ICTSD

International Centre for Trade and Sustainable Development

WORLD ECONOMIC FORUM

COMMITTED TO IMPROVING THE STATE OF THE WORLD

The E15 Initiative

STRENGTHENING THE GLOBAL TRADE AND INVESTMENT SYSTEM FOR SUSTAINABLE DEVELOPMENT

G20 Guiding Principles for Global Investment Policymaking: A Facilitator's Perspective

James Zhan

December 2016

E15 Investment Theme

Think Piece

ACKNOWLEDGMENTS

Published by

International Centre for Trade and Sustainable Development (ICTSD)
7 Chemin de Balexert, 1219 Geneva, Switzerland
Tel: +41 22 917 8492 – E-mail: ictsd@ictsd.ch – Website: www.ictsd.org
Publisher and Chief Executive: Ricardo Meléndez-Ortiz

World Economic Forum
91-93 route de la Capite, 1223 Cologny/Geneva, Switzerland
Tel: +41 22 869 1212 – E-mail: contact@weforum.org – Website: www.weforum.org
Co-Publisher and Managing Director: Richard Samans

Acknowledgments

This paper has been produced under the E15Initiative (E15). Implemented jointly by the International Centre for Trade and Sustainable Development (ICTSD) and the World Economic Forum, the E15 was established to convene world-class experts and institutions to generate strategic analysis and recommendations for government, business, and civil society geared towards strengthening the global trade and investment system for sustainable development.

For more information on the E15, please visit www.e15initiative.org/

The author of this paper was invited by the G20 Presidency to conceptualise and facilitate the negotiation of the Guiding Principles for Global Investment Policymaking. He wishes to express great appreciation to his colleagues, Richard Bolwijn and Joerg Weber, for their backstopping.

This paper is published as part of E15 activities on investment policy funded by the Netherlands.

James Zhan is Director of the Investment and Enterprise Division, UNCTAD; and a member of the E15 Task Force on Investment Policy.

With the support of:

Government of the Netherlands

Citation: Zhan, James. *G20 Guiding Principles for Global Investment Policymaking: A Facilitator's Perspective*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2016. www.e15initiative.org/

ISSN 2313-3805

ABSTRACT

In July 2016, the G20 Ministerial Meeting in Shanghai, China agreed on the *G20 Guiding Principles for Global Investment Policymaking* (the Guiding Principles). This paper provides a detailed analysis of the specific provisions to inform discussions on the future direction of multi-stakeholder investment policymaking.

CONTENTS

LIST OF ABBREVIATIONS AND ACRONYMS

BITs	Bilateral investment treaties
CETA	Comprehensive Economic and Trade Agreement
CSR	Corporate social responsibility
IIAs	International investment agreements
IMF	International Monetary Fund
MFN	Most-favoured nation
OECD	Organisation for Economic Co-operation and Development
RCEP	Regional Comprehensive Economic Partnership
SDGs	Sustainable Development Goals
TIWG	Trade and Investment Working Group
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

LIST OF FIGURES

INTRODUCTION

In July 2016, the G20 Ministerial Meeting held in Shanghai agreed on the *G20 Guiding Principles for Global Investment Policymaking* (the Guiding Principles). The Guiding Principles were subsequently endorsed by the G20 Heads of State at the September Hangzhou Summit.

Since their adoption, numerous experts and stakeholders have commented on the Guiding Principles and have hypothesised on how they can be used. This short paper attempts to provide an insider's view on how to (and how not to) read the Guiding Principles and inform discussions on the direction of multi-stakeholder investment policymaking in the absence of a formal global investment governance body to guide such a process.

GLOBAL INVESTMENT POLICY CONTEXT

At a time of pressing social and environmental challenges, harnessing economic growth for sustainable development is more important than ever. Investment is a primary driver of such growth. Therefore, mobilising investment and ensuring that it contributes to sustainable development is a priority for all countries.

Nationally, regionally, and globally, the need for a new generation of investment policies has become a prime focus of economic policy discourse. However, this change is not easily effected, because of four characterising strands that mark current investment policymaking processes, namely: dynamics, dichotomy, divergence, and dilemma.

