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GUIDING PRINCIPLES FOR ACP COUNTRIES' INVESTMENT POLICYMAKING

JOINTLY DEVELOPED BY UNCTAD AND THE ACP SECRETARIAT

1. Background and Rationale

The Guiding Principles come at a time of mounting economic, social and environmental challenges, which highlight the critical role of investment as a driver of equitable economic and social growth. Mobilizing investment and ensuring that it contributes to sustainable development objectives is a priority for all countries and for ACP countries in particular. The challenges ACP countries face today and the development objectives the Group has set itself, call for policies – at the national and international levels – that effectively attract investment and help harness it for sustainable development. In line with South-South and Triangular cooperation, the Guiding Principles can help develop a coherent, consciously designed and consolidated approach towards investment policymaking.

The design of the Guiding Principles has been inspired by various sources of international law and politics. The Principles, jointly developed by UNCTAD and the ACP Secretariat, draw on UNCTAD's Core Investment Principles that form an integral part of UNCTAD's Investment Policy Framework for Sustainable Development (2015 version). The Principles are in line with the Addis Ababa Action Agenda adopted during the Third UN International Conference on Financing for Development. The Principles build on UNCTAD's ongoing technical assistance and capacity building Programmes to ACP countries through various regional institutions such as CARICOM, COMESA, EAC, SADC, and the Pacific Islands Forum. The Principles build on key ACP policy documents, notably the Georgetown Agreement establishing the African, Caribbean and Pacific Group of States, the Declaration of the 8th Summit of ACP Heads of State and Government of the ACP Group of States, the Strategic Framework for ACP Private Sector Development. The Principles are in support of existing ACP initiatives, such as the ACP Private Sector Development Strategy, the Joint ACP-EU Cooperation Framework for Private Sector Development or the ACP Investment Facility.

The Principles come at a time when sustainable development-oriented reform has entered the mainstream of investment policymaking. Today a large number of countries are reforming their investment policies by reviewing their policies, adopting new approaches for national level action, developing new models for international treaty making, and by concluding international investment agreements (IIAs) with provisions aimed at addressing sustainable development concerns. While some ACP countries have undertaken important investment policy reform efforts, others are yet to embark on such a process. [1]

The Principles can help inform policy action at a time of increasing engagement in "mega-regional agreements". These developments could marginalize non-participating third parties and could counter regional efforts aimed at increasing intra-ACP investment flows. At the same time, the Group has urged the European Union to make firm commitments with the ACP countries for advancing deeper trade and investment relationships through the EPAs.

It is against this backdrop of a dynamic, changing and challenging investment policy landscape that ACP countries hereby propose the following non-binding principles to provide general guidance for investment policymaking:

[1] ACP countries are party to 756 bilateral investment treaties (BITs) (representing over 25 % of the BITs universe) and 57 treaties with investment provisions (TIPs).

2. The Guiding Principles

Area		Core Principles
"0"	**Investment for sustainable development**	• The overarching objective of investment policymaking is to promote investment for inclusive growth and sustainable development.
1	**Policy coherence**	• Investment policies should be grounded in a country's overall development strategy. All policies that impact on investment should be coherent and synergetic at both the national and international level.
2	**Public governance and institutions**	• Investment policies should be developed involving all stakeholders, and embedded in an institutional framework based on the rule of law that adheres to high standards of public governance and ensures predictable, efficient and transparent procedures for investors.
3	**Dynamic policymaking**	• Investment policies should be regularly reviewed for effectiveness and relevance and adapted to changing development dynamics.
4	**Balanced rights and obligations**	• Investment policies should be balanced in setting out rights and obligations of States and investors in the interest of development for all.
5	**Right to regulate**	• Each country has the sovereign right to establish entry and operational conditions for foreign investment, subject to international commitments, in the interest of the public good and to minimize potential negative effects.
6	**Openness to investment**	• In line with each country's development strategy, investment policy should establish open, stable and predictable entry conditions for investment.
7	**Investment protection and treatment**	• Investment policies should provide adequate protection to established investors. The treatment of established investors should be non-discriminatory in nature.
8	**Investment promotion and facilitation**	• Policies for investment promotion and facilitation should be aligned with sustainable development goals and designed to minimize the risk of harmful competition for investment.
9	**Corporate governance and responsibility**	• Investment policies should promote and facilitate the adoption of and compliance with best international practices of corporate social responsibility and good corporate governance.
10	**Regional and International cooperation**	• The international community should cooperate to address shared investment-for-development policy challenges, particularly in least developed countries. Collective efforts should also be made to avoid investment protectionism. Regional Economic Integration Organizations (REIOs) of ACP countries can play an important role in facilitating such cooperation.

