

EURO-ARAB INVESTOR-STATE DISPUTE SETTLEMENT:  
RECENT DEVELOPMENTS AND FUTURE PERSPECTIVES

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# Euro-Arab International Investment Agreements: towards a new generation of policies

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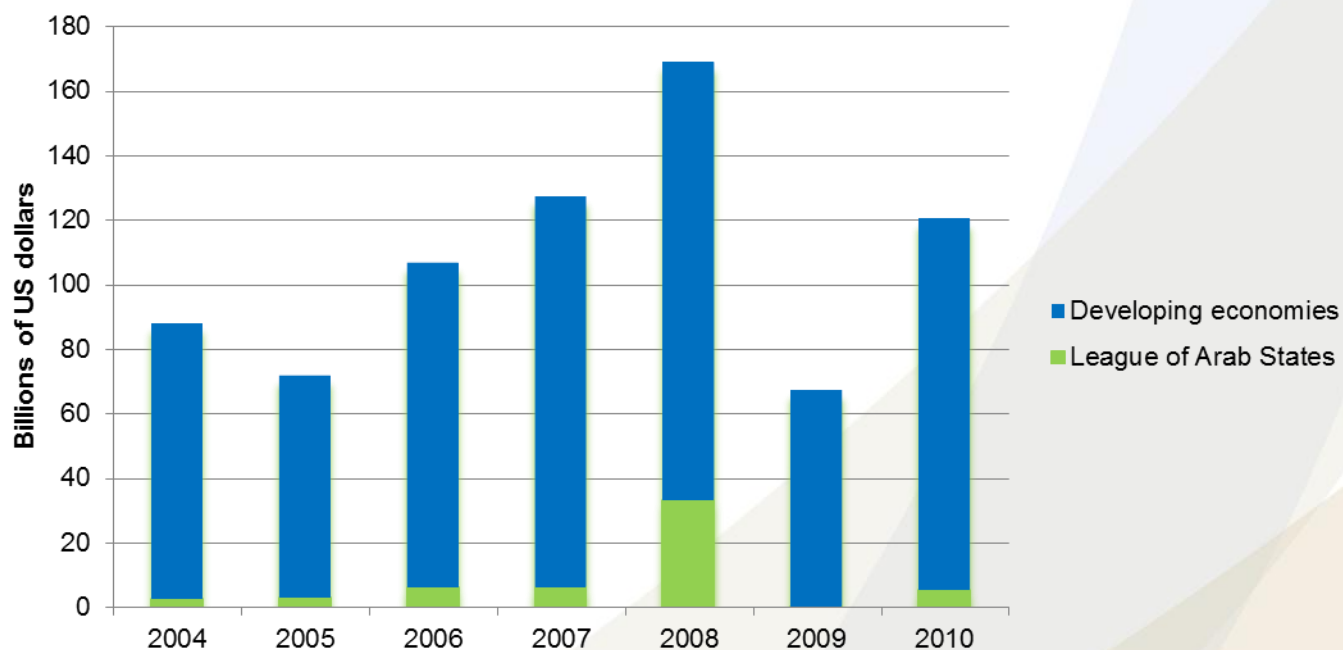
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# 1. The international regulatory framework governing Euro-Arab investment flows

## Comparison: EU FDI outflows to developing countries and to Arab States



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# The international framework governing Euro-Arab investment flows

Two-track approach to international investment treaty making with Arab countries:

## Bilateral

- Bilateral investment treaties (BITs) by individual European countries with Arab countries

## Regional

- The EU as a collective entity through Euro-Mediterranean agreements (1995 Barcelona process)
- Free Trade Agreements with the European Free Trade Association (EFTA)

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## A. Bilateral investment treaties (BITs)