DYNAMICS

The policy environment for cross-border investment is subject to constant change. At the national level, governments continue to adopt investment policy measures at a rate of about 100 annually (as measured over the past decade). This is accompanied by countless broader measures taken every year that influence the overall business environment for investors. At the same time, dynamics are also fluid at the international level, with new investment agreements concluded at the rate of one every fortnight over the past few years. More than 100 countries are currently involved in negotiating over 50 investment treaties, including several mega-regional agreements. And at the level of "soft law," the universe of codes and standards that govern the behaviour of corporate investors has also mushroomed.

DICHOTOMY

There is a dichotomy in national investment policymaking — with simultaneous moves to liberalise and promote investment and to regulate and restrict it. (Figure 1) While the bulk of national investment policy measures adopted in recent years tends toward investment liberalisation and promotion, the overall share of regulatory or restrictive measures has been on the rise (from an average of 5-10 percent in the early 2000s to an average of 25-30 percent in the past few years). Furthermore, governments are increasingly making use of industrial policies, tightening screening and monitoring procedures, and closely scrutinising cross-border mergers and acquisitions. Restrictive measures, especially at the administrative level, often apply particularly to strategic sectors, such as extractive industries and infrastructure, or are based on national security considerations. There are concerns that some of these measures may be taken for protectionist purposes.

DIVERGENCE

At the international level, efforts to update the current (and outdated) generation of treaties can lead to divergence and overlap. At best, the continuing proliferation of bilateral and regional investment treaties adds to the fragmentation of the global investment regime. (Figure 2) The regime already consists of more than 2,950 bilateral investment treaties and more than 350 other agreements with investment provisions. These were concluded at different times, following different approaches, and with partner countries at different levels of development. There is significant divergence and inconsistency even within the treaty networks of individual countries. Indeed, the current international investment regime is multi-layered and multifaceted, and overlap is abundant. For example, six mega-regionals — Pacer plus; the Comprehensive Economic and Trade Agreement (CETA); the Transatlantic Trade and Investment Partnership (TTIP); the Trans-Pacific Partnership (TPP); the Regional Comprehensive Economic Partnership (RCEP); and EU-Japan — overlap with 140 existing agreements (95 bilateral investment treaties (BITs) and 45 bilateral and regional international investment agreements (IIAs)). To date, negotiating parties have opted for a grandfathering approach, which means older treaties coexist with new ones, compounding the complexity and potential inconsistency. Almost all G20 members are involved in one or another mega-regional undertaking.

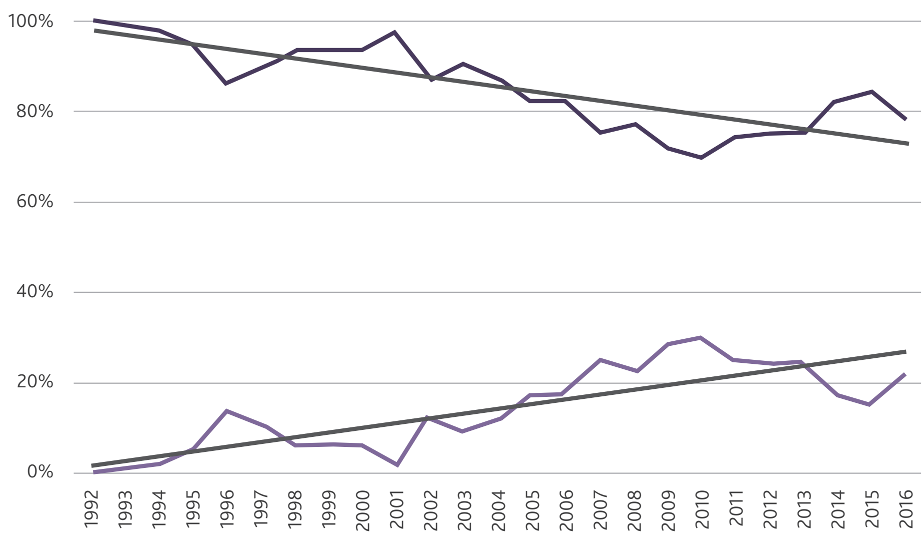


FIGURE 1:

Dichotomy of Policy Direction
(Changes in national investment policies, 1992-2016)

LEGEND:

