Trade, Investment and Tax Cooperation

G20 Argentina

Moving the G20’s investment agenda forward

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It is of paramount importance that the G20 pay attention to the mounting challenges facing the international investment regime, a regime that regulates an activity that is more important than trade in delivering goods and services to foreign markets and integrating these markets.[1] This is all the more important because international investment is crucial to advance sustainable development, especially in developing countries. For both immediate and long-term reasons, investment policies should, therefore, be a core item on the agenda of the G20 and the Trade and Investment Working Group in particular. The present policy brief makes two sets of recommendations:

The G20 should continue its important work on international investment policy reform and initiate steps to operationalise the Guiding Principles for Global Investment Policymaking. More specifically, the G20 should initiate a gap and trend analysis of the contents of international investment agreements (IIAs) in light of the Guiding Principles; operationalise the Guiding Principles by drafting annotations; initiate a voluntary peer learning mechanism among G20 countries regarding the use of the Guiding Principles; and invite UNCITRAL and ICSID to report on progress with regard to reforms of procedural rules.

The G20 should support ongoing WTO discussions on investment facilitation. More specifically, the G20 should stress that a future plurilateral investment facilitation agreement needs to be compatible with the most-favoured-nation principle; suggest that investment facilitation discussions aim not only at facilitating more FDI, but sustainable FDI; adopt Guiding Principles for Global Investment Facilitation to provide overall guidance; and encourage the extension of existing aid-for-trade initiatives to investment.

We realize that a number of these proposals require actions that go beyond Argentina’s Presidency. However, they are in line with the desirability that international investment issues constitute a core item on the agenda of the G20 and, in particular, its Trade and Investment Working Group.

[1] **The sales of foreign affiliates were US$38 trillion in 2016, compared to world exports of US$20 trillion that same year; see, UNCTAD *World Investment Report 2017: Investment and the Digital Economy* (Geneva: UNCTAD, 2017), p. 26.**

Challenge

It is of paramount importance that the G20 pays attention to the mounting challenges facing the international investment regime, for three reasons:

- International investment is crucial to support sustainable development, especially in developing countries, in line with the requirements of the 2030 Agenda for Sustainable Development and the G20 Action Plan on the 2030 Agenda for Sustainable Development. With the objective of promoting economic, social and environmental development within adequate governance mechanisms, it will not be sufficient just to increase the volume of foreign direct investment (FDI). Rather, the contribution of FDI to host countries needs to be improved as well, including through appropriate policies. Moreover, while the benefits for host countries have been well documented, recent research shows how outward FDI can directly support the 2030 Agenda as well.[1] Increasing the quantity and quality of FDI flows requires a well-functioning, accepted and accountable international framework that supports economically sound, environmentally sustainable and socially just investments.
- There are increasing signs that the current international investment regime needs to be improved to fulfill its principal purposes. Recent policy developments are increasingly challenging the idea that an open, rules-based and transparent international investment regime automatically and by itself leads to an adequate distribution of the benefits of investment among host and home countries. For example, leading G20 economies are encouraging firms to re-shore operations and invest at home, or they are tightening controls of outward FDI. There is also an increasing tendency to use screening mechanisms to review mergers and acquisitions. A further source of tensions is the lack of reciprocal market access in leading G20 economies. Moreover, there is a concern that performance requirements are practiced as a market-access condition in some G20 countries. At the same time, the growing number of investor-state dispute-settlement (ISDS) cases filed by foreign investors against host states is leading some governments to withdraw from key institutions of the

international investment regime (such as IIAs) and arbitration fora (such as the International Centre for Settlement of Investment Disputes (ICSID)). These growing political economy tensions, if un-adressed, could lead to increasing restrictions on international investment flows, indeed to an "investment war". This would be deplorable, given the evidence that, on balance, FDI brings significant benefits to both host and home economies and, as mentioned before, that investment flows can make an important contribution to achieving the Sustainable Development Goals (SDGs).

