SUSTAINABLE DEVELOPMENT AND INVESTMENT TREATIES: A COMPARATIVE ANALYSIS OF BILATERAL INVESTMENT TREATIES IN KENYA AND SOUTH AFRICA

BY

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DECLARATION

I declare that this dissertation, in regard to Sustainable Development and Investment Treaties: A Comparative Analysis of Bilateral Investment Treaties in Kenya and South Africa, is my original work which has not been presented for academic award to any other University or institution and all the sources used or quoted have been indicted and acknowledged by means of complete reference.

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DEDICATION

This research dissertation is dedicated to my lovely wife Catherine Kagendo and my ailing mother Dorice Nabalayo, plus my young daughters Michelle, Abigael, Hope and Neema.

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Perhaps this appears a surprise to most of my friends, colleagues and even some family members who might not be aware that I embarked to study my second Master degree in International Studies. I decided to undertake this field without consulting or informing anyone apart from my wife Cate who objected to my desire but I went ahead and defied her. Cate had her valid reasons as shortly highlight herein. My thirsty and desire to venture into International Studies more specifically International Relation and Diplomacy has been purely inherent for over a decade now. Despite being an advocate with already a Master of Laws (LLM) degree and now a Doctoral student at the tail end, I had always the nagging persistent self-desire to pursue this field, there is indeed a close interaction of this discipline with law and the knot that ties together the international relations is international law. Having studied International Relations, International Economics, International Business, Diplomacy, International Economic Policy Analysis among others at Master of Arts level, the units equips me with an opportunity to multitask and hopeful one time end up as diplomat, higher position in our government or in academia.

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I thank you immensely.

God bless you all

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SUMMARY

This is a comparative study assessing what is meant by sustainable development and the role of investment treaties. The study ventures to scrutinize Bilateral Investment Treaties and whether they contribute to sustainable development by examining the position of South Africa and Kenya as countries classified under the Medium Human Development (MHD) of incorporating the sustainable development agenda into international investment legal and policy formulation.

The study begins by giving an overview of sustainable development, foreign direct investment and bilateral investment treaties. It generates pertinent research questions, objectives and hypotheses on these areas, and provides contract law theory and the third-world approach theory to international law as the theoretical framework underpinning the study.

Subsequently, the relationship between sustainable development and bilateral investment treaties is examined, and it is noted that the two have a mutually-reinforcing relationship. It is however noted, upon an analysis of the key provisions in most of these treaties that they are by design limiting to the capacity or freedom of developing countries, such as Kenya, in regard of incorporation of sustainable development norms.

This study therefore proceeds to compare the position of Kenya with that of South Africa, noting that the review process of that countries bilateral investment treaties and its findings have sought to respond to the some of the challenges of reality for developing countries. Thus, the study seeks to draw lessons espoused and other experiences then accordingly gives recommendations. In addition, the study suggests areas for further research regarding the subject under inquiry

ACRONYMS

BITs: Bilateral Investment treaties

BEE: Black Economic Empowerment

UN: United Nations

UNCTAD: United Nations Center for Trade and Development

OECD: Organization for Economic Co-operation and Development

CERD: Charter of Economic Rights and Duties

EAC: East African Community

FDI: Foreign Direct Investment

FET: Free and Equitable Treatment

GDP: Gross Domestic Product

LDCs: Less Developed Countries

LAPSSET: Lamu Port and the New Transport and Development Corridor leading to South Sudan and Ethiopia

TWAIL: Third World Association of International Law

TRIMs: Trade-Related Investment Measures

SUPRA: Above

SDGs: Sustainable Development Goals

IBID: Id idem, the same place (immediately preceding footnote)

INGO: International Non-Governmental Organization

ICSID: International Centre for the Settlement of Investment Disputes

MDGs: Millennium Development Goals

MFN: Most-Favoured Nation

MHD: Medium Human Development

MTEF: Medium-Term Expenditure Framework

WB: World Bank

CHAPTER ONE

1.0 SUSTAINABLE DEVELOPMENT AND BILATERAL INVESTMENT, TREATIES

1.1 Introduction

This chapter commences by putting into perspective the concept of sustainable development and bilateral investment and providing its meaning, considering that sustainability is a broad concept.[1,2] Many definitions abound for sustainability and sustainable development, the term is generally understood as a goal, specifically within the context of the outcomes of the "Brundtland Commission."[3] While Cambridge dictionary defines development as a process where someone or something grows or changes to became more advanced.[4] The Commission report provided a structure for the incorporation of environmental rules and progress plans in a bid to eliminate trade-offs between environmental sustainability and economic growth.[5] Sustainable development can thus be said to incorporate environmental, social and economic concerns into all aspects of decision making.[6] The shared denominator in these definitions is the interaction between development and the interests of diverse players involved, for example investors, host nations and the public on the one hand, and worldwide organizations on the other.[7] Additionally, the specific link between international investment treaties and sustainable development concerns will be explored in the subsequent sections.

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[1] Education for Sustainability in Local Government: A hand book<http://aries.mq.edu.au :- Accessed on 29th May 2018

[2] Rachel Emas, *The Concept of Sustainable Development: Definition and Defining Principles, Brief for GSDR* 2015, at https://sustainabledevelopment.un.org. Accessed on 28th May 2018

[3] Rachel Emas, *The Concept of Sustainable Development: Definition and Defining Principles, Brief for GSDR* 2015, at https://sustainabledevelopment.un.org. Accessed on 28th May 2018.

[4] See Cambridge dictionary on definition of development

[5] Gro H. Brundtland et al., *Our Common Future: The Report of the World Commission on Environment and Development* (Oxford: Oxford University Press, 1987Report at IX. development is defined as that what meets the needs of the present without compromising the ability of the future generations to meet their own needs

[6] Rachel Emas:-*The Concept of Sustainable Development: Definition and Defining Principles, Brief for GSDR* 2015,at https://sustainabledevelopment.un.org. accessed on 28th May 2018

[7] Faith Simiyu, '*Rethinking & Recasting Bilateral Investment Treaties as Integrative Tools for Sustainable Development*: The Kenyan Experience: (3) *European Journal of Sustainable Development* 378.2014

Key motives why developing States negotiate bilateral investment treaties include anticipation that they will entice investment in their host countries, and that the venture in turn will cultivate into meaningful development hence economic growth.[8] Bilateral Investment treaties (BITs) are binding international investment agreements among two contracting entities (States) where such States undertake certain obligations with respect to investors and investment.[9] Sustainable development as mentioned above is an all-inclusive concept that considers environmental, social and economic proportions, recognizing that all must be considered together to find long-lasting prosperity of any State.[10] The concept of sustainable development currently is accepted in various global soft law instruments.[11] For example it is a concept that has evolved from the periphery to centrality in policy formulation; this is illustrated in it being the bedrock for the global framework for international relations and cooperation in the United Nations 2030 Agenda for Sustainable Development and Goals.[12] Moreover, this has been adopted into many countries' Constitutions, Kenya included.[13] It thus follows that it cannot be alienated from a discussion of a nation's investment endeavor whose focus would be to attain development and uplift the leaving standards of its own citizens.

Developing countries such as Kenya have entered into investment treaties with a view of treaties helping it achieve its domestic development.[14] However the focus of the treaties is maximization of profits against the interests of developing countries like sustainability in the

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[8] Cristina Bodea: *Bilateral Investment Treaties (BITs): The Global Investment Regime and Income Inequality in Developing Countries*. (Political Economy of International Organizations Conference) 2017 http://wp.peio. Accessed on 28th May 2018

[9] M Sornarajah:-*The International Law on Foreign Investment 3rd ed.* (Cambridge University Press: Cambridge, 2010) at 267.

[10] University of Alberta, What is sustainability at https://www.mcgill.ca. Accessed on 28th May 2018

[11] Faith Simiyu, '*Rethinking & Recasting Bilateral Investment Treaties as Integrative Tools for Sustainable Development:* The Kenyan Experience', (2014) 3 (3) European Journal of Sustainable Development378.

