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Arab NGO Network for Development
شبكة المنظمات العربية غير الحكومية للتنمية

CSO Partnership
for **Development Effectiveness**

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Kinda Mohamadieh

The Role and Accountability of the Private Sector in Development Processes



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I. The Private Sector and Development Agendas

A major feature of the approach to public development agendas¹ today is the central role that the private sector takes in shaping the narrative, and in the policy formulation and project implementation. Discussions pertaining to the roles and responsibilities of the private sector in development ought to be of concern to all actors involved in promoting sustainable development.

This paper focuses on issues relevant to the accountability of the private sector. It addresses the narratives concerning development and the private sector, arrangements for the private sector's participation, and the legal bases underlying the expanding role of the private sector in public development agendas. It discusses the prevailing development narratives at the international level, particularly at the United Nations under the sustainable development goals (SDGs) and Agenda 2030. This is because one of the major roles of this agenda is to normalize a certain narrative and way of thinking about different actors in the development sphere, one of which is the private sector. While this discussion is expanding, not enough attention or progress is achieved at the level of thinking about responsibilities of the private sector and the implications of its expanding involvement in the public sphere.

The paper utilizes the terms private sector and business enterprises interchangeably to mean profit-seeking private entities. In contrast, it is worth

¹ Public development agendas, as used in this paper, stand for the State's policies and objectives in the development sphere, including those that reflect goals and agendas agreed multilaterally, such as the SDGs.

noting that the use of private sector under UN documents often encompasses as well non-profit seeking entities, like private foundations. The notion of business enterprises encompasses both corporate actors and other business entities. The paper also addresses the role of business enterprises as foreign investors. The paper does not discuss the role of non-profit private sector in influencing development agendas.

Agenda 2030 and the SDGs as a site for expanding the role of the private sector in the public development sphere

The SDGs and Agenda 2030 has been a site for an expanded narrative about the importance of the private sector's role in development finance. For example, the UN's General Assembly resolution 70/224, outlined recommendations for enhancing cooperation between the United Nations and the private sector, emphasizing that achieving the 2030 Agenda for Sustainable Development would require greater engagement of business².

The UN Conference for Trade and Development (UNCTAD)- particularly the investment and enterprise division- has stressed private investment as an integral part of the financing for development discussion³. The 2014 World Investment Report issued by this division provided that "[t]he SDGs will have very signifi-

² See: Report of the Secretary-General, "Enhanced cooperation between the United Nations and all relevant partners, in particular the private sector," 10 August 2017, A/310/72. See also: <https://business.un.org>

³ See statement by James Zhan (Director of UNCTAD's Investment and Enterprise Division) at UNCTAD Investment Policy Framework 2015 launched at Financing for Development Conference, available at: http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1041&Sitemap_x0020_Taxonomy=UNCTAD20%Home;2071#;#UNCTAD20%and20%FfD6#;202015%;#Investment20%and20%Enterprise;2099#;#Investment20%Policy20%Framework20%

The notion of 'partnerships' under the SDGs; in search for accountability

The notion of partnerships was one of the most debated and contested issues addressed under the negotiations of the SDGs and Agenda 2030. The essential role of partnerships in achieving the 2030 Agenda was underscored in SDG 17, which enshrines partnership as a goal in itself and as critical means of implementation for the entire Agenda⁷. This issue was contested not because of opposition to participation of stakeholders per se, but because of the exploitation of the notion of 'partnerships' in order to obscure the differences between stakeholders, especially entities with profit objectives and other non-profit entities working in the public interest.

In this regard, it was noted that the notion of 'partnerships' could be a misleading term in the framework of the discussion about the engagement between UN entities and non-State actors, because it "promotes a false sense of equality" between civil society organizations (CSOs) and corporate actors, while ignoring "profound differences in their orientation, interests and accountability"⁸.

It is worth noting here that during 2016, the International Chamber of Commerce (ICC) was given an observer status with the General Assembly, which is a status that is usually reserved to non-Member States, like the Holy See and the State of Palestine,

⁷ Report of the Secretary-General, "Enhanced cooperation between the United Nations and all relevant partners, in particular the private sector", 10 August 2017, A/310/72. See page 2.

⁸ Barbara Adams and Jens Martens (May 2016), "Partnerships and the 2030 Agenda Time to reconsider their role in implementation", Background Note, Friedrich-Ebert-Stiftung (FES). See the referenced paper for some suggestions of accountability related proposals that could be considered in the context of the UN relation with the private sector

cant resource implications across the developed and developing world. Global investment needs are in the order of \$5 trillion to \$7 trillion per year. Estimates for investment needs in developing countries alone range from \$3.3 trillion to \$4.5 trillion per year...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"⁴ (emphasis added).