- The G20 as a forum of systemically significant economies is uniquely positioned to tackle the growing challenges facing the international investment regime. The G20 countries account for two-thirds of global FDI flows, and they participate in most IIAs. The G20 represents both developed countries and emerging markets, ensuring a broad representation of interests. Given that the international investment regime, lacking a core set of multilateral rules and institutions, is predominantly build on a network of mostly bilateral investment treaties and different fora to adjudicate investment disputes, the G20 provides an important venue to initiate policy dialogue and coordination to advance reforms on key international investment issues.

In light of these challenges and the fact that international investment rule-making is somewhat of an orphan in the current international system, we suggest that investment policies should be a core item on the agenda of the G20 and, in particular its Trade and Investment Working Group (TIWG) during the Argentinian presidency and beyond. In the following, the T20 Task Force on Trade, Investment and Tax Cooperation, based on comprehensive internal deliberations among scholars from a wide range of G20 countries, calls for immediate action on the two sets of policy proposals outlined below.

[1] M. Stephenson, "OFDI and development: policy considerations to leverage a new pathway for growth", in Syed Munir Khasru, *Towards Sustainable Development: Lessons from MDGs & Pathways for SDGs* (Dhaka: Institute for Policy, Advocacy, and Governance, 2017).

Proposal

1. Promoting international investment policy reform

The G20 should continue its important work on international investment policy reform in 2018 and, in particular, initiate steps to operationalise its Guiding Principles for Global Investment Policymaking, agreed upon in 2016 during the Chinese presidency.[1] These nine Guiding Principles are meant to contribute to foster an open, transparent and conducive global policy environment for investment, promote coherence between national and international investment policy-making and promote inclusive economic growth and sustainable development.[2] The Guiding Principles reflect a normative convergence among G20 countries with regard to overarching principles for a substantial reform of the international investment regime. They are an important first step towards a multilateral consensus on international investment reform. If operationalised properly, the Guiding Principles can give structure to negotiations currently under way in the context of bilateral and regional investment agreements. Many of the over 3,000 existing IIAs include vaguely drafted standards that create uncertainty as to their reach and their application in ISDS cases. Many countries are currently rethinking the model texts they are using to negotiate bilateral investment treaties or investment chapters in free trade agreements. However, given the investment regime's atomized structure, substantive reforms are a daunting task, only achievable over the long term.

Given the difficulties to achieve a comprehensive reform of IIAs in the immediate future, some institutions have narrowed reform efforts in the short-to-medium term to procedural aspects of the adjudication of investment disputes. The United Nations Commission on International Trade Law (UNCITRAL) is currently examining issues of ISDS reform. Through a discussion of the issue that began in the fall of 2017, government and other stakeholder delegates are identifying issues regarding various procedural aspects of ISDS, and will then proceed to consider how issues that require improvements can be addressed. The World Bank's ICSID is similarly examining issues of procedural reform, as the ICSID Secretariat is working to revise its rules used in investor-state arbitrations.

In light of these recent developments, we propose that the G20 take the following concrete actions in the short term, to promote the reform of substantive and procedural investment rules:

Proposal I: Initiate a gap analysis of IIA contents in light of the Guiding Principles for Global Investment Policymaking.

The Guiding Principles were explicitly agreed as non-binding principles to provide general guidance for investment policymaking, both at the domestic and international levels. To move this agenda forward within the G20, it would be desirable to have an overview of how these principles have been implemented in existing treaties. This would be important not only for effective harmonisation and policy convergence among G20 countries, but it would also be of immediate relevance for non-G20 countries, especially for developing and least developed countries, that will see that the world's largest economies set the example and include these principles in the negotiation and re-negotiation of their IIAs.

Accordingly, and in order to provide the basis for a further operationalisation of the Guiding Principles, the G20 should mandate the relevant international organisations with preparing a report, to be discussed in 2019, that includes a gap anlysis of existing IIAs. To guide such an analysis, an independent group of experts, representing researchers, business, labour, and civil-society, should be tasked to provide benchmark standards based on the Guiding Principles.

Proposal II: Extend the existing mandate to monitor investment policy measures to analyse trends of IIA contents in light of the Guiding Principles.

