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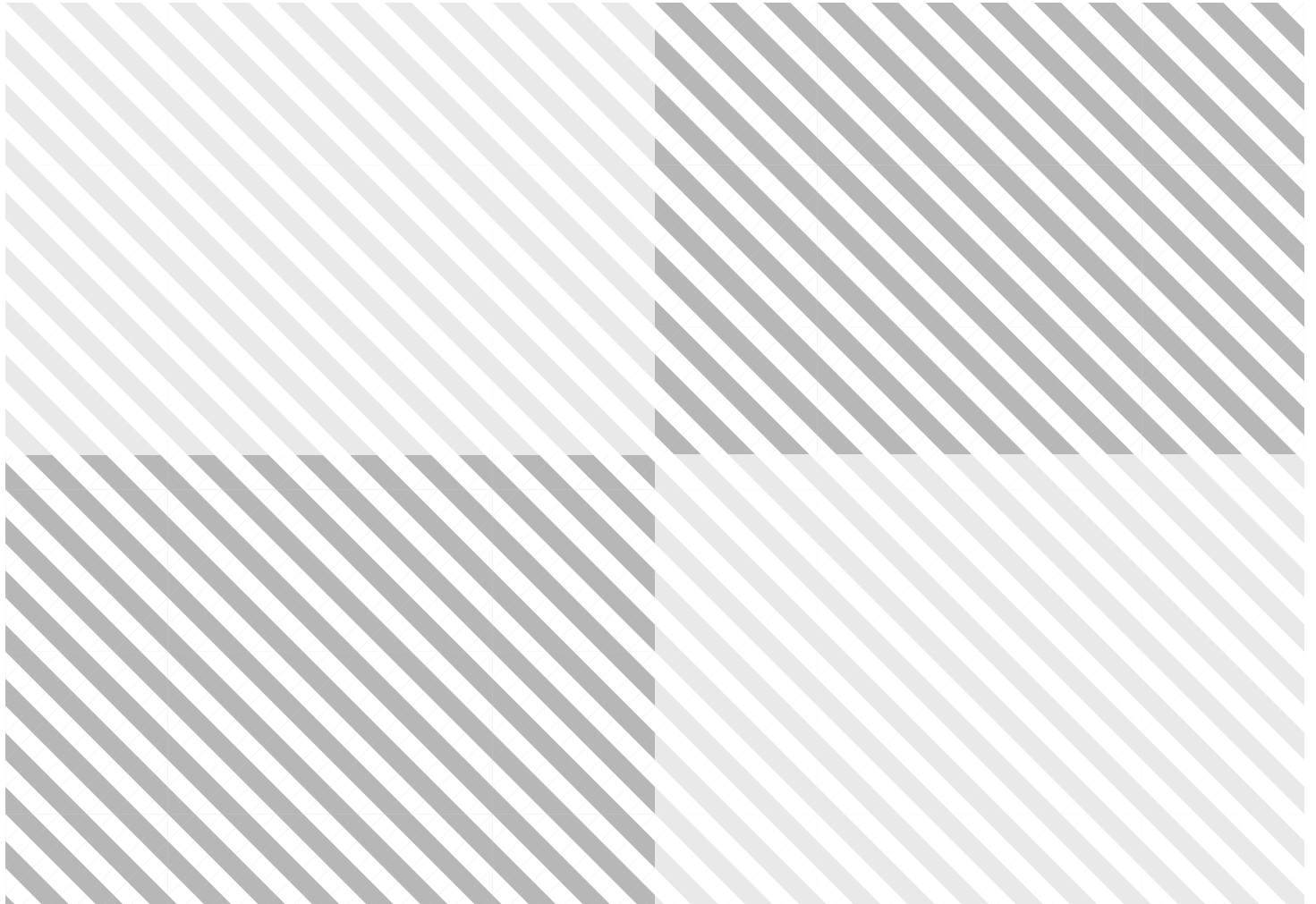


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White Paper

G20 Guiding Principles for Global Investment Policy-Making A Stepping Stone for Multilateral Rules on Investment

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Foreword

Since its creation in 1999, but particularly since its first leaders' summit in November 2008 and its institutionalization in 2010, the G20 has gathered leading countries to diagnose, discuss and work together towards a global recovery. Each G20 member, in turn assuming the presidency, has sought to shape the agenda and focus on concrete issues of international relevance to boost the economic recovery from the global financial crisis.

One of the most important and concrete outcomes of China's G20 presidency was the establishment of a **Trade and Investment Working Group (TIWG)**, recognizing that robust and sustainable trade and investment reinforces economic growth and calling for enhanced G20 trade and investment cooperation.¹ The Chinese presidency's renewed approach was not only to bring stand-alone investment issues to the G20 table, but also to re-spark the conversation on investment and trade policy-making by bringing them closer together again, acknowledging the complementarity of trade and investment as the engines of economic growth. This has paved the way for coherent, integrated discussions on trade and investment for the first time in 15 years in the global political arena.

On the investment side, the TIWG delivered the **G20 Guiding Principles for Global Investment Policy-Making (G20 Guiding Principles)**, a key outcome of the Chinese presidency. These were endorsed by trade ministers in Shanghai in July 2016 and then by heads of state at the Hangzhou Summit in September 2016, with the objective of fostering an open, transparent and conducive global policy environment for investment; promoting coherence in national and international investment policy-making; and promoting inclusive economic growth and sustainable development.²

The G20 Guiding Principles are introduced in Section I of this paper. It begins with a background review of their crafting and various attempts at devising guiding principles on international investment, and identifies some of the guidelines that have paved the way for the Principles.