The international financial institutions (World Bank and International Monetary Fund) and the multilateral development banks, including the European development banks active in the Arab region, have been reiterating since 2015 that meeting the SDGs requires moving the discussion from 'billions to trillions', which would require moving beyond focusing on official development assistance (ODA) to activating funds from public and private, national and global sources⁵. This is also being reflected in the narrative of institutions and country configurations at the international level, such as the narrative of the G24 developing countries' group of finance ministers⁶, the G20, and multiple UN agencies such as UNIDO and UNDP, among others.

for20%Sustainable20%Development

⁴ See: World Investment Report 2014, page xi (Key Messages), available at: http://unctad.org/en/Pages/DIAE/World20%Investment20%Report/World_Investment_Report.aspx

⁵ Barbara Adams and Sarah Dayringer, "UN partnerships in the public interest? Not yet", 25 October 2017, Global Policy Watch, available at: https://www.globalpolicy.org/images/pdfs/GPFEurope/GPW25_10_2017_18.pdf

⁶ See: <https://www.g24.org/>

and inter-governmental organizations⁹. The request for considering the ICC for an observer status at the UN, which was put forward by France, underlined the ICC's work in support of the UN in the areas of sustainable development, the environment, energy and climate change¹⁰. The letter by France stated that “[b]y virtue of its long history of authoritative involvement in international policymaking and its global reach, the International Chamber of Commerce is exceptionally positioned to represent world business at the General Assembly of the United Nations.... the relationship of Governments with the private sector has become more important as the role of business in generating employment and wealth through trade, investment and finance for development has been increasingly recognized by States Members of the United Nations and other stakeholders.^{11”}.

The discussion on financing for development

The discussion on financing for development continues under the auspices of the ECOSOC Forum on Financing for Development follow-up (FfD Forum), which is an intergovernmental process with universal participation mandated to review the Addis Ababa Action Agenda (Addis Agenda) and other financing for development outcomes and the means of implementation of the SDGs¹².

Looking at the outcome document of the 2018 FFD forum¹³, one could notice the deficiency in clarity when it comes to responsibilities and obligations of the private sector. The outcome document recognizes the need for Member States to “work to align incentives of both public and private actors with long-term sustainable development” (para. 5 of the outcome document). Yet, the section discussing “domestic and international private business and finance” does not include a vision for concrete steps to be taken by governments in this regard. It is limited to an open invitation to the private entities to undertake initiatives on a voluntary basis in order to align with sustainable development goals. For example, the mentioned section provides that States “invite private companies to adopt sustainable practices that foster long-term value” (para. 14), and that States “will promote sustainable corporate practices, including integrating environmental, social and governance factors into company reporting as appropriate, with countries deciding on the appropriate balance of voluntary and mandatory rules”. In addition, this section includes

¹² See: <http://www.un.org/esa/ffd/ffdforum/>. The 2018 Forum was held in New York from 23 to 26 April 2018. Final outcome document is available at: <https://undocs.org/E/FFDF/2018/L.2>

¹³ Available online at <http://www.un.org/esa/ffd/ffdforum/-2018-ffd-forum/outcome.html>

⁹ The Sixth Committee of the UN General Assembly granted observer status to the ICC, as a result of a resolution submitted by France, Albania, Colombia, the Netherlands and Tunisia and was adopted during the seventy-first session of the General Assembly. See: Svenja Brunkhorst and Jens Martens, “World’s largest business association gets direct voice in UN decision making”, Global Policy Forum, December 2016, 20, available at: <https://www.globalpolicy.org/component/content/article/-270-general/-52926worlds-largest-business-association-gets-direct-voice-in-un-decision-making.html>

¹⁰ Request for the inclusion of a supplementary item in the agenda of the sixty-seventh session Observer status for the International Chamber of Commerce in the General Assembly, letter dated 10 August 2012 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/191/67

¹¹ Ibid. France.

emphasis that “the UN should continue to bring together relevant stakeholders to discuss and disseminate the benefits of SDG investing”.

While the narrative and the processes to expand the participation of the private sector in development processes have been rapidly evolving and reflected in country policy approaches and practices, the discussion on the responsibility and accountability of the private sector that should be associated with these processes is not catching up. The facilitation of the private sector’s role is ongoing, including through access of the private sector to information, to spaces for influencing public decision-making in regard to development agendas both inside and outside the UN-including at regional and national levels, and through the construction of ‘investor-friendly’ legal and business environments. Yet, there has been limited attention and space for actively thinking about building effective mechanisms of accountability that would be aligned with the wider role that the private sector is undertaking in using public monies and influencing public development agendas.