Liberalization/promotion

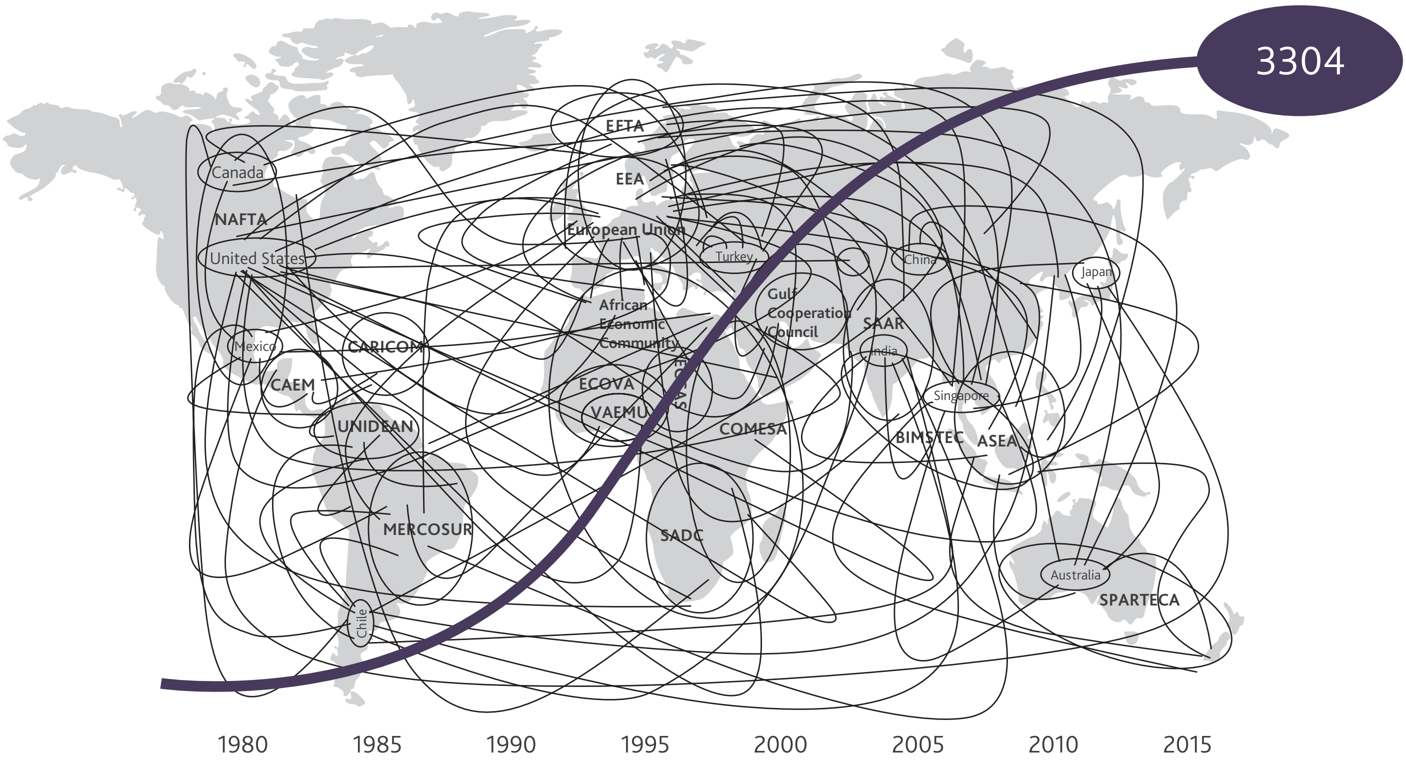
Regulation/restriction

Source: Zhan, based on UNCTAD National Investment Policy database ©

FIGURE 2:

Divergence of international investment policies
(Trends in international investment agreements, 1980-2015)

Source: Zhan, based on UNCTAD IIAs database ©



DILEMMAS

Efforts to boost investment in sustainable development are hampered by policy dilemmas. Financing the United Nations (UN) Sustainable Development Goals (SDGs), for example, will require mobilising and channelling a vast share of private investment into relevant sectors, including most basic infrastructure industries. Many of these sectors are sensitive or have a public service nature. This gives rise to several policy dilemmas. Policymakers need to find the right balance between creating a climate conducive to investment and removing barriers to investment on the one hand, and protecting public interests through regulation on the other. They need to find mechanisms to facilitate sufficiently attractive returns to private investors while guaranteeing accessibility and affordability of services for all. And the push for more private investment must be complementary to the parallel push for more public investment and continued public sector service responsibility. Fundamentally, the entry and protection of private (including foreign) investment must be improved in sectors that are key for sustainable development, which are precisely those where most restrictions tend to apply in both national and international investment policies.