Section II focuses on the objectives, scope and content of the G20 Guiding Principles and considers their potential impact on policy-making at the domestic and international levels.

Section III addresses the broader work of the G20 TIWG, including the trade and investment linkage, analyses the general state of play of G20 countries' investment agreements, and offers some preliminary conclusions and ways forward.

Understanding these new global principles on foreign direct investment (FDI) policy-making will be relevant for businesses, host and home countries alike, as they navigate a world of turmoil and controversy on the role and rights and obligations of FDI.

Building on Earlier Attempts – Taking a Realistic Approach

This section briefly reviews earlier attempts to establish international rules seeking either to regulate investment at the international level, or to address the role of international investment in broader policy initiatives. It suggests that the careful and circumscribed approach taken by the G20 Guiding Principles is the only realistic one which could have entailed delivery at this stage, and for that the effort has strong merit. The section also reviews several sets of rules and guidelines that have preceded the G20 Guiding Principles.

Earlier attempts to devise multilateral principles on investment

It is possible to take a strictly historical perspective and to show, over time, how various attempts have been made at negotiating multilateral rules on international investment, and on its key actors – multinational enterprises – and how the issue of international investment has consistently resisted international consensus. In spite of multiple efforts in various fora over the years, no multilateral rules on international investment exist, as these negotiations have resulted in failures that have scared and scarred many institutions and champions.

Because of these failures, the outcomes of numerous discussions and negotiations on investment at the multilateral level have inevitably taken, at best, the form of non-binding guidelines, guiding principles or non-binding principles. Soft law has been the way to ensure that the result of negotiations that have not made it into an agreed set of hard rules are consolidated in an instrument that, while not legally binding, would nevertheless contribute to the building of a corpus of rules disciplining FDI across nations.

This has typically been the fate of those instruments negotiated under the auspices of the World Bank (World Bank Guidelines on the Treatment of Foreign Investment),³ the UN (Code of Conduct on transnational corporations)⁴ and the OECD (OECD Guidelines for Multinational Enterprises)⁵ during the 1990s and the first decade of the current century.

At the multilateral level, while references to investment as an engine for sustainable economic growth can be found in the UN Charter,⁶ the UN General Assembly Declaration on Social Progress and Development,⁷ the UN Millennium Development Goals⁸ and the UN Global Compact⁹ – and more recently the UN Sustainable Development Goals (SDGs)¹⁰ and the Addis Ababa Action Agenda¹¹ – no international consensus was found over the years on the need and the way to regulate the interaction and impact of international investment flows.

At the same time, however, international negotiations on investment even among “like-minded” countries of mega-regional instruments such as the Trans-Pacific Partnership Agreement (TPP), Trans-Atlantic Trade and Investment Partnership (TTIP) and Regional Comprehensive Economic Partnership Agreement (RCEP) – with the only recent exception of the Canada-EU Free Trade Agreement (CETA) – are yet to deliver concrete, enforceable results on which to build further.

There is a general consensus over the need to ensure that the investment chapters of free trade agreements and mega-regionals clarify and streamline the content of the minimum standard of treatment, fair and equitable treatment, the operation of most favoured nations clauses and indirect expropriation limit the reference to legitimate expectations of investors, and reaffirm the state’s right to regulate for a public purpose.¹² However, there is no agreement over the way to go about it, let alone a possibility to consolidate the approaches between major international players, adding to it a pressing civil society which has been extremely vocal in opposing these treaties.

Entrenched negotiation positions have made it impossible to come to an agreement on core investment protection, liberalization and promotion rules. For decades, the differences between the EU member countries’ broad bilateral investment treaties (BITs) approach and the US model of pre-establishment protection and customary international law-based investment protection have been emphasized, if not artificially created to play one against the other in international investment disputes, and made it harder to bridge the gap, if it is admitted that there is such a gap in international legal terms.

In this context, it is realistic to consider that agreement on substantive investment protection standards or approaches to investment liberalization is extremely difficult in the short to medium term, globally and even among members of the G20. Be it for lack of common understanding or for lack of appetite for global rules, it is to be expected that a top-down approach to investment regulation will not happen in a fortnight.

In this respect, the outcome of the G20 TIWG is an even greater achievement as it has taken realistic stock of the state of play and identified the need for a different approach to achieve consensus. It has focused on common aspirations, general non-contentious principles and effective policy-making rather than on dividing approaches to substantive and binding legal commitments. The G20 Guiding Principles may actually represent the most elaborate achievement for many years to come.

Realistic approaches that preceded the G20 Guiding Principles

Institutions such as the OECD, UNCTAD, APEC and ILO, as well as the World Economic Forum and International Chamber of Commerce (ICC), have made this pragmatic analysis and have come to the conclusion that mandatory rule-making is not a realistic option, even in the form of model agreements or core substantive principles. International organizations have therefore decided to tackle the international investment agenda from a different, less contentious angle.

The discussions within the TIWG, which resulted in the G20 Guiding Principles, drew first on UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) and its overarching core principles (the "design criteria" for investment policies and for other IPFSD components). In fact, the first draft submitted to the members of the TIWG was based on UNCTAD's Core Principles of the IPFSD.