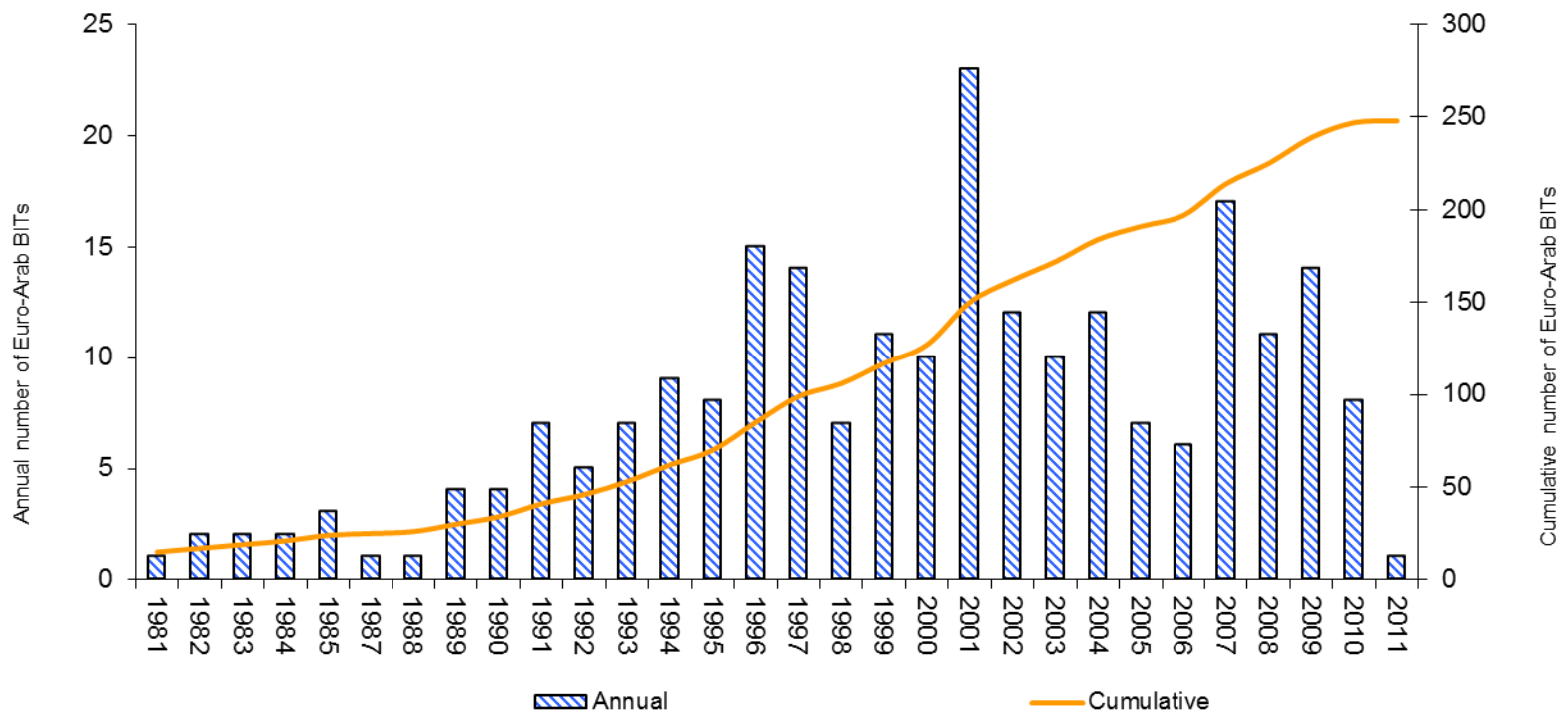
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## Core Elements of Euro-Arab BITs

- **Post-establishment protection:**
  - **Principle of fair and equitable treatment**
  - **Principle of non-discrimination (NT/MFN)**
  - **Expropriation**
  - **Transfer of funds**
- **Investor-State dispute settlement**