A set of common principles can help policymakers deal with these four "investment Ds" — namely, the policy dynamics, dichotomy, divergence, and dilemmas — to ensure greater policy coherence and support a conducive environment for investment in sustainable development.

FEATURES AND IMPLICATIONS

The adoption of the Guiding Principles is a landmark event. It is the first time in decades of international investment policymaking that consensus has been reached among such a varied group of countries (the G20 membership includes developed, developing, and transition economies). Moreover, collectively the G20 represents more than three-fourths of global foreign direct investment. (Figure 3) Therefore, the Guiding Principles could lay the foundation for global consensus building on key issues in 21st century investment policy.

NEW GENERATION

The Guiding Principles contain key new generation investment policy elements, such as sustainable development and inclusive growth, the right to regulate for public policy purposes, and guidelines on responsible business practice. These are the core elements that are typically weak or absent in most of the 3,300 existing IIAs. G20 members clearly tried to consolidate the most important elements of the emerging consensus. It is noteworthy that the first draft considered by the Trade and Investment Working Group (TIWG) of the G20 drew on the Core Principles of the United Nations Conference on Trade and Development (UNCTAD) *Investment Policy Framework for Sustainable Development*. The latter itself has gone through extensive consultation and global review by investment-development stakeholders.

GLOBAL STATEMENT

The Guiding Principles are a statement of the G20's collective position on the four key building blocks of investment policy and treaty making: establishment, protection and treatment, promotion and facilitation, and dispute settlement. The Guiding Principles are meant for global application as indicated in the title and the G20 Leaders' Communiqué. As already mentioned, the G20 represents more than two-thirds of global foreign direct investment — both inbound and outbound — which means G20 action will give significant traction to advance multilateral consensus.

IMPROVING 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.

DELICATE BALANCE

The Guiding Principles try to strike a delicate balance between the rights and obligations of firms and states, between liberalisation and regulation, and between the strategic interests of host and home countries.

NON-BINDING INSTRUMENT

The Guiding Principles are non-binding in nature, as the G20 took a realistic first step toward global investment policymaking in the 21st century. They are meant to serve as a guiding instrument for reviewing and formulating national investment policies and strategies. They are also meant to serve as an important reference for drafting and negotiating international investment treaties. The role and impact of the Guiding Principles could be far-reaching if they are effectively translated into concrete national laws and regulations. They could also be the touchstone for global reform of the existing IIA regime and the formulation of a new generation of IIAs, more appropriately aligned with 21st century concerns and priorities.

G20 GUIDING PRINCIPLES

The following is the text of the Guiding Principles. It is important to read and interpret the full set of principles as a coherent whole.

With the objective of (i) fostering an open, transparent and conducive global policy environment for investment, (ii) promoting coherence in national and international investment policymaking, and (iii) promoting inclusive economic growth and sustainable development, G20 members hereby propose the following non-binding principles to provide general guidance for investment policymaking.

I. Recognising 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.

II. Investment policies should establish open, non-discriminatory, transparent and predictable conditions for investment.

III. 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.

IV. 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.

V. 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.

VI. Governments reaffirm the right to regulate investment for legitimate public policy purposes.

VII. Policies for investment promotion should, to maximise 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.

VIII. Investment policies should promote and facilitate the observance by investors of international best practice and applicable instruments of responsible business conduct and corporate governance.

IX. 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 each other and should be considered together. They can serve as a reference for national and international investment policymaking, in accordance with respective international commitments, and taking into account national, and broader, sustainable development objectives and priorities.