The UNCTAD IPFSD approach is based on identifying guidelines for investment policy-making at the national and international level, with a focus on improving the sustainable development dimension of investment rulemaking. In its 2015 version, a fourth building bloc of a comprehensive action plan for promoting the attainment of the SDGs was added. The architecture is based on an overarching set of core principles that translate the challenges of investment policy-making into a set of design criteria for investment policies and for the other IPFSD components. The UNCTAD IPFSD then develops two pillars for policy-making, centring on national investment policy guidelines. These are meant to provide guidance for policy-makers on how to formulate investment policies and regulations and how to ensure their effectiveness.

The OECD with its Policy Framework on Investment (PFI) has worked on the role and place of investment policies in global economic regulation and devised a toolkit to identify and implement policies that mobilize private investment that supports steady economic growth and sustainable development, contributing to the economic and social well-being of people around the world.¹³ The PFI provides a framework by which to assess policies to improve investments and their impact, regularly updated to factor the various changes in the global investment landscape, examining 12 policy areas that matter for investment. It also aims to advance the implementation of the SDGs and to help mobilize financing for development in support of the post-2015 development agenda.

The PFI has been used to conduct OECD investment policy reviews by countries and for purposes of capacity building beyond the membership. It encourages policy-makers to ask appropriate questions about their economy, their institutions and their policy settings to identify priorities, develop an effective set of policies and evaluate progress. First developed in 2006, the PFI was updated in 2015 to take into account feedback from the numerous users of the framework at country and regional levels since its development, as well as changes in the global economic landscape.¹⁴

The PFI has been described as essentially a checklist which sets out the key elements in each policy area.¹⁵ With the PFI, the OECD has taken a pragmatic step to encourage countries to benchmark their investment policies against international good practices, to take a coherent approach to investment policies, focusing on an enabling framework for sustainable investment, and providing guidance and examples of good practice for domestic policy-making. The PFI has voluntarily downplayed the international top-down rule-setting on investment to favour the domestic policy approach to build consensus from the bottom up.

Indeed, what government could be opposed or take issue with good practices and practical recipes to improve the investment climate and thereby improve attractiveness for sustainable investment flows? The number of countries undergoing PFI reviews by the OECD or investment policy reviews by UNCTAD shows that this is not a contentious approach.

The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration) is an International Labour Organization (ILO) framework adopted and supported by business, unions and governments to maximize positive social and employment impacts of multinational enterprises and resolve possible negative impacts. It sets out roles and responsibilities for governments (home and host), multinational enterprises, and workers' and employers' organizations, and brings these actors together to solve decent work challenges and identify opportunities for inclusive growth. Its principles cover areas of employment, training, conditions of work and life and industrial relations.¹⁶

The MNE Declaration (v. 2006) states that "where governments of host countries offer special incentives to attract foreign investment, these incentives should not include any limitation of workers' freedom of association or the right to organize and bargain collectively."

Pursuant to the SDGs, ILO's Decent Work Agenda provides a crucial component of a comprehensive and integrated trade and investment approach. SDG 8, to "promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all", is reflected in full on the ILO's mandate of decent work for all and the complementarity of trade and investment policies with employment and decent work. This marks a significant policy shift, as until now trade and investment have often been pursued as ends in themselves, while employment and decent work have sometimes been relegated to outcomes that would come about semi-automatically by simply going for growth.¹⁷ This new policy imperative has been strongly picked up by G20 Guiding Principle 5, prompting investment policies to be consistent with the objectives of sustainable development and inclusive growth, and hence with goal 8 of the SDGs.

The World Economic Forum and the International Centre for Trade and Sustainable Development (ICTSD), through the E15 Initiative, also looked to assemble an ambitious number of policy recommendations for the investment regime, ranging from core areas of investment protection and liberalization, to investment facilitation and constructive

relationships with the trade regime, other international law regimes and other areas subject to international regulation such as global taxation.¹⁸ The E15 Initiative took the interesting approach of looking 10 to 15 years ahead, identifying a vision for 2030 and developing a coherent set of policies to achieve these priorities.

The recently released ICC Guidelines reaffirm fundamental principles for investment set out by the business community as essential for economic development. The guidelines, following the same approach as the OECD PFI, include investment policies within a broader frame of economic governance and rule-making. They highlight investment policies as a piece of a broader puzzle and take a global approach addressing both states and business actors. Both the OECD PFI and the ICC Guidelines insist on the necessary coherence between investment policies and other policy areas relevant for economic governance. They have not taken a position on core elements of investment protection or liberalization in international investment agreements beyond general encouragement (ICC Guidelines 1.3.f).¹⁹

A special mention must be made here of the APEC non-binding principles on investment whose original version dates back to 1994. The APEC non-binding principles, updated in 2011, consolidate core investment protection and liberalization provisions, albeit in a non-binding manner. In spite of repeated efforts and commitments, the APEC non-binding principles have so far not made it into a binding set of rules that would apply among APEC member economies, although the question remains on the table through the Free Trade Area of the Asia Pacific (FTAAP) negotiations, in the absence of other mega-regional investment agreements such as the TPP.

Whether the APEC non-binding principles are seen as a consolidation of a state of play among APEC member economies on investment protection and liberalization, or whether they are still aspirational and reflect mere objectives is debated. Detailed studies of core investment protection and liberalization rules among APEC member economies FTAs show a high degree of convergence and the non-binding principles may soon be considered obsolete in the region, representing an early stage of investment regulation.

In light of this exercises, it is the pragmatic approach that has prevailed in the proposal to come up with G20 Guiding Principles. It was a risky endeavour, though, on several grounds, not only because of past experience. It also required identifying acceptable building blocks and carefully addressing domestic and international policy-making, as opposed to rule-making, while not shying away from certain common principles where they reflect consensus.