[12] http://www.iisd.org. Accessed on 26th May 2018

[13] See Article 10 of the Kenyan Constitution 2010 on national values and principle of governance. More specifically Article 10 (d) provides for Sustainable development

[14] Markus Gehring and Andrew Newcombe, *An Introduction to Sustainable Development in World Investment Law*, (Kluwer Law International BV: The Netherlands, 2011) at 3–11.

development quest.[15] This is despite the fact that sustainable development is an idea and practice that is widely accepted in international law and supported by several treaties. Kenya was as of 2015, party to some eight BITs. And South Africa had forty nine.[16] Sustainable development, applied to investment treaties, would mean that the economic activities envisaged by these treaties would be capable of meeting the long term needs of both parties (host nations and foreign investors).[17] To that extent sustainable development becomes a key component of any State plus global investment law and policy;[18] hence a lot of States are obligated to enter into bilateral treaties. The comparative analysis adopted here is informed by the fact that there has been evidence of active incorporation of sustainable development concerns into the South African regime on international investment as it will be demonstrated in subsequent discussion, in addition both Kenya and South Africa are classified under the Medium Human Development (MHD) category, and are placed at number sixteen and nine respectively.[19]

1.2 Background

Kenya is considered as one of the fastest developing economies among other sister States in East Africa while South Africa is considered as among the fastest developing countries within the Southern Africa region,[20] under the Gross Domestic Product (GDP) category, South Africa is placed at number two while Kenya is at position eight in Africa.[21] Even though the dissertation is focused on these two States, it may make objective reference to other developing countries where need be for analytical and comparative purpose.

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[15] *Ibid*. at 3.
[16] See Dani Rodrik,' Understanding South Africa's Economic puzzles', *Economics of Transition*, Volume 16(4) 2008, John F Kennedy School of Business, Harvard University, Massachusetts, 769 – 797. The contracting states here include Italy, Japan, the United Kingdom, Switzerland, Netherlands, Germany, Kuwait, and Finland.
[17] Markus W. Gehring and Marie-Claire CordonierSegger (eds), *Sustainable Development in World Trade Law* (The Hague: Kluwer Law International, 2005.
[18] *Ibid.*
[19] See the Human Development Index (HDI) for Countries in Africa as included in a United Nations Development Programme's Human Development and the GDP Report of 2016.
[20] See *Ibid*
[21] *Ibid*

The principle that every sovereign State has a responsibility to safeguard workable use of natural resources within its borders for the current and upcoming generations is a cornerstone of sustainable development as explained under the Brundtland Report.[22] This is an obligation that cannot be delegated to foreign investors. States in the real sense are the custodians and at times owners of natural resources.[23] In Kenya, this was canvassed in the Lamu Port and the New Transport and Development Corridor leading to South Sudan and Ethiopia *(LAPSSET) case*.[24] In this case, Kenya and Ethiopia have signed a bilateral agreement to jointly undertake expansion of the LAPSSET, including the Standard Gauge Railway which is a Kenya vision 2030 flagship project.[25] However a case was lodged in 2012 by fishermen who challenged the Vision 2030 project on the grounds that they were neither consulted nor rewarded like land owners despite the project affecting their environment and their cultural and fishing rights.[26] The Court found in favour of the fishermen on all grounds. This case demonstrates the critical nature of the implementation of sustainable development in as far BITS and FDI are concerned in our nation's policy framework as envisioned under article 69-72 of the Kenyan Constitution.

In South Africa, a number of policies have been put in place to deal with inequality and affirmative action arising from centuries of racial discrimination perpetrated by the apartheid regime. The Black Economic Empowerment policy (BEE) was an example, requiring all mining firms to transfer 26% of all shares to South Africans who were hitherto deprived by the system. The policy was challenged by Italian investors in case of *Piero Foresti, Laura de*

[22] Articles 1.1 and 1.2 of ILA Declaration
[23] Part two of the Kenyan constitution at Article 69-72 provides for protection of environment and Natural Resource. On other hand South Africa Constitution at Section 24-25 provides sustainable development, protection of environment and natural resources
[24] http://mipakani.net /LAPSSET. Accessed on 31st May 2018
[25] *Ibid*
[26] *Mohammed Ali Baadi and Others v The Hon.AG* and 7 others (2018) eKLR, Petition No.22 of 2012

Carli and others v Republic of South Africa, ABB (AF) O7/01 the plaintiff challenged the policy on the premise that it amounted to expropriation and thus violated the conditions of the BIT. South Africa counter-claimed it had an obligation in domestic law to promote and protect the constitutional right to equality through the mining policy[27]. Upon completion of the case, the tribunal awarded costs to Italian company.[28] The tribunal's verdict sparked off a host of fundamental queries about the capability of developing States to regulate national policy in line with its requirements pursuant to an investment arbitration process. Upon settlement, South Africa reviewed its BIT policy through a Cabinet decision in 2010 perhaps as to provide counter measures to respond and address the decision of the court which could happen again in future.[29]

The above case demonstrated that whereas investment is central to development, doubts are cast on whether existing BITs have room to house sustainable development.[30] Evidently, investment treaties have potential of harming national welfare by curtailing a nation's ability to protect human rights of its citizens.[31] To that extent, investment treaties can work against sustainable development.

Kenya and South Africa have taken different approaches to the problem of unfavorable conditions arising from BITs. South Africa's policy shift is reflected in two policy documents: Bilateral Investment Treaty Policy Framework Review by the Ministry of Trade

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[27] See Case number ABB (AF) O7/01 *Piero Foresti, Laura de Carli and others v Republic of South Africa,*

[28] Luke Eric Peterson, "South Africa mining arbitration ends with a whimper, as terms of discontinuance are set down in award", online: *Investment Arbitration Reporter* at http://www.iareporter.com. Accessed on 26 March 2018.

[29] South Africa, Department of Trade and Industry, Update on the Review of Bilateral Investment Treaties in South Africa,(Pretoria: Report to Cabinet, 15 February 2013) online: *South African Foreign Policy Initiative*, at http://www.safpi.org. Accessed on 26 March 2018.

[30]Howad Mann et al, *IISD Model International Agreement on Investment for Sustainable Development: Negotiators' Handbook*, 2d ed (IISD, 2006) at IV.

[31]. Gus van Harten et al, "Public Statement on the International Investment Regime", (14 June 2011), online: *Osgoode Hall Law School, York University* at http://www.osgoode.yorku.ca. Accessed on 26 March 2018.

and Industry in June 2009,[32] plus a speech delivered by Dr Rob Davies from the Minister of Trade and Industry at the South African Inauguration of the UNCTAD Investment Policy Framework for Sustainable Development delivered on 26 July 2012 (the Speech).[33] The gist of the two policy frameworks is to review all first generation BITs signed with European countries after independence with the intention to terminate them.[34] The result was the termination of BITs signed between South Africa, Luxemburg and Belgium.[35]

Considering the foregoing, there is a standing need for adopting a new conceptual approach to understanding BITs, and thus influencing how they are regulated and crafted among different States such as Kenya and South Africa.

1.3 Problem Statement

The study focuses on whether investment treaties entered into by Kenya and South Africa have sufficiently incorporated the concept of sustainable development, and whether they have attained that objective. Even though developing countries are protected under the principle of sovereignty where all States are presumed to be equal under Article Two of the United Nations Charter.[36] Developing States enter into BITs to promote development and yet sustainable development has not been fully achieved. This is because of the tendency by developing nations to enter into agreements that prove detrimental to them. It is appreciated that nations enter into bilateral treaties, willingly in a bid to attract FDI aimed at promoting economic growth. However, this has resulted into policy frameworks that have not taken into

[32]Bilateral Investment Treaty Policy Framework Review, Government Position Paper (Department of Trade and Industry, Republic of South Africa, June 2009), http://www.thedti.gov.za. Accessed on 25 March 2018.

[33]*Speech by the Minister of Trade and Industry Dr Rob Davies at the South African launch of the United Nations Conference on Trade and Development (UNCTAD) Investment Policy Framework for sustainable development at the University of The Witwatersrand(26 July 2012),* http://unctad.org. Accessed on 25/3/2018.

[34] South Africa begins withdrawing from EU-member BITs, 30 October 2012, http://www.iisd.org. Accessed on 25 March 2018.

[35] The notice of termination was contained in a letter entitled, 'Termination of the Bilateral Investment Treaty with the Belgo-Luxembourg Economic Union', from MaiteNkoana-Mashabane, Minister of International Relations and Co-operation, to the Ambassador of the Kingdom of Belgium to South Africa, Johan Maricou, on 7 September 2012.

[36] See Article 2 of UN Charter

consideration the protection of national interests and fundamental human rights. Before the change of its policy South Africa did not protect the constitutional right to equality through the mining policy. Similarly, the Kenyan Government in the LAPSSET case did not adhere to the stringent measures required by the Constitution and national legislation on protection of fundamental human right (right to a clean environment) and right to public participation on issues that affect citizens.[37]

1.4 Research Objectives

i. To illustrate the relationship between FDI, BITs and sustainable development policies and whether BITs contribute to sustainable development and what changes need to be effected

ii. To determine whether the policy framework on BITs takes into account the protection of national interests and fundamental human rights in the Kenyan context

iii. To examine South Africa position in relation to the legal and policy framework for BITs and FDI in view of sustainable development and compare the same to the Kenyan position.