II. Crucial issues for consideration in unpacking the role of private sector in development

The following section discusses issues that are crucial in the conceptualization of the interface between the role of the private sector in development spheres and agendas and the role of the State and other actors. Often, these issues are kept in the blind spot of the discussion on private sector’s role in development and accountability.

A starting point to consider is that the discussion of the role and accountability of the private sector in development brings together two separate worlds, one that is public and another that is private. The public is led by the vision of development for all and serving the public interest, while the other is led by the culture of maximization of private profits and the primacy of shareholder value over any other stakeholders in a transaction by a corporate entity, including that of labor and affected communities. To bring these two worlds together and to align the incentives in the direction of serving the public interest and the development agendas require active intervention. It cannot be assumed that incentives will be aligned effectively based on the theory and dynamics of free and efficient markets.

Which private sector are we talking about?

What do we mean when we refer to the private sector? This should be a starting point when engaging in a discussion pertaining to the role and accountability of the private sector as an actor in development processes.

In developing countries, like the Arab countries, the domestic private sector manifests itself primarily in the form of small and medium enterprises (SMEs)¹⁴. 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. Many domestic enterprises are involved in procurement contracts as suppliers for multinational corporations. This is increasingly a main business target for SMEs. Deconstructing and understanding these relations and business practices among business enterprises have implications on the discussion of accountability and liabilities across the chains of economic activity, including in the public sphere.

Usually we find that SMEs as a proportion of business enterprises is high globally, and not only in developing countries. SMEs are usually defined as non-sub-sidiary, independent firms which employ less than a given number of employees¹⁵. It is worth noting that 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 report¹⁶, 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. As examples, SMEs constitute more than 99% of all non-agricultural private enterprises in Egypt and account for nearly three-quarters of new employment generation¹⁷. For 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,

¹⁶ 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)

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

¹⁷ See: Hussein ElAsrag, "The developmental role of SMEs in the Arab countries", Egyptian Ministry of Industry and Foreign Trade (2012), available online at: https://mpr.aub.uni-muenchen.de/1/40608/MPRA_paper_40608.pdf

¹⁴ "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>

¹⁵ "Small and Medium-sized Enterprises: Local Strength, Global Reach", available at: <http://www.oecd.org/cfe/leed/1918307.pdf>

as well as construction and real estate¹⁸. Discussing the role of corporations is actually discussing the role of capital in society, and such indicators as above could mean that capital is actually concentrated in sectors that are not necessarily contributing to added value production and diversification of the economy. For those reasons, when discussing the role and accountability of the private sector in development, it is important to deconstruct the scene of the corporate role in the economy.

Looking at the global scene, one ought to highlight that in recent years, around half of the leading 100 economies have a size (in terms of GDP) compared to transnational corporations (TNCs) (in terms of corporate sales)¹⁹. Moreover, much of the global economic activity and trade transactions are concentrated within 'global value chains' controlled by a few TNCs. Lead researchers from UNCTAD's team working on the Trade and Development Report have 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. Reversing this trend is essential for future growth and social cohesion"²⁰. Within this trend, the authors highlight, 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

¹⁸ Source : <https://www.forbesmiddleeast.com/en/list/top-100-companies-in-the-arab-world2016/>

¹⁹ See presentation by Stephanie Blackenburg at open Ended intergovernmental working group on TNCs, OBEs, and human rights (2015).

²⁰ Stephanie Blackenburg and Richard Kozul-Wright, "The Rentiers Are Here", Sep 2017, 25 by available online at <https://www.project-syndicate.org/commentary/rise-of-global-rentier-capitalism-by-stephanie-blankenburg-2-and-richard-kozul-wright09-2017->. Also see: UNCTAD Policy Brief No. 66 (May 2018) entitled "Corporate Rent-Seeking, Market Power and Equality: Time for A Multilateral Trust Buster?".

here as income derived solely from the ownership and control of an asset, rather than from innovative, entrepreneurial deployments of economic resources²¹) The authors further note that market concentration has risen significantly over the past two decades, particularly among the top 100 firms²². 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 employment²³. This is a reflection of big business detaching from productive activities and investment, including job creation. Thus, the value of the corporation reflected in the value of its outstanding shares²⁴ does not reflect its actual contribution to advancing productivity, innovation, job creation and growth in the real economy. The IMF followed in 2018 by highlighting the rise of 'corporate giants' and the 'market power of "superstar" companies in advanced economies²⁵'. Work by IMF researchers pointed out that concentration of market power²⁶ is most evident in advanced economies and is mostly driven by "superstar" firms in all broad economic sectors, not just in information and communication technology²⁷. According to this research, when market power becomes too strong, a negative relation is exhibited between market power and investment, innovation, and labor shares, "im-

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Outstanding shares refer to a company's stock currently held by all its shareholders, including share blocks held by institutional investors and restricted shares owned by the company's officers and insiders. See <https://www.investopedia.com/terms/o/outstandingshares.asp>

²⁵ See: Federico J. Díez and Daniel Leigh, IMF Blog, "Chart of the Week: The Rise of Corporate Giants", June 2018, 6.

