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Arab NGO Network for Development
شبكة المنظمات العربية غير الحكومية للتنمية

Development, The State and The Role Of Business:
Considerations In The Way Towards Effective Accountability Frameworks

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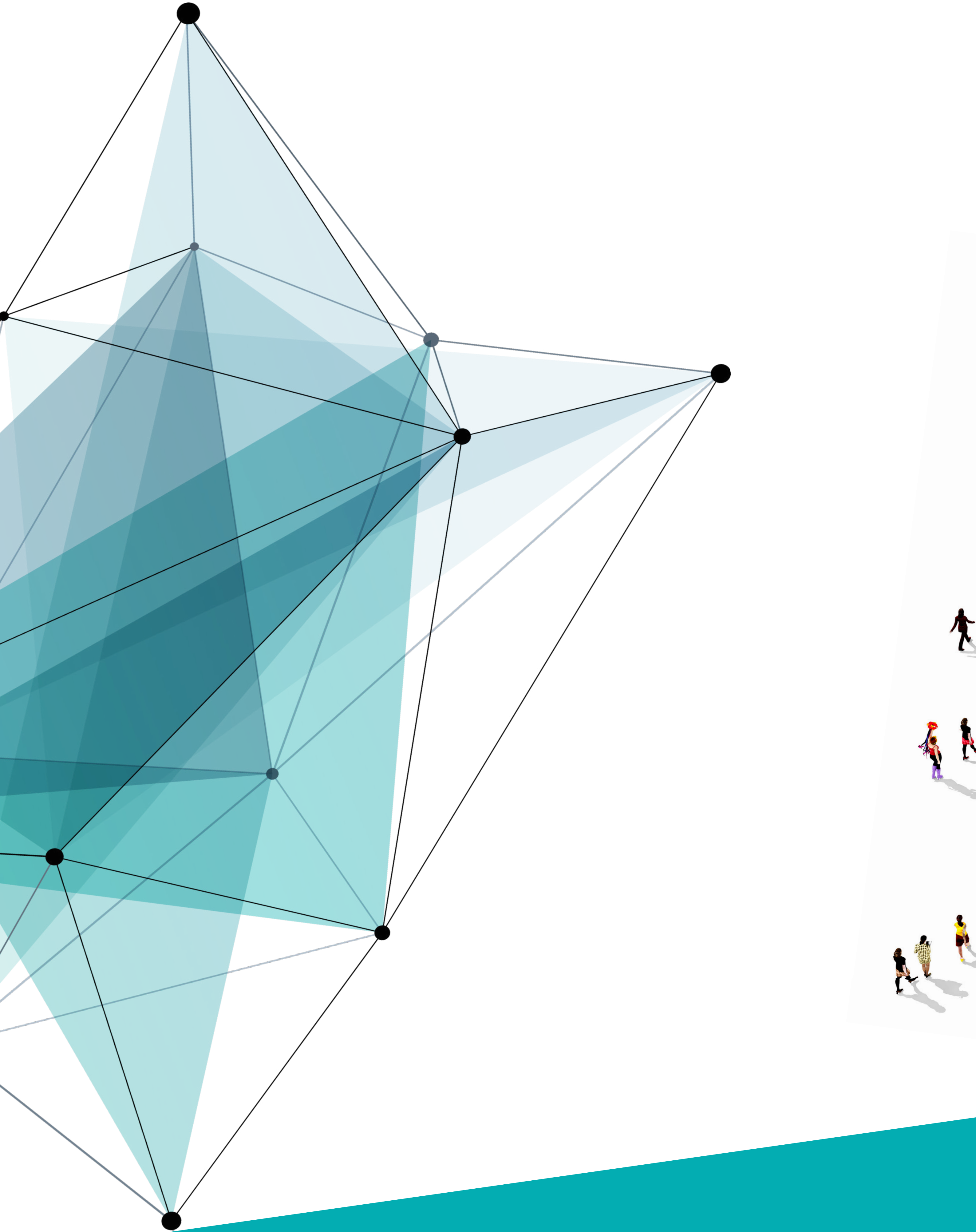

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Introduction

The role of the business sector and foreign direct investment are critical for economic growth and developmental processes. This statement might be close to being uncontestable. It is part of the mainstream narrative associated with Agenda 2030 for sustainable development.

Yet, a positive correlation between an enhanced role for the business sector and increased quantity of investments on one hand, and an added value on the sustainable development front on the other, is not a laissez-faire endeavor. It requires deliberate intervention by the State at multiple levels of the policy and legal framework in order to dynamically stimulate these linkages. Part of this intervention entails building an accountability framework for business that clarifies the minimum responsibilities of business as well as their respective liabilities in case of violation.

The story of the role of business in society and its accountability is closely intertwined with the story of the role of the State. It is States that offer rights and privileges to business entities through various policy and legal decisions they undertake and legislative frameworks they put in place. It is States that could design an accountability framework that is relevant and effectively aligned with the changing role that the business sector is undertaking in the development sphere. This is the basic premise of this chapter, which will be elaborated throughout the different sections.

The discussion in this chapter is set in the context of an increasing role of businesses in the public sphere and developmental processes. This trend resulted from the wave of privatizing what has been traditionally a public function, such as education, health service, and pension schemes.

A most recent manifestation of this trend are widespread public-private partnerships that have been promoted and utilized to expand the role of the private sector, including multinational companies, in the fulfillment of projects related to the Sustainable Development Goals (SDGs), including large infrastructure and public services projects[1]. This is enabled by a narrative that assumes public money is not enough and that the only way that the SDGs could be achieved is through enhancing the leverage of private money.

The 2015 Addis Ababa Action Agenda on financing for sustainable development addresses both States and the private sector. It calls on the private sector to adopt principles for responsible business and investment and engage as partners in the development process and to invest in areas critical to sustainable development. It commits governments to strengthening regulatory frameworks and developing policies to better align private sector incentives with public goals, and to encourage the private sector to adopt sustainable practices and foster long-term investment.

The 2014 World Investment Report issued by the UN Conference for Trade and Development, which also noted that "at current levels of investment in SDG-relevant sectors, developing countries alone face an annual gap of $2.5 trillion. In developing countries, especially in LDCs and other vulnerable economies, public finances are central to investment in SDGs. However, they cannot meet all SDG-implied resource demands. *The role of private sector investment will be indispensable*"[2] (emphasis added). According to the corporate group World Business Council for Sustainable Development, "business has a broader role to play as an essential source of finance when it comes to unlocking the estimated $5 trillion to $7 trillion worth of annual investment the United Nations estimates will be needed to realize the SDGs by 2030"[3].
The emphasis on the role of the private sector in developmental processes is expected to increase given the severe implications of the COVID pandemic on the fiscal space and related policy tools of many governments particularly developing countries, including Arab countries. Most middle-income countries in the Arab region witnessed a serious drop in revenues from tourism, remittances, trade and general economic activities,[4] consequently limiting their fiscal space

and ability to respond through stimulus packages, which developed countries have heavily resorted to in order to face the ramifications of the COVID-pandemic. Similarly, oil-rich countries in the Arab region face increasing constraints due to the changes in the demand for and price of oil, which promises to be a longer-term structural problem.[5] In addition, least developed countries and conflict-affected countries in the region saw their already limited capacities dwindle.[6] According to the International Monetary Fund (IMF) regional economic outlook for 2020, the region's economy is expected to contract by 5.7 percent, with the economies of some conflict countries projected to shrink by as much as 13 percent, amounting to an overall loss of US$ 152 billion.[7] This translates into an estimated 14.3 million persons becoming poor, raising the total to more than 115 million persons living in poverty, or around one quarter of the total populations in the Arab region.[8] Moreover, job losses are estimated to have reached around 17 million full time jobs during the second quarter of 2020.[9]

At the same time, it is often assumed that "vibrant private sector requires attracting international firms by ensuring that foreign direct investment finds an enabling environment"[10]. Often, building an 'enabling environment' has been associated with shrinking the role of the State. Given their international economic commitments, States have been increasingly giving up the tools that they need in order to stimulate positive dynamic linkages between investments and sustainable development. States have also often been reluctant to design an accountability framework under domestic legislative frameworks that clarifies their expectations from business and set mechanisms to hold violators to account. This in turn has led to increasing cases of corporate impunity for mal practices and human rights violations.

In addition, given many Arab countries are often categorized as 'fragile' and 'conflict affected economies'[11], they are often advised to compensate for risks faced by investors in such contexts, by "strengthen(ing) investment policy frameworks"[12]. These are usually the key words for calling countries to commit to a national and international legal framework that recognizes what is considered 'high standards for investor protections', including "guarantees for investors, namely: provision of fair and equitable compensation for expropriation; granting of fair and equitable treatment to foreign investments; intangibility of the law; guarantee of transfer of fund, right to repatriate profits and to liquidate the investment; or access to international settlement of investment disputes"[13]. This kind of legal framework does not usually attend to issues pertaining to responsibilities and accountability of businesses and investors, and in many instances, could constrain government's regulatory space and tools needed to address business accountability.

Taking the above as context, this chapter focuses on discussing the role of business, and related accountability frameworks, in contributing towards achieving sustainable development and development cooperation. The notion of sustainable development, as used here, incorporates multiple transformations that countries, particularly developing ones, ought to attend to, including industrialization in the context of the digital revolution, ecological transformations that would enable the mitigation and adaptation needed in light of the climate crisis, and attending to the challenge of inequalities including gender inequalities. The notion of accountability encompasses legal accountability under the applicable legislative frameworks and also accounts for the added value of the private sector on the developmental front.

The chapter commences with an overview of the global trends in business practices and how business conduct often falls in tension with sustainable development. This includes a discussion of the rising narrative on 'Corporate Purpose' and how it potentially interfaces with or influences the thinking about the role of the State regarding accountability of business. This is followed by overview of past and ongoing attempts at the international level to design a regulatory and accountability framework of business.

The third section offers a possible approach to framing accountability of the private sector, particularly when undertaking roles pertaining to development. This section flows from ideas elaborated under chapter one of this publication, entitled "The private sector and the development challenge in the Arab region: Nascent role and lacking accountability mechanisms".

The last section, preceding the conclusion, discusses ways in which States' approaches to contractual undertakings, laws pertaining to businesses and international commitments in the area of trade and investment could be reviewed and managed in a way that accounts for human rights and business accountability.

This chapter discusses the role of business enterprises in general, and is not restricted to the legal form of the corporation. Yet, it does focus in some parts on the corporation's roles and responsibilities given that the most influential private entities today choose to incorporate. The economic influence of these actors often spills over at the political and developmental fronts.

The emphasis on the role of the private sector in developmental processes is expected to increase given the severe implications of the COVID pandemic on the fiscal space and related policy tools of many governments particularly developing countries, including Arab countries.

Section 1: Global trends in business practices and tensions with sustainable development

The practices of corporations have been associated with enhanced forms of inequality and social regression. Concentration of economic resources among corporate elites, while wages are increasingly being depressed and detached from productivity growth of corporate entities is one trend in the corporate sphere.

UNCTAD had pointed out that "[i]n the past few decades, the world's largest corporations have increasingly been extracting profits from the economy instead of generating them through innovation. Furthermore, big business has been detaching from productive activities and investment, including job creation[14]. Reversing this trend is essential for future growth and social cohesion"[15].

The financialization of the economy has been inclining corporations towards short-term strategies focused on servicing the maximization of shareholder value (MSV). Under the MSV approach, shareholders are considered the only economic actors that take risk within the corporate entity, in comparison to tax payers and workers.

Short-termisim has been critiqued for various reasons. For example, the International Panel on Social Progress[16] points out that MSV and related short-term strategies became tools for extracting added value illegitimately away from workers to shareholders[17]. It explains that "increasing value for shareholders has been achieved through lowering pay and conditions for workers …, and through utilizing low-cost and often unprotected labour from developing countries in an increasingly globalized corporate economy"[18].

Furthermore, large non-financial corporations have emerged as a rentier class, and extracted huge gains that are wildly disproportionate to the social return of their activities (rent being defined here as income derived solely from the ownership and control of an asset, rather than from innovative, entrepreneurial deployments of economic resources)[19]. In addition, the increase in corporate power and concentration of market power has been associated with regress in the conditions of labor and anti-union practices[20] and negative relations with investment, innovation, and labor shares[21].

Increasingly, global economic activity and trade transactions are concentrated within 'global value chains' controlled by a few TNCs. This increases the reliance of SMEs in developing countries on being part of global value chains (GVCs). It also increases the influence of corporations in control of GVCs and parent companies over entities involved in the lower end of the value chain or corporate chain. In many cases, this has been associated with a trend of depressing the financing available from parent companies to subsidiaries or the returns accrued by entities in the lower end of the value chain in comparison to big companies who control the value chain, which are often financial companies.

The concentration of economic power spills over as political power and capacity to capture the political sphere. The 2019 Human Development Report pointed out that "economic elites and organized groups representing business interests thus shape policies substantially more than average citizens or mass-based interest groups do. … Income and wealth inequalities are thus transferred into political inequality, with privileged groups moulding the system according to their needs and preferences, leading to even more inequalities"[22].