# Trends of Euro-Arab BITs, 1981-2011

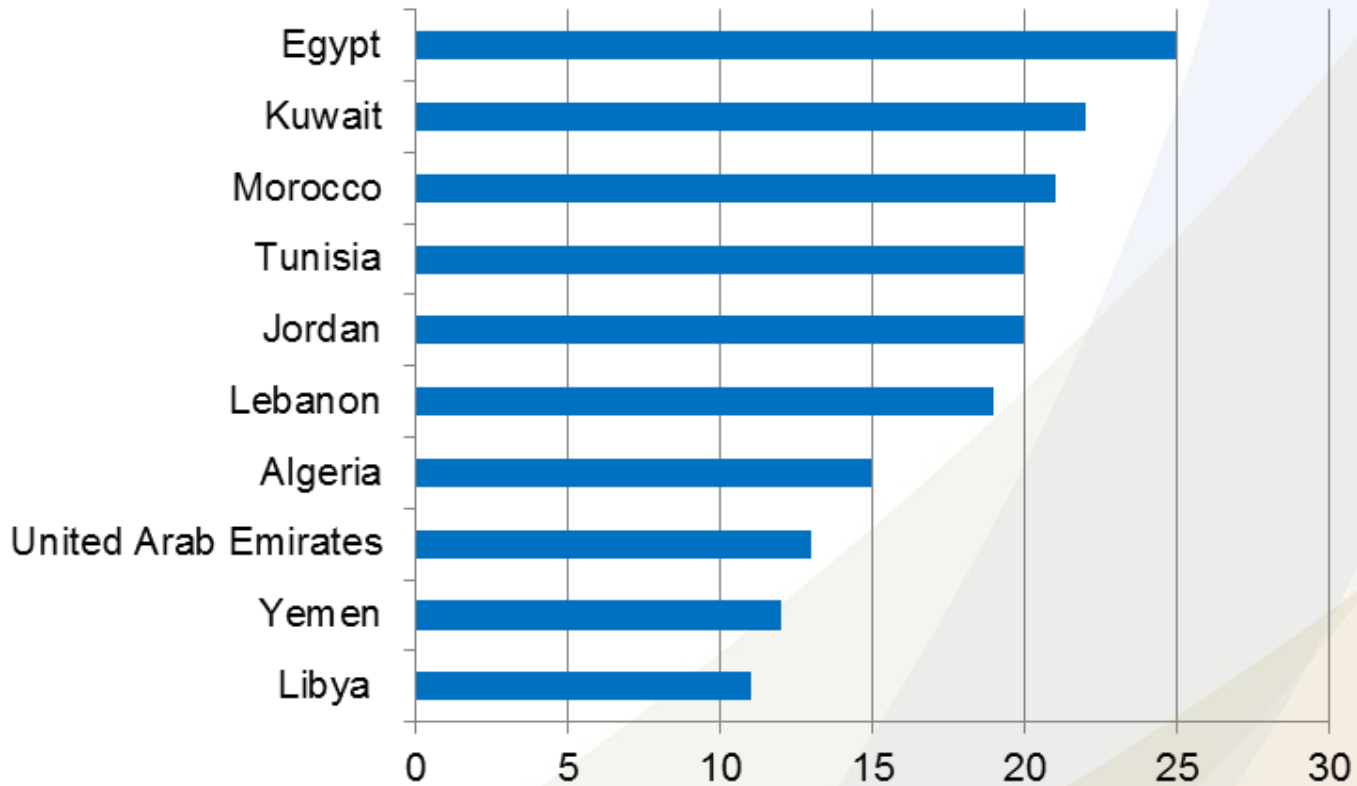
250 BITs signed between European and Arab countries