²⁶ Average markups stand for the ratio of the price at which firms sell their output to the marginal cost of production of that output, which provides a measure of market power.

²⁷ Federico J. Díez and Daniel Leigh. See footnote 23.

plying that the labor share of income declines in industries where market power rises"²⁸. Furthermore, the increase in corporate power has been associated with regress in the conditions of labor and anti-union practices. The International Trade Union Confederation (ITUC) has pointed out the rise of "shrinking democratic space for working people and unchecked corporate greed"²⁹. A 2018 report by the ITUC spoke of "outrageous behaviour of many multinational companies" in undermining unions and violation of labor rights. The example of Samsung was highlighted due to its anti-union practices whereby it denied workers freedom of association and collective bargaining rights. The report also pointed to the mal treatment of workers at Amazon and its campaigns against tax proposals to create affordable housing³⁰.

The dynamics between SMEs and the 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 (as referred to above, these domestic enterprises are those whose activities are mostly concentrated in the domestic markets and which are small in terms of employment capacities and turn over profits). 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, there is high threat that small domestic business enterprises would be crowded out from domestic markets.

Successful mobilization of private investments in support of sustainable development is not a 'laissez faire' affair

The discussion of leveraging private sector participation in the implementation of the SDGs often leads to a focus on the need to enhance the "investment-friendly environment". The notion of "investment-friendly environment" is not new and has been associated with deregulatory practices promoted as part of the neo-liberal agendas of the 1980s and 1990s. It is notion that is often used to indicate a regulatory framework that favors investors, such as investment treaties focused on protecting the investor, liberalization of national investment laws including prohibition of performance requirements on investors, and establishing special economic zones where often basic regulations such as labor laws are not applied. It has been also associated with leveraging private money through schemes of blended finance. The latter is a process where public money is invested in projects in which the private sector participates, including through contracts like public-private partnerships (PPPs) (See more on this issue under Section III).

One ought to question whether what is envisioned under such narrative of "investment-friendly environment" is compatible with the notion of enhancing private sector investments in support of sustainable development.

Country experiences have shown that building linkages between foreign direct investment (FDI) and sustainable development processes, including building productive capacities and generating decent jobs, is not a 'laissez faire' endeavor, but requires active

28 Ibid
29 See: ITUC Global Rights Index 2018, available at: <https://www.ituc-csi.org/ituc-global-rights-index20299-2018->
30 Ibid

policy interventions by governments. Yilmaz Akyuz points out that a hands-off approach to FDI, as to any other form of capital, can lead to more harm than good.³¹ FDI policy should be embedded in a country's overall industrial strategy in order to ensure that it contributes positively to economic dynamism of host countries³².

Historical experiences of currently industrialized countries reveal an active use of different policy interventions in order to support the rise of efficient and internationally competitive business enterprise sector as well as to ensure positive benefits from foreign investment. For example, the record of East Asian countries shows that successful practice has required that the public sector undertake policies to support and discipline both public and private enterprises to channel their activities to new and productive areas³³. In support of building domestic business enterprises, "authorities in the Republic of Korea forced their leading businessmen to invest in manufacturing, which was more risky to their profits but which also permitted labor to move into higher skilled jobs and restricted their investment in lucrative retail sectors, which were not the priority in the early stages of development"³⁴. Furthermore, industrialized countries have used performance requirements³⁵ to en-

31 Yilmaz Akyuz (2015), "Foreign Direct Investment, Investment Agreements and Economic Development: Myths and Realities", South Centre Research Paper 63#, available on: <https://www.southcentre.int/research-paper-63-october2015-/#more7895->

32 Ibid. Yilmaz Akyuz.

33 See: Montes and Mohamadieh (2015), "Throwing away industrial development tools: investment protection treaties and performance requirements", referencing Studwell, Joe (2013) *How Asia Works: Success and Failure in the World's Most Dynamic Region*. London: Profile Books.