While these trends are most evident in higher income countries, the power of corporate actors in the policy sphere ends up trickling towards developing countries through the influence of the former over policy approaches and programmatic work of international organizations and multilateral development banks, as well as through the lobbying of organized business associations such as the International Chambers of Commerce and the International Organization of Employers.

'Corporate Purpose': a rising narrative to preserve the status quo?

A Financial Times analytic piece entitled "The year capitalism went cuddly" presented the year 2019 as the year in which corporate executives put "purpose" at the heart of their business models and took a step away from a corporate model purely focused on increasing shareholder value[23]. This is often described as a move by corporations from a 'shareholder' to a 'stakeholder' model. Stakeholders are taken to mean those groups other than shareholders, such as customers, workers, suppliers and communities.

Workers reflect a major aspect of the interface of the corporation with society because the situation of workers embody the way in which a corporation could make major contributions towards society in the form of the jobs it creates and consequently the impact it leaves in the real economy and the purchasing power of its working class. It also has to do with the way the corporation either enables or undermines the middle class and its role in society, and how corporate practices either exacerbates or helps address distributional inequalities within society.

The term "community" is primarily used to refer to involuntary creditors of a corporation, thus those who are impacted by the role that the corporation plays without actively contracting into a specific relation with it. The notion of community could vary from the local community in the vicinity of an industrial corporation or its customers, to the users of the services provided by a digital technology company, to the clients of a financial corporation.

Looking a bit back, it was the financial and economic crisis commencing in 2008 that exposed fundamental problems in several regulatory areas, including regulation of the financial sector and more broadly corporate governance[24]. It was a moment for refocusing the attention on the debate pertaining to corporate purpose, corporate governance, the role of regulation in regard to corporate practice.

While this debate is not new[25], it continues and takes new impetus with an emerging recognition that a dominant culture of 'shareholder primacy' has distorted incentives within the corporation, and has been a major driver of short-term corporate strategies, leading to reduction in investments in research and development and to shrinking workers' returns, leading to deepening inequalities.[26]

The narrative pertaining to the purpose of the corporation has been spreading wide and fast among the corporate community, to an extent that it could be characterized as mainstream narrative. What drives this narrative, and whether it is going further than rhetoric towards real change, is important to investigate and deconstruct.

It has been pointed out that this change comes as an attempt from corporate chief executives to deter interventions by policy makers and regulators[27]. For example, a major American corporate lawyer opined that "when significant costs to society from climate change and the depletion of resources are tallied, as they will be, an armada of regulators and plaintiffs' lawyers will appear"[28]. John Ruggie opined that "a defensiveness about the role of the corporation in modern society" contributed to this repositioning and the rise of the narrative pertaining to 'corporate purpose'[29].

In this context, the attempts to capture the discussion by corporate actors could sway the attention away from a proper discussion on what regulatory changes and accountability mechanisms are needed. This could pose a challenge to the effective advancement towards developing an accountability framework for businesses in the developmental sphere.

The increase in corporate power and concentration of market power has been associated with regress in the conditions of labor and anti-union practices and negative relations with investment, innovation, and labor shares.

Section 2: Overview of past and ongoing attempts to design regulatory and accountability frameworks for business

Businesses and corporations have often been the subject of deliberations in the transnational sphere. Stephen Tully's monograph on the international documents on corporate responsibility[30] gives an account of such principal instruments drafted by intergovernmental organizations or States, in addition to those formulated by industry associations, trade unions and non-governmental organizations. This account covers instruments that dealt with the corporation in the fields of human rights, international criminal and environmental law, labour standards, international trade, armed conflict, sustainable development, corruption, consumer protection, among other fields[31].

In the post-colonial period, multiple international instruments were sought through the inter-governmental processes of the United Nations, which focused on regulating foreign investments and transnational corporations by host States. During that period transnational corporations (TNCs) were mainly coming from 'Northern' industrialized countries to 'Southern' newly independent countries, or were a continuation of the colonial legacy. The aim of those initiatives was to advance a transnational regulatory agenda of corporations.

For example, the 1962 UN Declaration on Permanent Sovereignty over Natural Resources addressed the role of foreign capital in the exploration, development and disposition of natural resources. In 1974, the development of a Code of Conduct for TNCs was a focus area for the UN Centre on TNCs[32]. The Code was meant to establish a multilateral framework to address the rights and responsibilities of transnational corporations and host country governments[33]. Negotiations on the Code did not succeed and it remained a draft document.

Multiple issue specific instruments addressing multinational corporations had emerged during the 1970s, and were cross referenced by the draft Code of Conduct for TNCs, which was intended to be an umbrella code[34]. These included the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977), the OECD Declaration on International Investment and Multinational Enterprises (1976) and Guidelines on Multinational enterprises[35], and the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1980) agreed at the United Nations Conference on Trade and Development (UNCTAD)[36].

In the process running up towards the World Summit on Sustainable Development (2002), citizen groups made corporate accountability their prime concern and called for establishing a global system to regulate the practices of corporations to prevent environmental damage, manipulation of currencies, profits and markets, violating human rights of workers and local communities[37]. This however was diluted in the outcomes of the conference.

Generally, after the attempt to develop the Code of Conduct, the processes pertaining to corporations under the umbrella of the United Nations have leaned towards voluntary guidance seeking to direct and advance an agenda of self-regulation by the corporation[38].

For example, the Guiding Principles on Business and Human Rights (GPs) were the result of an expert work led by the Special Representative of the UN Secretary-General for Business & Human Rights[39]. In 2011, the GPs were adopted by consensus at the level of the UN Human Rights Council. The GPs include a section entitled "The Corporate Responsibility to Respect Human Rights". This section explains that businesses "should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved" (principle 11) including: "avoid(ing) causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur" and "seek(ing) to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts" (principle 13).

The GPs seek to provide clarity on the human rights due diligence expected from businesses, and provides that this should include "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed", which should "cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships", "vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations", and be "ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve" (See principle 17).

States are expected to develop national action plans (NAPs) as a tool for promoting the comprehensive and effective implementation of the GPs[40]. A NAP can be defined as an evolving policy strategy developed by a government to protect against adverse human rights impacts by business enterprises in conformity with the GPs[41].

Recently, a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises has been under discussion within an inter-governmental group at the UN Human Rights Council[42]. The proposed instrument seeks to clarify standards of liability of businesses and address procedural and jurisdictional issues pertaining to access to justice by victims of corporate human rights violations. One of the potential added value of such an instrument is the ability to achieve a level of convergence in regard to liability standards of covered entities between jurisdictions that become Party to the Instrument, and to clarify the mechanisms of international cooperation in this regard. It could also facilitate the access of victims of corporate human rights violations to courts in order to bring legal action against the violating entity and other entities that exert a certain level of control or influence over the actions that caused the harm, such as parent companies.

Corporations have also been subject of several multilateral instruments in other areas of law, including ILO Conventions and Declarations, such as the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy[43], environmental instruments, international criminal instruments, as well as conventions on corruption and bribery.[44] It is clear from the review undertaken above that businesses and their accountability has been subject of multiple transnational attempts to create soft and hard law[45].

Issues of concern in recent approaches to accountability of businesses

The responsibility of businesses has been increasingly discussed from the human rights perspective and is increasingly being addressed from a sustainability or sustainable development point of view, which is often understood to include economic, social, environmental and governance issues (See Annex 1)[46].

Elements pertaining to business responsibilities and accountability are proliferating in multiple legal instruments and other initiatives.[47] For example, some new international investment agreements lay out expectations from international investors in terms of contributions to host countries and/ or towards mitigating or avoiding possible negative impacts of their investments[48]. In some countries, national investment authorities are also developing criteria pertaining to sustainable investment[49] and home countries sometimes condition support to their firms investing abroad upon certain criteria pertaining to sustainability. Standards are also being developed by multilateral institutions like UNCTAD's Investment Policy Framework for Sustainable Development, and by the International Financial Corporation and the Asian Development Bank. This is in addition to voluntary guidance developed by businesses themselves, including those by business associations like the International Chambers of Commerce, voluntary standards of private institutional investors and voluntary industry codes, such as in the mining sector.

Recently, the OECD produced 'FDI Qualities Indicators' that focuses on "assessing the contribution of foreign investment to sustainable development and identifying policies to maximise positive impacts and minimise potential negative impacts"[50]. This work focuses on five clusters of FDI qualities including productivity and innovation, employment and job quality, human capital and skills, gender equality, and carbon footprint (See annexes 2 and 3).

Given the above, one can point out that responsibilities of businesses and related accountability frameworks is increasingly becoming a mainstream issue in multiple fora. However, one can notice that often this discussion lacks consideration of the implementation mechanisms, including for example advancing the legal liability regimes that would be attached to these responsibilities, which would allow the operationalization of the accountability mechanisms pertaining to businesses and their responsibilities.

Besides advancing on identifying responsibilities of business in the field of human rights and sustainable development, including its expected economic, social, and environmental added value, building an accountability framework requires States to advance the linkages of these responsibilities to an implementation framework. Central to such implementation framework should be the aim of facilitating access to judicial remedies for victims of business misconduct and violations. In this regard, it is important to consider how the systems of administrative, civil and criminal liability at the national level address corporate liabilities. It is also important to review how States design their commitments under international instruments, such as international investment agreements, in a way that provides tools to address breaches of law or harm-causing conduct by businesses benefitting from those agreements (this issue is further discussed under Section IV).

Responsibilities of businesses and related accountability frameworks is increasingly becoming a mainstream issue in multiple fora. However, this discussion lacks consideration of the implementation mechanisms.

Section 3 : Basics for an accountability framework to accompany the role of the private sector in the developmental sphere

Enhancing the contribution of the private sector towards sustainable development objectives requires an accountability framework built around two-pillars.

The first pillar entails do-no-harm policies in which private actors are expected to take measures to prevent any violations of third-party rights throughout their practices. This pillar requires recognizing potential externalities that may arise within the context of business practices, taking measures to limit externalities, as well as ensuring liability and accountability where such externalities arise. For example, this would also include how a corporation would account for and address the interests of non-shareholders, both workers and the affected community.

The second pillar entails value addition and active contributions towards national sustainable development goals. This would entail fulfilling basic obligations under national laws including the tax regulatory framework in addition to advancing collective targets such as research and development, technological advancement, digital transformations, among other goals.

In this discussion, it is important to note the particularities of interactions in the context of value chains and corporate groups, particularly given much of investments are undertaken within these contexts. Deconstructing and understanding these relations and business practices have implications on the discussion of accountability and liabilities across these complex economic activities. For example, some of the questions that could be posed in these contexts include the following: When it comes to pursuing the do-no-harm pillar, what would be the responsibility of a parent company or its duty vis a vis its subsidiary in order to avoid harm resulting from the latter's conduct. Is the parent company or lead company in a supply chain responsible for providing enough financing that allows its subsidiary or main suppliers to invest in adequate infrastructure that helps prevent human rights violations?

Building an accountability framework to accompany the role of businesses in the context of sustainable development entails elaborating the sustainability characteristics of business and what is expected from them in that regard. In a publication entitled "Towards an Indicative List of FDI Sustainability Characteristics"[51], it is noted that one definition of "sustainable investment" is "commercially viable investment that makes a maximum contribution to the economic, social and environmental development of host countries and takes place in the framework of fair governance mechanisms"[52]. It is also noted that these sustainability considerations are relevant throughout the life-cycle of an investment or business activity and its relationship with a host country government and local communities. This includes (1) before specific investments are made; (2) at the stage of entering a host country; (3) while investments are operating; and (4) reviews of those decisions or operations after they have been made and implemented (whether investments continue to operate or not).[53]

Often when it comes to foreign direct investment (FDI), building an effective accountability framework requires international cooperation among the Host and Home states of the investors, including the willingness of the Home state to regulate its national companies and investors when they operate abroad, what is often known as domestic regulations with extraterritorial reach.

While sustainability characteristics of an investment could be applied globally, it is also important to consider whether specifics are needed depending on the sector of activity and size of the business endeavor. Moreover, while the standards that would apply in approaching and potentially regulating the role of the business sector should not differ between national and foreign business, the policy tools used to ensure fulfillment of these standards could differ depending on the size and consequently potential impact of the business. Indeed, size matters in terms of potential implications on the macro-economic front, developmental front, environmental front, human rights front, and other aspects closely intertwined with sustainable development.

For example, it has been noted under the Guiding Principles on Business and Human Rights that "[t]he means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size".[54] This has been the practice reflected in the European Union regulation regarding non-financial reporting by businesses and of France's regulation regarding the duty of vigilance by businesses (which will be discussed under section IV).

These considerations ought to be a matter of concern for multiple national institutions including those responsible for investment policies and investments treaty negotiations, authorities supporting local businesses abroad, such as investment promotion authorities, as well as central and local government authorities responsible for negotiating contracts with the private sector. This requires expanding the set of considerations that these institutions take account off, beyond the quantitative measures of investments towards accounting for sustainability considerations.