1.5 Research Questions

i. Whether there are particular techniques through which Bilateral Investment Treaties can incorporate the concept of sustainable development.

ii. Whether Kenya's BITs encourage foreign Direct Investment (FDI) that is cognizant of sustainable development as enshrined in the Constitution.

iii. Whether South Africa has adopted a suitable legal and policy framework on BITs and FDI in view of sustainable development.

[37] See Article 42 on environment and Article 118 public access and public participation of the Kenyan Constitution 2010

1.6 Hypothesis

(i) There is no relationship between direct foreign investment, BITs, and sustainable development policies.

(ii) BITs in the Kenyan context promote and protect national interests and fundamental human rights.

(iii) South Africa's approach in incorporating sustainable development imperatives into BITs is more robust than Kenya's.

1.7 Significance of the Study

This research critically evaluates the fidelity of BITs to sustainable development concerns through a comparison of BITs in Kenya and South Africa. [38] The study takes a comparative approach to the issue by looking at what South Africa has done to ensure observance and implementation of sustainable development in its FDI and BITS legal and policy framework. The research thus aims, ultimately, at making recommendations that would further the full realization of sustainable development in BITs as is encapsulated in the Kenyan Constitution. The bases of justification may be categorized as follows:

1.6.1 Policy Justification

The study will be vital in providing information relevant to the Government of Kenya's initiatives on BITs. In particular, it will make a contribution in respect of what changes need to be effected to ensure that BITs can achieve the desired goal of encouraging FDI while taking cognizance of the sustainable development concept as encapsulated in, among others, the Constitution. This is more so an important initiative to undertake given the recent LAPSSET case ruling from the Kenyan Courts.

[38] Mohammed Ali Baadi and Others v The Hon.AG and 7 others [2018] eKLR, Petition No.22 of 2012

It is also of great significance to developing countries keen on attracting FDI cognizant of achieving sustainable development. It will also help policy makers while dealing with FDI with a focus on sustainable development.

1.6.2 Academic Justification

In the academic circles, this research aims at contributing to the ongoing discussion on the role of BIT supporting foreign direct investment and sustainable development hence adding on the existing literature on the topic.

1.6.3 General Public Justification

Additionally, the research will aid stockholders around the world in making informed decision if they decide to invest in South Africa and Kenya on general knowledge regarding investments.

1.7 Literature Review

The advocates of the idea that BITs do not encourage FDI are, for instance, Neumayer and Spess,[39] who argue against BITs having an influence on FDI. Their study emphases on the signaling outcome on BITs then find a positive effect of BITs on FDI inflows across various model specifications.[40] They aver that by concluding BITs with developed countries, predominantly those that are key FDI exporters, such States give up some of their domestic policy sovereignty by binding themselves to external investment fortification.[41] It is their conclusion that results are perhaps more evident in countries with weak State organizations,

[39]Neumayer, E. and Spess, L.: 2005, *Do bilateral investment treaties increase foreign direct investment to developing countries*?, World Development 33(10), 1567–1585
[40]*Ibid*
[41] *Ibid*

in such States self-assurance and credibility-inspiring symbol is yielded to external investors as the signing of BITs is normally the greatest significant aim.[42]

Salacuse and Sullivan[43] are of the view that BITs which has solid investor fortification entices FDI as equated to a contract with weaker principles. In line of this argument their results presented that United States BIT is more probable to encourage FDI inflows than Organization for Economic Co-operation and Development (OECD) countries. Gallagher and Birch hold the view that ratified BITs are more effective in investment promotion compared to those that are not.[44] Grosse and Trevino[45] argue that BITs aid to limit ambiguity and expenses related to long-standing investment, thereby causing internal FDI. Some authors advocate for views that BITs decrease burden of trade as investors acquire guarantee that foreign and domestic investors will be subjected on same footing.[46] Egger and Merlos[47] admit that BITs have an enhanced bearing on a long-term base than in the short term. Another writer in this field is Yackee,[48] who has a divergent view and suggests that the institutional excellence test displays a conflicting restrictive association than what was expounded by Neumayer and Spess. Who goes on to argue against robust connection among BITs and FDI on basis that prospective investors are not normally aware of the existence of BITs and BITs do not solve the difficulties of dependable obligation.[49]

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[42]Neumayer and Spess supra note 35
[43]Salacuse, J. and Sullivan, N.: 2004, Do BITs really work? An Evaluation of bilateral investment treaties and their grand bargain, Harvard International Law Journal 46(1)
[44] Gallagher, KP and Birch, MB (2006), DO Investment Agreements Attract Investments? Evidence from Latin America, The Journal for World of Investment Trade, Vol; 7 No 6, 961-974.
[45] Grosse R and Trevino, T L J.2005,. New Institutional Economies and FDI Location in Central and Eastern Europe, Manage International Review Volume 45 No 2: 123-145.
[46] *Ibid*
[47] Egger, P. Merlo (2007), The Impact of Bilateral Investment Treaties on FDI dynamic; the world Economy 2007 Vol 30: 1536-1549.
[48]Yackee, J. W 2007. Do BITs Really Work? Revisiting the Emperical link between investment treaties and FDI, Legal Research Paper Series, Paper No. 1054 Wisconsin: University of Wisconsin Law School
[49]*Ibid*

In considering the place of improved norms in BITs treaty-making, it is notable that increasingly, the environment does not seem to be hostile to efforts by developing countries in incorporating norms of value to them. Commenting on this idea, Sornarajah noted that:[50]

"*Whereas the previous tendency had been to create doctrines that favoured the insulation of foreign investment through theories of internationalization of foreign investment, there were now competing norms such as the doctrine of permanent sovereignty over natural resources, economic self-determination and national control over` all natural resources. These norms sought to localize the foreign investment process by vesting control in the hands of the host State*."

This observation is essentially indicative that the project being pursued by this study is possible for developing countries to operationalize certain norms is grounded on a factual reality that may yet be exploited.

Central to this study is the incorporation of environmental concerns tied to exploitation of natural resources, where ventures undertaken by the investing States are through BITs. Conservational clusters have observed multinational corporations as having been accountable for contamination experienced predominantly in developing States, where environmental principles are laidback.[51] Therefore, NGOs believe the treaties discourage actions taken against polluters of the ecosystem of ozone layer because treaties ensure that violation of prevailing rights of investors are considered as expropriations under agreements.[52] In regard to this point, this study will aim to analyze the exemptions which host States, particularly Kenya, may pursue to safeguard environment as provided under her constitution at Article 69

[50] Sornarajah M, *The international law on foreign investment*, Third Edition, Cambridge University Press, Cambridge, 2010, 184.
[51] *Ibid*
[52] *Ibid*, 225.

-72 relevant to sustainable development targets. It appears the above commentators on the subject noted that some investment treaties have responded to the concern of sustainable development.

Various complexities face the BITs environment in Kenya. Firstly, the Institute of Economic Affairs has noted that research point out little connection among the amount of FDI and BITs.[53] In any event, FDI inflows are said to have nominal influence to Kenya's GDP.[54] South Africa, another example of African country has opted not to carry on with more BITs; this was informed after foreign investors pressed charges at the Washington, D.C.-based International Centre for Settlement of Investment Disputes (ICSID), claiming that variations in some of its domestic laws amounted to expropriation of investments because the changes condensed worth of the investment assets.[55] Kenya has not been challenged at ICSID yet; from above analysis therefore it can safely be stated that rushing into clumsy BITs would only expose the country to suits as well illustrated by above case of South Africa.

Alternatively, it is crucial that avenues available for countries such as Kenya to make BITs should be watertight in terms of sustainable development objectives.[56] This study aims to explore this possibility.

1.8 Gaps in the Literature Review

There is well-established writing on the influences on BITs to FDI as is illustrated above. However, in regard to impacts of BITs to sustainable development, there is a dearth of literature that is country specific and devoid of generalizations. The linkage between BITs and sustainable development in Kenya with an aim of anchoring the above legal and policy

[53] See http://www.ieakenya.or.ke which provides opinion as to why Kenya should not sign more BITs. Accessed on 12th August, 2018.
[54] *Ibid*. The World Bank indicators relied on showed that this figure stood at less than 1% for all but six years in the period between 1970 and 2012.
[55] *Ibid.*
[56] *Ibid.*

frameworks on the concept of sustainable development is not available even though enshrined in the Kenyan Constitution. Faith Simiyu argues that assessment of legitimate position of sustainable development in Kenya is through the lens of sustainable development as a fundamental principle of International Law.[57] The study looks at combined examination of national law principles embedded in constitutional provisions and International Law. The role of BITs and sustainable development in the Kenyan context with an aim of learning best practices from countries like South Africa is, arguably, a new enquiry as such; this paper will examine the body of existing literature on these issues in turn, eventually giving recommendations that will strengthen the BITs legal and policy framework in the Kenyan and South African context.