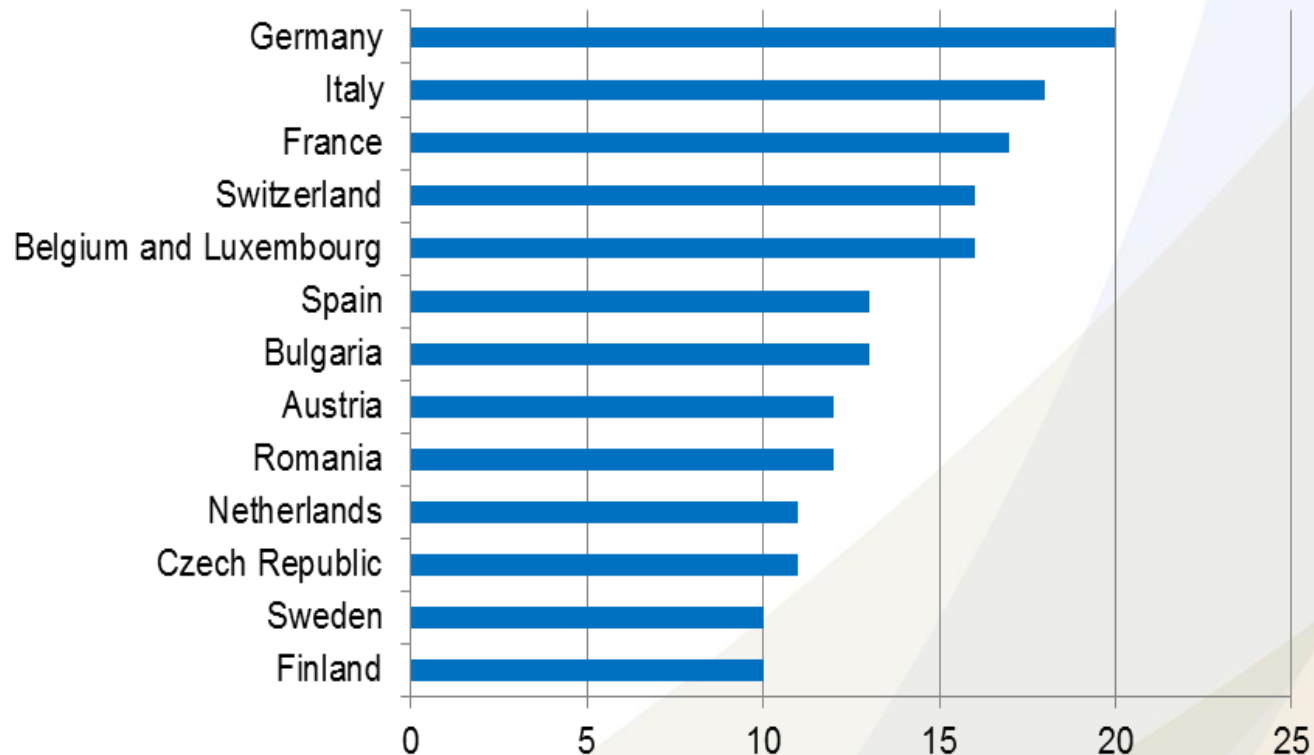
European countries signed a total of over 1600 BITs