Besides advancing on the national level, building an accountability framework requires States to cooperate regionally and internationally in interventions that complement the national endeavor. While States can take unilateral action, it is important for governments to work together to approach this endeavor, especially given that competition among jurisdictions could lead some countries to be reluctant to legislate higher standards or could lead to a race to the bottom. In addition, transnational corporations have an economic size comparable if not dwarfing the economies of many countries[55]. These entities are able to maneuver legislative frameworks of various jurisdictions and exploit the discrepancies among these frameworks. It could make obsolete steps taken by countries unilaterally. Advancing through an international treaty could help in achieving convergence among jurisdictions and could also help countries who are cautious to take such steps because of worry about their competitiveness position.

Besides advancing on the national level, building an accountability framework requires States to cooperate regionally and internationally in interventions that complement the national endeavor.

Section 4: State's policy tools to balance rights and obligations of businesses and investors

The story of accountability of business starts and ends with the story of the role of the State. It is States that offer rights and privileges to private entities through various policy and legal decisions they undertake. It is also States that could design an accountability framework that is tantamount with the extent of role that the business sector is undertaking in the development sphere.

UNCTAD points out that "[r]eaping the development benefits from investment requires [from States] not only an enabling policy framework … it also requires adequate regulation to minimize any risks associated with investment"[56].

This section will discuss some of the legal aspects pertaining to rights and responsibilities of businesses as we know it today. It will highlight imbalances that need to be addressed if these legal frameworks are to attend to the challenge of accountability in the context of an expanding role for business in the development sphere.

Issues discussed under this section include the contractual endeavors that States undertake with businesses through government procurement, public private partnerships or other contractual deals, approaches to corporate law and its implications on shaping corporate incentives, the commitments that States undertake under international investment treaties, the obligations of States under international human rights law and how they are translated in domestic legal frameworks, and the way States manage the interface between international economic law and international human rights law.

Contractual undertakings between the State and business in the public development sphere

Key element in the legal frameworks underpinning and governing businesses' involvement in the public development sphere are investor-state contracts that usually apply to both domestic and foreign investments.

Contractual arrangements, which fall under the broader umbrella of public-private partnerships (PPPs), have been expanding in many sectors including for infrastructure investments and public services' provisions such as in energy, health, sanitation, water, education, among others.

Other public contracts include procurement contracts in multiple sectors, whereby government departments or local authorities, purchase work, goods or services from businesses. For example, they could include contracts where the private sector would provide services within facilities operated by States, such as facilities for healthcare, water supply, or other public services.

It is well recognized under the 2030 Agenda on Sustainable Development that achieving sustainable consumption and production patterns requires states to "promote public procurement practices that are sustainable, in accordance with national policies and priorities" (See target 12.7 of the SDGs).

The UN Guiding Principles on Business and Human rights give special attention to the State's role as a commercial actor and provides that "States should promote respect for human rights by business enterprises with which they conduct commercial transactions." (See Guiding Principle 6)

Studies have shown that PPPs and related laws generally fail to mention sustainable development, relevant environmental standards, community participation requirements, and general alignment with national development plans[57].

Integrating sustainability criteria in these procurement contracts can help achieve economic, social and environmental co-benefits. A study by the International Institute for Sustainable Development (IISD) explains that sustainability criteria could shift public financing toward sustainable infrastructure and sustainable investment in general, and indirectly influence the incentives of the private sector by sending market signals that there is demand for sustainable infrastructure[58]. This would in turn increase the ability of the private sector to design, build and operate sustainable infrastructure[59].

Besides sustainability criteria, human rights should be considered when conducting procurement processes, including identifying potential risks to human rights and incorporating human rights considerations in contracts[60]. Government departments and other public authorities and institutions that purchase goods and services and enter into various PPP contracts could undertake multiple measures that would assist in preventing human rights abuses being perpetrated by those they are procuring from[61].

Safeguards directed towards broader social, environmental and human rights considerations ought to be integrated across the PPP life-cycle (i.e. from setting of goals, designs and specifications, tender evaluation, supplier selection, to monitoring and contracting functions). It should not be limited to the exercise of conducting pre and post environmental impact assessments as part of the licensing and permit issuance and extension requirements[62]. It is important to consider how sustainability criteria could be reflected both in the umbrella legal framework that will govern the contract, usually including the PPP laws and investment laws, along with the contract itself.

A study by the international consultancy, McKinsey, provides that overcoming the current resistance to adopting sustainability criteria on the assumption that it will increase upfront costs, requires "a change of mindset" and the adoption of project valuation methodologies that capture risks and impacts of business-as-usual and the long-term co-benefits of sustainable infrastructure[63].

Multilateral development banks active in the Arab region, like the World Bank and the European Bank for Reconstruction and Development, play an active role in promoting and incentivizing PPP projects[64]. A report about PPPs in Tunisia points out that "IFIs and donor countries have prompted the Tunisian authorities to adopt a legal framework for PPPs through two major laws, one dealing with user-pay concession PPPs (2008) and one dealing with government-pay PPPs (2015)"[65].

Yet, the approach of such multilateral banks to guidance pertaining to the legal framework that should govern PPP contracts has been criticized by both civil society groups as well as international law firms. For example, the international US based law firm Foley Hoag LLP released in 2017 a response to the 2017 edition of the World Bank Group's Guidance on PPP Contractual Provisions. In this response, the law firm points out that the World Bank's guidance prioritizes private sector preferences and requirements over public policy considerations and fails to achieve an appropriate balance between investors' rights and their obligations to governments and communities[66] (See Annex 4).

Generally, it is well accepted that governments have a range of tools at their disposal, including for example, providing incentives through procurement policies or licensing processes favourable to businesses with strong due diligence approaches, providing resources and guidance to companies to conduct due diligence, or introducing regulations with respect to responsible business conduct"[67].

On this point, John Ruggie had noted that "home governments [of investors] should make export credit and investment insurance conditional upon companies undertaking such due diligence and developing mitigating steps in case of potential harm".[68] Similarly, UNCTAD points out that "[s]ustainability issues should also be a main consideration in investment contracts between the host country and individual investors. Such contracts can be a means to commit investors to environmental or social standards beyond the level established by the host country's general legislation, taking into account international standards and best practices"[69].

Corporate law and the relation of corporation with society

Corporate law provides the core set of rules under which corporations are governed, which directly shapes what corporations do and how they do it[70]. Some consider that "corporate law has become a relatively extensive area of law covering core company law principles and extending to corporate finance, takeovers, corporate securities law and corporate insolvency law,... areas of soft law such as principles of corporate governance and even corporate social responsibility"[71].
Yet, one can distinguish distinguish between the set of core enforceable rules set under corporate law, and the broader corporate governance system, which would also encompass the former. Corporate governance codes, as a form of self-commitment by corporations to self-regulation, has been expanding since the 1990s[72].

Corporate law is often too inward looking, primarily concerned with the agency problems emerging from dynamics of managers, shareholders and creditors, while disregarding the broader implications of the corporation in society, including externalities such as implications on human rights.

A 2011 report by the Special Representative of the UN Secretary General on human rights and business, reviewing corporate law in 39 jurisdictions including Algeria, Morocco, Sudan, Saudi Arabia and United Arab Emirates, highlighted two patterns: one is a lack of clarity in corporate law regarding what companies or their directors and officers are required to do regarding human rights, and, in some cases, even what they are permitted to do, and the other is the limited coordination between corporate regulators, on the one hand, and Government agencies responsible for implementing human rights obligations, on the other. As a result, in most of the jurisdictions studied, companies and their directors and officers lack effective guidance on how best to ensure or oversee corporate respect for human rights[73].
For example, the surveys provided that in a number of jurisdictions, the company's best interest correspond to the shareholders' interests as the company's owners, either explicitly or in an implied manner, such as is the case in Algeria. This means that the interests of other stakeholders besides shareholders, such as workers, consumers, communities impacted by corporate practices, as often sidelined from considerations under corporate law.

Regarding disclosures pertaining to social and environmental policies, while in several jurisdictions, including Morocco, such disclosure is seen by many large companies as a matter of good practice, these disclosures remain voluntary endeavor and not enshrined as an obligation under the law.

Some non-legal initiatives have been highlighted in the report referenced above, as tools to encourage consideration of human rights issues by corporate actors. For example, in Morocco, the General Confederation of Moroccan Corporations (CGEM), a professional association created in 1947, adopted a corporate social responsibility charter based on international standards. The Charter includes provisions aimed at rewarding positive human rights practices, such as a compliance label for products that fulfilled certain international standards. In Algeria, the first Algerian Code of Corporate Governance was launched in 2009 as a private initiative to address corporate governance issues.

Some stock exchanges have developed a responsible investment index, which is used to promote what is considered as better practices pertaining to environmental, social and governance issues. For example, in Saudi Arabia, the General Investment Authority launched the Saudi Arabian Responsible Competitive Index which assesses leading Saudi Arabian businesses based on company strategy, management, stakeholder engagement processes and social, environmental, and economic performance systems[74]. Also in Saudi Arabia, the Corporate Governance Regulations imposed by the stock exchange on public joint stock companies requires the board to outline a written policy that regulates the relationship with stakeholders, including for example the company's "social contributions," which will include any non-commercial activity with a community focus undertaken by the company[75]. This regulatory effort through stock exchanges is only possible in economies where there is an active stock exchange and only if companies active in the country, both domestic and international companies, are listed. It also does not influence the conditions in non-listed companies.

The interaction between corporate law and other non-mandatory tools to promote corporate governance is important to consider. This sheds light on the extent to which the State and the law play an active role in changing incentives among corporate actors, in comparison to leaving change to come as a result of voluntary guidance and market pressures.

For those purposes, one of the questions of concern when reviewing corporate law is the extent to which it could serve as one tool that does more than just enable the corporate contractual transactions. For example, could corporate law be an enabler and incentivizer of societal added value by corporations and an enabler of the alignment between the private and public interests particularly private interest of growth and profit and the public interest of development.

It is worth noting that corporate law scholarship has come to recognize that corporate law ought to grapple with issues pertaining to non-shareholders, particularly communities and broader society impacted by the corporate activities. For example, the authors of "The Anatomy of Corporate Law"[76], recognized the need to evolve in their approach to the role of corporate law over the years, particularly between the release of the first addition of their book in 2004 and the third edition in 2017. In the latest edition of their book, the authors noted that "[a] striking extension of [the] analytical framework [they use in their book]…is our recognition that *the agency problems among the contractual participants in the corporation resemble in important respects a different set of problems that arise between parties affected by corporate activities but who lack any contractual leverage over the firm. We term such parties— who are not shareholders, managers, employees, or creditors— the firm's "external constituencies." In many cases, corporate activities may harm these outside parties"* (Emphasis added)[77].

Corporate law has been reformed in a number of jurisdictions over the last decade. For example[78], in India, the Companies Act 2013, replacing the Companies Act 1956, requires companies to formulate a corporate social responsibility policy (See Section 135 of the Act)[79]. In addition, both private limited and public limited companies, of a certain net worth and size of turnover[80], are required to spend at least 2% of their average net profit for the immediately preceding three financial years on corporate social responsibility activities[81]. Among the committees of the Board that are made mandatory for listed and prescribed classes of companies is a corporate social responsibility committee (Section 154 of the Act).

Another example is the French corporate duty of vigilance law that was adopted by the French National Assembly in February 2017 (discussed elsewhere in this chapter too), which requires companies of a certain size to identify and prevent adverse human rights and environment impacts in their activities in France and abroad. This includes the activities of companies they control, such as subsidiaries, and those they have relations with as subcontractors or suppliers[82]. A similar law is under discussion in Switzerland, requiring companies that are based in Switzerland to carry human rights and environmental due diligence in Switzerland and abroad[83].

The above sample of examples draw a picture that is conducive to the notion of change in corporate law. Areas of potential change that could be useful when thinking of the role and accountability of corporations in the realm of development could include issues pertaining to incorporation and listing, in order to recognize a duty by the corporation towards society. Another area could be directors' duties, particularly regarding their duties towards non-shareholders' interests, such as those of employees, customers or communities affected by the company's activities. Non-financial reporting, particularly on issues pertaining to social environmental and human rights aspects of the corporate conduct and added value is another crucial aspect of potential reforms.

States commitments under international investment treaties and the gap pertaining to investor obligations

There are currently more than 3,200 international investment protection treaties, including investment rules in free trade agreements. Arab countries are actively engaged in this web of international treaties (See annex 5). Most of these treaties are primarily focused on providing protections to foreign investors. They tend not to impose obligations on investors.

These treaties provide foreign investors with the legal power to seek compensation for what is considered adverse acts/omissions by a sovereign State, such as direct or indirect expropriation or other impairments or breaches of a certain treatment, including non-discrimination, 'fair and equitable treatment' standard, and the protection against illegal or uncompensated expropriation[84]. The mechanisms that enables this is known as investor-State dispute settlement (ISDS).