34 Ibid. Montes and Mohamadieh 2015.

35 Performance requirements usually encompasses multiple kinds of policy interventions such as: local content and local processing requirements, trade balancing requirements, foreign exchange restrictions, export controls, requirements to establish a joint venture

hance the linkages between FDI and their economic development objectives. The United States imposed a 75 per cent local content requirement on the Toyota Camry, the UK required 90 percent local content on the Nissan Primera, and Italy imposed 75 percent local content requirement on the Mitsubishi Pajero. A detailed analysis of United States and Japanese FDI in a sample of 74 countries in seven broad branches of manufacturing over the 1982-1994 period found export performance requirements to be effective in increasing the export-orientation of foreign affiliates to third countries³⁶. Moreover, Kumar and Ghallagher indicate that countries like Australia, Canada, France, Japan, Norway, and Sweden, among others have made extensive use of performance requirements³⁷.

Consequently, enhancing the added value and accountability of the private sector in its endeavors in the sphere of public development agendas and policies requires policy space for the State, allowing it to design and utilize the needed mechanisms to ensure accountability and effective linkages between the private sector interests and public interest. These tools include legislative and regulatory tools. Thus, accountability of the private sector and policy space of the State go hand in hand.

with domestic participation, requirements for a minimum level of domestic equity participation, employment requirements, requirements to locate headquarters in a specific region, export requirements, research and development requirements, among other kinds of measures.

36 Montes and Mohamadieh 2015, referencing Kumar, Nagesh (2003) "Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries." UNCTAD. Geneva.

37 Ibid, referencing Kumar and Gallagher 2007 "Relevance of 'Policy Space' for Development: Implications for Multilateral Trade Negotiations".

The debate of soft law and hard law

The discussion of liability and accountability of the private sector, including corporate responsibilities and obligations, include a debate of whether soft law or hard law would constitute the best approaches in this area.

One can note that the references to accountability in the UN Secretary General's report "Enhanced cooperation between the United Nations and all relevant partners, in particular the private sector"³⁸ were limited to references to the Global Compact. The latter is a voluntary initiative, which according to the website of the Global Compact 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"³⁹.

This narrative gives a false indication that the accountability mechanisms that are already in place are enough, and that we just have to expand the participation of the private sector in these mechanisms. This narrative is not limited to the level of the United Nations, and other international institutions and country configurations, but also trickles down into the policies and approaches of ministries and governmental authorities at the national level. Many of these institutions in the developing countries get a major support from UN agencies that adopt this narrative.

Furthermore, some argue that soft law, in the form of guidelines that corporations would adopt in their internal procedures and practices, would be more effective in comparison to hard law that could lead to

discouraging business enterprises from operating in certain jurisdictions. Another soft law focused proposition is that the adoption of internal grievance mechanisms in a business enterprise could be a sufficient accountability mechanism.

Broadly speaking, the soft law approach has been promoted under the notion of corporate social responsibility, stemming from the idea of self-regulation as the best means to proceed with addressing the relation of business to the broader society, coupled with the idea that States are ineffective in regulating dynamic private actors. For example, this discussion is evident at the UN Human Rights Council where some stakeholders advocate for the Guiding Principles on Business and Human Rights⁴⁰ as the best approach to enhance the accountability of business enterprises, in comparison to other stakeholders who call for a legally binding instrument on business and human rights (See more on this issue under Section III).

Underlying this debate between the utility of soft or hard law is the political debate regarding the role of the State and the interface between the State and the market. While soft law could play a role in advancing good practices by business entities, it should not displace the necessity for hard law to complete the picture of accountability mechanisms and ensure access to remedy and justice for stakeholders that could fall victims as a result of mal practice by business enterprises.

40 See: <https://www.business-humanrights.org/en/un-guiding-principles>

38 See reference 3.
39 See: <https://www.unglobalcompact.org/what-is-g>

The conceptualization of accountability mechanisms and the importance of access to information

The accountability measures for the private sector are expected to vary in accordance with the size and scale of the business enterprise and its operations. For example, the Guiding Principles in business and human rights (GPs) have recognized that "the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts" (GP 14)⁴¹. On this point, the GPs provide in commentary form that "the means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size. Small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms. But some small and medium-sized enterprises can have severe human rights impacts, which will require corresponding measures regardless of their size. Severity of impacts will be judged by their scale, scope and irremediable character. The means through which a business enterprise meets its responsibility to respect human rights may also vary depending on whether, and the extent to which, it conducts business through a corporate group or individually. However, the responsibility to respect human rights applies fully and equally to all business enterprises"⁴².

41 http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
42 Ibid.