Objectives, Scope and Content of the G20 Guiding Principles and the TIWG

Objectives and main drivers

The first immediate objective of the G20 Guiding Principles is to provide general guidance for investment policy-making. The nature and form of the text is clear: it is a set of design criteria, general in nature, and not specifically focused on domestic or international rule-making, but rather covers both, and it is non-binding.

The overall consensus that brings G20 members together on the Guiding Principles is the: role of international investment in the global economic recovery and an equally clear understanding of an overall desire for an open, transparent and conducive investment framework; need for coherence between domestic and international investment policies; and role for investment to contribute and play its part in inclusive economic growth and sustainable development.

From these objectives follow three main drivers for the Guiding Principles:

1. Policy coherence: A key driver for the Guiding Principles was the desire to strengthen policy coherence between national and international policies, and consistency between investment policies and other policy areas, as well as sustainable development objectives.²⁰
2. Sustainable development objectives and inclusive growth: The way sustainable development objectives should feature among the Guiding Principles was subject to discussion among the G20 members. As noted by James Zhan, Director of Investment and Enterprise at the United Nations Conference on Trade and Development (UNCTAD), two approaches were considered by the TIWG: to put sustainable development upfront as a fully-fledged, standalone guiding principle, or to focus on core investment policy issues and ensure the investment principles are in line with sustainable development objectives. The latter approach prevailed and language to this effect is included in the preamble of the Guiding Principles and finds its way again into the concluding paragraph. Sustainable development objectives are thereby reaffirmed in their role for investment policy-making while avoiding characterizing their content and criteria and concrete translation into rules or principles. Inclusive economic growth and sustainable development objectives are further emphasized as common goals under principle 5.

Similarly, the objectives reaffirm the common understanding among G20 member economies on the role investment plays in the overall economic recovery and that it must be given full attention. This is in line with the broader approach taken by the G20 members to address international trade and investment as noted in

the G20 Trade Ministers Statement.²¹ Trade ministers endorsed the G20 Strategy for Global Trade Growth, committing to “lead by example to lower trade costs, harness trade and investment policy coherence, boost trade in services, enhance trade finance, promote e-commerce development, and address trade and development.”

3. Non-binding character: While guiding principles for policy-making in and by themselves do not constitute mandatory rules and do not bind the members as to the content of rules or even over-arching principles, consensus could be achieved because of the way in which the non-binding character of these Guiding Principles was stressed. Member economies agreed upon the aspirational nature of the Guiding Principles, their role as a guiding instrument for the formulation of domestic investment policies and strategies. In his article, Zhan affirms that they may even go beyond and are also meant to serve as an important reference for drafting and negotiating international investment treaties.²² This may be so when general principles are concerned to achieve effective investment policies. The Guiding Principles were ultimately agreed upon precisely because of their non-binding nature that would allow countries as far apart in their understanding of international investment protection and liberalization as India, South Africa, Brazil, China, the European Union and the United States to find common ground.²³

Both the preamble language and the concluding paragraph further highlights the role of these Guiding Principles to serve as a reference for policy-making in the domestic and international policy design process,²⁴ which can be looked at as a positive statement of agreement or the reiteration of an intentional vagueness in their focus.

Content of the G20 Guiding Principles

The G20 Guiding Principles (see Appendix) identify nine elements of investment policy-making that constitute a strong global statement around four key areas of investment policy-making (whether at the domestic or international levels): entry and establishment, treatment and protection, promotion and facilitation, and the settlement of disputes.

In addressing these four key areas the Guiding Principles strike a delicate balance between substantive issues and the rule-making and design process itself. The way each of these key areas appear in the Guiding Principles is telling of the level of consensus or of the sensitivity of issues that are carefully avoided, such as for example competition for investment, through incentives, performance requirements and industrial policies, market access, core elements of

investment protection, investors obligations and the role of home countries.

The main elements covered on different parts of the nine G20 Guiding Principles are as follows:

- Avoiding investment protectionism
- Openness, transparency and non-discrimination
- Investment protection
- Transparency, coherence in investment rule-making, including consistency with the objectives of sustainable development and inclusive growth)
- The right to regulate for public purpose
- Investment promotion and facilitation
- Responsible business conduct
- International cooperation on investment

Discussing in further detail, the content of each of the nine Guiding Principles can be characterized as:

1. Avoiding investment protectionism is the first and most important guiding principle for G20 member economies and, as such, the first to be spelled out. It became apparent during the discussions of the Trade and Investment Working Group that it would need to be reflected first. Since its launch, the core concern for G20 members has been the temptation of investment protectionism that could result from the global financial and economic crisis, and that could drive countries to re-establish barriers to entry and operation of investment that have been systematically taken down over the last five decades. A mandate to monitor such potential protectionist trade and investment measures had been given in 2009 to the OECD, UNCTAD and the WTO, the three organizations coming up with a quarterly report reviewing measures and identifying broader trends. This first principle is both concrete and has broad-ranging implications on policy-making. Interestingly, the addressees of this first guiding principle are the governments.
2. Directly linked to avoiding investment protectionism is the requirement to keep an *open, stable and predictable climate for investment*. While the commitment to avoid protectionism is strong, the way to achieve policies that reflect this commitment are both precise and general. They are precise in so far as they rely on key concepts of international trade and investment frameworks: openness, non-discrimination, transparency and predictability. Openness of an economy to investment is generally achieved through non-discrimination between foreign and domestic operators. Similarly, transparency regarding the conditions and procedures enabling investments is a basic feature of any investment policy framework at the domestic level. They are general however in so far as they announce an objective but do not go into the concrete means to achieve the ends themselves. For instance, whether these policies will apply at the pre-establishment stage or only once an investor has been admitted in accordance with the laws and regulations of the host State, however open and enabling they may be, is not addressed here. But there is logic to this, as doing so would most likely have constituted a major stumbling block within the negotiations.