Since the first G20 Summit in Washington in November 2008, the United Nations Conference on Trade and Development (UNCTAD) and the Organisation for

Economic Co-operation and Development (OECD) have reported about investment policy measures adopted by G20 countries at the national and international levels. At the moment, these reports provide information about national policy developments and IIAs negotiated by G20 countries, as well as a brief overview of general trends with regard to the contents of these treaties, and they do not seek to distinguish between, for example, measures taken to increase benefits of foreign investment and measures taken for protectionist purposes. The reports do not examine the extent to which any new IIAs reflect the Guiding Principles.

Accordingly, the present reporting mandate of UNCTAD and the OECD should be extended to include a trend analysis of the contents of recently negotiated IIAs against benchmark standards based on the Guiding Principles.

Proposal III: Operationalise the Guiding Principles by drafting annotations.

The Guiding Principles are formulated at a high level of generality. This was necessary, given the limited time available and to obtain consensus among a diverse group of countries. While the Guiding Principles provide overall guidance to IIA negotiators, it would be desirable to delineate in greater detail the various issues that fall under each of the Guiding Principles, to provide more specific guidance. In doing so, this effort could conceivably distinguish between issues about which there is broad-based consensus, and issues for which distinct approaches are taken by governments, possibly evolving eventually in a restatement of international investment law.

Accordingly, the G20 should mandate an independent group of experts from institutions of higher learning around the world to annotate the Guiding Principles, keeping in mind, among other things, the need to advance the SDGs. The results should be submitted to a future meeting of the Trade and Investment Working Group for its consideration.

Proposal IV: Initiate a voluntary peer learning mechanism among G20 countries regarding the operationalisation of the Guiding Principles.

Voluntary peer learning mechanisms have gained importance within the G20 in recent years. While peer reviews to monitor individual countries' efforts towards a commonly agreed goal have been part of the G20's work for quite some time,[3] peer learning is a more recent phenomenon. For example, the G20 initiated in 2017 a voluntary peer learning mechanism on the national implementation strategies of the 2030 Agenda for Sustainable Development. Peer learning mechanisms can be a useful tool to share experiences among G20 countries about various reform options to operationalise and implement the Guiding Principles.

Accordingly, the G20 should initiate a voluntary peer learning process on the operationalisation of the Guiding Principles, facilitated by the relevant international organisations. Countries participating in the peer learning process should report about their experiences and lessons learned in forthcoming sessions of the Trade and Investment Working Group.

Proposal V: Invite UNCITRAL and ICSID to report on progress with regard to procedural reforms.

A range of procedural issues relating to the international investment regime have received considerable attention in the public and on the part of governments, focused in particular on ISDS. As the number of ISDS cases increases and the various costs of these cases become even more apparent, the regime's dispute-settlement system is likely to attract even more criticism. In light of this, discussions are taking place in both UNCITRAL and ICSID about how to improve the regime's dispute-settlement system. These discussions are of great importance, as they bear on the very legitimacy of the investment regime, and the G20 should follow them closely.

Accordingly, the G20 should invite UNCITRAL and ICSID to report regularly to the Trade and Investment Working Group about the status of the discussions in their organisations. The Working Group, in turn, may wish to take the developments in these organisations into account when disussing other matters related to the international investment regime.

2. Supporting ongoing investment facilitation discussions

As discussed earlier, international investment is crucial to support sustainable development. In fact, given the substantial investment gap that exists to reach the SDGs,[4] it would be highly desirable if FDI flows would rise considerably, especially in key areas critical for reaching the SDGs, and particularly to developing countries. While the nature of the economic determinants in host countries are central to attracting FDI, the nature of the regulatory framework and investment promotion play an important role in this respect as well. To address this issue, experts advocated an international support programme for sustainable investment facilitation[5] and UNCTAD subsequently elaborated a Global Action Menu for Investment Facilitation. [6] The G20 itself recognised the importance of this topic in 2016.[7] During the German G20 presidency in 2017, the Compact with Africa focused on increasing private investments in selected developing countries [8] and investment facilitation was discussed in detail, with a view towards adopting a non-binding investment facilitation package.[9] Despite the lack of agreement among G20 countries during the German G20 presidency on this package, a group of 41 WTO members and the European Union adopted, on the margins of the 11th WTO Ministerial Conference in Buenos Aires in December 2017, a Joint Ministerial Statement on Investment Facilitation for Development [10] that called for structured discussions among a group of like-minded countries. These discussions started in March 2018 with the participation of WTO members and "the aim of developing a multilateral framework on investment facilitation."[11] Thus, work on a framework for facilitating FDI flows has begun at the international level. The challenge is to bring this work to fruition. In doing so, however, and especially in light of the need to reach the SDGs, it is important that any agreements emerging from this work will not only encourage higher FDI flows, but sustainable FDI flows, that is, involve investment with certain sustainability characteristics. In this context, it is also of concern that there are signs that inward and outward FDI protectionism is rising.