Accountability is closely associated with access to information about the role and practices of the private sector. Besides access to the information, the relevance of the information provided is important. In addition to financial reporting, several jurisdictions are requiring that business enterprises of certain size report on social and environmental aspects of their business practices⁴³. In the context of the involvement of businesses in development-focused projects, it is important to ensure the transparency of the contractual arrangements between the government and the private sector.

III. Rights and obligations of corporations/investors: What legal bases are at play?

The relationship of the private sector to the State and society overall is entrenched in multiple legal instruments, both domestic and international. All private sector activities, both domestic and foreign, are supposed to be regulated by domestic laws, including corporate laws, investment laws, labor laws environmental and health laws, product liability laws, among others (human rights law...). The liability of business enterprises for misconduct should be clearly addressed in civil, criminal and administrative laws, although in many countries there are significant gaps in addressing standards of liability for corporate conduct in these various areas of law.

43 See for example, the EU non financial reporting for large companies at : https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en

In addition, investors' rights and obligations are addressed under other legal instruments, including investment contracts and international investment treaties. Investment contracts could involve both foreign investors and domestic investors. Increasingly, public-private partnership (PPP) contracts are promoted as a vehicle for mobilizing private investment for the fulfillment of the SDGs and other development goals, specifically in the area of infrastructure investment. The Organisation for Economic Co-operation and Development (OECD), in the "Principles of Public Governance of Public-Private Partnerships" (2012), defines Public-Private Partnerships (PPPs) as "long term contractual arrangements between the government and a private partner whereby the latter delivers and funds public services using a capital asset, sharing the associated risks"⁴⁴. The terms of these partnerships are usually set out in the contract, which outlines the responsibilities of each party, and also allocates risk⁴⁵. Negotiations of these contracts are covered by commercial confidentiality, making it hard for civil society and parliamentarians to scrutinise them⁴⁶. However, these complex economic and legal relationships have impacts that extend beyond the involved private entity and the State, to impact other stakeholders including the communities where these projects are undertaken. Moreover, the public at large is concerned, given that public money is involved in these contracts and risks could entail loss of taxpayer money in the process.

Past experiences have shown that many countries have faced difficulties in attaining the projected benefits out of public-private arrangements. For example, a recent study by the EU Court of Auditors pointed that such projects in the European Union show "widespread shortcomings and limited benefits"⁴⁷. Challenges were linked to overall institutional and legal frameworks within the concerned States. Overall, PPPs have been associated with increased costs in comparison to traditional public procurement, non-transparent contingent liabilities that end up increasing the public debt burdens, lack of transparency and limited public scrutiny, as well as lack of effective identification of risk factors and allocation of responsibilities⁴⁸. An effective cooperation with the private sector depends on the nature of the project and service being provided and requires a legal framework that balances the rights and responsibilities of the State and those of the private entities and allocates risk adequately, without leaving the public sector and the local communities overexposed to extended risk.

In addressing matters of private sector accountability, including defining rights and obligations of private sector entities in their investment endeavors, it is important to keep in sight the interplay between different legal bases that define the relation of the private investor to the State and other impacted stakeholders. It would be of added value if groups that are concerned with different elements under this complex legal framework would work together and cooperate.

44 See : Chakravarthi Raghavan, « Europe: PPPs show «widespread shortcomings and limited benefits» », SUNS # 12, 8660 April 2018, reporting on a report released by the EU Court of Auditors in March 2018, available online at: <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=3D45153>

45 See <https://ppp.worldbank.org/public-private-partnership/agreements>

46 "Public-Private Partnerships: Global Campaign Manifesto", available at: <http://eurodad.org/files/pdf/-1546821world-bank-must-stop-promoting-dangerous-public-private-partnerships1527763292-.pdf>

47 See : Chakravarthi Raghavan, see footnote 45.

48 See: María José Romero, "The fiscal costs of PPPs in the spotlight", available at: <http://investmentpolicyhub.unctad.org/Blog/Index/60>

IV. A deeper look into selected unfolding processes

The following processes of reform are unfolding at the national, regional, and international levels, and could potentially play a central role in balancing the rights and obligations of private sector entities/ business enterprises under international law. This section gives a brief about these processes. These areas were selected for discussion here because they could potentially be useful areas for campaigning by civil society groups in regard to private sector accountability. However, this selection is not intended to be considered as an exhaustive list of areas where accountability of business enterprises ought to be addressed. Indeed, enhancing accountability of business enterprises requires a discussion that engages multiple forums and areas of law, including human rights law, investment laws, labor laws, corporate law, environmental laws, among others.