1.9 Theoretical Framework

The research relies on two theoretical formulations: the Third World Association of International Law (TWAIL) theory and the Contract theory which are relevant to the study in question.

1.9. 1 Third World (TWAIL) Approaches to International Law Theory

TWAIL is a methodology, theory, as well as an international movement which originated in the 1960s and 70s,[58] with roots within the decolonization discourse.[59] At the core of the theory is the investigation of how developing countries can use international law in a way that would be beneficial to their interests.[60] Centrally, TWAIL theory is termed as requiring a collective principled obligation to the knowledgeable hands-on struggle to picture,

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[57] Faith Simiyu, *'Rethinking & Recasting Bilateral Investment Treaties as Integrative Tools for Sustainable Development*: The Kenyan Experience', (2014) 3 (3) *European Journal of Sustainable Development* 378

[58] Karin Mickelson, 'Taking Stock of TWAIL Histories', (2014) 10 *International Community Law Review* 356.

[59] Makau Mutua, 'What is TWAIL?', (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* 31.

[60] Antony Anghie, 'TWAIL: Past and Future', (2014) 10 *International Community Law Review* 480.

modification or even retrench those features of intellectual real structure that help generate or uphold the normally inadequate, biased or unmerited worldwide order.[61]

TWAIL has been held to have three objectives: to investigate the rationale behind application of international law as a set of norms that are used to make non Europeans to appear subservient to Europeans. Second, to establish an alternative international governance system and third, through scholarships, politics and policy to abolish factors that have consigned developing countries to underdevelopment.[62] The vision statement of TWAIL displays how the theory has a very critical outlook at international law and BITs in particular.[63] It rejects a Eurocentric concept of international law and proposes the establishment of universal norms that would appeal to everybody.[64]

International investment law, through this lens, could therefore be viewed as a perpetuation of this structure having the sole purpose of advancing western investor welfare at the cost of host nations. This system is traceable to the colonial period. However, even after the demise of colonialism and independence was obtained western powers came up with yet other rules and institutions of international trade and investment which provide western powers with alternatives that are meant to access resources in developing countries.[65] This was done in the pretext of promoting and protecting foreign investment in host nations.

[61]Obiora Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?', 10 *International Community Law Review* 376.
[62] *Ibid*
[63] Pooja Parmar, 'TWAIL: An Epistemological Inquiry', (2008) 10 *International Community Law Review* 365
[64]Mutua, at 36.
[65] James Thuo Gathii, 'War's Legacy in International Investment Law', (2009) 11(4) *International Community Law Review* 382.

1.9.2 Contract Theory

The central thesis of the contract theory is that investment treaties are contracts entered into to favor foreign investors.[66] Countries that enter these treaties have the objective of benefitting themselves in attracting investment.[67] On this view, there is a conceptual convergence between the approach taken by TWAIL and the contract theory: both view investment treaties as perpetuating the dominating attitude of developed countries at the cost of developing countries.

A formal treaty need to make the commitments for the host nation more credible.[68] Sanctions are however attached for failure to comply with obligations through an international arbitral mechanism which can be set in motion without exhausting local remedies.[69] Developing countries continue signing unequal BITs notwithstanding the negative effects despite the fact that their existence is, on one of the major views, not a major factor in the attraction of FDI as compared to liberal requirements for admission of member States.[70] This is because BITs have a tendency to favor capital exporting countries at the expense of host nations (capital importing States) where a rigid BIT would further lead to less protection of foreign investment.[71]

According to John Austin, international law is 'law improperly called' as it is not 'commanded', but is a covenant among two equal independent States. However, other jurists have countered this opinion. For example, Heinrich Tripel avers that, it is 'rather the source of international law which provides the common will of States'. More explicitly, it lay in law making accord seized unequivocally (treaties) or implicitly (custom). Once a law making

[66] A van Aaken, 'International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis', (2009) 12 (2) *Journal of International Economic Law* 520.
[67] *Ibid.* at 521.
[68] *Ibid.*
[69] *Ibid.*
[70] Xavier Carim, 'BITs 'Not Decisive in Attracting Investment' says South Africa", (27 September 2012), available Online at *TWN Third World Network* <http://www.twnside.org Accessed on 25 March 2017.
[71] van Aaken at 509.

agreement had been created by the common will of the States via an act of explicit or implicit agreement, those same States are no longer free to repudiate it by a consequent unilateral act at will, hence States must remain legally bound by the original act of common will.[72] Conversely, international law like a contract may therefore not be enforced by independent sanctions all the time but rather through cooperation and interaction among the parties, with repeat dealings, reputation and a preference for reciprocity doing most of the enforcement work. However, in regard to bilateral investment treaties which involve some private investors, any contravention attracts sanctions by either arbitration or through the International Court of Justice (ICJ).

The UN system also has a broad social contract dimension in that States agreed to co-operate, and afford each other the same treatment that they would expect for themselves, known as the principle of complementarity in order to prevent the State of war that had devastated effects during the First and Second World War.[73] In conclusion, BITs are by nature contractual obligations binding two nations hence the relevance of contract theory to this study.

11 Methodology

This is a qualitative research dissertation that takes a comparative, interdisciplinary approach, combining the analysis of international investment, international treaty-making, and international law. It examines the sustainability and the factor of unbalanced BITs among developed and developing countries in regulating global investment aided by international law. Because of the breadth of BITs as a subject of enquiry, the study will focus more particularly on BITs the primary subject matter of which is exploitation of natural resources.

[72] See Hall, S. *The Persistent Spectre: Natural Law, International Order and Limits of Legal Positivism*: - European Journal of International Law. 12(2): 283: 2001
[73] See Hobbes, T. Leviathan. Macpherson, C. B. (ed.). *London Penguin Books of Commonwealth*, Chapter XVII, p. 223.) 1985

It will purely involve a desk top review of literature of asymmetric BITs between developed and developing countries. It will adopt a purposive sampling approach that relate to the study in determining the relevant material and existing data or findings.

12 Chapters Breakdown

The research project comprises five chapters. Chapter one introduces the research topic by looking at general background, the statement problem, study objectives, literature review, significance of the study, hypothesis, theoretical review and finally the methodology of this research.

Chapter two will address issues raised in research objective one (the relationship between BITs, FDI and sustainable development) and highlight the history of BITs in line with its place in encouraging FDI and sustainable development. It will demonstrate how the rudimentary structure and crucial goal of the treaties is aimed at provision of protection which investors seek. The history, the aim and structure of BITs shows how the main aim has been to ensure security of investments in the host nation.

Chapter three generally assesses international investment treaties and their contribution in achieving sustainable development for the host country. It will also look at BITs between developed and developing countries.

Chapter four discusses the framework of BITs and does a comparative study of frameworks in Kenya and South Africa with a view of identifying the best practices that South Africa has adopted in this respect.

Chapter five will address the conclusions that have been reached following the discussions under the previous chapters and make recommendations for Kenya to adopt going forward in as far as BITs and FDI is concerned.

CHAPTER TWO

2.0 BILATERAL INVESTMENT TREATIES, FOREIGN DIRECT INVESTMENT, SUSTAINABLE DEVELOPMENT AND DEVELOPING COUNTRIES

2.1 Introduction

After the introduction in chapter one, chapter two provides background of the study, examines the idea of sustainable development and unpacks its apparatuses in an analysis that is relevant for a study of foreign investment. It then proceeds to scrutinize the relationship between the concepts of sustainable development, FDI and BITs and how they have been applied in countries such as Kenya and South Africa. It further evaluates how international investments agreements relate to sustainable development and then inspects how developing countries have responded to BITs. The chapter is concluded by contextualizing the relevant findings to developing countries.

2.2 Background

BITs, viewed as international agreements, will typically involve the entrance into binding terms by two countries in regard to investment venture with a foreign national in another (host) State. An important question for this study is the place of BITs in promoting (through engendering) sustainable development concerns for the host countries. Of central importance to this inquiry is, therefore, the extent to which these agreements take into account economic, social and environmental considerations, which would then correspondingly impose the relevant obligations on the investing companies.