3. Annotations to the Principles

Principle "0" – the premise: Investment for sustainable development

This overarching principle interacts with all the other principles and defines the overall objective of ACP countries' national and international investment policies, as they are embarking on implementing the landmark 2030 Agenda for Sustainable Development, the Addis Ababa Action Agenda, the Paris Agreement on Climate Change and the major political documents of the ACP, in particular the Georgetown Agreement, establishing the African, Caribbean and Pacific Group of States, the Declaration of the 8th Summit of Heads of State and Government of the ACP Group of States, the ACP Strategy for Private Sector Development, the Joint ACP-EU Framework for ACP Private Sector Development or the new approach of ACP Group to support the development of agricultural value chains.

This principle recognizes the need to promote and facilitate investment not only for economic growth as such, but for growth that benefits all, including the poorest, i.e. investment for equitable, inclusive, balanced and sustainable economic growth and social development.

This principle also recognizes the role of a dynamic private sector as a key factor in strengthening the competitiveness of ACP countries, in facilitating their progressive integration into the global economy, strengthening trade flows, raising revenues and incomes, and creating jobs. Strengthening private sector development support is therefore at the heart of the priorities that are vital for the ACP Group to attain the development goals it has set itself.

This principle also calls for the mainstreaming of sustainable development issues – i.e. development that meets the needs of the present without compromising the ability of future generations to meet theirs – in investment policymaking, both at the national and international levels.

This principle is particularly important in the context of the action menu for the promotion and facilitation of investment in sectors that are key for countries' sustainable development prospects (e.g. investment for transitioning to a green economy).

Together with other principles, it can help resolve the policy dilemma's arising with greater private investor involvement in sensitive sectors and sectors with a public service nature.

Promoting investment for inclusive growth and sustainable development implies:

- *Balancing liberalization and the right to regulate.* This may require adopting selective, gradual or sequenced approaches to liberalization. It means balancing the rights and obligations of private sector operators in SDG-related sectors. It implies maintaining flexibility and policy space, including in international commitments. (See also principles 4 and 5). This is particularly important given the different levels of economic development among ACP countries, which include least developed countries (LDCs) and Small Island Developing States (SIDS).

- *Balancing the need for attractive risk-return rates with the need for accessible and affordable services*. This requires governments to pro-actively address market failures. It means placing clear obligations on investors and extracting firm commitments. And it implies making incentives or subsidies conditional on social inclusiveness. (See also principle 4.)

- *Balancing a push for private investment with the continued fundamental role of public investment.* This calls for an explicit definition of complementary roles for public and private investment. It also means managing the interaction between private investment policies and public policies, especially concerning SDG-related sectors. It requires taking a holistic approach to investment across these sectors.

Principle 1: Policy coherence

This principle recognizes that investment is a means to an end, and that investment policy should thus be integrated in an overarching development strategy. It also acknowledges that success in attracting and benefiting from investment depends not only on investment policy "stricto sensu" (i.e. entry and establishment rules, treatment and protection) but on a host of investment-related policy areas including tax and trade policies, entrepreneurship development, access to finance, access to energy (including renewable energy), environmental, labour, social or public health policies, as well as sectoral policies (e.g. fisheries, tourism, agriculture). It recognizes that these policy areas interact with each other and that there is consequently a need for a coherent overall approach to make them conducive to sustainable development and to achieve synergies. As these policies may not always be fully coherent, sustainable development objectives and considerations shall prevail in case of inconsistencies. The same considerations apply with respect to the interaction between private investment policymaking and rule-making at the national, bilateral, regional and international levels. Successful experiences with investment for development often involved the establishment of special agencies with a specific mandate to coordinate the work of different ministries, government units and policy areas, including the negotiation of IIAs.

Principle 2: Public governance and institutions

The concept of good public governance refers to the efficiency and effectiveness of government services, including such aspects as accountability, predictability, clarity, transparency, fairness, rule of law, and the absence of corruption. This principle recognizes the importance of good public governance as a key factor in creating an environment conducive to attracting investment. It also stresses the significance of a participatory approach to policy development as a basic ingredient of investment policies aimed at inclusive growth and fairness for all. The element of transparency is especially important, as in and by itself it tends to facilitate dialogue between public and private sector stakeholders, including companies, organized labour and non-governmental organizations (NGOs).