Reform of international investment agreements and clarifying investor obligations

The reform of the investment protection regime has become a policy objective adopted by a broad base of developed and developing countries. Yilmaz Akyuz notes that the experience with investment treaties strongly suggests that policy interventions that would be necessary to contain adverse effects of FDI on stability, balance of payments, capital accumulation and industrial development and to activate its potential benefits, have been increasingly circumscribed through rules imbedded in international investment treaties⁴⁹. For example, action in support of infant-in-

49 Yilmaz Akyuz, "Foreign Direct Investment, Investment Agreements and Economic Development: Myths and Realities", South

dustry and domestic firms with the aim of enabling them to compete with foreign affiliates or successfully link up to global chains is restricted under the 'national treatment' clause of investment treaties, which requires that host countries treat foreign investors no less favorably than domestic investors⁵⁰. This is among a range of other prohibitions on governmental action needed to achieve a positive spill-over from FDI and limit negative impacts, including prohibitions on performance requirements, capital controls, among other restrictions on regulatory action⁵¹.

Reforms of investment treaties are supposed to cover two aspects of the regime: (1) the substantive investment standards under investment treaties (or investment chapters in free trade agreements) and (2) the investor-state dispute settlement (ISDS). Currently, there exists more than 2,900 investment treaties (in addition to trade agreements with investment rule), most of which provide for arbitration as the means for settlement of disputes between the investor and the state⁵². Arab countries are heavily involved as parties to such agreements.

While there is an overall convergence among the international community on the need for reform of these treaties, the focus of these reform efforts and the end objective behind the proposals and actions presented as reform vary substantially. In this discussion, one of the most fundamental issues for consideration is whether the reforms being proposed would

Centre Research Paper 63#, available on: <https://www.southcentre.int/research-paper-63-october2015-/#more7895->

50 Ibid. Yilmaz Akyuz.

51 For more information, see: South Centre [2015], Investment Treaties: Views and Experiences from Developing Countries. For more details: <https://www.southcentre.int/product/investment-treaties-views-and-experiences-from-developing-countries/>

52 See : <http://investmentpolicyhub.unctad.org/IIA/liasByCountry#iialInnerMenu>

support countries in attaining systemic changes that allow fostering the linkages between investment and development objectives and addressing the challenges arising from the current system of rules on country's policy and developmental space.

It is worth noting that several countries are withdrawing from these treaties, which are considered unbalanced and intrusive on regulatory space. One can highlight the experiences of India, Indonesia, Ecuador, South Africa, and Bolivia in this regard. Other countries have been active in building new visions and models for these treaties, including Egypt, other African countries through developing the Pan-African Investment Code, among other initiatives.

One of the core limitations of these treaties is their over-emphasis on investor protection without attending to investor obligations. Thus, one core element to address with a view towards balancing these treaties is developing the obligations of investors, including in regard to their contribution to development objectives, respect of domestic laws, and broader responsibility in their investment practices. Increasingly, countries are taking these issues into consideration in their treaty practice, model approaches, and guidelines⁵³.

Another important issue to consider in this debate is how the handling of investment treaties is proceeding at the national, regional, and multilateral levels, and the extent to which these processes are coordinated. Effective institutional coordination of decision making at these multiple levels is necessary. If not, risks

⁵³ See for example, Morocco-Nigeria Reciprocal Investment Promotion and Protection Agreement, India's model BIT, Pan African Investment Code (PAIC), Southern African Development Community model BIT, COMESA Investment Agreement (signed 2007/05/23, not yet into force, and is being renegotiated, among other initiatives.

are high that negotiations could proceed regionally or multilaterally in a way that hinders the achievement of benefits or would be regressive vis-à-vis national efforts and visions. In this area, civil society groups active both at the international and regional or national levels could help bring attention to these issues and work with the responsible authorities.⁵⁴

The treaty on TNCs, other business enterprises with respect to human rights

The discussion on a legally binding instrument on transnational corporations, other business enterprises with respect to human rights have commenced at the UN Human Rights Council in 2015, based on a mandate established by HRC Resolution A/HRC/RES/26/9. The open-ended intergovernmental working group established by this resolution successfully completed three meetings during 2015, 2016, and 2017.

Discussions on business and human rights have a long history, including most recently the adoption of the UN Guiding Principles on Business and Human Rights⁵⁵. Previously, these issues were tackled under the draft UN Code of Conduct on Transnational Corporations, which underwent a decade of negotiations between 1982 and the early 1990s under the UN Commission on Transnational Corporations. The "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights" were also discussed at the beginning of the millennium. The importance of the current process rests in big part in the fact that it brought the discussion on business' responsibilities

⁵⁴ This resolution was adopted on 26 June 2014, at the 26th session of the HRC.

