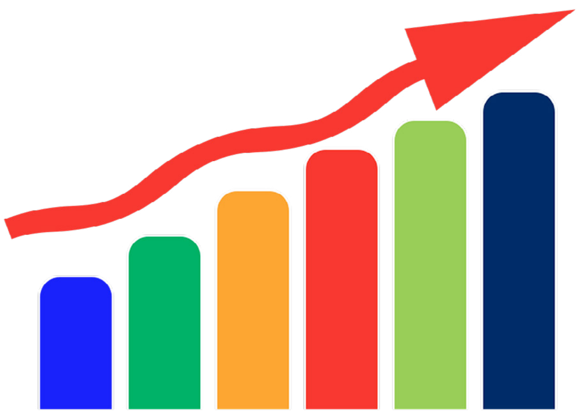
Investment

1. What are the stated G20 goals and commitments in relation to this topic?

The G20 is promoting a new investment paradigm for itself and inviting the world to follow suit. The paradigm aims to help lift the global economy and create jobs by investing trillions of dollars, particularly into domestic and cross-border investment projects and infrastructure development. The plan that would help achieve this groundbreaking shift is entitled "From Billions to Trillions: Transforming Development Finance". It shows how the multilateral development banks (MDBs) would work with governments to leverage these huge funds, especially from pension funds and insurance companies (and other long-term institutional investors). The G20 asserts that this plan would support the new United Nations Sustainable Development Goals (SDGs), particularly its infrastructure goals (see #10 of this series).

The G20 nations and the international organizations that support their efforts envision global investment and infrastructure accelerating trade, which in turn will lead to economic growth, job creation and productivity. Its mantra has been repeated year after year:



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- At the 2014 G20 Australian Summit, the G20 Leaders noted that "[o]ur growth strategies contain major investment initiatives, including actions to strengthen public investment and improve our domestic investment and financing climate, which is essential to attract new private sector finance for investment."[1]
- It was at this summit that the G20 announced an ambitious goal to lift the G20's GDP by at least an additional two per cent by 2018.
- At their 2015 Turkish G20 Summit, G20 Finance Ministers and Central Bank Governors reiterated that boosting investment is a top priority.
- The 2016 Summit in Hangzhou, China repeated this mantra, featuring trade and investment prominently in the Leaders' Communiqué, and making new commitments.

At the 2017 Summit in Hamburg, Germany, President Trump is likely to further accelerate the G20 plan. Trump's Contract with the American Voter[2] would provide tax credits for firms to invest $1 trillion over ten years in infrastructure.

The G20 has a long-standing practice of assigning topics to one of two work streams: the exclusive G20 "finance track", comprised of the G20 central bank governors and finance ministers, focuses on financial and macroeconomic issues, while relegating development and sustainability issues to the "Sherpa track", comprised of top aides of G20 Heads of State. As such, the economic and financial decision makers are insulated from what they see as soft, non-financial issues in the Sherpa Track.

This two-track mindset of the G20 is reinforced by external organizations that work with the G20, such as the OECD and the World Bank. In spite of the declared intent of the Chinese G20 Presidency to prioritize investment, trade and infrastructure, and for the first time, the SDGs, it is also evident in the 2016 Communiqué that this split between "hard" and "soft" issues institutionalizes policy incoherence in the G20.[3]

Under the heading of "Robust International Trade and Investment" in the Chinese G20 Communiqué,[4] the G20 Leaders noted "with concern the slow growth in trade and investment globally" and committed to enhance "an open world economy by working towards trade and investment facilitation and liberalization." To this end, the Leaders endorsed the G20 Guiding Principles for Global Investment Policymaking.

Under the heading of "Inclusive and Interconnected Development",[5] appearing immediately below the above section, the Leaders made different kinds of commitments on trade and investment, using development-oriented language. The section noted: "Our growth, to be strong, sustainable and balanced, must also be inclusive. We are committed to ensuring the benefits of our growth reach all people and maximize the growth potential of developing and low-income countries. In this context, we place sustainable development high on the G20 agenda". Here, the G20:

- pledged to align its work with the SDGs.
- announced the G20 Initiative on Supporting Industrialization in Africa and Least Developed Countries.
- reaffirmed its commitment to promote quality infrastructure investment.
- endorsed the Global Infrastructure Connectivity Alliance to connect the regional infrastructure master plans around the world.