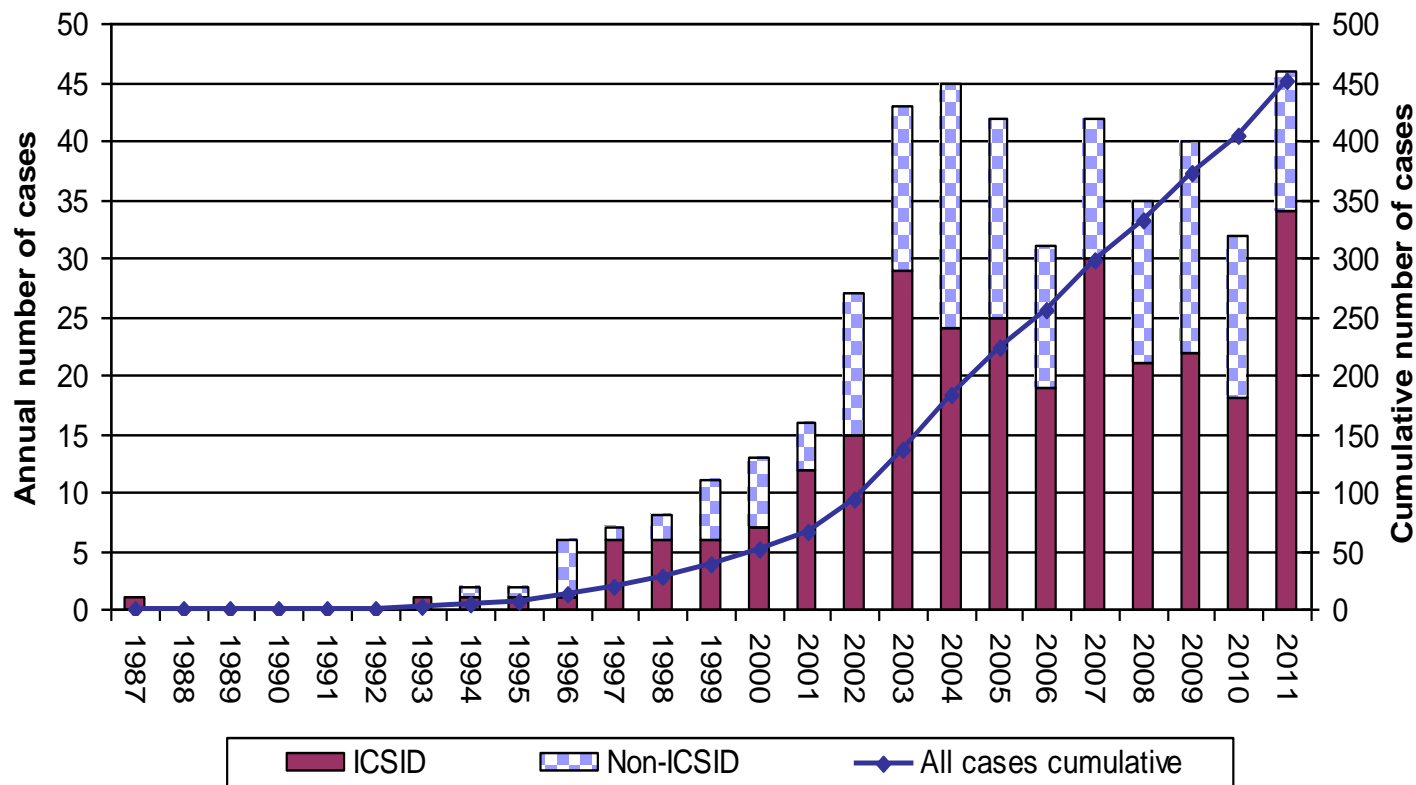
## Top 10 Arab countries in term of the number of BITs signed with European countries



## Top European countries in term of the number of BITs signed with Arab countries



## Known investment treaty arbitrations (cumulative and newly instituted cases)



- At least 24 treaty-based cases filed by European investors against host Arab countries (see annex).

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## ISDS: concerns for host Arab countries

- **Impact on the country's right to regulate for the public interest**
- **High costs involved in conducting procedures**
- **Arbitration awards can involve huge sums**
- **Potential impact on country's reputation as investment location**

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## B. Regional Trade Agreements

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## Euro-Arab RTAs

### EU Agreements with Arab countries containing investment provisions (9)

- Tunisia (1995)
- Morocco (1996)
- Yemen (1996)
- Palestine Liberation Organization (PLO) (1997)
- Egypt (2001)
- Algeria (2002)
- Lebanon (2002)
- Jordan (2002)
- Iraq (2012)