In light of these recent developments, we propose that the G20 take the following concrete actions in relation to investment facilitation:

Proposal VI: Encourage the investment facilitation discussions in the WTO and support their multilateralisation.

Structured international investment facilitation discussions about a multilateral framework on investment facilitation have begun in the WTO among a group of like-minded countries, consisting of developed countries, developing countries and economies in transition, all of which are also FDI host and home countries. For the moment, this plurilateral approach seems to be the most promising approach, and it needs to be pursued with vigour.

Accordingly, the G20 should endorse and support the WTO discussions. At the same time, the G20 should recommend that these plurilateral discussions be conducted in a manner that the results will be applied on a most-favoured-nation basis, as a key yardstick to allow for a subsequent multilateralization. Achieving this will require that the concerns of investment facilitation critics are taken into account, in particular by defining what investment facilitation is and what it is not. This would entail, in particular, acknowledging that market access, investment protection and ISDS are not part of the discussions of any agreement. At the same time, a multilateral framework would provide govenments seeking to reform their investment policy regimes with a baseline, reference point and justification that would facilitate such reforms. Moreover, while these discussions are ongoing, the G20 should urge a standstill in FDI protectionism.

Proposal VII: Suggest that investment facilitation discussions aim not only at facilitating more FDI, but sustainable FDI for sustainable development.

Given that the SDGs are the lodestar of international development policies, it is important that investment flows are not only commercially viable but also make a maximum contribution to the economic, social and environmental development of countries and take place in the context of fair governance mechanisms – sustainable FDI for sustainable development.[12] In fact, there is a growing consensus on the part of host and home country governments, international investors and other stakeholders on the characteristics of FDI that lead to sustainable development outcomes, including on the governance mechanisms that maximize FDI benefits and minimize costs.[13] The G20 can play a key role in facilitating and encouraging sustainable FDI. Moreover, as all G20 members are increasingly both sources and recipients of FDI flows, governments therefore more and more use their investment promotion agencies (IPAs), both to attract FDI and facilitate outward investment to strengthen the international competitiveness of their firms. Yet, one IPA's outward investment is another IPA's inward investment. There are therefore clear win-win scenarios, allowing IPAs to partner to facilitate outward investment from one economy as inward investment into another economy. This is a notable shift from years ago, when IPAs were only competing to attract inward FDI, creating potentially a zero-sum game.

Accordingly, the G20 should encourage the WTO negotiation parties to pay particular attention to the facilitaton of sustainable FDI flows. Furthermore, they should urge negotiators to make special arrangements for investment facilitation technical assistance for least developed countries. This is particularly necessary in the case of large-scale projects for which robust pre-investment economic-development, environmental and social impact assessment studies need to be conducted to maximise the positive effects of such projects and minimise the negative ones. The G20 should further advocate that home countries encourage their firms to undertake outward FDI in ways that produce sustainable development outcomes, and they should support host countries in strengthening their governance mechanisms in that direction. A number of G20 economies have started to do so unilaterally, but an endorsement by the G20 can serve to broaden this approach. Such an effort could be usefully complemented by the creation of a digital platform for IPAs to exchange information and co-operate on investment facilitation regarding inward and outward FDI.