3. The third guiding principle relates to investment protection and deals with strong protection and legal certainty. It also addresses settlement of investment disputes that has become in recent years the fixation abscess of international investment negotiations. This guiding principle advocates for legal certainty and strong protection of investors and their investments, including both tangible and intangible investments. The scope of the principle goes beyond protecting traditional property rights and identifies tangible and intangible assets and rights as requiring strong protection. This is again the recognition that investment protection must go beyond the protection of property rights afforded by traditional investment rules and that they should encompass more recent forms of such rights (i.e. intellectual property rights, data, derived rights).

The interesting aspect of this principle is the emphasis on settlement of disputes, on dispute prevention policies and effective mechanisms to prevent, settle and then enforce the outcome of dispute settlement. The objective for rule-making or designing of mechanisms is to establish fair, open and transparent dispute settlement procedures. The principle also explicitly identifies the risk of abuse by foreign investors of these procedures. While it is of course the main objective of this paper to highlight the content of the Guiding Principles, it is also interesting in this regard to underline what is not there. There is no specific normative content, no standard or level of protection in this principle, beyond the affirmation that the protection must be strong and that disputes must be addressed. Similarly, there is no agreement on the type of mechanisms for dispute settlement beyond the principles of fairness, openness and transparency. While fairness and transparency are clearly identified principles in dispute resolution, whether in the current investor to state dispute settlement mechanisms, particularly with the recent improvements on transparency and public access, the same cannot be said about openness and one wonders about the concrete implications, beyond public access to arbitration procedures and hearings. The two following principles address policy-making and design criteria to achieve the substantive objectives spelled out in the first three items.

4. *Transparency and participation in the regulatory process* is a core principle of the international trading system. It makes sense both to ensure that all players in the international trading system play by the rules and because the policies and rules at stake are limited and focused on the border/entry of investments. Although they are generally considered non-contentious also for investment policy-making, some transparency-related angles are highly controversial, such as the ones that relate to national security reviews; hence the need for a compromise. As it will be discussed in more detail below, this is far from obvious however in the sense that investment policies address virtually all areas of domestic laws and regulations, and that any and all domestic laws and regulations are relevant for foreign investors. The scope of this aspiration for transparency and stakeholder participation in investment policy-making is therefore a double-edged sword and must be considered carefully to ensure that it matches domestic rule-making procedures and not become too burdensome and encroach on policy flexibility. Clearly operationalizing this principle goes well

beyond publication and access by investors to rules and measures and reaches well into the domestic institutions.

5. *Coherence between national and international investment policies* is a very legitimate desire and objective; however, it is clearly more difficult to ensure in the absence of multilateral rules on investment and in a scattered landscape of rules and obligations. Although coherence does not mean harmonization, interestingly the overall *objectives of sustainable development and inclusive growth* are spelled out again, among the design or policy-making objectives, to emphasize that not only is coherence within investment policies desirable, but necessary.
6. The state's *right to regulate investment for legitimate public purpose* then follows the main design criteria. This principle is delinked from the investment protection principle, and the content has been cropped to achieve an agreement ad minima. This reflects the fact that far beyond the G20, but here also, there is no consensus on the best way to address legitimate concerns about a state's right to regulate. For some G20 member countries, the language of the principles is important to avoid implying that commitments by states at the national and international levels to protect foreign investors could clash with the state's right to regulate for public interest, and that they would risk impinging on this right. Other member economies have made it a central feature of their international investment negotiations to protect the state's right to regulate, and it would therefore have been difficult to reach a consensus beyond reaffirming it. The difference in these approaches have dominated investment agendas of the last decade, including at the TTIP negotiations and on the new investment treaty models and policies of certain countries, such as Brazil or India. The European Union, for example, has put the issue of the right to regulate at the centre of "trade for all," its new trade and investment strategy.²⁵
7. The focus on *investment promotion and facilitation*, also picked up very strongly by the G20 and B20 in 2017 under the German presidency, is another important component of the Guiding Principles and shows the member countries' pragmatic approach to investment policies. The above principles and rules are of course meant to achieve a concrete objective: attracting and retaining investment that has a concrete and positive impact on the host state's economy. This can be achieved through coherent and effective investment promotion and facilitation policies. Again, this principle refers to transparency, this time as a corollary to conduciveness. In practice, it refers to investment promotion measures and making the rules and regulations known to investors when entering but also when operating their business. As noted by Zhan in his paper,²⁶ and as was also apparent during the discussion of earlier drafts of the Guiding Principles, G20 members wanted to avoid the issue of investment incentives and their corollary: performance requirements linked to incentives.²⁷

The issue of investment incentives that are consistently criticized for their lack of proven impact on the investment decision-making also leads to competition for investment

among states and even within states. Some countries, however, are not yet ready to forego the possibility of providing these incentives. To avoid tackling the issue directly in the Guiding Principles, it was decided to focus on "effective and efficient" investment promotion that reflects the positive and pro-active role states can play in promoting investment. It is interesting to note in this regard that investment promotion and facilitation are at the core of the new treaty approach of Brazil and several countries that are looking into strengthening the promotion and facilitation role of investment cooperation.