A paper prepared for the Group of 24 (group of developing countries' finance ministers) points out that "country experiences have revealed that IIAs could have an adverse policy impact on various policy areas that are generally important for developing countries in relation to the achievement of their development objectives", including industrial policy goals, tax reform, the use of capital controls, intellectual property rights, public-private partnerships, and climate change action in relation to investment in clean technologies[85].

The unfounded assumption that investment treaties help attract FDI

International Investment Agreements (IIAs) were signed primarily based on the premise of attracting foreign direct investment (FDI) (See Annex 6 about FDI in the Arab region). However, empirical evidence pertaining to a positive correlation between IIAs and FDI does not prove to be solid. Authoritative research by academics and international institutions do not provide conclusive evidence about any positive correlation between signing up to these treaties and attractiveness to FDI.

For example, an OECD study from 2018 that comprehensively reviews the existing evidence states the following: "[t]he several dozen econometric studies that have tested whether there is a correlation between the existence of [BITs] and FDI inflows to developing countries show diverse and at times contradicting results. Some studies found positive correlation, at least in certain configurations, some found a very weak, no, or even negative correlation, and some studies found correlation between [BITs] and greater inflows, but not necessarily from the States with which a treaty has been concluded"[86].

The UNCTAD Trade and Development Report (2014)[87] noted that "results [of various studies in this field] do not support the hypothesis that BITs foster bilateral FDI. Developing country policymakers should not assume that signing up to BITs will boost FDI…they should remain cautious about any kind of recommendation to actively pursue BITs".

Furthermore, countries that have terminated their IIAs saw no decrease in their FDI inflow[88].

An empirical study from the University of Oxford shows that it is exceedingly rare for foreign investors to factor in investment treaties when committing capital abroad, including deciding on the destination and volume of their investments. Similarly, availability and pricing of public and private political risk insurance is very rarely affected by presence or absence of an investment treaty including ISDS[89].

Numerous studies, including by the World Bank and UNCTAD, indicate that BITs are hardly the determining factor for investors when making the decision to invest; other factors -- such as market size and growth potential, a skilled workforce, availability of natural resources and adequate infrastructure -- appear to be more important determinants of FDI[90].

Therefore, the main economic justification for investment treaties is rarely fulfilled in practice. This indicates that countries ought not be discouraged about revisiting their legal frameworks and commitments to balance the rights and obligations of investors, including reviewing international investment treaties to clarify investor obligations and revisit domestic legal frameworks to clarify businesses' obligations, both domestic and foreign business.

Challenges to sustainable development endeavors

The investors' right to directly sue host States, which the ISDS mechanism enables, has allowed unprecedented challenges to governmental action. The way investors have been using the ISDS mechanism to bring, or threaten the bringing of, costly cases against States that are undertaking, or planning to undertake, new legislation and other measures related to sustainable development, could effectuate a 'chilling effect' on the regulatory process.

The ISDS mechanism has already been used to challenge State interventions in multiple areas of crucial implications for the public interest such as[91]: pricing of domestic tariffs for essential public services[92], court decisions regarding the appropriate scope and nature of intellectual property rights[93], efforts to combat aggressive tax avoidance[94] efforts to scale back grants of wasteful and unwise incentives[95], policy approaches aiming to help ensure host countries and communities receive some of the potential benefits of FDI[96], decisions regarding environmental permits[97], and measures to tackle climate change[98]. These ISDS cases show that investment treaties as they stand today "provide corporate actors and asset holders disproportionate power to shape the law and outcomes, including in ways that are inconsistent with or undermine sustainable development and human rights"[99].

Moreover, through these treaties, States have been increasingly stripped away of tools necessary for achieving linkages between investment and sustainable development objectives, and which historically have been actively used by today's industrialized countries. A major area of concern relates to investment treaty provisions that prohibit performance measures, which are requirements that investors will have to fulfill for entry and operation, some of which are sometimes linked to certain incentives[100]. Performance requirements have proved useful in the experiences of industrialized economies and also would be needed in an endeavor to contribute towards sustainable development. Treaty restrictions on performance requirements have the effect of reducing scenarios in which mutual benefit could accrue both to investors as well as the host state and local communities[101]. While foreign companies have capabilities in facilitating host states' access to technologies, skills, and other development related added values, these gains are not automatic, as previously noted. Performance measures are tools that could induce investors to make these contributions as part of their operations[102].

States seeking to align their commitments under trade and investment agreements with their sustainable development goals need to review their treaty commitments, balancing the rights and obligations of investors under these treaties, clarifying investor obligations, both do-no-harm obligations and positive contributions towards sustainable development. States ought to also reclaim many of the tools that have been restricted through trade and investment agreements, such as performance requirements.

Some Arab countries have embarked on a review of their investment treaty obligations, such as Egypt. However, it is not yet clear where this endeavor is heading. Several Arab countries are active in the multilateral discussions on reforming ISDS, such as Egypt, Morocco, Tunisia, Algeria, and Bahrain. These talks are taking place at the UN Commission on International Trade Law[103].

Morocco have signed a new investment agreement with Nigeria in 2016 that introduces a new approach to obligations of investors. It imposes a number of obligations on investors, and incorporates an enforcement mechanism whereby the investor can be held civilly liable in its home state for damages caused in host states[104].

Generally, one can note a widening debate tackling how IIAs could provide legal grounds and procedural mechanisms to challenge corporations when they violate laws and/or cause harms, including through limiting the benefits they would otherwise get from the treaty[105].

States' unfulfilled obligations under international human rights law

States have existing obligations under international human rights law (IHRL) to regulate the conduct of their businesses when operating in their territory or jurisdiction. UN Human Rights Treaty Bodies have recognized that States have positive obligations to "exercise due diligence to prevent, punish, investigate or redress the harm caused by private persons or entities".[106]

In order to meet their duty of human rights due diligence, States should regulate certain activities of private individuals and bodies by adopting effective measures to prevent future injury and respond to past injury[107]. It is also well recognized that it is necessary for States to have adequate legal and institutional frameworks to …provide remedies in case of violations in the context of business activities and operations[108].This includes the obligation to regulate the conduct of their own entities when they operate abroad[109].

However, usually these obligations are not fully or effectively fulfilled and these regulations are not in place or are not well developed. So today, the Home and Host States of investors often do not have such regulations in place. Setting in place these legal frameworks is important especially if the protections offered to private entities under international investment and trade agreements would at a certain point be conditioned on compliance with domestic human rights law.

Some State practice is emerging regarding adoption of mandatory human rights due diligence for businesses. As mentioned earlier, France adopted a law on duty of vigilance in 2017[110]. The law sets a number of obligations on companies headquartered in France, including affiliates of a foreign company. The law applies to those companies with either more than 5000 employees in France in direct or indirect subsidiaries, or those entities that have more than 10,000 employees in total in France and foreign direct and indirect subsidiaries. The obligations established under the law include requirements on companies to set a diligence plan to respect human rights and fundamental freedoms, including health and safety of persons, and the environment. The law also requires covered companies to effectively implement the plan, and to publish due diligence plans and implementation reports and include them in annual reporting of the company. This reporting is a core element to allow monitoring by civil society organizations, and consequently, the actionability of the core elements of the law.

Weak attention to human rights issues under international economic treaties

As discussed earlier, international commitments undertaken by States in the investment and trade realm often puts a strain on States policy and regulatory space.

Among the human rights community, there is already a recognition that States should actively address this tension. Multiple human rights authorities have addressed this issue. For example, the Committee on Economic, Social and Cultural Rights recognized that the negotiation and conclusion of trade and investment agreements could obstruct States from complying with their obligations under the Covenant. The Committee recommended that "[t]he interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations[111].

The UN Guiding Principles on Business and Human Rights have also addressed this interface. Guiding Principle 9 provides that "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts." The commentary on this principle explains that: "(…) the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection."

Generally, the human rights question under economic agreements is either not considered or is weakly addressed. Usually, there are no exceptions under IIAs allowing States a way out of their commitments for the purpose of fulfilling a human right.

Some recently reformed international investment agreements include language pertaining to the 'right to regulate'[112]. Although IIAs do not directly limit the "right" of States to regulate, which is an essential feature of the sovereignty of States, it does limit the policy options and choices of States on how to exercise the right to regulate, by excluding certain regulatory measures or putting them under pressure through requiring the State to pay compensation. States are expected to exercise the right to regulate without violating the respective treaties.

One of the main shortcomings of including 'right to regulate' language under trade and investment treaties is that it does not change the substantive rules of these agreements. It also usually does not add any legal obligations or rights and does not explicitly cover human rights obligations. It eventually serves as an interpretative tool.

States have existing obligations under international human rights law (IHRL) to regulate the conduct of their businesses when operating in their territory or jurisdiction. UN Human Rights Treaty Bodies have recognized that States have positive obligations to "exercise due diligence to prevent, punish, investigate or redress the harm caused by private persons or entities".

Concluding points

An effective accountability framework to accompany the expanding role of businesses in the context of sustainable development requires State action and interventions at multiple levels of policy and regulatory processes. Such a framework necessitates two-pillars. The first pillar entails do-no-harm policies in which private actors are expected to take measures to prevent violations of third-party rights throughout their practices. The second pillar entails value addition and active contributions towards national sustainable development goals. This framework should involve attention to the human rights perspective as well as the economic, social, environmental and governance issues. All of these issues and perspectives overlap and are intertwined.

Balancing the rights and obligations of the business sector and finding solutions for private sector accountability requires attention to multiple areas of policy and law including human rights, investment, labour, corporate governance, environmental regulation, among other specialized areas. Thus, policy coherence among these different areas ought to be a priority if States seek to effectively advance an accountability framework pertaining to the role of businesses in the developmental sphere. This in turn requires effective institutional cooperation both at the national and international levels.

Assuming such a role requires an acknowledgement that, in many cases, States have given up valuable policy and regulatory tools as a result of commitments under international trade and investment agreements and as a result of other financial arrangements and advice received by multilateral development and financial banks. Achieving the challenges of positive linkages between investments and sustainable development would require reconsidering many of those commitments and reclaiming States' policy and regulatory tools. It entails an active role for the State in promoting linkages between investments, both domestic and foreign, with the developmental goals and priorities of the nation. It requires State's contribution towards ensuring a positively dynamic interaction between foreign and domestic investors, while limiting negative spill overs associated with some FDI. It also requires more effort in solidifying the human rights legal regime pertaining to businesses, including national human rights frameworks in addition to international standards and instruments pertaining to business and human rights.

ANNEXES

Annex (1) Issues of core concern for enhancing accountability of business towards sustainable development

The following list of issues should be taken as indicative but should also be used and adapted according to national contexts. The issues could be considered to assess the business conduct and also assess whether States are taking active steps to facilitate positive linkages between business/ investments and sustainable development.

This list is based on multiple existing initiatives and guidelines that have been reviewed in this paper[113].

Economic considerations:

- Fulfillment of tax obligations and tax accountability including preventing tax avoidance.
- Contributions to productive sectors including agriculture, industrial production, and services, building productive capacities, and diversifying and upgrading productive capacities.
- Productivity and innovation, including the extent to which foreign firms and their linkages with domestic firms enable productivity growth and enhance innovation capacity through knowledge and technology transfer.
- Contributions to technology advancement and transfer, clean infrastructure development, digital transformations.
- Contributions to local research and development and local skill development including the extent to which foreign firms help develop human capital and skills, directly through in-house training, and indirectly through knowledge transfers to domestic firms[114]
- Economic empowerment, interactions and potential spillovers from foreign to domestic firms, whether FDI crowds out local investors or expands the pool of opportunities available for local firms and investors. This includes considering domestic sourcing of foreign companies, or vertical linkages of foreign firms with domestic suppliers in host economies.
- Employment generation and quality of jobs, and how investments, including FDI, contribute to employment and job quality in host countries, including wages, job stability and safety at work. How many jobs are generated, and whether they secure and covered by minimum standards for decent work.
- Implications for local communities, whether lower income groups and less developed areas benefit from the activities of multinational enterprises, how local communities impacted by the activities are involved through consultations and free, prior and informed consent.

Environmental and ecological considerations:

- Contributing to environmental transformation (carbon footprint, and environmental technologies), including contributions towards reducing CO_2 emissions through investment in energy- saving and renewable energy technologies.
- Undertaking environmental impact assessments and mitigating actions in light of the results.
- Maintaining an environmental management system consistent with recognized international environmental management standards and good business practice standards.
- Adopting approaches that respect the conservation of resources and the protection

of resources, reduce waste generation, smartly manage disposal of waste, undertake action to protect natural habitats, species and other biodiversity, implement climate change related adaptation plans.

- Developing water pollution control, and management of water uses, water allocation including minimise water use
- Using renewable energy in products and services or promotion of use of renewable energy in its activities.