Particularly, the applications of BITs to developing countries have been attributed to supposed benefits in terms of attracting FDI and promote development. For this proposition to be upheld, it would be necessary to demonstrate that BITs both (i) in fact occasion increased FDI streams to developing countries which may (ii) engender inclusive and wholesome development, that is, essentially sustainable development. An overview of sustainable development and its relevance to foreign direct investment

The concept of sustainable development is the organizing principle of the sustainable development goals (SDGs), which are part of part of multidimensional as applicable under international relations aims to change the world towards a sustainable and resilient pathway. Intergovernmental efforts strictly began with the 1972 United Nations Conference on the Human Environment. As already discussed under chapter one, (Brundtland Commission) provided a definition of sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs. Over stint, the definition of sustainable development has evolved to capture a more all-inclusive approach, connecting the three proportions of economic development, social inclusion, and environmental sustainability. In sum, the SDGs aim to offer a universal outline for collaboration to address the three scopes of sustainable development within an ethical agenda based on: (i) the right to development for every country, (ii) human rights and social inclusion, (iii) convergence of living standards across the world, (iv) shared duties and prospects.[1]

Reportedly, the international community has amplified its efforts in pledging and raising the economies, the environment, among other things.[2] Of curiosity is the (SDGs) of 2015 set out quantitative objectives across the social, economic, and environmental dimensions of sustainable development to be attained by 2030.[3] The SDGs build upon what was perceived

[1] Sustainable Development Solutions Network Secretariat, *Getting started with the Sustainable Development Goals: A Guide for Stakeholders*, 2015, 10.
[2] Waage, Jeff, et al. "Governing Sustainable Development Goals: Interactions, Infrastructures, and Institutions." *Thinking Beyond Sectors for Sustainable Development*, edited by Jeff Waage and Christopher Yap, Ubiquity Press, London, 2015, pp. 79–88.
[3] See Sustainable Development Solutions Network Secretariat, *Getting started with the Sustainable Development Goals: A Guide for Stakeholders*, 2015.

as the success of the eight MDGs to eliminate extreme poverty by 2015. However, it is widely comprehended that numerous States did not make satisfactory progress, particularly on environmental sustainability.[4] Sustainable development, hence delimiting the broader form of SDGs as compared to the MDGs, is to the effect that increased consideration is given to the amalgamation of economic development, social inclusion, and environmental stability.

Grown out of, among others, environmental concerns, the concept of sustainable development is made up of several principles, elements and components. The main pillars of sustainable development, as revealed above, are the economic, social, and environmental spheres.[5]

2.3 The Relationship between Sustainable Development and FDI

(FDI), is the transmission of perceptible and imperceptible possessions from one State to another with the purpose to use it to create wealth in that country under total or partial control of the proprietor of the resources.[6] Before the concept is discussed, we must keep in mind that while economic growth is a key asset or element of development, it in itself is not development.[7] Thus, on this view, Flammang contents that the mere raising of the gross domestic product (GDP) or other economic income in a country cannot be defined as economic growth. This is because this is just a structural factor and many other things need to be examined so as to term it as development. For instance, if the GDP rises but there are still a high number of unemployed and poverty-stricken people in the country then this cannot be termed as development. Development only occurs if poverty levels decrease while GDP

[4] *Ibid* at p, 7.
[5] O Blanchard, Buchs A,' *Clarifying Sustainable Development Concepts through Role Play',* SAGE Journals, 1 January 2015.
[6] Sornajah M, *The international law on foreign investment*, 3rd Edn, Cambridge University Press, 2010.
[7] https://www.iisd.org. Accessed on 11/7/2018

increases.[8] The classical current case study at hand is the current Kenyan scenario of the need to finance the China's projects and repay their loans; Kenyan parliament on 20th Thursday September 2018 passed the financial bill overtaxing the citizens for use of all petroleum products at 8%. This is something that must worry any sound policy makers; a country cannot make progressive development by overtaxing and overburdening its own citizens. This can only act as accelerator to more misery and poverty in a developing country.

It is notable that there is almost little to no evidence that intergovernmental institutions meant to promote FDI actually lead to any economic growth or even development for that matter.[9] Similarly, it is relevant that many societies have seen and experienced a rise of inequality even as they appear to have achieved economic growth on aggregate.[10] Nonetheless, economic growth does play an essential part in sustainable development. Lisa Haapanen and Petri Tapio[11] discuss the aspect of interdependence of sustainable development and foreign direct investment. They both show that the two are interdependent and it is not a *"chicken and egg game"* of what comes first; both can happen at different stages and can lead to one another. Accordingly, economic growth can only lead to development if it coexists positively with other important variable or aspects such as environmental issues, social issues, and economic ones. This is exemplified in the Preamble of the WTO Agreement.[12]

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[8] Henry, C. Michael. "Economic Growth and Economic Development: A Distinction without a Difference." *Social and Economic Studies*, vol. 36, no. 4, 1987, pp. 67–84. *JSTOR*, JSTOR, www.jstor.org/stable/27862915.
[9] Alcacer, J., & Ingram, P. (2013). Spanning the Institutional Abyss: The Intergovernmental Network and the Governance of Foreign Direct Investment. *American Journal of Sociology, 118*(4), 1061. doi:10.1086/668692
[10] Sustainable Development Solutions Network Secretariat, *Getting started with the Sustainable Development Goals: A Guide for Stakeholders*, 2015, 7.
[11] See Brucan, Silviu. "The Systemic Power." *Journal of Peace Research*, vol. 12, no. 1, 1975, pp. 63. *JSTOR*, JSTOR, www.jstor.org/stable/422901.
[12] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (hereinafter Marrakesh Agreement) accessed on 14/7/2018

2.4 The Relationship of International Investment Treaties/Engagements and Sustainable Development

BITs are formal expressions of intergovernmental cooperation and works magic to boost international relations of the two States. Basically, governments relinquish or compromise their sovereignty to choose their own trade and policies and decide to have similar concessions with other countries on a voluntary frontier. This is a State of *interdependence.* This is a good thing because it shows that the governments of different nations consider the fact that they are not operating in isolation and depend on each other hence extending the international principle of complementarity. They recognize the countries surrounding them and this shows that they recognize the fact that imposed policies not only affect their citizens but also those of other nations.[13] However, a mere cursory glance at BITs from this perspective would not be conclusive; it is submitted that various complexities underlie BITs, especially for developing countries, and these may need to be re-evaluated to consider unique need of developing States and such countries sustainable development concerns. This realization necessitates scrutiny of the connection concerning BITs and the SDG agenda, in particular, in view of the organizing principle that is sustainable development.

The SDG program therefore demands for a converted global corporation, and this implies that governments, for instance, need to coordinate with a broad spectrum of actors, such as multinational businesses, local governments, regional and international bodies, and civil society organizations.[14] It is noteworthy that a great deal of international collaboration is convoluted in the negotiations for and entrance into BITs, and in this way the imperatives of partnership in relation to sustainable development are implicated.

[13] Foulke, R. (1918). Treaties, *Columbia Law Review, 18*(5), 422-458. doi:10.2307/1111110
[14] Sustainable Development Solutions Network Secretariat, *Getting started with the Sustainable Development Goals: A Guide for Stakeholders*, 2015, 9.

Further justification for the efforts of this study to include incorporation of sustainable development concerns in BITs, for the benefit of developing countries, is based on "integrated development" as part of the SDG agenda. The SDG agenda consequently "moves away from ruined approaches to development and promotes the integration of the economy, environment, and society. Included in this is the need for good governance as contemplated in Kenyan constitution article 10 and robust shared linkages, which translates into a framework focused on "people, planet, prosperity, peace and partnerships."[15]

In sum, therefore, it would seem that to be representative of more a more wholesome development (considering they already play only a marginal role in attracting FDI), BITs in developing countries would be in need of re-evaluation to incorporate sustainable development concerns.

2.5 How International Investment Agreements (IIAs) Relate to Sustainable Development.

An analysis of the Commitment to Development Index of 2017 shows an unexpected result that exposes the inefficiency of IIAs in relation to sustainable development. The Index reveals that International IIAs are in dire need of revisions so that they may suit the contemporary situations.[16]

It is seen that although IIAs have the capacity to balance and influence both foreign investor's policies and States' rights to public policy, they have not been able to do exemplary work in keeping the balance. As a result, developing countries that depend on

[15] Sustainable Development Solutions Network Secretariat, *Getting started with the Sustainable Development Goals: A Guide for Stakeholders*, 2015, 10.
[16] Commitment Development Index 2016. Available at https://www.cgdev.org/commitment-development-index-2017

Foreign Investment as their main source of income tend to suffer from this imbalance and do not develop sustainably or even show any sign of a positive development result.

When the above happens some components of sustainable development are affected. As an example, there is an effect on such components as and multilateral lending.[17] They are affected because without enough resources or income then the developing countries will not be able to participate in the above mentioned components, impacting negatively on the economic pillar of sustainable development.

Implementation of the SDG agenda depends deeply on home-grown preparation and service delivery where public buy into local leadership, well-coordinated with the work of other echelons of governance.[18] This concept emerges as key upon a consideration of the motivations and positions of governmental departments or institutions responsible for negotiation of and entrance into BITs.