8. The next principle on *international best practices and applicable instruments of responsible business conduct and corporate governance* builds on the OECD Guidelines for multinational enterprises, and recognizes the role of best practices and soft law instruments developed on these issues. The Guiding Principles incorporate by reference the OECD Guidelines and consolidate them as a desirable feature of policy-making at the domestic and international level. While it recognizes the importance of such instruments of responsible business practices, it is the closest the Guiding Principles come to spelling out obligations for investors, which keeps being raised by civil society as another pending issue it has with the investment regime.
9. The last principle on cooperation could be seen as paying a tribute to international institutions active in investment policy-making, such as the OECD, UNCTAD, the World Bank and, where relevant, the WTO. The reference to *cooperation and dialogue* is important in the absence of an international forum where investment issues are discussed. The terms "[S]hared investment policy challenges" is more ambiguous and seems to represent a compromise wording to address the concerns voiced by some G20 member countries, typically the developing economies members of the G20, and the position of other members that beyond naming investment protectionism as the common concern, are not prepared to identify downsides of investment policies, either at the national or the international levels.

The Guiding Principles conclude with an operational statement that they should not be considered in isolation and that, as indicated in the UN Guiding Principles, the OECD PFI or the UNCTAD IPFSD core principles for policy-making, they constitute a coherent set which needs to take into account national and broader, sustainable development objectives and priorities.

The statement that the Guiding Principles "interact with each other and should be considered together" warrants careful scrutiny. It reflects the overall aspiration to coherence and consistency in the policy-making process, to ensure that investment policies to avoid protectionism or on investment protection do not clash with other policies on investment promotion or on responsible business conduct. The concrete implication of this statement does not go as far as the statement in an earlier draft suggesting that the principles should not be applied or interpreted in isolation. The fact that the Guiding Principles are non-binding does not make application or interpretation necessary beyond inspiration when drafting policies and aspiration for coherence.

Conclusions, State of Play and the Way Forward

Preliminary conclusions

The Guiding Principles' opening and closing statements are indeed coherent on the role that is devolved to them, and closes the exercise. Before qualifying the Guiding Principles as non-binding, which leaves no doubt as to their legal nature, the preamble describes them as a proposal by the G20 members to provide general guidance for investment policy-making. The concluding paragraph states that they can serve as a reference for national and international investment policy-making and in so far emphasizes the role of the Guiding Principles as a policy-making checklist or a good practices manual.

Two interesting remarks come to mind with regard to the reference that is made in the concluding paragraph to international investment policy-making and to international commitments. This is the only place in the Guiding Principles, apart from the reference to necessary coherence between national and international policies, where international investment negotiations are addressed. Were it not for this reference, the exercise could be limited in its scope and application to domestic policy-making. It remains to be seen whether these Guiding Principles as they currently stand reflect an actual consensus on investment rule-making and it will be left to the implementation and the follow-up to show whether the focus is on setting a stepping stone for investment negotiations, or carefully circling around any kind of international investment rules.

As previously flagged, it may also be interesting to take a quick glance at what has made it into the G20 Guiding Principles and what has not. Four main issues do not feature prominently, as a result of a consensus approach, in the G20 Guiding Principles: a role for international rule-making, a clear focus on substantive investment rules, a balanced approach to investors' rights and obligations, and a strong and central reference to sustainable development as a Guiding Principle.

One could argue, however, that some of the elements are inherently contained within the principles. First, that liberalization, protection, regulation and promotion are all covered here, and hence the role in international rule-making is more aspirational in nature. Second, the principles are supposed to aim at a higher level of consensus, and again by nature are not treaty provisions or the result of negotiations. Third, that investor's rights and obligations are covered strongly in principle 8 about responsible business conduct. And fourth, that the sustainable development dimension is emphasized in three critical places: the preamble, the last paragraph making it a common thread, and the overarching objective to be consistent with the objectives of sustainable development and inclusive growth. These arguments are again a witness of the constructive ambiguity under which the principles were built.

From the point of view of their scope of application, the G20 Guiding Principles offer answers and guidance, but also raise many questions. It could be argued that in this respect they miss on their goal to set clear guiding principles for international rule-making. They remain too general and too vague, clearly on purpose. But they could also be seen a crucial and very concrete first step in order to achieve further guidelines. Thus, they may be seen as a clever and non-contentious introductory stride that begins with common denominators that are less susceptible of disagreement, and will build and flesh out where appropriate the commonly agreed principles.

In view of the large differences among investment policy-making processes around the globe, one should recognize the ground-breaking nature of the achievement in just agreeing a set of principles, not less because of the difference of views of the players around the G20 itself. Taking a more critical stance, as indicated at the outset, it is dangerous when discussing domestic or international rule-making on investment to use the term "principle" as the reference to principles of international law comes immediately to mind. But it is obvious from the exercise that the TIWG members have sought to avoid any such reference in the Guiding Principles themselves and that the reference to investment policy-making is more about the process itself than about the substantive content and outcome.

Furthermore, a word of caution is needed when it relates to transparency as a principle for policy-making. Transparency is a concept that comes up four times in the Guiding Principles and should be handled with care in the context of domestic and international rule-making, also because of contentious national security issues globally, but especially in key countries such as the United States which feature strong screening mechanisms on the matter.