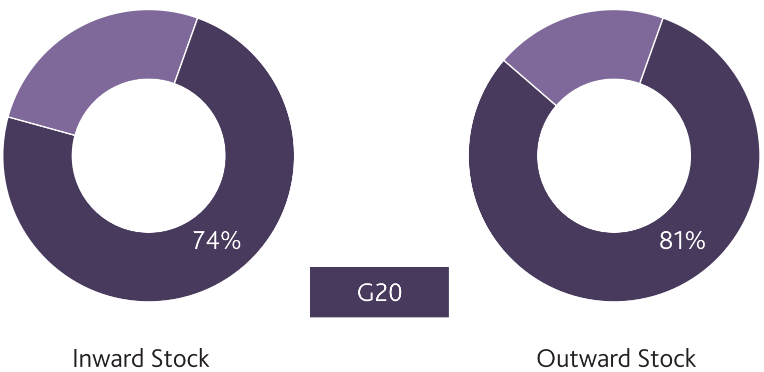


FIGURE 3:

Dominance of G20 in global FDI
(Share of G20 in total world FDI stock, as of 2015)

Source: Zhan, based on UNCTAD FDI-MNEs-GVCs database ©

ANNOTATIONS AND INTERPRETATION

As clearly stated in the concluding paragraph, the Guiding Principles cover both national and international policymaking dimensions, substantive issues and policymaking processes, and the interaction between investment and other public policies.

SUSTAINABLE DEVELOPMENT

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 issues and ensure the investment principles are in line with sustainable development objectives. After intensive discussion, the G20 members eventually agreed to take a hybrid approach: a statement on sustainable development in the preamble (objectives of the Principles) and conclusion (the use of the Principles), and the emphasis on the consistency and coherence of investment policies with sustainable development and inclusive growth as a standalone principle (Principle V). The sustainable development dimension is further strengthened by the inclusion of principles on the right to regulate and on corporate social responsibility (CSR). These are all salient features of new generation IIAs. In fact, the sustainable development dimension is rarely found in existing IIAs (including old ones concluded by G20 members).

PROTECTIONISM

Avoiding investment protectionism is listed upfront, emphasising the grave concern with which G20 members regard this rising phenomenon. It reflects the determination of the G20 to address the issue, as manifested in G20 leaders' commitments since the global financial and economic crisis (see Section 6).

ENABLING CONDITIONS

Principle II reaffirms the traditional criteria for assessing an environment conducive to investment, i.e., openness, non-discrimination, transparency, and predictability. It remains general in dealing with the complexity of investment regimes, and it implies coverage of both pre-establishment and post-establishment.

TRANSPARENCY

The word "transparency" appears in Principles II, III, IV, and VII. The most important and substantive is Principle IV, which emphasises a participatory approach to investment policymaking involving "all stakeholders." This is a novel feature for new generation IIAs, which has far-reaching implications.

SCOPE OF PROTECTION

With respect to investment protection, the Guiding Principles use the asset-based definition, "tangible and intangible" investment. This is in line with most of the IIAs concluded by G20 members. This is a particularly noteworthy distinction today with the growing importance of the digital economy in which intangible assets have become ubiquitous to investment. It is noteworthy that the G20 members avoided going into the specific treaty provision level, such as most-favoured nation (MFN) and national treatment.

RIGHT TO REGULATE

Reference to the "right to regulate" is rarely found in the 3,300 existing IIAs (including those concluded by G20 countries), except in the most recent ones. Therefore, Principle VI represents a new generation approach. It is important to note that the "right to regulate" is further defined with a reference to "for legitimate public policy purposes." This helps strike a delicate balance between liberalisation/protection and regulation. It is worth mentioning that G20 members tried to provide some examples to illustrate "legitimate public policy purposes," but failed to reach agreement on this point.

DISPUTE SETTLEMENT

Principle IV emphasises effectiveness in handling dispute settlement and enforcement. More important, this Principle introduces dispute prevention, which is weak or absent in most existing IIAs. The Principle also stresses that dispute settlement procedures should be fair, open, and transparent, with appropriate safeguards to prevent abuse, including by investors. It is meant to address the widespread concern about the investor-state dispute settlement mechanism that prevails in the existing body of IIAs. The Principle is in line with the recommendations of UNCTAD's *Roadmap for IIA Reform*. It is worth noting that the Principle does not go to the level of specific approaches, such as the exhaustion of domestic remedies, investor-state dispute settlement, or the establishment of an investment court. This reflects the inconclusiveness of ongoing international debate on the full implications of these options.