Rising SDG policies and plans should be a multi-stakeholder process, engaging national and local government agents, civil society, businesses, religious leaders and academia among others. A country's SDG strategy needs to be taken seriously as time-bound, quantitative objectives and articulate the major shifts in policy.[19]

At the contracting stage, an important consideration is that national governments are the ultimate duty-bearers of the SGD plan.[20] Very importantly, international financial institutions are meant to participate both in strategy formation and in goal-based or sectoral committees.

[17] Nelson N, *'Sustainable Development.'* (1997) 8(1996 Yearbook) Colo J Int'l Envtl L & Pol'y 59
[18] Sustainable Development Solutions Network Secretariat, *Getting started with the Sustainable Development Goals: A Guide for Stakeholders*, 2015, 11.
[19] See *Ibid* at p15.
[20] *Ibid.*

Specifically, the International Monetary Fund (IMF), regional development banks, sub-regional development banks, and aid coordination groups can lend guidance on the process of developing an SDG-consistent Medium-Term Expenditure Framework (MTEF) and macroeconomic framework.[21] In the same vein, business should be represented in the SDG planning processes. Some opportunities include:[22] sustainable production processes, (ii) regenerative use of natural resources, (iii) improved social protection for labour, (iv) corporate social responsibility initiatives, and (v) philanthropic assistances. These considerations sum up the ideal framework under which collaboration in various initiatives can be structured to yield sustainable development targets. The framework would be useful in delimiting the expected input of host governments and international investors in entrance into BITs.

Are there any incentives for IIAs to participate in these collaborative efforts? On this point, it is notable that several enterprises already see the SGD plan as being dire to their development, and data displays that trades that incorporate sustainable development practices into their model outperform their contestants.[23]

Originally, BITs, amongst other IIAs, were created to reduce the level of discrimination that foreign investors faced in countries they invested in. However, this is no longer the case as IIAs exploit this, as noted above. This exploitation is seen through the alarming increase of cases of multinational entities that are seen as exploiting domestic markets. The cases are taken to the relevant tribunals of IIAs as they are not in line with the property or human rights

[21] *Ibid*
[22] *Ibid.*
[23] *Ibid*

considerations which should be the ultimate rights observed. This should not be the case as it adversely affects ideal or inclusive development.[24]

This notwithstanding, there have been measured responses by some countries as some countries have already began noticing the negative effects that investment policy may sometimes result to and they have begun laying out their plans. For example:

(i) States need to pursue to rebalance their responsibilities in dealing with IIAs, this way; countries pledge safeguard to foreign investors and conversely preventing such foreign investors to from overstepping or ignoring their human, social and environmental rights.[25]

Illustration was in the case of *Vattenfall v Germany,*[26] in this case Vattenfall, a Swedish energy firm, was sued Germany for discontinuing a coal power plant which was in Hamburg. Germany imposed laws to protect the environment and *Vattenfall* was trying to circumvent them. Here, Germany stood its ground in terms of protecting the environment and not caving in to the idea of starting the coal fired power plant which would go against the already set environmental laws. This may not have been very rewarding economically, but it certainly disclosed a deliberate balance between the rights and obligations tied to the relevant environmental management norms instead of succumbing to the investing company's preferences.

(ii) Countries are reasserting control over their treaties. In their nature treaties contain established provisions which permit States to observer use of the contract or have a say on interpretation regarding matters taken before arbitral tribunals.[27]

(iii) Subject-matter of IIAs appears to be broadening in that they no longer only focus on trade and investment issues but is also seeking to include environmental issues, social

[24] UNCTAD, Investor – State Dispute Settlement: Review of Developments in 2016 Report. Available at: http://unctad.org. 2017d1. Accessed on 13/7/2018
[25] ICSID Case No. ARB/09/6.
[26] *Ibid*
[27] UNCTAD (2011), Interpretation of IIAs: What States Can Do, IIA Issues Note No 3. Available at: www.unctad.org. Accessed on 12/7/2018

responsibility, corruption and any other matters that go hand in hand with investment. This shows that countries that are part of IIAs are beginning to recognize that investment is dependent on many other factors and in this way policies will be made in such a way that they also consider this other factors.[28]

(iv) Countries have heeded to the International Centre for the Settlement of Investment Disputes (ICSID) cry about excessive cases and attempt to strengthening their treaties' defensive character. They do this by injecting control phases aimed at filing a notification for arbitration, providing it easier to object frivolous claims.

2.6 BITs and Developing Countries

Developing countries have not been left behind as far as BITs are concerned, In recent history on BITs and developing countries, (after downfall of Soviet Union which essentially opposed property base of international investment norms) gradually presented new open plans on foreign investment. Despite prevailing condition being caused by the prevailing economic beliefs which inclined to liberalization of foreign investment systems, it was also a result of rivalry for inadequate volume of foreign investment that was to flow headed for these States.[29] Ultimately the effect was towards the area of foreign investment, which was elevated by dominance of neo-liberal policies, stimulated mainly by international financial institutions such as International Monetary Fund and World Bank, which advocated for, primarily for liberalization which allows foreign investment. This was characteristically followed by national treatment after entry, and the attendant protection with regard to violation of guaranteed standards of treatment, as well as providing for protected measures of dispute resolution. The guidelines provided were to be executed if States needed to obtain financial support from the international financial institutions. States were also compelled to

[28] UNCTAD (2010), World Investment Report 2010, at Chp IV.

[29] Sornajah M, *The international law on foreign investment*, 3rd Edn, Cambridge University Press, 2010 at, 24.

sign bilateral investment treaties committing themselves for the protection of foreign investment. This neo-liberal package is said to have significantly influenced attitudes and methodologies to investment law.[30]

Moreover, it is likely to perceive drifts which show arbitrators pursued to construe treaties in a manner that advanced neo-liberal prescriptions contrasting giving effect to the intention of the parties.[31] In view of the foregoing, this study attempts to find a way of assessing the disparity of power in BITs that calls for the inclusion of the legitimate aims of developing countries, such a historical reality is a matter of concern. In the same measure, contemporary scholars have criticized these liberalization endeavors through conditionality's as having paid lip service to the genuine welfare of developing countries.[32]

Different scholars have various views on whether BITs promote development in developing countries. Hallward Driemier states that BITs actually do not increase FDI flow from developed to developing countries thus they are not performing their original functions which included provision of assurances to foreign investors in nonexistence of noble national functions. Others like Salcuse & Sullivan contend that the signing of BITs in countries produces a ripple effect in that the signing of one BIT leads to others leading to economic advancement and development. Conversely for instance, Marxist economists characterize foreign investment as the recolonization of host States.[33] This goes against the function or role that treaties are typically meant to or envisioned to play. Treaties were meant to be a sort of arbitration method between investors and governments.[34] Thus, on this view, this however

[30] *Ibid* 24.
[31] *Ibid* , 24.
[32] See Migai Akech, *Privatisation and democracy in East Africa: The Promise of Administrative Law*, East African Educational Publishers Ltd, Nairobi, 2009, 17-51.
[33] Kenneth J Vandevelde, A *Brief History of International Investment Agreements,* 12 U.C. DAVIS J INT'L L. & POL'Y 157, 484(2005).
[34] Brucan, Silviu. "The Systemic Power." *Journal of Peace Research*, vol. 12, no. 1, 1975, pp. 63.

has taken an unwelcome turn as developed countries appear to taking advantage of emerging nations.

The United Nations Conference on Trade and Development (UNCTAD) [35] defines in addition categories least-developed countries *(*LDCs) using a set out criteria. The criterion is as follows.[36] Firstly, income is considered, ranging for three years in terms profit (gross) national income per capita. Secondly, another consideration is human assets, comprising indicators such as nutrition, health, enrolment to school and adult literacy. The third consideration is economic vulnerability, with the indicators being natural shocks, trade-related shocks, physical exposure, economic exposure, size and location.

This criterion basically lays out countries that have a population of over 75 million and does not meet all the above criteria. If a country meets the above criteria, it is eligible to be identified as a developing country according to UNCTAD categorization.

The WTO and the UN in general do not clearly establish the difference between developed and developing countries thus issues are emerging in some countries like the US hence the need for these terms to be defined.[37] Interestingly enough, China[38] and Korea with their high GDPs are still considered developing countries while Japan is a developed country even though it has a GDP lower than that of Korea's.

Kenya and South Africa have been members of the WTO from 1994 making them founder member States. Despite the fact that South Africa's GDP stands at about $349,419m while

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[35] UNCTAD Article Available at http://unctad.org. Accessed on 10 August 2018
[36] *Ibid*
[37] FirstPost Newspaper Article Available at:https://www.firstpost.com. Accessed on 10th August, 2018.
[38] CNBC Article. Accessed on 10th August, 2018.