### EFTA free trade agreements with Arab countries containing investment provisions (7)

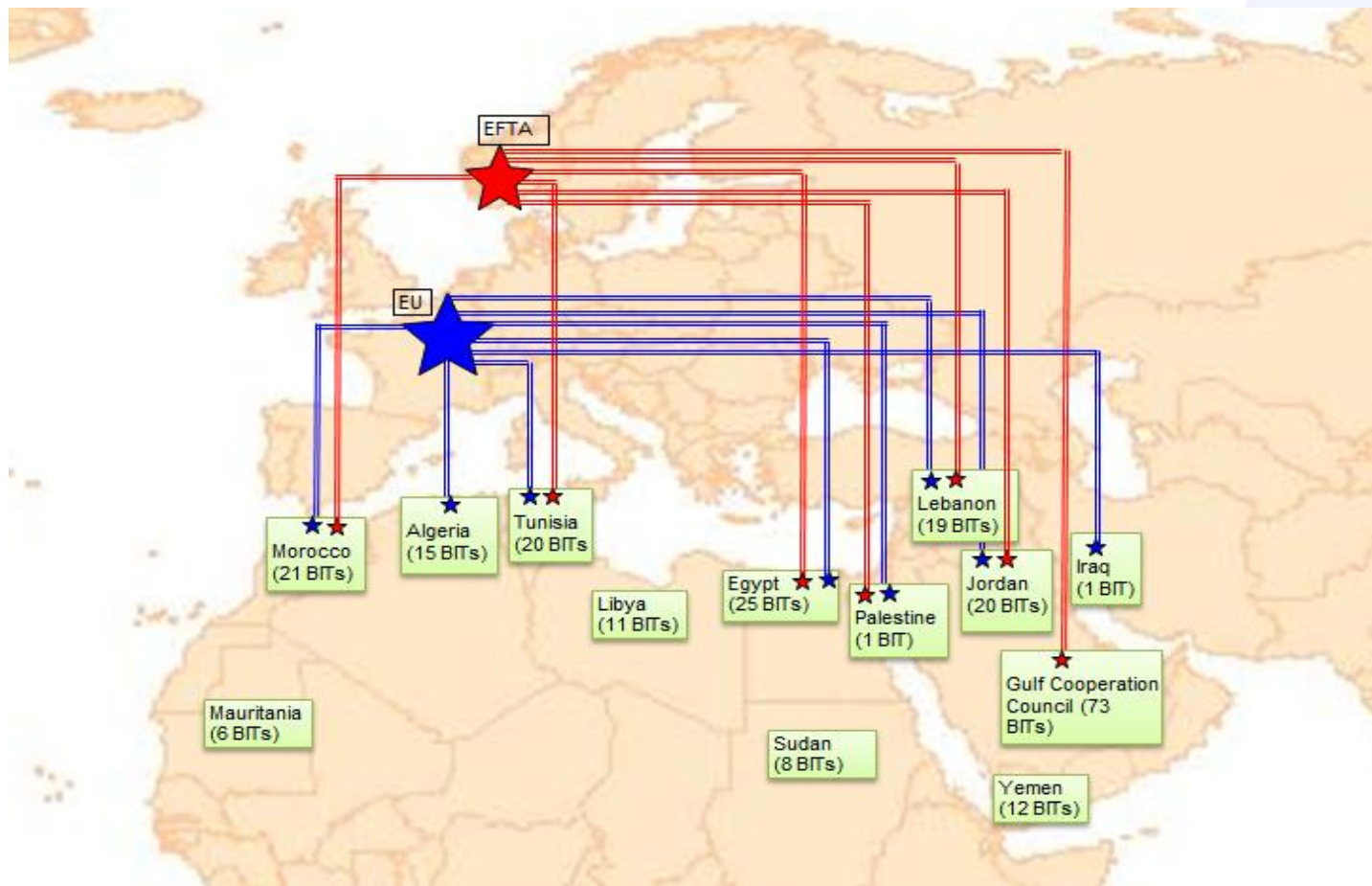
- Morocco (1997)
- Palestine Liberation Organization (PLO) (1998)
- Jordan (2001)
- Tunisia (2004)
- Lebanon (2004)
- Egypt (2007)
- Gulf Cooperation Council (2009)

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## Core elements of Euro-Arab FTAs

- Unlike BITs, the scope and depth of the investment provisions varies greatly in these agreements
- No investment protection provisions (expropriation, investor-State disputes mechanism)
- Some RTAs grant the right of establishment of companies on NT and MFN basis (EU-Jordan, EU-Iraq)
- Almost all of these agreements have a free movement of capital provision with a balance payments difficulty exception
- EFTA agreements with Tunisia and Egypt include a FET provision

## Euro-Arab IIAs at a glance



FTAs with the EU

FTAs with EFTA States



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## Recent developments affecting Euro-Arab international investment policies

- **The European Commission now negotiates not only agreements concerning the liberalization of trade and investment, but also conditions relating to the protection of investment on behalf of all member States.**
- **This will entail important changes to the global investment policy landscape.**
- **In December 2011, the EU Council adopted negotiating directives for deep and comprehensive FTAs with Egypt, Jordan, Morocco and Tunisia which can potentially replace 106 BITs signed by these countries with individual EU members.**
- **At the same time some Arab countries are revising their model BITs and investment policies to adapt to new socio-economic priorities.**