Proposal VIII: Adopt Guiding Principles for Global Investment Facilitation

During the German presidency, the G20 came close to agreeing on a non-binding investment facilitation package that included the fostering of an open and transparent business climate and actions to promote inclusive economic growth. A considerable amount of work was undertaken towards this objective, and it would be desirable if the fruits of this work could be harvested, at least at the level of principles.

Accordingly, the G20 should build on these discussions and adopt Guiding Principles for Global Investment Facilitation. Such Investment Facilitation Principles would provide overall guidance to the discussions in the WTO, and they could draw attention to the need to encourage the flow of sustainable FDI. Increased transparency, for example, could promote the use of best practices regarding investment laws and policies, and it could also help countries to learn from peers on how to encourage sustainable investment while safeguarding the national interest. It would also be desirable if the G20 could encourage Argentina and other interested parties to examine empirically, for example, for the agriculture/food value chain, the range of issues that arise in the context of the utilization of sustainability characteristics and facilitating investment flows.

Proposal IX: Extend Aid-for-Trade initiatives to international investment.

The WTO-led Aid-for-Trade initiative seeks to mobilize resources to address the trade-related constraints faced by developing and least developed countries. [14] Similar initatives exist at the national level. Considering that trade and investment are tightly intertwined, trade facilitation alone does not maximise positive trade effects and mutually beneficial international economic exchanges in general, but rather needs to be complemented with practical measures that address investment-related constraints.

Accordingly, the G20 should recommend that the current WTO-led aid-for-trade initiative, as well as national programmes of this kind, be immediately expanded to include support for investment facilitation, such as strengthening investment promotion agencies. Such expanded aid-for-investment-and-trade initiatives would also support the negotiation of international investment facilitation rules, in particular by improving developing countries' economic determinants for attracting sustainable FDI.

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[1] Available at http://investmentpolicyhub.unctad.org/Upload/Documents/Annex%20III%20G20%20Guiding%20Principles%20for%20Global%20Investment%20Policymaking.pdf.

[2] Ibid.

[3] For example, the G20 implemented the Mutual Assessment Process (MAP) in 2009 to monitor national growth policies and the G20 Voluntary Peer Review on Inefficient Fossil Fuel Subsidies that Encourage Wasteful Consumption in 2013.

[4] See e.g., UNCTAD, *World Investment Report 2014. Investing in the SDGs: An Action Plan*(Geneva: UNCTAD, 2014).

[5] Karl P. Sauvant and Khalil Hamdani, "An international support programme for sustainable investment facilitation," July 2015, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798147, and Karl P. Sauvant, on behalf of the E15 Task Force on Investment Policy, "The evolving international investment law and policy regime: ways forward. E15 Task Force on Investment Policy – Policy Options Paper" (Geneva: ICTSD and WEF, E15 Initiative, 2016), ch. 3.2, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2721465..

[6] Available at http://investmentpolicyhub.unctad.org/Publications/Details/148.

[7] See Principle VII of the Guiding Principles, op. cit., and para. 25 of the G20 Leaders' Communique Hangzhou Summit, available at http://www.g20chn.com/xwzxEnglish/sum_ann/201609/t20160906_3397.html.

[8] Available at https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Featured/G20/2017-03-30-g20-compact-with-africa.html

[9] Axel Berger, "What's next for the investment facilitation agenda?" *Columbia FDI Perspective*, no. 224, April 23, 2018.

[10] WTO, "Joint ministerial statement on investment facilitation for development," WT/MIN(17)/59, available at https://worldtradescanner.com/Investment%20Facilitation%20for%20Development.pdf. See also Felipe Hees and Pedro Mendonça Cavalcante, "Focusing on investment facilitation—is it that difficult?" *Columbia FDI Perspectives*, no. 202, June 19, 2017.

[11] WTO, "Joint ministerial statement on investment facilitation for development," WT/MIN(17)/59, available at https://worldtradescanner.com/Investment%20Facilitation%20for%20Development.pdf.

[12] Karl P. Sauvant and Howard Mann, "Towards an indicative list of FDI sustainability characteristics" (Geneva: ICTSD and WEF, 2017), available at https://ssrn.com/abstract=3055961.

[13] Ibid.

[14] See, https://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm.

Existing Initiatives & Analysis