Social dimensions:

- Fulfillment of labor rights, including freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; and the effective abolition of child labour.
- Commitment to ILO standards (beyond domestic laws) including at minimum those set in the ILO Convention on Core Labour Standards and Declaration on Multinational Enterprises and Social Policy that lays out what are considered as the minimum global standards, or core labour standards.
- Providing decent job opportunities with fair wages based on the national minimum wage and provide constructive career paths that include investing in skills development of workers
- Providing safe workplace and adequate health and safety conditions for workers, including investing in pension plans for workers and employee and social security benefits.
- Adherence to non-discrimination in the work place and in employment practices.
- Attending to specific problems associated with women's access to utilities in the work place, along with active engagement in regard to promoting equal opportunities to participate in the workforce and decision-making positions
- Avoiding exploitation of intellectual protect rights, traditional knowledge, and local culture and artifacts.

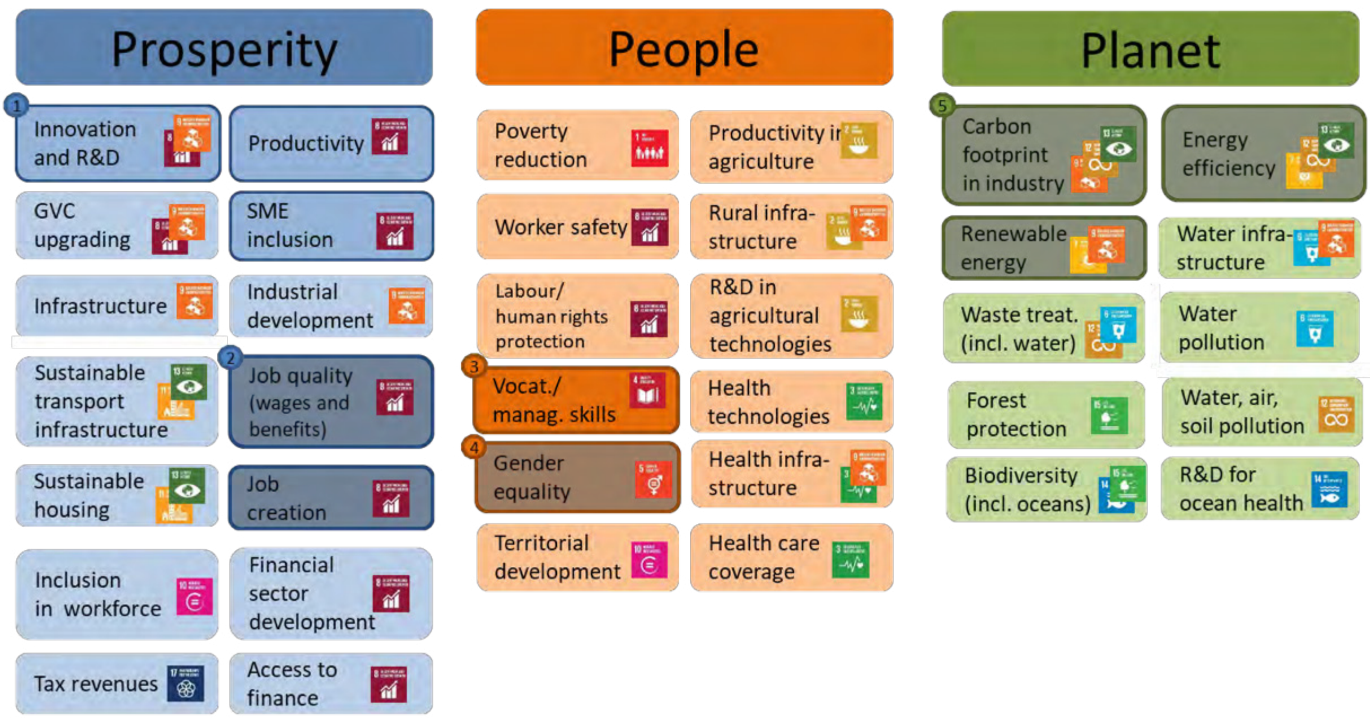
Other cross-cutting considerations including corporate governance and conduct:

- General compliance with domestic law.
- Transparency of decision-making structures including contracts with the public sector, which would entail payments by investors to the government that may be in the form of taxes, rents, royalties, in addition to supply chain due diligence.
- Reporting, beyond financial reporting, to cover social, environmental, governance practices.
- Disclosure of necessary information in the making of an investment such as the corporate history and practices of the investor, and commitment to honesty and plain dealing in making investments.
- Undertaking prior and post risk assessments emanating from the company practices including human rights risks, environmental, economic, social and other risks at the corporate, country, site, or product levels.
- Actively committing to consumer rights, including acting in accordance with fair business, marketing and advertising practices when dealing with consumers and ensuring the safety and quality of goods and services they provide.
- Good corporate governance including ensuring Host States are aware of the status of the investments in their countries, including the financial situation, performance, beneficial ownership, and governance of the company and human resource policies.
- Promote the role of women in the decision-making structures of the corporation.
- Fulfillment of human rights due diligence as

developed under the UNGPs, including identifying, preventing and addressing adverse impacts on human rights.

- Refraining from all acts that may be prejudicial to the public order, morals or to the public interest.
- Avoid political influence, and the spill over of economic power into political spaces, including refraining from influencing the appointment of persons to public office or financing political parties.
- Respecting socio-cultural values, and refraining from interfering with internal political affairs and intergovernmental relations.

Annex (2) : The OECD FDI qualities



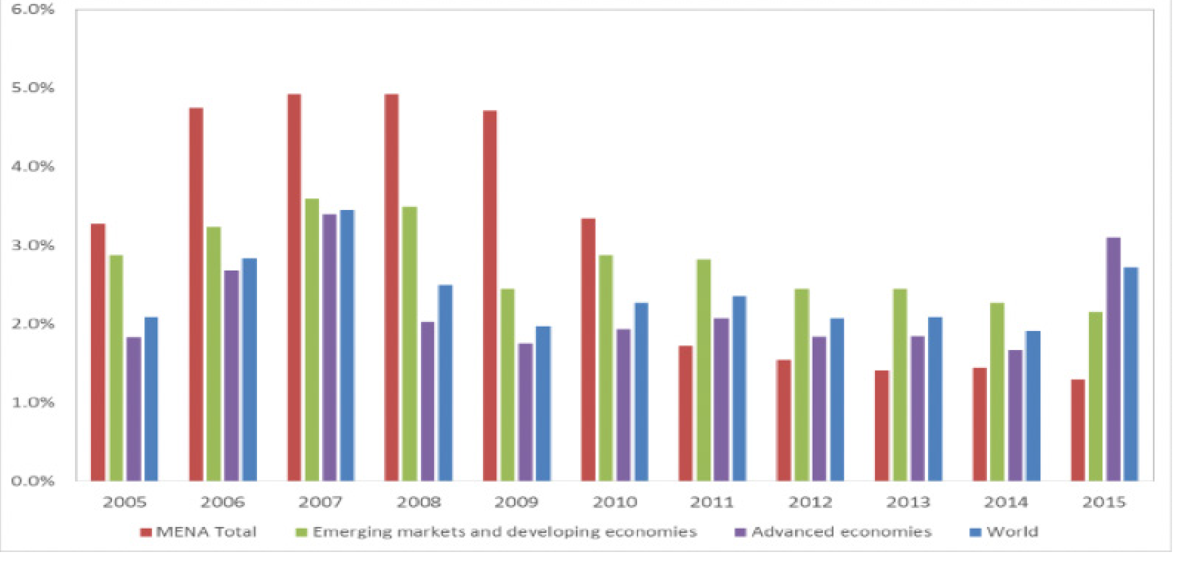
According to the OECD, FDI Qualities can be grouped under three of the 5Ps of the 2030 Agenda, prosperity, people and planet, which broadly translate to economic, social and environmental sustainability. Source: OECD (2019), "FDI Qualities Indicators: Measuring the Sustainable Development Impacts of Investment," Paris 35.

Annex (3): OECD proposed FDI Qualities by sustainability cluster and outcomes

Cluster	Outcomes
1. Productivity & innovation	Labour productivity Labour productivity growth Product innovation Process innovation R&D expenditures Use of foreign technologies
2. Employment & job quality	Employment expansion Job creation per unit of FDI Wage levels Job security (temporary employment) Worker safety (injuries)
3. Skills	Skill intensity On-the-job training Technical skill shortages/surpluses
4. Gender equality	Gender employment equality Gender wage equality
	Female top managers (female empowerment)
	Women entrepreneurship
5. Carbon footprint	Carbon emissions Energy efficiency Renewable energy vs. fossil fuels

Source: OECD (2019), "FDI Qualities Indicators: Measuring the Sustainable Development Impacts of Investment," Paris, page 36

(1)FDI Comparisons by region (% of GDP)



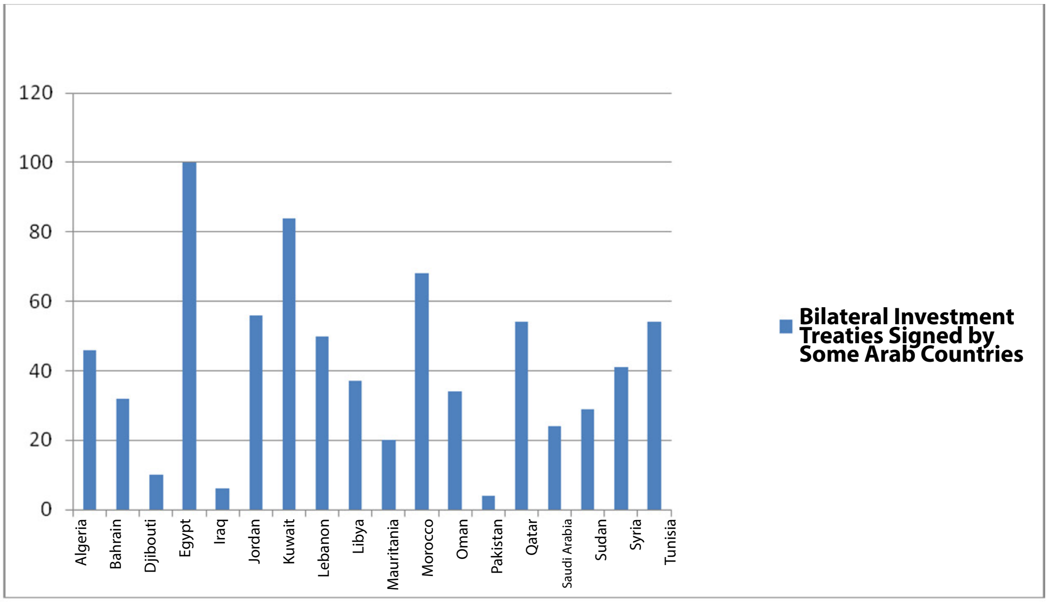
Source: OECD fragility report page 15, based on OECD Foreign Direct Investment statistics database, IMF Balance of Payments database, and OECD staff calculations.

Annex (4): Comments on the World Bank guidance on PPPs contractual provisions by Foley Hoag LLP (2017).

1. Places disproportionate risks and other burdensome financial obligations on governments, leading to the privatization of gains and socialization of losses.
2. Recommends language under which good-faith and non-discriminatory regulation in the public interest (for example, to address climate change or achieve other environmental and social goals) would trigger an obligation for the government to compensate the private investor.
3. Fails to address social, environmental, climate change and human rights concerns arising from infrastructure projects.
4. Misses an opportunity to highlight the potential of infrastructure to contribute to sustainable development, mentioning environmental and human rights considerations only in relation to risks of negative impacts.
5. Excludes the possibility of government participation in PPPs as one of the shareholders or partners of the project company, thus denying governments the potential social benefits of equity ownership.

Foley Hoag LLP. (2017). Summary comments on the World Bank Group's 2017 Guidance on PPP Contractual Provisions. Retrieved from https://us.boell.org/2017/09/15/summary-comments-world-bank-groups-2017- guidance-ppp-contractual-provisions-0

Annex (5): Bilateral Investment Treaties Signed by Some Arab Countries



Source: Graph prepared by guide author, based on UNCTAD (2017) . Includes the number of signed treaties but not necessarily entered into force.

Annex (6): Investments in the Arab region and questions that ought to be asked from a sustainable development perspective

FDI in the Arab countries

The recent picture of FDI flows in light of the COVID pandemic is much different than the previous recent years. UNCTAD's World Investment Report provides that global FDI flows fell by 35 per cent in 2020, to the lowest level since 2005 and almost 20 per cent lower than the 2009 dip after the global financial crisis.[115] It has been projected that FDI flows to the Arab region are likely to drop by around 45%, or the amount of 17.8 billion USD, mostly affecting electrical industries and transport industries.[116]

Back in 2018, the world was already witnessing a slide in FDI flows, driven by large repatriations by American multinational companies of their accumulated foreign earnings following tax reforms in the United States[117]. Yet, in developing countries, FDI flows rose by 2 percent. According to the 2019 UNCTAD World Investment Report, FDI inflows to North Africa increased by 7 per cent to $14 billion during that period. For example, Egypt remained the largest FDI recipient in Africa in 2018, although inflows decreased by 8 per cent to $6.8 billion[118]. However, foreign investment in Egypt was skewed towards the oil and gas industry. Similarly, a 7 per cent increase in FDI in Sudan was concentrated in the oil and gas exploration and agriculture[119]. Morocco stood out by being able to draw investments in several sectors, including automotive, renewable energy, infrastructure and finance, whereby FDI to the country increased to $3.6 billion.