PROMOTION AND FACILITATION

In Principle VII, investment promotion and facilitation cover both the pre-establishment and post-establishment stages and attraction as well as retention. The G20 avoided taking a position on the issue of incentives, as it is highly controversial and hardly dealt with in existing IIAs. Furthermore, G20 members were not able to reach a common understanding on the notion of "harmful competition for investment." Therefore, the Principle addresses the concern through the wording of "effective and efficient" in investment promotion. Investment facilitation and promotion are rarely found in existing G20 IIAs (except for the new Brazilian IIAs). In fact, more than 90 percent of the existing IIAs do not contain substantive provisions on investment promotion and facilitation. Proactive investment facilitation and promotion provisions appear only in some of the most recent treaties.

CORPORATE RESPONSIBILITY

It is worth mentioning at the outset that the Organisation for Economic Co-operation and Development (OECD) was effective in advancing this Principle in line with its *Guidelines for Multinational Enterprises*. As the heading of the Guiding Principles clearly indicates, this instrument is meant to provide guidance to policymakers, not (CSR) recommendations for investors per se. The Principles take a soft approach, not making a mandatory statement, but referencing international instruments and good practice. The real-world situation is paradoxical in that, on the one hand, there is a proliferation of CSR standards at the global, regional, and national levels (including through thousands of industry and firm-level standards and codes of conduct); on the other hand, the concept of CSR is either weak or absent in most existing IIAs. The inclusion of CSR in the Guiding Principles thus represents an advance to streamline and harmonise this important aspect in international investment rule making. It is noteworthy that some members thought there would be room for a stronger statement on the issue, reflecting international efforts in this respect. Mainstreaming CSR into IIAs remains a challenge, particularly with respect to the mandatory approach.

INTERNATIONAL COOPERATION

Principle IX emphasises the importance of ongoing dialogue and collective efforts to address common challenges for investment and development. Some members favoured a more ambitious approach, suggesting that the Principle could also address the issue of partnership between investment home and host countries. However, others felt that the issue was more relevant in the context of supporting low-income countries' efforts to attract and benefit from investment – a salient feature of UNCTAD's *Global Action Menu for Investment Facilitation and the World Bank's Doing Business Project*.

INTERACTION BETWEEN THE PRINCIPLES

It is important to read and interpret the full set of principles as a coherent whole. This has been emphasised in the concluding paragraph of the Guiding Principles. For example, the Principle on avoiding protectionism should be interpreted in conjunction with the Principle on the right to regulate for legitimate public policy purposes. Only when taken together is it possible to assess the extent to which G20 members have succeeded in negotiating a balanced approach to investment policymaking.

THE WAY FORWARD

Building on its achievements in the areas of trade and investment under the Chinese Presidency, the G20 has highlighted in the 2016 Ministerial Statement and Leaders' Communiqué the way forward for its investment policymaking work.

MANDATES BY THE G20 MINISTERS

The Statement of the G20 Trade Ministers Meeting in Shanghai, 9-10 July 2016, welcomed the inputs provided by international organisations in the areas of trade and investment. It encouraged continued work in the TIWG (paragraph 5: "*We encourage officials to make good use of the TIWG to better support Trade Ministers Meetings and to further strengthen G20 trade and investment cooperation*.") Trade Ministers also outlined the framework of a continued work programme for international organisations supporting the investment work of the TIWG, as follows:

- Continue trade and investment policy monitoring (paragraph 12: "*We ask the WTO, OECD and UNCTAD to continue, within their respective mandates, their regular reporting on restrictive measures affecting trade in goods and services, and investment.*");

- Advance work on investment promotion and facilitation (paragraph 18: "*We value discussions on investment promotion and facilitation, and encourage 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*."); and

- Undertake further research and analysis on the complementarity between trade and investment regimes (paragraph 20: "*We welcome further research and analytical* *work in UNCTAD, WTO, OECD and the World Bank, in consultation with the IMF, within their existing mandates and resources, to identify ways and means to enhance coherence and complementarity between trade and investment regimes*.")