In the realm of international investment rules, transparency is a means to an end and should not be seen as an end in itself that could be achieved once and for all and that should follow one model. While it is clear that transparency is an enabling characteristic for investment policies, to ensure that investors have a clear understanding of the rules and conditions that will apply to entry and operation of their investments in the host country, transparency in the domestic rule-setting and in the international investment negotiations process is another issue altogether. The fact that lack of transparency is one of the main grievances of civil society about investment arbitration, but also about international negotiations on investment, is telling of the need to deal carefully with legitimate aspirations to greater transparency in the policy-making process. These comments do of course not apply to a greater level of transparency in investment dispute settlement where the Mauritius Convention on Transparency sets a standard.

State of play of G20 countries' investment treaties

The approach taken by G20 Guiding Principles is also to carefully avoid any legal terminology and references to international law principles on investment protection or obligations relating to investment liberalization. None of the core investment treatment and protection standards and obligations are mentioned in the Guiding Principles, whether national treatment, most favoured nation treatment, fair and equitable treatment, protection against unlawful expropriation and protection of free transfer of funds. The settlement of investment disputes is mentioned as a mechanism and, in so far as it is a contentious issue in international negotiations on investment, there is no position as to whether it should take one form or another. New features such as an international investment court, just sanctioned by CETA, were evidently off the table too. Only the overall objective of fairness, transparency and no abuse of the process are referred to.

This is where the Guiding Principles may be seen by some as a missed opportunity. A separate study prepared by Rodrigo Polanco from the World Trade Institute²⁸ on this subject shows that there is more convergence between a state's international investment agreements commitments than apparent, especially after China's shift to pre-establishment commitments based on a negative list.

Preliminary conclusions of Polanco's work are included below, outlining areas of convergence between G20 countries' international investment agreements already in force. Polanco studied common features between the Guiding Principles and traditional investment treaty practice of G20 countries, and he characterizes the common threads of their agreements, arguing that an average G20 country's international investment agreement would include the following features:²⁹

- *Scope of application:* Investment would be defined as every kind of asset, including a non-exhaustive list of covered assets, and would not require certain characteristics of the investment. Investors would be defined as natural persons who are nationals or citizens of the contracting party and judicial entities with their place of incorporation in the contracting party.³⁰
- Promotion and admission: The admission clause would merely require a non-binding establishment in accordance with contracting parties' domestic laws and regulations.³¹
- *Standards of treatment:* The national treatment standard would cover only investments in the post-establishment phase and would be broadly defined without reference to "in like circumstances". The most favoured nation treatment standard would only stretch to investments in the post-establishment phase and would be limited to investments and investors "in like circumstances" and certain sectors. Moreover, the investor-state dispute settlement mechanism (ISDS) would not be excluded from the scope of the most favoured nation treatment. An unqualified fair and equitable treatment standard would be included without reference to customary international law. The full protection and security standard would also be included without any further qualifications.³²

- *Standards of protection:* The free transfer of funds would be guaranteed without any further exceptions for financial difficulties and/or protection of creditors. A prompt, adequate and effective compensation for expropriation would be provided (Hull formula), including compensation for indirect expropriation without any exceptions such as measures adopted for a public policy objective or compulsory licenses under TRIPS. Depicting an evolution in BIT negotiations in G20 countries, an umbrella clause would not be included in the treaty. But there also would be no clause that prohibits performance requirements.³³
- *Investor-state dispute settlement:* The treaty would provide for ISDS without any exemptions for certain disputes or investors and inter-state dispute settlement mechanisms.³⁴

With respect to the application of the Guiding Principles for global policy-making, the study concludes that there are clear differences between principles that correspond to a more traditional content of investment treaties (Principle 1: Performance requirements; Principle 2: NT, MFN and transparency and Principle 3: Prevention of disputes, "enhanced" ISDS), which are largely followed, in comparison to more novel principles (Principle 4: Transparency; Principle 5: Sustainable development ; Principle 6: Right to regulate; Principle 7: Investment promotion; Principle 8: Corporate social responsibility; and Principle 9: Technical cooperation/capacity building), that are largely pending of complete implementation, with important differences across G20 countries.

Trade and investment links in the G20 agenda

Foreign Direct Investment is a key component of the G20's ambition to raise global growth by at least 2% above trajectory, over the next five years. With that goal, these non-binding principles are a very successful deliverable for the investment section of this year's G20 TIWG. These principles aim to foster an open, transparent and conducive global policy for investment, providing coherence and broader predictability for businesses globally.

Highlighting investment as a key component to global value chains (GVCs), the general ideas established on the investment principles should be advanced globally and regionally to governments and policy-makers in order to achieve further coherence in newer treaties and regulations. The GVC component also highlights the link to trade, which has regained international momentum with G20 and B20, just to name a few, addressing these links as a central issue. As a matter of fact, the conversations at the new TIWG extended well beyond an investment-only focus.

On this specific issue, one of the other deliverables of the TIWG was a joint report between the WTO, OECD, UNCTAD and the World Bank on the inter-relationship between trade and investment, and links beyond. The report identifies issues and areas where further analysis is needed on the interactions of both trade and investment measures and their regimes. A good query here is how this report and this – not new – issue should be taken forward at the G20 and beyond.

The institutionalization of the TIWG in itself is another major deliverable for China's G20 presidency. It creates a safe space for G20 trade and investment officials for discussing both topics together, having already started discussions on promotion and facilitation; the latter being taken forward vigorously by the G20 German presidency. There is a consensus also on continuing work on policy coherence, in particular between trade and investment policies. In this particular instance, UNCTAD coordinated the backstopping of the investment work of the TIWG and the Interagency Working Group (consisting of OECD, UNCTAD, World Bank and WTO). It should be acknowledged that domestic reform is also of the essence, if international trade and investment reform is to have an impact.

