Members..." This paragraph lays out the WTO's work programme on investment until the Fifth Ministerial, but does not exclude that the negotiations may deal with additional topics at a later stage.

### Core elements of a WTO investment agreement

ICC believes that WTO negotiations should aim to build a solid consensus on the following basic elements of a global framework of WTO rules and disciplines to govern cross-border investment:

#### Scope and definition

Investment should be broadly defined to cover the multitude of ways in which investors access foreign markets, and the multiple types of assets that are considered to be an investment. A single definition of the term "investment" should apply to both liberalization and protection provisions of a WTO investment agreement.

ICC prefers a broad definition of investment drawing on the provisions of the most extensive BITs, and including: shares, stocks, bonds and debentures or any other forms of participation in a company, business enterprise or joint venture; strategic alliances; claims to money or performance under contract having economic value; real property; tangible and intangible property; goodwill; intellectual property; trademarks; contractual obligations under service or turnkey construction contracts; BOT (build, operate, transfer) arrangements; legal rights such as licenses, and other forms of business cooperation; as long as they reflect a long-term commitment to growing an overseas-based business.

The term "investor" should be broadly defined to include business entities (traditional and other), natural persons, joint ventures, business organizations, strategic alliances, etc. The definition of "investor" should also allow for possible new forms of investor arrangements. Majority ownership and management control should be always be possible in cases where investors consider this as essential for running a business effectively.

The term "national" should include any natural person who is a citizen or permanent resident of a WTO member country and any entity (e.g., corporation, trust, partnership, joint venture, sole proprietorship, or other association) constituted or organized under the laws of that WTO member country.

The term "returns" should be broadly defined to include: profit, capital gains, interest, dividends, royalties, and fees (including service and technical assistance fees) and other financial or performance-related remuneration, and proceeds from liquidation of an investment.

A WTO agreement on investment should include a definition of the territorial entities and the regional economic integration arrangements to be bound by the obligations of the agreement. Such an agreement should apply equally to sub-national entities and to members of regional arrangements.

### **Transparency**

All national provisions affecting rights of entry, establishment and post-establishment operations, such as sectors or industries reserved for domestic investors, conditions applying to joint ventures, taxation etc., should be publicly available. In addition to the WTO's general transparency provisions, notably the obligation to publish, notify and impartially administer all relevant rules and regulations pertaining to the conditions for, restrictions of and changes in the investment regime affecting foreign investors, the right of foreign investors to appeal and review such measures before they become effective should form part of procedural transparency in the context of a framework of WTO rules on investment. ICC believes that a negative list or "top-down" approach for a comprehensive investment regime (i.e. no sector would be excluded a priori but specific exceptions would be listed) would provide for greater transparency for investors and governments alike.

### **Non-discrimination**

A framework of multilateral investment rules must incorporate the principles of MFN and national treatment, which form the bedrock of all WTO agreements. ICC supports a high unconditional standard of MFN treatment both in the pre- and the post-establishment phase of foreign investment to ensure equal treatment of foreign investors by the host country. National treatment must aim at treating foreign investors no less favourably than domestic investors.

### **Pre-establishment and post-establishment conditions**

From ICC's point of view, a framework of WTO rules on investment should include pre-establishment obligations to remove discriminatory measures against foreign investors through general MFN and national treatment, while scheduling exceptions (screening, national security etc.) on a negative list or "top-down" basis. An advantage of the negative list approach is that new sectors, arising as a result of technological development, could be automatically covered by the disciplines of an agreement unless explicit action was taken to exclude them. A negative list approach would be the most transparent and pro-liberalization.

If, however, WTO Members adhere to the positive-list approach identified in Doha, ICC expects the results to be less investor-friendly, with the added risk that Members schedule merely their current liberalization achievements rather than new market-access commitments. This would limit the market-opening effect and up-front liberalization resulting from such an agreement and its added value for business.

### **Investment protection**

One of the main objectives of a WTO agreement on investment should be to provide strong and effective protection for investors against nationalization, expropriation, and measures tantamount to expropriation. Protection should be provided both against outright expropriation, as well as so-called "creeping expropriation" caused by progressive erosion of the original conditions under which an initial investment decision was made. In the event such actions take place, expropriations must be for a public purpose and carried out in a non-discriminatory fashion, and investors must be provided with an acceptable timetable for divestment. Clear guarantees of prompt, adequate and effective

compensation should be paid in freely convertible currencies. A WTO agreement on investment should offer a broad definition of expropriation. ICC would therefore like to see expropriation standards included in the negotiations.

### **Transfer of funds**

Because the right to make financial transfers is intrinsic to foreign investment projects, a WTO investment agreement should include clear provisions guaranteeing investors the freedom to transfer all payments related to an investment (i.e., capital, current income and proceeds from liquidation, payments pursuant to a loan agreement in connection with investments, payments for technical services and royalties for the use of trademarks, patents and other intellectual property) without delay and in a freely convertible currency.