2. What does "investment" mean? Why is this topic important?

Economists agree that fostering robust domestic investment and foreign direct investment (FDI) is a path that contributes to robust trade, which in turn stimulates economic growth. FDI is investment made to acquire lasting interest in enterprises operating outside

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of the country of the investor. On the positive side, it can create efficient links between economies, and may serve as a vehicle for local enterprise development, including small- and medium-sized enterprises (SMEs). It can also diffuse innovation through transfers of technology and know-how between the recipient ("host") and the investing ("home") economies and create jobs. It can also provide an opportunity for the host economy to promote its products more widely in international trade.[6]

In the process of competing for FDI, some undesirable trends emerge. To attract FDI, countries often race to make investment easier for investors by reducing or removing regulations and bureaucratic red tape, in such areas as issuance of business permits, customs regulations, and ease in hiring and firing workers. When they do this well, they are rewarded with high rankings by the World Bank's flagship publication, Doing Business. In this rush to the bottom, governments neglect their responsibility to protect workers and the environment and to require investors to demonstrate responsible business conduct. Even though an independent panel challenged the assumption of the Doing Business Report that correlates reduction in regulation with growth and development, the laissez-faire spirit is deeply ingrained in the rhetoric of the international organizations that promote economic growth.

Countries also enter into international investment agreements (IIAs) to set rules on FDI. Over 3,200 bilateral, regional, or international investment agreements are currently in circulation. These agreements are concluded in a piecemeal manner, since any undertaking to do so at the global level is futile. While IIAs aim to set standards on host state's treatment of foreign investors, modern investment agreements increasingly liberalize cross-border investment. Some are more progressive than others, embedding sustainable development, environmental protection and labor standards, and industry voluntary initiatives. But they generally constrain the ability of the host state to change the laws on the books to protect the investor from having to incur potential cost of complying with new laws.

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IIAs also confer other special privileges to foreign investors; for example, investor-state dispute settlement (ISDS) mechanisms in investment agreements entitle foreign private investors to sue host governments for violating their protected interests in these agreements, even though they are not party to them (investment agreements are treaties that are concluded between states). This provides foreign investors with an advantage over domestic investors. In recent years, investors relied on their ISDS privileges to challenge a wide range of host state laws.[7] UNCTAD notes that host countries faced up to $114 billion worth of claims and awards of up to $50 billion.[8] In a nutshell, these agreements favor invest-ment liberalization policies and protection of investor interests over and above the legitimate public policy considerations, investor obligations, and rights of citizens.

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In China, the G20 Leaders and Trade Ministers had to acknowledge that their growth goal had eluded them: global trade slowed "from an average of over 7% per annum between 1990 and 2008, to less than 3% between 2009 and 2015."[9] This problem can be attributed in part to the rising tide of protectionism among the G20 nations, which closed down much trade. The rich nations took more steps to open up to foreign investments than to expand trade. Notwithstanding this track record, investment data and projections on domestic investment and FDI are down.[10] This poor state of the G20 economic performance forced the embarrassed G20 nations to commit to even more structural reform measures in the 2016 Hangzhou Action Plan to liberalize investment and trade.

3. What is the progress so far and what are the challenges in relation to this topic?

G20 Guiding Principles for Global Investment Policy Making. In a nine-point statement, the Guiding Principles aim to foster an open, transparent and conducive global policy environment for investment, coherence in national and international policy making, and inclusive economic growth and sustainable development. There is a hint of an attempt to bridge the persistent split between "hard" finance and "soft" nonfinance issues within the G20, noted above. In fact, UNCTAD, which facilitated the G20 endorsement of the Principles, called the G20 endorsement of the Principles a "landmark event."

Unfortunately, the nine brief Principles do not yet deserve UNCTAD's generous billing. It is a Christmas tree with nine ornaments, symbolizing different perspectives of stakeholders. They offer only a brief notation that these principles should be considered together and serve as a reference point for national and international policy making – it has no elaboration of the key concepts, or suggestions on how the G20 could balance, offset or prioritize the principles in implementation. In fact, UNCTAD had already done the heavy lifting by setting out the ten-point Principles for Investment Policy Making, and providing guidance on concretizing them, in the Investment Policy Framework on Sustainable Development. Why would the G20 not endorse UNCTAD's balanced and comprehensive Framework?

Investment Agreements and Sustainable Development. UNCTAD envisions a "new generation" of investment policies and agreements, placing inclusive growth and sustainable development at the center of efforts to attract investors. In the process, it counsels balancing of investment liberalization policies and protection of investor interests, on the one hand, and legitimate public policy considerations and investor obligations, on the other.