⁵⁵ See A/HRC/31/17 and resolution 4/17 of 16 June 2011.

and obligations to an inter-governmental process of dialogue and negotiations, after being undertaken for a long time through expert-led processes.

A treaty could potentially help develop the international legal framework and adapt it to today's economic reality of corporations, which require action on both sides of the corporate chain, including in the home and host States. A prospective treaty could focus on addressing the multitude of challenges that victims of corporate human rights abuse face when seeking remedy, especially in the case of transnational corporate conduct. These include constraints in the jurisdiction of the host State courts due to lack of adequate substantive and procedural laws, obstacles pertaining to jurisdiction of home State courts, as well as challenges in collection of evidence and information and proving the chain of liability between a subsidiary and a parent company, among others⁵⁶. Accordingly, a binding instrument would complement domestic legislative frameworks and mechanisms to allow effective redress for victims of human rights abuses perpetrated by corporate actors, which today can use their incorporation and contractual structures, and the gaps in international law to escape liability⁵⁷.

Among the core issues discussed in this process are the following: clarification of State's obligations to regulate the conduct of their corporations when operating abroad, mechanism for international co-

⁵⁶ Kinda Mohamadieh, "Legally binding instrument on TNCs human rights: October session a successful step on the way forward", 20.01.2017, available at: <https://blog.southcentre.int/01/2017/legally-binding-instrument-on-tncs-human-rights-october-session-a-successful-step-on-the-way-forward/>

⁵⁷ See: Uribe and Mohamadieh, "Building a binding instrument on business & human rights", available online at: <https://www.business-humanrights.org/en/building-a-binding-instrument-on-business-and-human-rights>

operation that need to be strengthened in the investigation phases of cases as well as enforcement of judgments, standards of corporate liability under domestic laws, jurisdiction of courts in home and host states of corporations to address cases of corporate human rights abuse, the scope of a prospective treaty, along other issues such as prevention, access to remedy, due diligence by States and corporations, as well compliance.

V. Proposed considerations for a position on private sector's involvement and accountability in development processes

Private sector accountability is a complex concept that integrates multiple levels of consideration- national, regional and multilateral- as well as multiple legal bases. Accordingly, envisioning a position and program of work pertaining to private sector accountability, especially in the realm of its involvement in the developmental sphere, requires defining the specific niche area(s) in which the concerned organization(s) could achieve the most added-value.

In such an exercise, it would be important to take the following factors into consideration:

In terms of policy issues:

- **Expansion of private sector participation in public development agendas requires more attention and operationalization of accountability mechanisms. At the heart of it, this issue is about the conceptualization of the role of the State and its interface with the market;**
- **Balancing the rights and obligations of the business sector ought to be tackled under various areas of law including domestic law as well as international law. Moreover, solutions for private sector accountability would not be found under one exclusive policy or legal sphere. For example, solutions for accountability should be sought under multiple interlinked policy and le-**

gal areas, such as policies and laws in the fields of human rights, investment, labour, corporate governance, environmental regulation, among other specialized areas.

- **There is a need for attention to the discussion concerning soft and hard law approaches and also to public and private mechanisms of accountability;**
- **Accountability is closely inter-linked with transparency and access to information, as well as institutional and regulatory capacities of the State;**
- **Mechanisms of accountability could be differentiated depending on the nature of the practices by business enterprises as well as their size and potential impact;**
- **The role of business enterprises in conflict areas requires specific attention.**

In terms of strategy:

- **The responsibility for enhancing accountability of the private sector stretches across different national institutions, development cooperation institutions, and international institutions/multilateral organizations. Advocacy strategies ought to engage these institutions.**
- **Interventions by civil society groups ought to be undertaken at the national, regional and international levels, depending on the availability of resources and networking/ cooperation possibilities among groups of CSOs operating**

at these multiple levels. Action at the domestic municipal level could also be important;

- **Advocacy towards enhancing private sector accountability ought to consider how policy forums and discussions interplay and how the narrative gets consolidated across various levels, while focusing on the spaces where the concerned group is able to have highest influence.**
- **It is important to account for the fact that the site to be chosen to advocate on the issue of private sector accountability will influence how this issue will end up being addressed. For example, the dynamics of discussing private sector accountability at the Human Rights Council differs from discussing this issue at the International Labor Organization, or at the UN Conference on Trade and Development. Each forum will allow for framing the issue in a certain manner. Also, each forum has different political dynamics among Member States and non-State actors, which would eventually determine what possible outcomes ensue. This applies as well to the choice of forums at the national and regional levels.**

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