Principle 3: Dynamic policymaking

This principle recognizes that national and international investment policies need flexibility to adapt to changing economic and social circumstances, while recognizing that a favourable investment climate requires stability and predictability. For one, different policies are needed at different development stages, an issue of particular importance for the ACP Group with its LDC and SIDS membership. New factors may emerge on the domestic policy scene, including government changes, social pressures or environmental degradation. International dynamics can have an impact on national investment policies as well, including through regional integration or through international competition for the attraction of specific types of foreign investment. The dynamics of investment policies imply a need for ACP countries to continuously assess the effectiveness of existing instruments, including IIAs. If these do not achieve the desired results in terms of economic and social development, or do so at too high a cost, they may need to be revised.

Principle 4: Balanced rights and obligations

Investment policies need to serve two potentially conflicting purposes. On the one hand, they have to create attractive conditions for foreign investors. To this end, investment policies include features of investment liberalization, protection, promotion and facilitation. On the other hand, the overall regulatory framework of the host country has to ensure that any negative social or environmental effects are minimized (e.g. investment in sensitive sectors, such as natural resources and its impact on local communities). More regulation may also be warranted to find appropriate responses to crises (e.g. financial crisis, food crisis, climate change). Against this background, this core principle suggests that the investment climate and policies of a country should be "balanced" as regards the overall treatment of foreign investors. Where and how to strike this balance is basically an issue for the domestic law of host countries and therefore requires adequate local capacities. International policies vis-à-vis foreign investors likewise play a role and – if not carefully designed – might tilt the balance in favour of those investors. The principle does not mean that each individual investment-related regulation of a host country would have to be balanced.

Principle 5: Right to regulate

The right to regulate is an expression of a country's sovereignty. Regulation includes both the general legal and administrative framework of host countries as well as sector or industry-specific rules. It also entails effective implementation of rules, including the enforcement of rights. Regulation is not only a State's right, but also a necessity. Without an adequate regulatory framework, a country will not be attractive for foreign investors, because such investors seek clarity, stability and predictability of investment conditions in the host country. The authority to regulate can, under certain circumstances, be ceded to an international body to make rules for groups of states. It can be subject to international obligations that countries undertake; with regard to the treatment of foreign investors this often takes place at the bilateral or regional level. International commitments thus reduce "policy space". This principle advocates that countries maintain sufficient policy space to regulate for the public good (e.g. for the protection of public health, access to social services - including health, water and education - the protection of the environment, public safety, the promotion of cultural diversity, the protection of public morals and food security).

Principle 6: Openness to investment

This principle considers a welcoming investment climate, with transparent and predictable entry conditions and procedures, a precondition for attracting foreign investment conducive for sustainable development. The term "openness" is not limited to formal openness as expressed in a country's investment framework and, possibly, in entry rights granted in IIAs. Equally important is the absence of informal investment barriers, such as burdensome, unclear and non-transparent administrative procedures. In addition, the issue of "openness" reaches beyond the establishment of an investment. Trade openness can be of crucial importance, too; in particular, when the investment significantly depends on imports or exports.

At the same time, the principle recognizes that countries have legitimate reasons to limit openness to foreign investment, for instance in the context of their national or regional development strategies or for national security reasons, and in line with their level of development. This principle interacts with the concept of special and differential treatment, which applies to international investment policymaking and gives legal expression to the special needs and concerns of developing countries and/or LDCs in IIAs and other international economic agreements. Special and differential treatment is based on the notion that ACP Countries (and third parties) at different stages of development should not necessarily be bound by the same obligations because they may have different forms of administrative, legislative and judicial systems and thus may not achieve the same standards at the same time.

Principle 7: Investment protection

This principle acknowledges that investment protection, although only one among many determinants of foreign investment, can be an important policy tool for the attraction of investment. It therefore closely interacts with the principle on investment promotion and facilitation (Principle 9). It has a national and an international component. Core elements of protection at the national level include, inter alia, the rule of the law, the principle of freedom of contract and access to courts. Key components of investment protection frequently found in IIAs comprise the principle of non-discrimination (national treatment and most-favoured nation treatment), fair and equitable treatment, protection in case of expropriation, provisions on movement of capital, and effective dispute settlement.

Principle 8: Investment promotion and facilitation

Most countries have set up promotion schemes to attract and facilitate foreign investment. Promotion and facilitation measures often include the granting of fiscal or financial incentives, the establishment of special economic zones or "one-stop shops". Many countries have also set up special investment promotion agencies (IPAs) to target foreign investors, offer matchmaking services and provide aftercare. At the same time, concrete facilitation measures are largely absent in international investment policies.