Arab countries have generally attracted FDI in the form of greenfield investments, in comparison to mergers and acquisitions[120]. Generally, Greenfield investments entail a corporate investment that involves building a new entity in a foreign country, while mergers and acquisitions entail purchase of an existing company in a foreign country through an international acquisition[121]. UNCTAD points out that greenfield investments will generally imply a greater immediate contribution to productive capacity and job creation[122]. Greenfield investments tend to contribute to expanding productive capacities domestically, and in this sense could be important from a developmental perspective. An OECD report pointed out that indicators confirm that greenfield FDI projects generate jobs, but unevenly across countries, which varies with the level of development and economic structure.

For example, FDI projects in mining or biotechnology (capital-intensive) generate fewer jobs per dollar invested than those in garment manufacturing or healthcare (labour-intensive), for instance[123]. Mergers and acquisitions may bring benefits such as technology upgrading or access to international markets (or survival in case of troubled acquisition targets), but may also have negative effects (e.g. on employment in case of restructurings)[124].

During the period 2003-2012, greenfield investments in most Middle East and North Africa (MENA) countries represented over 80% of total FDI projects.[125] However, this is not always the case. For example, the largest investment in Morocco during 2018 was the acquisition of a remaining 53 per cent of Saham Finances, Morocco's largest insurer, by a South African company[126].

Moreover, greenfield FDI in Arab countries has been mainly in the oil and gas or real estate sectors. Thus, these investments might have low contributions to long term sustainable development and sought economic transformations[127]. In addition, the large investment figures for real estate often reflect the impact of one or two megaprojects[128].

In comparison to other regions of the world, FDI has played a limited role in developing infrastructure in Arab countries. Where it happened, infrastructure investments were concentrated in the e-mobile telecommunications and energy, along with a few port terminals, while transport and water sectors have witnessed a handful of projects with foreign participation[129].

Investments from Europe (especially France and the UK) and the United States have a prominent role in the region, while China, India and Japan are sources of investments for certain oil producers.[130] Yet, Chinese investments are generally growing in several Arab countries. Furthermore, intra-Arab investments, particularly from Gulf Countries to non-oil producing countries play a significant role in the region.

For example, the largest sources of greenfield FDI in Egypt between 2003 and 2015 have been from GCC countries, primarily the United Arab Emirates (27%) and Qatar (12%)[131]. In total, GCC countries accounted for almost 50% of total greenfield FDI in Egypt over the period. European nations accounted for over 25% of total greenfield capital expenditure. Similarly, investors from the GCC account for a dominant 50% of total greenfield FDI in Jordan.

The dynamics of oil producers and non-oil producing countries vary in regard to investment flows. While non-oil producing Arab countries usually attract investors from closer countries such as European countries, oil producers are able to attract capital flows from further[132].

Furthermore, oil producing countries are often capital importers and capital exporters. For example, the UAE is an active investor in the region[133]. Outward FDI from some Gulf countries increased in 2018[134]. Multinational enterprises from Saudi Arabia and the United Arab Emirates played an important role in this trend. UNCTAD reported that FDI from Saudi Arabia almost tripled to $21 billion, mainly in technology, finance and infrastructure activities[135].

The active intra-regional investment flows among Arab countries instigates questions pertaining to the potential for regional strategic investments in regional that contribute to the collective regionals transformation, such as regional projects that contribute to clean energy production, investments in clean technologies relevant to the industrialization processes in the region, cleaner infrastructure projects, among others.

Yet, it is also important to note that UNCTAD has pointed out that a significant part of investment between developing countries (South–South FDI) is ultimately owned by developed-country multinational enterprises[136]. Indeed, many companies incorporated in developing countries are subsidiaries of parent companies from developed countries.

Assumptions about FDI

The general narrative pertaining to FDI has often associated it with economic diversification, strengthening economic resilience, supporting technology transfer, driving structural transformation by increasing productivity, development of SMEs, promoting skills development, among other benefits[137]. Yet, studies have shown that successful attraction of FDI does not guarantee rapid and sustained growth and industrialization. The latter involves structural transformation which "is only possible with substantial and sustained investment over decades in new activities and products"[138].

Furthermore, studies have shown that the impact left by FDI depends on its nature and the sector where it is concentrated. For example, an OECD report pointed out that foreign investments in the primary sector, such as oil and gas, tend to have a negative effect on growth whereby the local economy receives limited spill-overs – whether in terms of employment, skills development or the injection of funds into the local economy – from investments in the export-oriented resources sector[139].

The impact left by FDI also depends on the role of the States and its approach towards FDI policy. Akyuz had pointed out that "a hands-off approach to FDI, as to any other form of capital, can lead to more harm than good. FDI policy needs to be embedded in the overall industrial strategy in order to ensure that it contributes positively to economic dynamism"[140].

Similarly, UNCTAD's[141] work shows that the positive development impacts of FDI do not always materialize automatically. UNCTAD's Investment Policy Framework for Sustainable Development explains that "the effect of FDI can also be negative …For example, it can lead to outflows of financial resources in the form of repatriated earnings or fees; it can, under certain circumstances, crowd out domestic investment and domestic enterprise[142]; it can at times reduce employment by introducing more efficient work practices or through restructurings[143], or jobs created may be unstable due to the footloose nature of some investment types; it can increase imports more than exports (or yield limited net export gains), e.g. in case of investment operations requiring intermediate inputs or for market-seeking investments[144]; technology dissemination might not take place, or only at high cost (e.g. through licensing fees)[145], and local technological development may be slowed down; skills transfers may be limited by the nature of jobs created; fiscal gains may be limited by tax avoidance schemes available to international investors, including transfer pricing; and so forth".

Furthermore, according to a recent OECD report, "[m]aximising socio-economic and environmental benefits and minimising potential risks associated with FDI may not be a primary concern for profit-seeking investors and may not receive sufficient attention by policymakers seeking to attract investment. While, in principle, FDI has the potential to advance sustainable development, private sector incentives and both home and host country policies need to be carefully considered as they play a critical role for enabling this potential"[146].

A discussion of investment from a sustainable development perspective should obviously extend beyond the quantity of FDI flows towards unpacking the quality of this investment and its added value, including for example its contribution to employment generating productive processes and capacities, that are aligned with sustainability objectives, aligned with sought socio-ecological transformations. It is important to consider the nature of the investments, whether greenfield or mergers and acquisitions, and the sectors in which they are concentrated. Furthermore, it is important to address the dynamics between the domestic and foreign investments are important to consider when discussing contributions of investments to sustainable development, including whether foreign investments help mobilize domestic investments or have a crowd out effect on it.

Role of domestic investors and business enterprises

Often when discussing the role of the private sector, no distinction is made between domestic and foreign investments and investors. In developing countries, we often drift towards thinking of foreign direct investments (FDI) when discussing the role of investments in the SDGs. However, investments with a potential to contribute towards achieving transformational objectives including sustainable development goals, include both domestic and foreign investments. When discussing business and development objectives, the role of domestic businesses and investors is as important to consider as the role of international investors. Generally, domestic enterprises tend to be smaller than foreign investors, given the latter are able to undertake cross border ventures.

It is important to pay bigger attention to the conducive and enabling environment for domestic investors and businesses to flourish. There are multiple factors that play a role in forming closer and more stable linkages between domestic enterprises and investors and domestic markets. These include being inclined to source locally, employing locally in comparison to a multinational who might bring its employees from abroad, and keeping profits to circulate in the national economy in comparison to being syphoned to parent companies abroad.

In Arab countries, as most other developing countries, the domestic[147] private sector is mainly formed of small and medium enterprises (SMEs). SMEs are usually defined as non-subsidiary, independent firms which employ less than a given number of employees[148]. Many domestic enterprises are involved in procurement contracts as suppliers for multinational corporations. This is increasingly a main business target for SMEs[149]. (For more details, please review the chapter by Zeina Abla).

The definition of micro, small and medium enterprises varies across jurisdictions, mostly in relation with the size of the market activity. According to an IFC report[150], in Morocco and Lebanon, microenterprises are defined as having fewer than 10 employees, while in Egypt the definition refers to entities with fewer than 5 employees.

SMEs constitute more than 99% of all non-agricultural private enterprises in Egypt and account for nearly three-quarters of new employment generation[151]. In Kuwait, the sector of SMEs constitutes approximately 90% of the private workforce, and in Lebanon it accounts to more than 95% of the total enterprises and contribute about 90% of the jobs.

Despite that, the presence of the big corporations is evident, either through subsidiaries or suppliers. This corporate activity is often concentrated in certain sectors. For example, in the Arab region, the top corporations are concentrated in the oil and financial sectors, as well as construction and real estate[152]. The dynamics between SMEs and big corporation is an important issue to address in this discussion. Liberalizing investment policies and regulatory frameworks is not necessarily the most effective environment for supporting and enhancing the role of domestic private enterprises. A policy to attract foreign investors ought to include the tools necessary to enhance the linkages between foreign and domestic investors or business enterprises. If such policies are not dynamic in such a way, small domestic business enterprises could be easily crowded out from domestic markets.

Endnotes

1 See: World Bank Group Infrastructure and Private-Public Partnerships blog http://blogs.worldbank.org/ppps/public-private-partnerships-and-2030-agenda-sustainable-development , World Bank Procuring Infrastructure PPPs 2018 Report, available at: http://bpp.worldbank.org/en/key-findings

2 See: World Investment Report 2014, page xi (Key Messages), available at: http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/World_Investment_Report.aspx

3 "World Business Council for Sustainable Development (WBCSD) https://s3.amazonaws.com/sustainabledevelopment.report/2019/2019_sustainable_development_report.pdf

4 United Nations Policy Brief (2020), "The Impact of Covid-19 on the Arab Region", page 3, available at: https://unsdg.un.org/sites/default/files/2020-07/sg_policy_brief_covid-19_and_arab_states_english_version_july_2020.pdf

5 Ibid, page 6

6 Ibid, pages 3 and 4

7 Ibid, page 2, based on International Monetary Fund, Regional Economic Outlook Update, available at https://www.imf.org/en/Publications/REO/MECA/Issues/2020/10/14/regional-economic-outlook-menap-cca and ESCWA estimates.

8 United Nations Policy Brief (2020), "The Impact of Covid-19 on the Arab Region", page 2.

9 Ibid, based on estimates from International Labour Organization, ILO Monitor: COVID-19 and the World of Work, fourth edition, 27 May 2020.

10 OECD Background Note (December 2018), "FDI in fragile and conflict affected economies in the Middle East and North Africa: trends and policies"

11 See: Ibid, OECD

12 Reference 10, OECD, pages 8 and 9

13 Ibid, OECD, page 34

14 UNCTAD: market concentration has risen significantly over the past two decades, particularly among the top 100 firms, While market capitalization of the 100 top firms increased to 7,000 times that of the bottom 2,000 firms in 2015, that was not reflected in employment. Between 1995 and 2015, the top 100 firms increased their market capitalization fourfold, but did not even double their share of employment

15 Stephanie Blackenburg and Richard Kozul-Wright, "The Rentiers Are Here", Sep 25, 2017 by _available online at https://www.project-syndicate.org/commentary/rise-of-global-rentier-capitalism-by-stephanie-blankenburg-2-and-richard-kozul-wright-2017-09. Also see: UNCTAD Policy Brief No. 66 (May 2018) entitled "Corproate Rent-Seeking, Market Power and Equality: Time for A Multilateral Trust Buster?".