Some of these topics were highlighted by the G20 Trade (and Investment) Ministers Statement, as they create a benchmark for future work on investment, and trade and investment matters, and to battle the increasing anti-trade rhetoric. Furthermore, the 2016 G20 TIWG ministerial communiqué highlights links with sustainable development, in which trade and investment ministers:³⁵

- Agreed to provide political leadership by acting with determination to promote inclusive, robust and sustainable trade and investment growth
- Resolved to step up efforts to better communicate the benefits of trade and investment openness and cooperation to a wider public
- Committed to lead by example in harnessing trade and investment policy coherence to contribute to global prosperity and sustainable development
- Valued discussion on investment promotion and facilitation, and endorsed the G20 Guiding Principles for Global Investment Policy-Making
- Called to work on investment promotion and facilitation and "encouraged UNCTAD, the World Bank, the OECD and the WTO to advance this work within their respective mandates and work programmes, which could be useful for future consideration by the G20." (para 18)
- Committed to ensuring that trade, investment and other public policies, at both national and global levels, remain coherent, complementary and mutually reinforcing

The trade ministers also took note of the B20 recommendation for the WTO working group on the relationship between trade and investment to resume its work. Incorporating B20 recommendations is also a suggested angle, as the extensive work of the B20 task forces should have a more relevant say on policy issues. Further avenues for the B20 to input into the G20 would be much welcomed in future processes. Some of these principles were also recognized by leaders on the G20 Summit's communiqué, especially on avoiding protectionism and on investment promotion and facilitation, creating avenues for follow-up into the outputs of the G20 in the future.

Next steps

It is important to stress that the mere fact of agreeing on a basic set of Guiding Principles itself constitutes a great achievement. It is now for policy-makers to decide if they will serve as a foundation to be taken further, or remain as a one-off. Either way, they are valuable in reflecting consensus in otherwise entrenched negotiations at the bilateral, regional and multilateral levels. The principles could, for example, cross-fertilize with other regional policy discussions, such as APEC's work on investment and its non-binding investment principles.

It is important to read these Guiding Principles in the broader context of discontent and backlash against traditional investment treaty-making, where it is argued that investment treaties focus only on obligations for the state and rights for investors, and where the state's right to regulate for public purpose can be challenged without appropriate safeguards. This leads to the broader agenda of the reform of international investment policies. It remains to be seen whether the G20 Guiding Principle constitute a step towards new investment treaty-making or whether they remain more general and aspirational.

The key features of new essentials of investment policy instruments – such as the overarching achievement of sustainable development and inclusive growth, responsible business conduct on the part of investors and a retitling of the balance between the obligations taken by the state and the state's inherent right and duty to regulate for public purpose – are central in the Guiding Principles. The fact that they remain general, do not go into legal concepts and formulations to preserve consensus is illustrative of the current tension in investment treaty negotiations between different approaches to investment promotion and facilitation, investment protection and investment liberalization. A careful scrutiny of the way they will evolve and be reflected in operational investment policies will provide the test for their role as a building block in investment policy-making.

It will be particularly interesting to watch how they will be dealt with by the business community. There are clear signs for an appetite towards new approaches and new rules for investment, which reflect a changing economic landscape and a redistribution of roles. It may well be that it is the business community that can take these Guiding Principles one step further, following in the footsteps of the WTO trade facilitation Bali agreement, which is strongly supported by business. The trade and investment agenda of the International Chamber of Commerce, including the WTO Business Dialogues, and discussions at the World Economic Forum Annual Meeting in Davos, will provide a screenshot of business interest on the matter of further aligning investment policies, especially as the 2016 G20 investment Guiding Principles are a good and commendable start, but they need to be taken forward in order to have further global policy-making impact.

Appendix: The G20 Guiding Principles for Global Investment Policy-Making

With the objective of fostering an open, transparent and conducive global policy environment for investment; promoting coherence in national and international investment policy-making; promoting inclusive economic growth and sustainable development, G20 members hereby propose the following non-binding principles to provide general guidance for investment policy-making:

1. Recognizing the critical role of investment as an engine of economic growth in the global economy, governments should avoid protectionism in relation to cross-border investment.
2. Investment policies should establish open, non-discriminatory, transparent and predictable conditions for investment.
3. Investment policies should provide legal certainty and strong protection to investors and investments, tangible and intangible, including access to effective mechanisms for the prevention and settlement of disputes, as well as to enforcement procedures. Dispute settlement procedures should be fair, open and transparent, with appropriate safeguards to prevent abuse.
4. Regulation relating to investment should be developed in a transparent manner with the opportunity for all stakeholders to participate, and embedded in an institutional framework based on the rule of law.
5. Investment policies and other policies that impact on investment should be coherent at both the national and international levels and aimed at fostering investment, consistent with the objectives of sustainable development and inclusive growth.
6. Governments reaffirm the right to regulate investment for legitimate public policy purposes.
7. Policies for investment promotion should, to maximize economic benefit, be effective and efficient, aimed at attracting and retaining investment, and matched by facilitation efforts that promote transparency and are conducive for investors to establish, conduct and expand their businesses.
8. Investment policies should promote and facilitate the observance by investors of international best practices and applicable instruments of responsible business conduct and corporate governance.
9. The international community should continue to cooperate and engage in dialogue with a view to maintaining an open and conducive policy environment for investment, and to address shared investment policy challenges.

These principles interact with one another and should be considered together. They can serve as a reference for national and international investment policy-making, in accordance with respective international commitments, and taking into account national, and broader, sustainable development objectives and priorities.

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