The principle contains three components. First, it stipulates that in their efforts to improve the investment climate, countries should not compromise sustainable development goals, for instance by lowering regulatory standards on social or environmental issues, or by offering incentives that annul a large part of the economic benefit of the investment for the host country. Second, the principle acknowledges that, as more and more countries seek to boost investment and target specific types of investment, the risk of harmful competition for investment increases; i.e. a race to the regulatory bottom or a race to the top of incentives (with negative social and environmental consequences or escalating commitments of public funds). Investment policies should be designed to minimize this risk. This underlines the importance of international coordination (see Principle 11 below). Third, the principle acknowledges that investment policies should increase their focus on addressing ground-level obstacles to investment, by means of concrete investment facilitation policies. [2]

The third aspect, emphasizing the importance of concrete investment facilitation policies, is particularly crucial for "accessing investment" and for the sustainable development and inclusive growth of ACP countries. Investment promotion and facilitation work hand in hand. While one is about promoting a location as an investment destination (and is therefore often country- specific and competitive in nature), the other one, i.e. facilitation is about making it easier for investors to

[2] Investment facilitation policies include improvements in transparency and information available to investors; efficient and effective administrative procedures for investors; consistency and predictability of the policy environment for investors through consultation procedures; increase accountability and effectiveness of government officials and mitigate investment disputes through ombudspersons; cross-border coordination and collaboration initiatives such as regional investment compacts or links between outward and inward investment promotion agencies; and technical cooperation and other specific support mechanisms for investment.

establish or expand their investments, as well as to conduct their day-to-day business in host countries. To date, however, national and international investment policies have paid relatively little attention to investment facilitation. Investment facilitation can thus be considered a systemic gap in both national and international investment policies. Any investment facilitation initiative cannot be considered in isolation from the broader investment for development agenda

Principle 9: Corporate governance and responsibility
This principle recognizes that corporate governance and CSR standards are increasingly shaping investment policy at the national and international levels. This development is reflected in the proliferation of standards, including several intergovernmental organization standards of the United Nations, the ILO, the IFC and the OECD, providing guidance on fundamental CSR issues; dozens of multi-stakeholder initiatives; hundreds of industry association codes; and thousands of individual company codes (*WIR11*). Most recently, the UN Human Rights Council adopted a resolution endorsing the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

CSR standards are voluntary in nature and so exist as a unique dimension of "soft law". The principle calls on governments to actively promote CSR standards and to monitor compliance with them. Promotion also includes the option to adopt existing CSR standards as part of regulatory initiatives, turning voluntary standards into mandatory requirements.

Principle 10: Regional and international cooperation
This principle considers that investment policies touch upon a number of issues that would benefit from more international cooperation. The principle also advocates that particular efforts should be made to encourage foreign investment in LDCs. Building on the tangible results produced by South-South and Triangular Cooperation, intra-ACP cooperation holds considerable potential with respect to investment policymaking for sustainable development. Such coordination can help building consensus in formulating common positions and understanding on core investment policy elements. Such cooperation is particularly important at a time when a coordinated approach is needed to avoid that IIA reform efforts will become fragmented and incoherent. Unlike the first phase of IIA reform, in which most activities took place at the national level, phase 2 of IIA reform will require countries to intensify collaboration and coordination between treaty partners to address the systemic risks and incoherence of the large body of old treaties.

Regional Economic Integration Organizations (REIOs) of ACP countries can play an important role in facilitating such cooperation by offering the platforms for exchange of experiences and consensus-building among ACP countries. Such cooperation mechanisms for investment policymaking among ACP countries and among ACP regions, is of particular importance and should complement North-South cooperation. Regional investment regimes can play a crucial role in this regard.

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Some Core Principles relate to a specific investment policy area (e.g. openness to investment, investment protection and promotion, corporate governance and social responsibility) and can therefore relatively easily be traced to specific guidelines and options in the national and international parts of the framework. Other Core Principles (e.g. on public governance and institutions, balanced rights and obligations, the right to regulate) are important for investment policymaking as a whole. As a consequence, they are reflected in guidelines dispersed across the entire range of relevant policy issues covered by the framework.

The Core Principles interact with each other. The individual principles and corresponding guidelines therefore must not be applied and interpreted in isolation. In particular, Principle "0" – as the overarching rule within the policy framework – has relevance for all subsequent principles. Integrating investment policies into sustainable development strategies requires a coherent policy framework. Good public governance is needed in its design and implementation. Sustainable development is an ongoing challenge, which underlines the importance of policymaking dynamics. And an investment policy framework needs to comprise elements of investment regulation and corporate governance, on the one hand, and openness, protection and promotion, on the other hand, thereby contributing to an investment climate with balanced rights and obligations for investors.