Kenya's GDP was still at a relatively lower amounting to $74m, South Africa and Kenya are both developing countries under the WTO.[39]

2.7 Conclusion

This Chapter has unpacked the idea of sustainable development and considered its environmental, economic and social aspects. It has also explored the available data on the connection among BITs, FDI, and sustainable development in developing countries. It has been noted that the data does not necessarily disclose a positive association between BITs and the attraction of FDI. It is also relevant that sustainable development has been seen to have an important linkage with BITs ventures, particularly because of their economic and environmental implications. More significantly, the Chapter has observed that there are important roles on the part of States and other stakeholders in implementing and cooperating to implement the SDG agenda.

It is accordingly concluded that, considering the historical development of BITs, there are various avenues for developing countries to incorporate sustainable development concerns in their BITs. However, a lot of this would still be affected by the significant balance of power and hegemonic nature of that exists at a global level on the part of developed countries and international economic organizations.

[39] https://countryeconomy.com accessed, on 10th August, 2018.

CHAPTER THREE

3.0 BILATERAL INVESTMENT TREATIES AND SUSTAINABLE DEVELOPMENT

3.1 Introduction

This chapter considers more closely the correlation of investment treaties and sustainable development. After considering the nature of the relationship and its desirability, the chapter proceeds to discuss the available techniques of incorporating the sustainable development agenda into bilateral investment treaties. Considering that sustainable development is in a significant way a challenge to investment, this chapter investigates how best intercontinental covenants that oversee such investment could be adapted for this challenge.

Particularly, the following discussion on the central elements of BITs will reveal that owing to the weaker economic position of developing countries, they typically retain less negotiating power and thus those with greater bargaining power can impose conditions that significantly benefit themselves.[1]

3.2 Background

In the twentieth century, the contemporary treatment standards of foreign investors have been outlined in international law on the duty of the State for damage to non-nationals and their chattels. An inadequacy of international customary law to safeguard foreign investment has motivated States to negotiate and conclude IIAs. After the initial BIT was signed between Pakistan and Germany in 1959, States have concluded over 3,000 BITs, most of which were drawn up in the past 15 years.[2]

Contrary to the established view that sole drive of BITs is protect foreign investment, the claim is increasingly being made that broader societal interests, such as sustainable

[1] Yulia Levashova, 'Role of sustainable development in Bilateral investment treaties: recent trends and developments', *Journal of Sustainable Finance and Investments*, 2012, 1-8, 4.
[2] See Sornajah M, *The international law on foreign investment*, 3rd Edn, Cambridge University Press, 2010.

development, should be incorporated into investment treaties.[3] The dilemma for host States (and, particularly, developing States) is that they have to balance between complying with the international responsibilities under human rights and environmental treaties, as well as satisfying national economic commitments

Considering the foregoing, it is important to investigate whether BITs and other international treaties on investment have a bearing to sustainable development concerns. As discussed earlier, sustainable development essentially concerns the assimilation of environmental concerns into economic development along with the reciprocal integration of economic and social concerns into environmental policies and obligations.[4] To put the issue in context, the ramifications of entering into and being found liable under investment treaties have been observed to be far-reaching (the record payout to investors for breach of an investment agreement is 1.7 billion US dollars[5]), affecting issues beyond investment policy, public health and environmental measures, and challenging to withdraw from (the ability to terminate a treaty or its effects is typically restricted for decades).

The above revelations are important in understanding the need to re-conceptualize and rebalance obligations for host States in a bid to align such obligations with these States' legitimate objectives including sustainable development.

3.3 The Relationship between Sustainable Development and Investment Treaties

At a conceptual level, investment is important for sustainable development. Structural economic change is required by sustainable development, and such change may be conveyed

[3] *Ibid at 1*.
[4] Phillipe Sands, *Principles of international environmental law*, 2Edn, Cambridge University Press, Cambridge, UK.
[5] See International Institute for Environment and Development, 'Investment treaties and sustainable development: an overview', 2.

through investment in different systems of manufacturing, transport, energy production, industrial and resource mining. Accordingly, the upgrade of justifiable expansion is, in the end, the raise of investment that upholds and fosters sustainability and promotes equitable social and economic development.[6]

However, commentators have noted that investment does not necessarily, lead towards the goals of sustainable development. On this point, policymakers are faulted for adopting narrow benchmarks of augmented dimensions to evaluate realization of investment. Some States might be receptive to investment that is unrestricted; degrading to the environment and by extension handles personnel unfairly for the aim of creating a few in-country economic aids. [7]

Thus, to a remarkable degree, investment is contingent on a number of requirements in the host State, such as adherence of the national laws and obligations. Thus, a paradox is evident it may be seen that some countries in the greatest need of investment for sustainable development are those that, due to their underdevelopment, may not receive much as per their expectation hence venturing into other means to finance her budget in view of attainment of sustainable development .

Further, as outlined in Agenda 22 of the United Nations Conference on the Environment and Development, investment was identified as factor is essential for the capability of developing countries to meet their basic desires sustainably. This can only be achieved if indeed Sustainable development is supported by increased investment, necessitate by provision of

[6] Nathalie Bernasconi-Osterwalder, Aaron Cosbey, Lise Johnson, and Damon Vis-Dunbar, *Investment treaties and why they matter to sustainable development:* International Institute for Sustainable Development, Winnipeg, 2012, 1.
[7] *Ibid*

internal and external financial resources.[8] It is therefore argued that from the social and environmental perspectives, economic development stimulated through foreign direct investment need to be complimentary to the objectives of developing States in order to improve their environmental and human rights policies, consistent with the States' capability to regulate in public interest.[9]

As the discussion will point out shortly, the nature of BITs clauses has an important effect on what can be considered to be legitimate governmental policy in regulating economic and investment activity domestically.

3.4 Gears of BITs and their Relationship to Sustainable Development

Despite the fact that BITs vary from treaty to treaty, the structure and content of the agreements is usually quite standard.[10] The components of BITs will usually be State obligations relating to free and equitable treatment, expropriation, national treatment, most-favoured-nation treatment, performance requirements among others. By and large, however, BITs pursue a uniform objective, which is the safeguard of foreign investment.[11] It is noteworthy that for the most part, BITs do not contain references to either sustainable development in general or environmental, health or labour standards in particular. Reasons include the fact that developed States, which are usually the exporters of capital, have prime interest in protecting their own investors through the relevant international agreements.[12]

[8] See United Nations Conference on Environment & Development, 1992.
[9] Yulia Levashova, 'Role of sustainable development in Bilateral investment treaties: recent trends and developments', 1.
[10] See *Ibid* at, 3.
[11] See Dolzer R and Stevens M, *Bilateral investment treaties*, Martinus Nijhoff Publishers, The Hague, 1995.
[12] *Ibid* at', 4.

Relatedly, it be concluded that international investment treaties can limit strategy space for signatory States[13] (which space could include implementation of sustainable development agenda). The seriousness of these commitments is buttressed by the existence of a redress and sanctions system. Recourse to arbitration regarding international investment agreements has improved swiftly in recent years: this can be supported by the increases in cases by the start of 2013 cases had risen at least ten times above the 2000 level this means more States, investors and non-State actors are more aware of their rights .[14] Through the arbitrations, investors sue for compensation for losses suffered due to policy measures by host States that they challenge as illegitimate. These include actions to introduce performance requirements, improve public revenues, and introduce performance requirements, protection of the environment and addressing historical injustices.[15]

What follows is a step-by-step analysis of the standard components of BITs and a discussion of their implications for the incorporation of the sustainable development agenda in BITs in particular and international investment treaties in general.

(i) Free and Equitable Treatment

The requirement clause in BITs that imposes obligations on the host State is the "free and equitable treatment" (FET) standard. In practice, treaties do not concretely define what this standard entails, and there have been differing interpretations by international tribunals.[16] The question is whether this standard represents either ensuring observance of the investor's basic (or legitimate) expectations or, on the other hand, whether it entails the State providing a

[13] International Institute for Environment and Development, 'Investment treaties and sustainable development: an overview at p 2.
[14] See *Ibid* at, 3.
[15] *Ibid*
[16] Nathalie Bernasconi-Osterwalder, Aaron Cosbey, Lise Johnson, and Damon Vis-Dunbar, *Investment treaties and why they matter to sustainable development:* 12.

pledge not to act in a way that is unreasonable, unfair or outrageous. Both positions have been accepted by various tribunals.[17]

The bar set by the former position on "basic or legitimate expectations" has been said to be particularly high for developing countries to meet.[18] The reasons being some of such countries are constrained by absence of technical, financial, and sometimes human resources to strengthen own regulatory establishment.[19] Synchronization among ministries and different departments of government is "difficult even for developed countries, making a standard of liberty from ambiguity and total transparency look unrealistic for any country." This standard would also be problematic if the relevant tribunal takes a broad position on what can be considered "legitimate."[20] However this problem may not be in all countries some of the countries have clear interdepartmental linkages which enables them function seamlessly without much difficulty.