16 International Panel on Social Progress. The full report of the panel is entitled "Rethinking Society for the 21st Centruy" and published by Cambridge University Press. The references here are to draft chapters that are available at: https://www.ipsp.org

17 See: Mike Konczal (August 2018), "The shareholder revolution devours its children", available at: https://www.thenation.com/article/the-shareholder-revolution-devours-its-children/ (last accessed on 12.17.2018)

18 See reference 16, International Panel on Social Progress, Chapter 6.

19 See reference 15, UNCTAD.

20 ITUC Global Rights Index 2018, available at: https://www.ituc-csi.org/ituc-global-rights-index-2018-20299

21 See: Federico J. Díez and Daniel Leigh, IMF Blog, "Chart of the Week: The Rise of Corporate Giants", June 6, 2018.

22 Human Development Report 2019, page 88, available at: http://hdr.undp.org/sites/default/files/hdr2019.pdf. The report points out that: "Most of the literature has found that in high human development countries inequalities depress political participation, specifically the frequency of political discussion and participation in elections among all citizens but the richest".102

23 Andrew Edgecliffe-Johnson and Attracta Mooney (Dec 2019), "The year capitalism went cuddly", Financial Times

24 United Nations (2009), Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System, chaired by Joseph Stiglitz.

25 For example, back in 2000, Zingales and Rajan argued that "given the changing nature of the firm, the focus of corporate governance must shift from alleviating agency problems between managers and shareholders to studying mechanisms that give the firm the power to provide incentives to human capital". In 1993, Millon wrote about a crisis and new directions in corporate law. See: Raghuram Rajan and Luigi Zingales (2000), "The Governance of the New Enterprise", National Bureau of Economic Research working paper 7958, available at: https://www.nber.org/papers/w7958, David K. Millon, "New Directions in Corporate Law Communitarians, Contractarians, And The Crisis In Corporate Law", 50 Wash. & Lee L. Rev. 1373 (1993), available at: http://scholarlycommons.law.wlu.edu/wlulr/vol50/iss4/2

26 Martin Lipton (2018), "The Purpose of the Corporation", available at Harvard Corporate Governance Blog https://corpgov.law.harvard.edu/2018/04/11/the-purpose-of-the-corporation/ (last accessed on 1.3.2019)

27 (Colin Mayer of Said Business School and John Ruggie referenced in: Andrew Edgecliffe-Johnson and Attracta Mooney (Dec 2019), "The year capitalism went cuddly", Financial Times

28 Martin Lipton, Wall street lawyer, referenced in Andrew Edgecliffe-Johnson and Attracta Mooney (Dec 2019), "The year capitalism went cuddly", Financial Times

29 Ibid, Financial Times

30 Stephen Tully (Oct 2005). International documents on Corporate Responsibility. ElgarOnline. Material available online at: https://www.elgaronline.com/view/9781843768197.00012.xml (last accessed 12.13.2018)

31 Ibid.

32 The UN Center on TNCs was was established by ECOSOC Resolutions 1908 (1974) and 1913 (1974). See also, Karl P. Sauvant (2015), "The Negotiations of the United Nations Code of Conduct on Transnational Corporations; Experience and Lessons Learned", The Journal of World Investment and Trade, See: footnote 10, Available online at: http://ccsi.columbia.edu/files/2015/03/KPS-UN-Code-proof-2-Journal-of-World-Investment-and-Trade-March-2015.pdf (Last accessed 12.13.2018)

33 Ibid. Sauvant (2015).

34 Other initiatives not addressed here include: International Code of Marketing of Breast-milk Substitutes discussed at WHO (1981), the code of conduct on transfer of technology discussed at UNCTAD.

35 See: http://www.oecd.org/daf/inv/investment-policoecddeclarationoninternationalinvestmentandmultinationalenterprises.htm (last accessed on 12.13.2018). The OECD Guidelines are a set of recommendations by governments to business.The Guidelines were first adopted in 1976 and have been updated five times, most recently in 2011 and they form part of the wider OECD Declaration on International Investment and Multinational Enterprises. For more details see: the OECD consultation paper entitled "Business Responsibilities and Investment Treaties" (January 2020) by David Gaukrodger

36 See: A/RES/35/63 (December 1980), available at: https://undocs.org/en/A/RES/35/63 (last accessed on 12.13.2018) and UN Doc TD/RBP/ CONF/10/ Rev.2 available at: https://unctad.org/en/docs/tdrbpconf10r2.en.pdf (last accessed on 12.13.2018)

37 Martin Khor (October 2003), Making Big Corporations Accountable, TWN Briefing Paper 12

38 Besides the instruments addressed here, it is worth recalling the experience pertaining to the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (E/CN.4/Sub.2/2003/12 (2003)), which were the subject of discussions under the UN Sub-Commission on the Promotion and Protection of Human Rights between 2001 and 2003, dealt with companies' human rights obligations and responsibilities. The Norms were designed as direct obligations on TNCs and other business enterprise. They were not adopted by States. See: Karl-Heinz Moder (2005). "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights". Background paper to the FES side event at the 60th session of the UN-Commission on Human Rights on 25 March 2005, Palais des Nations, Geneva. Available online at: http://www.fes-globalization.org/geneva/documents/UN_Norms/25March04_UN-Norms_Background.pdf (last accessed on 12.13.2018)

39 Besides the UNGPs, the Global Compact, initiated by the UN Secretary General as well, presents itself as "A call to companies to align strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals". See: https://www.unglobalcompact.org/what-is-gc/our-work/all

40 June 2014, Human Rights Council resolution 26/22

41 OECD consultation paper entitled "Business Responsibilities and Investment Treaties" (January 2020) by David Gaukrodger, page 77, available at: https://www.oecd.org/daf/inv/investment-policy/Consultation-Paper-on-business-responsibilities-and-investment-treaties.pdf

42 See: Resolution 26/9 of the Human Rights Council "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights" (July 2014), available online at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9 and the work of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. Information available at: https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx

43 This was negotiated and adopted by governments of home and host countries of multinational enterprises (MNEs) as well as global representative bodies of employers and workers. It was updated in March 2017 to reflect the decent-work related targets of the SDGs covering employment, training, conditions of work and life, and industrial relations: ILO 2017.

44 Stephen Tully (Oct 2005). International documents

on Corporate Responsibility. ElgarOnline. Material available online at: https://www.elgaronline.com/view/9781843768197.00012.xml (last accessed 12.13.2018)
45 Katarina Weilert (2010). "Taming the Untamable? Transnational Corporations in United Nations Law and Practice". Max Planck Yearbook of United Nations Law. Available online at: http://www.mpil.de/files/pdf3/mpunyb_11_weilert_14.pdf (last accessed on 12.15.2018)
46 See for example: Sauvant, Karl and Mann, Howard (2017), "Towards an Indicative List of FDI sustainability Characteristics", E15 Initiative, ICTSD and World Economic Forum.
47 Ibid, Mann and Sauvant.
48 For example: BIT between Brazil and Malawi, BIT between Nigeria and Morocco, Southern African Development Community Model BIT, and the Draft Pan-African Investment Code, among others
49 Mann and Sauvant mention the examples of Thailand Board of Investment, Australia's Foreign Investment Policy and Namibia's Investment Promotion Act 2016 that mention, by way of examples, enhancement of national competitiveness by encouraging research and development, innovation and value creation in the agricultural, industrial and services sectors, small and medium-sized enterprises, fair competition, and inclusive growth, transparent regulation and supervision of investors, as well as ensuring a fair return to the people and the promotion of local linkages and employment creation.
50 OECD (2019), "FDI Qualities Indicators: Measuring the Sustainable Development Impacts of Investment," Paris, page 30.
51 Sauvant, Karl and Mann, Howard (2017), "Towards an Indicative List of FDI sustainability Characteristics", E15 Initiative, ICTSD and World Economic Forum.
52 Ibid, Mann and Sauvant, page 2
53 Ibid, Executive summary, page IV
54 See: The Guiding Principles are available at: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. See commentary on Principle 14.
55 Martin Khor (October 2003), Making Big Corporations Accountable, TWN Briefing Paper 12
56 UNCTAD Investment Policy Framework for Sustainable Development, page 47.
57 Presentation by Motoko Aizawa, Coordinator, The Observatory for Sustainable Infrastructure, IISD webinar available at: https://iisd.org/event/webinar-public-private-partnership-ppp-contracts-understanding-new-approaches-contractual)
58 Martin Brauch (2017), "Contracts for Sustainable Infrastructure", International Institute for Sustainable Development, page 5 referencing a study by Bielenberg, A., Kerlin, M., Oppenheim, J., and Roberts, M. (2016). Financing change to mobile private sector financing for sustainable infrastructure. McKinsey Center for Business and Environment. Retrieved from http:// www.mckinsey.com/~/media/mckinsey/industries/capital%20projects%20and%20infrastructure/our%20insights/ the%20next%20generation%20of%20infrastructure/financing_change_how_to_mobilize_private-sector_ financing_for_sustainable-_infrastructure.ashx
59 Ibid, IISD.
60 See for example: Department of finance, UK, Procurement Guidance Note PGN 03/18, Human Rights in Public Procurement, (December 2018), available at: https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/PGN-03-18-Human-Rights-in-Public-Procurement.PDF
61 See "Public Procurement and Human Rights: A Survey of Twenty Jurisdictions" (2016) available at : https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2018/08/public-procurement-and-human-rights-a-survey-of-twenty-jurisdictions.pdf
62 IISD, Sustainable development: Is there a role for public private partnerships? A summary of an IISD preliminary investigation. Referencing Colverson, S., & Perera, O. (2011). Geneva: International Institute for Sustainable Development (IISD). See: https://www.iisd.org/library/sustainable-development-there-role-public-private-partnerships-summary-iisd-preliminary
63 Ibid, page 6.
64 See for example, "Failure to fly: Challenges and lessons learned from public-private partnerships in Tunisia", Tunisian Observatory of the Economy and Eurodad, page 24
65 Ibid.
66 See reference 94, IISD, referencing Foley Hoag LLP. (2017). Summary comments on theWorld Bank Group's 2017 Guidance on PPP Contractual Provisions. Retrieved from https://us.boell.org/2017/09/15/summary-comments-world-bank-groups-2017- guidance-ppp-contractual-provisions-0
67 See "Business Responsibilities and Investment Treaties", by David Gaukrodger, Consultation paper by the OECD Secretariat (January 2020), referencing OECD, Annual report on Responsible Business Conduct (2018).
68 Ibid, page 45, referencing Ruggie (2013).
69 UNCTAD Investment Policy Framework for sustainable development, page 47.

70 See: Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31/Add.2 (May 2011). Corporate law everywhere provides for five main features that are considered the basic legal characteristic of the corporation, including: separate legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership. See: R. Kraakman, J. Armour, P. Davies, L. Enriques, H. Hansmann, G. Hertig, K. Hopt, H. Kanda, M. Pargendler, W.- G. Ringe, and E. Rock (2017), The Anatomy of Corporate Law: A Comparative and Functional Approach, Oxford University Press.

71 Tomasic Roman, eds. (2016), Routledge Handbook of Corporate Law, Introduction: Corporate Law in Transition, page 1, Routledge. See also: Farrar, John H. (2003) „Corporate Governance and the Judges," Bond Law Review: Vol. 15: Iss. 1, Article 5.mAvailable at: http://epublications.bond.edu.au/blr/vol15/iss1/5. For example, it is noted in the American context that "a primary source of corporate governance rules are the legal rules formulated by the prestigious American Law Institute (ALI) in its "Principles of Corporate Governance." The ALI was founded in 1923 to promote the clarification and simplification of American judge-made common law, and to facilitate the adaptation of law to changing social needs, through drafting, approving, and publishing restatements of the law, model codes, and other proposals for law reform. Source: Jonathan Macey (2008), "Corporate Law and Corporate Governance", Chapter 2 in Macey, Corporate Governance: Promises Kept, Promises Broken, page 33, Princeton University Press.

72 See for example: the Cadbury Committee Code of 1992 in the United Kingdom.

73 Ibid, A/HRC/17/31/Add.2, see summary

74 Ibid, A/HRC/17/31/Add.2, para. 47.

75 Ibid, para. 107.

76 A comparative textbook on corporate law that covers six jurisdictions including the United States, United Kingdom, France, Germany, Italy, and Japan.

77 R. Kraakman, J. Armour, P. Davies, L. Enriques, H. Hansmann, G. Hertig, K. Hopt, H. Kanda, M. Pargendler, W.- G. Ringe, and E. Rock (2017), The Anatomy of Corporate Law: A Comparative and Functional Approach, Preface section, Oxford University Press.

78 One can also mention the reform of UK Companies Act 2006 that had codified the fundamental aspects of established law in regard to director's duties (See part 172 of the UK Companies Act 2006), and

79 See: India's corporate Act 2013, available at: http://www.mca.gov.in/MinistryV2/tca.html. See also: Uttamkumar Hathi (2014), "Indian Companies Act 2013 –Highlights and Review", available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2442727 (last accessed 12.19.2018).

80 The requirement is mandatory for companies with net worth of Rs 5 billion or more; or turnover of Rs 10 billion or more; or net profit of Rs 50 million or more during any fiscal year.