A few recent and positive IIA models offer a glimpse of the future. For example, Norway's model bilateral investment agreement, which has «not lowered standards» and «right to regulate» clauses. The Model

Bilateral Investment Treaty Template of SADC (Southern African Development Community), a regional organization consisting of 14 member countries,[11] cites the IFC Performance Standards in reference to environmental and social impact assessment and the precautionary principle.[12] The G20 is in a position to do more to promote progressive versions of investment agreements, reflecting UNCTAD's guidance. They should also ensure that IIAs do not create conflict with countries' planned emission reductions (the Intended Nationally Determined Contributions (INDCs) under the Paris Climate Change Agreement.

Governments' right to regulate investment for legitimate public policy purposes merits further attention of the G20 leaders. UNCTAD's guidance recognizes the host country's right to set regulations on entry and operational conditions for FDI, in the interest of public good or national security, and to minimize potential negative effects of such investment, and should be the starting point for the G20.

Reforming ISDS mechanisms in investment agreements should be prioritized. Host countries' new climate change policies and laws, to be established in accordance with countries' commitments to reducing carbon emissions, could be the next target of legal attacks by investors.[13]

Investment and SDGs. The Chinese G20 Summit welcomed the Global Infrastructure Connectivity Alliance, established in 2016 to enhance the synergy and cooperation among various regional infrastructure connectivity programs in a holistic way. The MDBs are expected to support and underwrite this initiative. Infrastructure connectivity, whether within a single country or across borders, is clearly the new favorite concept of the G20 for achieving sustainable development and shared prosperity. In fact, resilient infrastructure is one of the stated goals in SDG 9, and infrastructure investment could help countries meet this goal, as well as other SDGs. Yet, we do not know whether there is a firm connection between infrastructure investment and economic growth – academic research of Chinese infrastructure investment suggests that such connection is tenuous, and could trigger an infrastructure-led national financial and economic crisis.[14] It is already clear that the idea of cross-border connectivity will inevitably lead to large-scale or even mega projects, a particular G20 obsession. Experts caution that such projects are delivered "over budget, over time, over and over again."[15] Further work is needed to articulate how G20's contribution to investments will align with the SDG sectors. MDBs have an important role to play in supporting G20's commitment in SDGs, including resilient infrastructure.

Focus on Industrialization in Africa. The G20 Initiative on Supporting Industrialization in Africa and LDCs deserves a mention, due to strong interest expressed by Germany to focus on this during its forthcoming G20 Presidency. Under this Initiative, the G20 commits to:

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- Promote investment in sustainable and secure energy, renewables and energy efficiency, and sustainable and resilient infrastructure and industries in Africa and LDCs, in line with the 2030 Agenda and Paris Agreement's objectives and the countries' Nationally Determined Contributions to emission reduction.
- Help countries and communities predict and prepare for the risks posed by climate change.
- Support Africa and LDCs to industrialize in accordance with WTO rules.
- Identify infrastructure gaps, needs and funding requirements for sustainable infrastructure including regional and rural infrastructure.
- Explore ways to improve the financial and technical support for feasibility studies and preparation of infrastructure and industrial projects to attain bankability.
- Facilitate the leveraging of multi-stakeholder resources for investment in trade, connectivity, transport and industrial corridors, and support local development of special economic zones, industrial parks and science and technology parks to attract investment and talent.

The Development Working Group will follow up on this initiative with relevant work streams and ask for reports in 2018. While Germany[16] and the European Union are already positioning themselves to lend strong support to this initiative, the burden of proof falls on the G20 and African nations to show that these efforts will help meet the SDGs without increasing debt to unsustainable levels.

4. What is the desired future direction of the G20 with respect to the topic

- As a matter of urgency, the G20 should consider how to integrate the currently bifurcated work stream structure that separates considerations on investment by the Finance track from sustainability and developmental aspects of investment by the Sherpa track. This will ensure coherence between economic and financial initiatives and decisions, on the one hand, and sustainable development considerations, and in particular, the SDGs, on the other.
- Align the new Guiding Principles for Global Investment Policymaking with UNCTAD's Principles for Investment Policy Making, as well as the guidance and resources in the Investment Policy Framework on Sustainable Development.