MANDATES BY THE G20 LEADERS

The G20 Leaders' Communiqué of the Hangzhou Summit took up the Trade Ministers' findings and provided further guidance on the G20's future work on investment. Specifically, G20 leaders:

- Committed to further strengthen G20 trade and investment cooperation (paragraph 25: "*We endorse the outcome of the G20 Trade Ministers Meeting held in Shanghai on 9-10 July, and welcome the establishment of the G20 Trade and Investment Working Group (TIWG). We commit to further strengthen G20 trade and investment cooperation*.");

- Reiterated the commitment to standstill and rollback protectionist measures (paragraph 28: "*We reiterate our opposition to protectionism on trade and investment in all its forms. We extend our commitments to standstill and rollback of protectionist measures till the end of 2018, reaffirm our determination to deliver on them and support the work of the WTO, UNCTAD and OECD in monitoring protectionism*.")

- Endorsed the G20 Guiding Principles (paragraph 29: "*We endorse the G20 Guiding Principles for Global Investment Policymaking, which will help foster an open, transparent and conducive global policy environment for investment*."); and

- Welcomed further work by the international organisations on, inter alia, communicating the benefits of trade and investment, investment promotion and facilitation, and enhancing coherence and complementarity between trade and investment regimes (Section on Acknowledgement and the Way Forward: "*We also welcome further joint work by the WTO, UNCTAD, OECD, ITC, World Bank Group and IMF, in collaboration with other relevant international organizations, within their existing mandates and resources, to identify ways and means to promote inclusive, robust and sustainable trade and investment growth, including but not limited to the work of measuring trade costs, reporting on restrictive measures, improving economic trade modeling, communicating the benefits of trade and investment, investment promotion and facilitation, enhancing coherence and complementarity between trade and investment regimes, and promoting inclusive and coordinated global value chains*.").

Translating this work programme into concrete action will require concerted efforts by the G20, the above-mentioned international organisations, and other investment-development stakeholders. The B20 and T20 are keen to ensure that the Guiding Principles will be implemented and disseminated.

CONCLUDING REMARKS

The adoption of the *G20 Guiding Principles for Global Investment Policymaking* is an auspicious accomplishment. The G20 has gone beyond the IIA traditional construct. The Principles have established a roadmap for future investment policymaking and reflect the consensus on key investment and related sustainable development issues. The Guiding Principles provide the blueprint for a new generation of investment policies and treaties. It could have been even more ambitious in certain aspects, but the nature of the instrument ought to be recognised, as well as the diverging interests of G20 members and those of different investment-development stakeholders.

On the whole, reaching agreement on the Guiding Principles is a momentous achievement in the inaugural year for the TIWG. In less than six months, the G20 reached consensus on an issue area that has been marked by controversy for more than six decades. This remarkable feat was possible owing to the strong and effective leadership of the Chinese Presidency and the collective wisdom and political will of the G20 members. UNCTAD led the substantive support, and the OECD also made contributions to the process.

The Guiding Principles, no doubt, have far-reaching implications as we chart the path toward a new generation of national investment policies and international investment treaties. They will also influence the reforms of the old international investment regime, which still exerts influence on investment and sustainable development. The Principles set a baseline for future consensus on investment policies worldwide. They lay the foundation for further work, which could extend to other areas, such as investment facilitation and promotion in low-income countries, and the creation of sustainable development-oriented national investment policy frameworks and international investment treaties.

It goes without saying that the dissemination and application of the Guiding Principles within and beyond the G20 remain a challenge for G20 members and investment stakeholders. The TIWG may well concentrate future efforts on the formulation of a strategy to aid the coherent and coordinated implementation of the Principles. This will be a useful step to ensure the Guiding Principles transcend the paper realm and contribute materially to transform investment policy to match the priorities and address the challenges we face in the 21st century.

Implemented jointly by ICTSD and the World Economic Forum, the E15Initiative was established to convene world-class experts and institutions to generate strategic analysis and recommendations for government, business, and civil society geared towards strengthening the global trade and investment system for sustainable development.

ICTSD

International Centre for Trade and Sustainable Development

WORLD ECONOMIC FORUM

COMMITTED TO IMPROVING THE STATE OF THE WORLD