**These developments represent an opportunity to consolidate and rebalance the existing network of Euro-Arab IIAs**

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## **2. Towards a new generation of investment policies for inclusive growth and sustainable development**

# Core principles for investment policymaking

- 1 Investment for sustainable development**
  - ...overarching objective of investment policymaking ...
- 2 Policy coherence**
  - ...grounded in a country's overall development strategy ...
- 3 Public governance and institutions**
  - ...involving all stakeholders...predictable, efficient and transparent process ...
- 4 Dynamic policymaking**
  - ...regular reviews for effectiveness and relevance ...
- 5 Balanced rights and obligations**
  - ...setting out rights and obligations of States and investors in the interest of development
- 6 Right to regulate**
  - ...in the interest of the public good and to minimize potential negative effects
- 7 Openness to investment**
  - ...in line with development strategy ... open, stable and predictable entry conditions ...
- 8 Investment protection and treatment**
  - ...adequate protection to established investors ... non-discriminatory
- 9 Investment promotion and facilitation**
  - ...aligned with sustainable development goals ... minimize risk of harmful competition for investment
- 10 Corporate governance and responsibility**
  - ...promote adoption of and compliance with best international practices of CSR ...
- 11 International cooperation**
  - ...address shared investment-for-development challenges ... avoid investment protectionism

## IPFSD policy options – some examples

- Carefully craft **scope** and **definitions** clause to promote and protect investments contributing to the host country's economic development.
- Clarify **FET** in detail (exhaustive list of State obligations).
- Limit the scope of the **transfer of funds** clause.
- Include **exceptions** to protect human rights, health, labor standards, and the environment.
- Create an **institutional setup** that makes the IIA adaptable to changing development contexts.

# An excerpt from the IPFSD framework

## 4.3 Fair and equitable treatment (FET)

... protects foreign investors/ investments against, e.g. denial of justice, arbitrary and abusive treatment

- 4.3.0 Give an unqualified commitment to treat foreign investors/investments “fairly and equitably”.
- 4.3.1 Qualify the FET standard by reference to:
  - minimum standard of treatment of aliens under customary international law (MST/CIL)
  - international law or principles of international law.
- 4.3.2 Include an exhaustive list of State obligations under FET, e.g. obligation not to
  - deny justice in judicial or administrative proceedings
  - treat investors in a manifestly arbitrary manner
  - flagrantly violate due process
  - engage in manifestly abusive treatment involving continuous, unjustified coercion or harassment
  - infringe investors’ legitimate expectations based on investment-inducing representations or measures.
- 4.3.3 Clarify (with a view to giving interpretative guidance to arbitral tribunals) that:
  - the FET clause does not preclude States from adopting good faith regulatory or other measures that pursue legitimate policy objectives
  - the investor’s conduct (including the observance of universally recognized standards, see section 7) is relevant in determining whether the FET standard has been breached
  - the country’s level of development is relevant in determining whether the FET standard has been breached
  - a breach of another provision of the IIA or of another international agreement cannot establish a claim for breach of the clause.
- 4.3.4 Omit FET clause.

# Discussion Forum

<http://unctad.org/ipfsd>



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## Core Principles for Investment Policymaking



### 1. Investment for sustainable development

*The overarching objective of investment policymaking is to promote investment for inclusive growth and sustainable development.*

Last updated on 05 May 2012, at 12:05 AM

[view history](#)

 [Stephen Young](#) [ *University of Glasgow* ]

Posted on 14 June 2012, at 12:44 PM

#### Focus of the IPFSD (Stephen Young)

Focus of the IPFSD. The notion of 'sustainable development' is central to the IPFSD, and its definition needs to be clarified and extended. For example, p5 notes that sustainable development issues include environmental, social and poverty alleviation – as well as investor responsibility in these areas; p5/6 comments on 'a desire to pursue sustainable development through responsible investment'; and p6 states that sustainable investment implies the promotion of specific types of investment e.g. 'green investments' and 'low carbon investment' (see also the definition on p11). Aside from clarifying the definition, I wonder if the notion of sustainable development is given sufficient attention in the National

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