### **Development provisions**

ICC considers that the core provisions of an investment agreement as described in this statement would be of great benefit to developing countries by supporting their economic development and enabling them to attract a greater share of world investment flows. The special situation of developing countries can and should be taken into account by means of negotiated sector exceptions and phasing-in periods. Specific concerns of developing countries embodied in existing BITs should be reflected in a multilateral framework. Moreover, technical assistance and capacity building in helping to implement the provisions of such an agreement will make a significant contribution towards making the provisions of the agreement operationally effective. Technical assistance and capacity building to encourage the transfer of technology from foreign investors to local partners would be particularly helpful to developing countries.

### **Exceptions and balance-of-payments safeguards**

While recognizing that the ability to establish reservations and exceptions to provisions of a WTO agreement on investment will be necessary to ensure acceptance and facilitate adherence to the agreement, such reservations and exceptions should be strictly limited and subject to:

- a "stand-still" commitment: no further country-specific exceptions to either market access or non-discrimination commitments; and
- a "rollback" commitment, meaning progressive liberalization of those areas where countries have registered exceptions.

For the sake of transparency there should be no general exception clause (e.g. excluding "any existing non-conforming measures"), but detailed country-specific exception lists, as lack of transparency in the process of administering reservations and exceptions raises questions about non-discrimination.

Under a WTO investment agreement, recourse to balance-of-payments safeguards should be the only justification for temporarily limiting financial flows.

### **Settlement of disputes**

As in the case of other WTO agreements, effective dispute settlement mechanisms are essential to secure the benefits of a WTO agreement on investment. ICC is of the view that such an agreement should include provisions for both state-to-state and investor-to-state dispute settlement. Therefore, ICC favours a full extension of the WTO state-to-state dispute settlement procedure to all provisions of a WTO investment agreement. Furthermore, in order to provide effective protection of investor rights, the agreement should include a binding investor-to-state dispute settlement mechanism, in addition to and separate from the WTO "state-to state" dispute settlement procedure. While remaining a treaty regulating strictly state-to-state disputes, the WTO must in an agreement on investment provide for

effective means to settle disputes between investors and host governments. Investors should be required to make a choice between taking a dispute to the existing WTO "state-to-state" dispute settlement mechanism through their government, or opting for the investor-to-state mechanism. Under such an investor-to-state mechanism, investors should be free to choose between resort to arbitration or going to the courts, this choice however having to be fixed at a given time. In the case of arbitration, a WTO investment agreement should include a provision stating that WTO members agree to submit themselves to arbitral proceedings, which the investor may put in motion. While the investor and the host government should be free to select the arbitration rules and forum, a WTO investment agreement should nevertheless foresee a choice of competent authorities in case no selection was previously made, namely ICSID, UNCITRAL, or the ICC International Court of Arbitration.

## Conclusion

ICC strongly believes that only by providing high standards of market access and investment protection will a WTO agreement on investment offer an added value to companies by increasing the predictability of the policy environment for their investment, which in turn may lead to additional investments. Adherence to such high standards will encourage foreign investment in developing countries.

To summarize, ICC would like to see the following key elements included in a multilateral agreement on investment(1):

- a broad definition of investment(2);
- transparency;
- a negative list approach for pre-establishment including national treatment, MFN treatment and market access provisions;
- national treatment and MFN treatment in the post-entry stage;
- a high standard of investment protection;
- provisions for comprehensive and unrestricted transfer of funds; and
- an obligation for member countries to provide for investor-to-state dispute settlement procedures.

ICC knows that it will be difficult to achieve all of the above-mentioned objectives in the Doha Round. Nonetheless, it should be noted that many of the high standards of market access and investment protection described above are incorporated in a large number of BITs, many of them concluded with developing countries. A WTO investment agreement should therefore strive to multilateralize those same high standards. At this early stage of the negotiating process, ICC wishes to state world business expectations so that these can serve as a reference point for the initial proposals put forward by WTO members and over the course of the negotiations. ICC stands ready to provide further input into the negotiation process as it progresses.

## About ICC

ICC is the world business organization, the only representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world. ICC promotes an open international trade and investment system and the market economy. Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. ICC was founded in 1919 and today it groups thousands of

member companies and associations from over 140 countries.

**Document n° 103/234 Rev 7 final EN**  
7 March 2003

**Footnotes**

(1) ICC India considers that "there is no evidence that the pattern and flow of investment will change in any significant way with multilateral rules on investment. Therefore, any comments on the basic provisions that should be included in such rules is premature." ICC India further remarks that it "does not support the framing of multilateral rules on investment unless the rules enshrined in BITs are harmonized and the specific concerns of developing countries embodied in BITs on a case by case basis are also included in a multilateral framework."

(2) ICC Thailand is of the view that short-term capital flows should be excluded from a WTO investment agreement and strongly recommends a positive list approach.