81 See: Ekta Bahl (2014), "An overview of CSR Rules under Companies Act, 2013", available online at: https://www.business-standard.com/article/companies/an-overview-of-csr-rules-under-companies-act-2013-114031000385_1.html

82 For example: French Corporate Duty of Vigilence Law. See: Sandra Cossart, Jérôme Chaplier and Tiphaine Beau De Lomenie, "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All", European Coalition for Corporate Justice, available at https://www.cambridge.org/core/services/aop-cambridge-core/content/view/7C85F4E2B2F7DD1E1397FC8EFCFE9BDD/S2057019817000141a.pdf/french_law_on_duty_of_care_a_historic_step_towards_making_globalization_work_for_all.pdf

83 See: The Swiss Popular Initiative on Responsible Business. For more information: Nicolas Bueno, "The Swiss Popular Initiative on Responsible Business; From Responsibility to Liability", University of Lausanne, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125672. Update on this process available on: https://www.business-humanrights.org/en/switzerland-ngo-coalition-launches-responsible-business-initiative

84 See: Carlos Correa and Jorge Vinuales (2016), "Intellectual Property Rights as Protected Investments: How Open are the Gates?", J Int Economic Law (2016) 19 (1): 91-120, available at: https://academic.oup.com/jiel/article/19/1/91/2357950/Intellectual-Property-Rights-as-Protected

85 "Challenges of Investment Treaties on Policy Areas of Concern to Developing Countries", a G-24 Working Paper, March 2019, by Kinda Mohamadieh, available at: https://www.g24.org/wp-content/uploads/2019/03/Challenges_for_developing_countries_in_IIAs.pdf

86 Joachim Pohl, "Societal Benefits and Costs of International Investment Agreements", OECD (2018), available at: https://www.oecd-ilibrary.org/docserver/e5f85c3d-enpdf?expires=1587907609&id=id&accname=guest&checksum=FF4EB01D644F9E4EAA1C71804E7109F9

87 See UNCTAD Trade and Development Report 2014,

Chapter VI, page 155, available at: http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=981. See also: See also: UNCTAD, IIA Issues Note (Sept 2014), "The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998-2014," available at: http://investmentpolicyhub.unctad.org/Upload/Documents/unctad-web- diae-pcb-2014-Sep%2024.pdf

88 Situation in South Africa: South Africa commenced in terminating BITs after a cabinet review undertaken in 2009. South Africa remains a top receiver of FDI on the African continent; it was ranked by UNCTAD as the top recipient of FDI inflows among the African countries in 2013. Situation in Bolivia: In 2006, Bolivia started to systematically withdraw from every BIT that reached its expiration date. In May 2013, Bolivia collectively denounced all its remaining BITs. Concurrently, FDI inflows into Bolivia have steadily increased, reaching an unprecedented peak of US$1.75 billion in 2013. Situation in Brazil: Brazil had negotiated 14 BITs, however these agreements were not approved and ratified by its Congress due to the imbalance of the agreements and their impact on the state's right to regulate. Brazil remained one of the highest receivers of FDI, and was ranked the 5TH largest recipient of FDI in the world in 2013 Source: UNCTAD.

89 See: Lauge Poulsen, "The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence." In Yearbook on International Investment Law & Policy 2009/2010. New York: Oxford University Press; Jason Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment: Some Hints from Alternative Evidence." Virginia Journal of International Law, 51:397 (2010-2011).

90 Kusi Hornberger, How Much Does Investment Climate Matter? Joseph Battat, and Peter Kusek (2011) "Attracting FDI; How Much Does Investment Climate Matter?", published as World Bank Group- View Point: Public Policy for the Private Sector, available at:
http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/327-Attracting-FDI.pdf See: Trade and Development Report 2014, p. 159, available at: http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=981

91 The following list is sourced from: Lise Johnson (2019)
"IIAs and Investor (Mis) Conduct", available at: http://ccsi.columbia.edu/2020/01/21/iias-and-investor-mis-conduct/

92 Urbaser S.A. v. Argentina, ICSID Case No. ARB/07/26 Award (Dec. 8, 2016).

93 Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2 (Final Award (in favor of State) March 16, 2017).

94 Vodafone International Holdings v. The Government of India, PCA Case No. 2016-35 (India-Netherlands BIT); Vodafone Group Plc v. The Government of India, UNCITRAL (India-UK BIT).

95 Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20; Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1 (Award (in favor of Investor), May 16, 2018).

96 UP and CD Holding v. Hungary, ICSID Case No. ARB/13/35, Award, October 9, 2018, para. 414.

97 Bilcon of Delaware et al v. Government of Canada, PCA Case No. 2009-04 (Award on Jurisdiction and Liability (in favor of investor), March 17, 2015); Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12 (Award (in favor of State), Oct. 14, 2016).

98 TransCanada Corporation and TransCanada PipeLines Limited v. The United States of America, ICSID Case No. ARB/16/21 (settled, 2017).

99 Lise Johnson 2019 "IIAs and Investor (Mis) Conduct", available at: : http://ccsi.columbia.edu/2020/01/21/iias-and-investor-mis-conduct/

100 Performance requirements could be applied to foreign as well as domestic investors, and could include: local content and local processing requirements, requirements to establish joint ventures with domestic participation, requirements for a minimum level of domestic equity participation, employment requirements, research and development requirements, technology development, environmental assessment requirements, among others.

101 See: International Institute for Sustainable Development, "Investment treaties and why they matter for sustainable development", page 29.

102 See Kinda Mohamadieh and Manuel Montes (2015), "Throwing away industrial development tools: investment protection treaties and performance requirements", South Centre.

103 See: https://uncitral.un.org/en/working_groups/3/investor-state

104 See: bilateral investment agreement between Morocco and Nigeria, Article15 on Investment, Labour and Human Rights Protection and Article 20 on Investor Liability, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3711/morocco---nigeria-bit-2016-

105 For more discussion of this issue, see:

"IIAs and Investor (Mis) Conduct", **Lise Johnson January 14, 2019** http://ccsi.columbia.edu/2020/01/21/iias-and-investor-mis-conduct/

106 UN Doc CCPR/C/21/Rev.1/Add. 13 (2004), par. 8. [8. The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities.]

107 See: Human Rights Committee, General Comment 35, UN Doc. CCPR/C/GC/35 (2014), para. 9; General Comment 27, UN Doc. CCPR/C/21/Rev.1/Add.9 (1999), para. 6; and, Committee on the Rights of the Child, General Comment 16, UN Doc. CRC/C/GC/16 (2013) p. 2.

108 Committee on the Rights of the Child, General Comment 16, UN Doc. CRC/C/GC/16 (2013), para. 4.

109 Specifically in regard to corporations, the Committee on Economic, Social, and Cultural Rights provided that: States should take steps to "prevent human rights contraventions abroad by corporations which have their main seat in their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant." (Statement on ESCRs and business Op. Cit, Note 17) and General Comment 16 (para. 43) by the Committee on the Rights of the Child explains that: home states have obligations to respect, protect, and fulfill children's rights by business enterprise's foreign operations when there is a reasonable link between the State and the conduct concerned, namely where the enterprises has center of activity, is registered or domiciled or has its main place of business or substantial business activities in the State. The General Comment 16 proposes: measures for states to prevent harm abroad, such as making public finance and other public support conditional on carrying out a process to identify, prevent or mitigate any negative impacts on children's rights in their overseas operations, taking into account the prior record of business enterprises for the same purposes; ensuring that state agencies such as export credit agencies take steps to identify prevent and mitigate adverse impacts of projects they support.

110 French Law on Vigilance, Loi n 2017-399 du 17 Mars 2017 relative au devoir de vigilance des sociétiés mères et des enterprises donneuses d'ordre < https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte>. Other recent developments in European countries are outlined by the Business & Human Rights Resource Center (BHRRC) here: <https://www.business-humanrights.org/en/national-movements-for-mandatory-human-rights-due-diligence-in-european-countries>. More details can be found in the OECD consultation paper entitled "Business Responsibilities and Investment Treaties" (January 2020) by David Gaukrodger.

111 See Para. 13 of the General Comment 24 of the Committee on Economic, Social and Cultural Rights.

112 For example, Art. 8.9.1 CETA, the parties "reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity".

113 See for example: UNGPs, OECD FDI qualities, IISD background document entitled "Harnessing Investment for Sustainable Development: Inclusion of investor obligations and corporate accountability provisions in trade and investment agreements" (2018), and UNCTAD Investment Policy Framework for Sustainable Development, and paper by Mann and Sauvant.

114 (OECD FDI qualities)

115 UNCTAD, World Investment Report 2021, page 2, available at: https://unctad.org/webflyer/world-investment-report-2021.

116 United Nations Policy Brief (2020), "The Impact of Covid-19 on the Arab Region", page 11, available at: https://unsdg.un.org/sites/default/files/2020-07/sg_policy_brief_covid-19_and_arab_states_english_version_july_2020.pdf

117 UNCTAD World Investment Report 2019. See 'Overview' of the report. Available at: https://unctad.org/en/PublicationsLibrary/wir2019_overview_en.pdf

118 https://unctad.org/en/PublicationsLibrary/wir2019_overview_en.pdf
119 OECD Background Note (December 2018), "FDI in fragile and conflict affected economies in the Middle East and North Africa: trends and policies"
120 Ibid, page 13.
121 See: https://www.investopedia.com/ask/answers/06/greenfieldvsacquistion.asp. See also reference 54, OECD, page 14
122 UNCTAD Investment Policy Framework for Sustainable Development, page 40, available at: https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf
123 See OECD (2019), "FDI Qualities Indicators: Measuring the Sustainable Development Impacts of Investment," Paris, page 17. The report provides that "Over longer time spans, and when taking into account the possibility of spillover effects on domestic firms, greenfield FDI relates positively to employment growth; but this does not apply to all countries. In the OECD, the positive FDI-employment growth relationship is stronger in countries where medium-tech industrialization processes are, or have been, stronger and more sustained." Page 18
124 Ibid.
125 See: Federico Carril Caccia , Juliette Milgram Baleix , Jordi Paniagua (2018), "FDI in the MENA Region: Factors that Hinder or Favour Investments in the Region", IEMED Mediterranean Yearbook.
126 UNCTAD World Investment Report 2019, page 36-37
127 OECD Background Note (December 2018), "FDI in fragile and conflict affected economies in the Middle East and North Africa: trends and policies", page 31
128 Ibid, OECD.
129 OECD Background Note (December 2018), "FDI in fragile and conflict affected economies in the Middle East and North Africa: trends and policies", page 31
130 Federico Carril Caccia , Juliette Milgram Baleix , Jordi Paniagua (2018), "FDI in the MENA Region: Factors that Hinder or Favour Investments in the Region", IEMED Mediterranean Yearbook page 1
131 See reference 64, OECD, page 16.
132 Ibid.
133 See reference 66
134 UNCTAD World Investment Report 2019
135 Ibid, UNCTAD WIR 2019, page 6
136 UNCTAD WIR 2019, Overview
137 OECD Background Note (December 2018), "FDI in fragile and conflict affected economies in the Middle East and North Africa: trends and policies", page10
138 Montes, Manuel F (2014) "Obstacles to Development in the Global Economic System." Research paper no. 51. The South Centre, Geneva , page. 1
139 OECD Background Note (December 2018), "FDI in fragile and conflict affected economies in the Middle East and North Africa: trends and policies".
140 Akyuz, Yilmaz (2015), "Foreign Direct Investment, Investment Agreements and Economic Development: Myths and Realities", South Centre
141 UNCTAD Investment Policy Framework for Sustainable Development, page 46
142 UNCTAD World Investment Report 1997
143 UNCTAD World Investment Report 1994, UNCTAD World Investment Report 2000.
144 UNCTAD World Investment Report 2002 and UNCTAD World Investment Report 2011
145 UNCTAD World Investment Report 2011
146 OECD Background Note (December 2018), "FDI in fragile and conflict affected economies in the Middle East and North Africa: trends and policies", page 30.
147 The term 'domestic' is used here in a nuanced way, taking into consideration that in today's world of globalized markets and value chains, the nature of the economic activities is rarely purely domestic.
148 "Small and Medium-sized Enterprises: Local Strength, Global Reach", available at: http://www.oecd.org/cfe/leed/1918307.pdf
149 "How SMEs can connect to supply the big boys", available at: https://www.telegraph.co.uk/finance/newsbysector/industry/10624307/how-smes-big-business-success.html
150 See : Sahar Nasr and Douglas Pearce, "SMEs for Job Creation in the Arab World: SME Access to Financial Services", (2012), available at: http://www.ifc.org/wps/wcm/connect/1115c70045539e51af04afc66d9c728b/SMEs+for+Job+Creation+in+the+Arab+World.pdf?MOD=AJPERES. The report points out that relatively low definition thresholds may be appropriate for non-GCC MENA countries, which may have smaller enterprise sizes at all levels. The variation in definition could even be within institutions at country level. The Egyptian Small Enterprise Law 141 of 2004 defined micro enterprises as companies or sole partnerships with paid-up capital of less than LE50,000, and small enterprises as companies or sole proprietorships with paid-up capital between LE50,000 and LE 1 million, and with 6 to 50 employees. The Central Agency for Public Mobilization and Statistics (CAPMAS) acknowledges this definition, but in practice uses number of employees,

defining micro-enterprises as having up to 5 employees, small enterprises as up to 50 employees, and medium and large enterprise as having over 50 employees. The central bank groups SMEs together for definitional purposes and focuses on paid-up capital and sales turnover. (See footnote on page 51 of the report)

151 See: Hussein ElAsrag, "The developmental role of SMEs in the Arab countries", Egyptian Ministry of Industry and Foreign Trade (2012), available online at: https://mpra.ub.uni-muenchen.de/40608/1/MPRA_paper_40608.pdf

152 Source : https://www.forbesmiddleeast.com/en/list/top-100-companies-in-the-arab-world-2016/