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China moves the G20 on international investment

by
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During China's Presidency of the Group of Twenty (G20), culminating in the G20 Hangzhou Summit in September 2016, important decisions were taken that could shape the future of international investment law and policy. China was the driver, given its fear of FDI protectionism and of discriminatory treatment toward its outward investors.

First, the Summit endorsed [1] nine "Guiding Principles for Global Investment Policymaking," agreed in July 2016 by the G20 Trade Ministers,[2] and prepared by their Trade and Investment Working Group to provide overall guidance to investment policy making: avoidance of FDI protectionism; openness, non-discrimination, transparency, and predictability; investment protection, including dispute settlement; transparency in investment rule-making, involving all stakeholders; coherence in rule-making, consistent with sustainable development; the right to regulate; investment promotion and facilitation; responsible business conduct; and international cooperation.

Reaching agreement was a challenge, with G20 members having to compromise in a short period in the face of disparate views on key issues. The Principles, therefore, were formulated in general language, and certain issues such as specific protections could not be agreed. Other notions could not be clarified, such as that investment promotion and facilitation should include maximizing benefits for host countries; that investment, best to contribute to sustainable development, should exhibit certain sustainability characteristics; and that "responsible business conduct" should include obligations, in such areas as those addressed, for instance, in the OECD Guidelines for Multinational Enterprises. More generally, the G20 Principles remain focused on the obligations of host countries, with only modest references to investor obligations and no mention at all of home country obligations.

China, with help from Canada as Working Group co-Chair, brought about a compromise, aided by its links to other members of the BRICS group and supported by the Secretariats of UNCTAD, the OECD, the WTO, and the World Bank. Agreement was possible because the Principles are general in nature, are non-binding and keep the focus on host country obligations. Overall, they are a desirable step toward outlining a comprehensive international investment framework and preparing the ground for an eventual plurilateral or multilateral investment regime.

Going forward, it is important for governments to build on the Principles. For example, a review (e.g., a gap analysis) could be undertaken of the extent to which international investment agreements already reflect the Principles and the ways in which new agreements take them into account. Another possibility would be for international organizations to monitor future treaty practice in light of the Principles and periodically to report on the results of such monitoring, or to invite countries to report on implementation of the Principles in their own policies. Finally, the Principles could be elaborated through the addition of annotations. The key is for governments actually to work with the Principles. As a first step, then, the Principles need to be widely disseminated.

Second, China's Presidency has laid the groundwork for something concrete, relatively non-controversial and in the interest of all countries, namely, the facilitation of higher FDI flows to developing countries, and especially the least developed among them. The Trade Ministers "encourage[d] UNCTAD, the World Bank, the OECD and the WTO to advance this work within their respective mandates and work programmes."[3] Various international organizations have initiated such work.

Encouraging, too, is India's proposal for an "Agreement on Trade Facilitation in Services" at the WTO,[4] explicitly covering Mode 3 (i.e., commercial presence) of the General Agreement on Trade in Services. FDI (akin to "commercial presence") in services accounts for roughly two-thirds of total FDI. Such an Agreement could become a stepping-stone for a broader international support program for sustainable investment facilitation.[5] In the near/medium term, one way to make progress would be to prepare G20 "Guiding Principles for Global Investment Facilitation," drawing on the precedent of the "Guiding Principles for Global Investment Policymaking."

Finally, the G20 decided to maintain its Trade and Investment Working Group. This Group could remain a valuable additional platform for intergovernmental discussion regarding governance of international investment in a non-rule-making setting, and can serve as an incubator for related ideas.

Germany, holding the G20 Presidency in 2017 and co-chairing the Working Group, can move the G20's investment policy work forward. However, given the controversies surrounding some investment issues, and given Germany's federal elections set to take place in the fall of 2017, that country's focus is likely to be on investment facilitation. Argentina, holding the G20 Presidency after Germany and having an interest in FDI facilitation, could build on whatever work has been done to achieve additional concrete results.

Considering the difficulty of the investment issue and the shortness of time, the agreements reached by the G20 represent important accomplishments. The challenge, now, is to build on them.

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[1] *See* "G20 Leaders' Communiqué," available at http://www.consilium.europa.eu/en/meetings/international-summit/2016/09/Leaders-CommuniqueHangzhouSummit-final_pdf/, para. 29.

[2] "G20 Trade Ministers Meeting Statement," available at https://www.wto.org/english/news_e/news16_e/dgra_09jul16_e.pdf.

[3] *Ibid.*, para. 18.

[4] *See* WTO Working Party on Domestic Regulation, "Concept Note for an Initiative on Trade Facilitation in Services," Doc. S/WPDR/W/55, Sept. 27, 2016.

[5] *See* Karl P. Sauvant, "We need an international support programme for sustainable investment facilitation," *Columbia FDI Perspectives*, No. 151, Jul. 6, 2015.

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