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- Since the G20 nations enter into numerous investment agreements, including large scale regional or international agreements, the decision to embed sustainable development in IIA will have a huge ripple effects across the globe. The G20 should follow UNCTAD's guidance, and as a matter of priority support the host state's right to regulate, as well as reform ISDS. Investment agreements should support national sustainable development processes and not conflict with the host state's contributions to emission reduction to address climate change.
  - The G20's negotiators of investment agreements should be fully informed of UNCTAD's menu of options for investment agreements, including ISDS.
  - As shareholders of multilateral development banks, the G20 nations should ensure that:
    - Their representatives on MDB boards inquire about climate risks and co-benefits associated with proposed investments by the relevant MDB.
    - They use robust disclosure policies and environmental and social safeguard policies as well as a common climate assessment protocol that projects future climate impacts on investments and investment impacts on climate and people.
- Additional homework is necessary for the G20 to ensure that infrastructure investment actually aligns with and supports the SDGs in a purposeful manner.
- On the G20 Initiative on Supporting Industrialization in Africa and LDCs Africa, the G20s should be mindful of the past mistakes in trade and industrialization policies, and not repeat them in connection with the renewed G20 efforts on Africa.
- On infrastructure and investment, see the set of recommendations for G20 under the G20 Themes #5 of this series on Infrastructure and PPP.

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[1] G20 Leaders' Communiqué, Brisbane, November 2016, available at: http://www.g20.utoronto.ca/2014/2014-1116-communique.html

[2] See Donald Trump's "Contract with the American Voter" on his website.

[3] See Motoko Aizawa, Waleria Schuele: „In Search of Policy Coherence. Aligning OECD Infrastructure Advice with Sustainable Development", 2016, available at: https://eu.boell.org/sites/default/files/oecd-3.pdf

[4] See paragraphs 25-31 of the G20 Leaders' Communiqué Hangzhou Summit, September 2016, available at: http://www.g20.utoronto.ca/2016/160905-communique.html

5 See ibid, paragraphs 32-41

6 OECD Benchmark Definition of Foreign Direct Investment, Fourth Edition, OECD (2008) available at: https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf

7 Over 200 scholars in the United States filed a letter protesting ISDS provisions in investment agreements. It notes that investors challenged host states' environmental, health, and safety regulations, fiscal policies, bans on toxins, denials of permits including for toxic waste dumps, moratoria on extraction of natural resources, measures taken in response to financial crises, court decisions on issues ranging from the scope of intellectual property rights to the resolution of bankruptcy claims, policy decisions on privatizations of prisons and healthcare, and efforts to combat tax evasion, among others. See http://ccsi.columbia.edu/2016/10/03/220-law-and-economics-professors-sign-letter-opposing-isds-in-the-tpp/

8 „Investment Policy Framework for Sustainable Development", published by the United Nations Conference on Trade and Development, 2015, available at: http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf, p.79.

9 G20 Trade Ministers Meeting Statement, July 2016, available at: http://www.oecd.org/daf/inv/investment-policy/G20-Trade-Ministers-Statement-July-2016.pdf

10 Ibid.

11 The 14 member countries of SADC are: Angola, Botswana, Congo (DR), Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

12 According to European Union law, "The precautionary principle enables rapid response in the face of a possible danger to human, animal or plant health, or to protect the environment. In particular, where scientific data do not permit a complete evaluation of the risk, recourse to this principle may, for example, be used to stop distribution or order withdrawal from the market of products likely to be hazardous." See: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l32042

13 See Meredith Wilensky: „Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures Under the Trans-Pacific Partnership", 2015, available at: http://web.law.columbia.edu/sites/default/files/microsites/climate-change/wilensky_-_eli_trans-pacific_partnership_0.pdf

14 Atif Ansar, Bent Flyvbjerg, Alexander Budzier, Daniel Lunn: „Does infrastructure investment lead to economic growth or economic fragility? Evidence from China", 2015, available at: http://oxrep.oxfordjournals.org/content/32/3.toc; Summary available at: http://oxrep.oxfordjournals.org/content/32/3/360.abstract.

15 Bent Flyvbjerg : „Over Budget, Over Time, Over and Over Again: Managing Major Projects", April 2011, in: Peter W. G. Morris, Jeffrey K. Pinto, Jonas Söderlund (eds.), The Oxford Handbook of Project Management, Oxford University Press, pp. 321-344, 2013, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2278226.

16 See Chancellor Merkel's speech of October 11 2016, available at: https://www.bundesregierung.de/Content/EN/Reden/2016/2016-10-11-bkin-julius-nyerere-gebaeude_en.html?nn=393812

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Contact: Simone Zühr, zuehr@boell.de