In considering the possible effects of such a demanding interpretation of the obligation on government policy space and sustainable development, Bernaconi, Cosby, Johnson and Dunbar note that States will usually be reluctant, due to the FET obligation, to introduce regulatory changes due to a fear of the risk of costly or embarrassing arbitration that is consequent upon introduction of such regulatory changes. In this manner, the fear of damage awards and arbitrations generally, act to forestall the advancement of public interest litigation.[21]

[17] The former position, for instance, was relied on by the tribunal in *Tecnicas Medoambientales Tecmed S.A. v United Mexican States*, ICSID Case No. ARB(AF)00/2, Award, May 2003, para. 154. The latter position is seen in *Glamis Gold v United States*, UNCITRAL, Award, June 8, 2009.
[18] *Ibid* at 13.
[19] *Ibid*
[20] Supra at , 13.
[21] Nathalie Bernasconi-Osterwalder, Aaron Cosbey, Lise Johnson, and Damon Vis-Dunbar, *Investment treaties and why they matter to sustainable development: Questions and answers*, 14.

On this challenge, there are several approaches that could be taken by host States. These comprise evading the insertion of the FET standard in investment treaties, crafting a particular interpretive note when the standard is included.[22]

(ii) Expropriation

On this element, commentators already mentioned above have noted that the question is not so much whether a State has a duty to expropriate but rather, circumstances in which a State will also have to compensate the affected rights holder, and which, conversely, may not then be regarded as expropriations (since, usually, any expropriation must be compensated).[23] Generally, IIAs will require that expropriation be for a public purpose and should be non-discriminatory, and that it must be implemented in accord with proper procedure of law.

A challenge posed by this component is the specific meaning and possible cases of "indirect" expropriation under investment treaties. Accordingly, subject on how it is understood, the obligation may ultimately require taxpayers to pay investors to change or halt performance that is hitherto conflicting to the public interest. Similarly, if a government is found liable may be stopped to regulate as it should to protect investor's interest, given the threat that is investor claims. Considering the attendant ambiguities, the State is left in an uncertain position, not knowing in advance whether a pending piece of legislation will require costly and potentially embarrassing litigation and compensation.[24]

On this challenge, States are increasingly incorporating additional language in their investment treaties clarifying the scope of indirect expropriation.[25]

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[22] The investment chapter of the 2005 trade agreement between Singapore and India, for instance, omits the. When the interpretive note is used, it typically indicates that the FET requirement is synonymous with the customary international law minimum standard of treatment of aliens.
[23] Nathalie Bernasconi-Osterwalder, Aaron Cosbey, Lise Johnson, and Damon Vis-Dunbar, *Investment treaties and why they matter to sustainable development: Questions and answers*, 15.
[24] *Ibid* at 18.
[25] This is for instance the case for The 2007 Investment Agreement for the COMESA Common Investment Area.

(iii) National Treatment

"National treatment" obligates host States to treat foreign investors the same way as they treat their own national investors, this obligation creates pre-establishment rights, giving foreign investors the right to enter a host country and make an investment on terms similar, analysts reviewed under chapter one of this dissertation have noted that through such arrangements, governments give away a key power they traditionally hold by virtue of their sovereignty for example the power to regulate and control the admission of external entities or individuals who enter as specialists.[26] From a sustainable development perspective, a key concern with pre-establishment rights in BITs is that in some countries laws governing host country initiatives may be weak or absent these will include environmental, labour and safety laws. In such incidences, States might want to specify a high standard of conduct for new investments, for example to take advantage of the technical capability of the foreign investor.[27] The test then is investor may argue that such requirement violates the host State's duties for pre-establishment national treatment.

Accordingly, if a tribunal exclusively emphasizes on impact of the measure and disregards the conceivable motives for the differential treatment as being immaterial to whether there is a breach of the national treatment obligation, that responsibility may hamper governments' capabilities to apply or develop laws and policies aiding legitimate and significant public interest goals.[28]

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[26] Nathalie Bernasconi-Osterwalder, Aaron Cosbey, Lise Johnson, and Damon Vis-Dunbar, *Investment treaties and why they matter to sustainable development: Questions and answers*, 21.
[27] *Ibid*, 22.
[28] *Ibid* 22.

(iv) Most-Favoured Nation (MFN) Treatment

This means that if a State is party to the treaty as partner, it should treat other State's investors the same way or favourably than it treats investors from other countries which are not members to the treaty. Because of the ability that this gives home States to require host States to import provisions in other BITs upon demand, this obligation gives rise to some problems. Various differences among treaties might have stemmed due to the reason that agreements were signed at different stages in progression of investment treaties, another reason is that perhaps State's diverse treaty associates might have been influential and using hegemonic power to offer their own ready-made agreements on a take-it-or-leave-it basis.[29] Tied to this challenge is the possibility of limiting efforts to improve investment treaties. Considering this, a need for rebalancing the way in which this obligation is construed arises.

(v) Performance Requirements

These are ingredients that investors are required to meet in order to establish or operate a trade, or to access benefit obtainable by the host State. These may be imposed as mandatory measures, or could be in place alongside various incentives to meet them.

The WTO's Trade-Related Investment Measures (TRIMs) Agreement forbids certain categories of trade-related performance requirements.[30] Although this Agreement only encompasses a sub-group of all performance requirements, these obligations are important specified that nearly all of the world's trading nations subscribe to them. Restrictions will usually also exclude such strategy actions as (i) technology transfer, production processes, and (ii) demand to hire persons of a specific nationality to senior management posts.[31]

[29] *Ibid* 25.
[30] The prohibited categories include requirements for domestic sourcing of inputs and restrictions on imports and exports related to local production.
[31] *Ibid* 25.

This reality is problematic considering that, among other things, foreign investment is often presented a significant avenue of facilitating transfer of technology that could be useful in circumventing, in many cases overly polluting phases of domestic industrial development. Thus, such restrictions do not take account of the need for more environmental-friendly practices that States might require of foreign investors. Accordingly, it is clear that from a sustainable development perspective it may be healthier for countries to establish flexibility of some types of performance requirements.

3.5 Conclusion

Inside the outline of international investment law, sustainable development perspective the objective aims to ensure that economic, social and environmental aspects are interconnected.[32] The preceding sections have outlined the specific components of typical BITs that have a significant bearing on sustainable development, in particular for host States that also happen to be developing countries. It has been seen, in sum that BITs a dominant part of the international law oversees foreign investment. The purpose of these treaties, and who partakes to enacting them, can have far-reaching implications for sustainable development.[33]

As a preliminary point, it was noted that there is a mutually-reinforcing relationship between international investment and sustainable development. Based on this premise, this Chapter has investigated the key elements of BITs that might be seen as having a bearing on sustainable development imperatives for host countries vis-à-vis the investment ventures undertaken by international investors.

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[32] Yulia Levashova, 'Role of sustainable development in Bilateral investment treaties: recent trends and developments', *Journal of Sustainable Finance and Investments*, 2012, 1-8, 2.

[33] International Institute for Environment and Development, '*Investment treaties and sustainable development*: an overview at 1.

It has been seen that the central and standard elements of BITs, by and large, as presently understood and represented in the overwhelming majority of BITs, can be viewed as a substantial hurdle in attainment of sustainable development agenda. BITs produce this effect because the key obligations they engender place a significant strain on developing countries, and at the same time cause a counterproductive fear (of litigation) in the governments in terms of pursuing regulatory reform and best practices to achieve sustainable development.

Nonetheless, it has been seen that there are outliers in the shape of host States that have developed mechanisms to retain their autonomy to pursue the sustainable development agenda without necessarily trading off foreign investment inflows.

CHAPTER FOUR

4.0 A COMPARATIVE ANALYSIS OF THE LEGAL AND POLICY APPROACHES TO INVESTMENT: THE CASE OF SOUTH AFRICA AND KENYA

4.1 Introduction

Chapter three examined concept of sustainable development and discussed its specific implications for traditional BITs from the viewpoint of developing nations. Chapter four is a comparative analysis of the approaches taken by host States in relation to rebalancing their obligations under BITs. This chapter engages in a comparative analysis of South African and Kenyan case study with the aim of allowing Kenya to learn from South Africa's some best practices to BITs.

This chapter provides a background to the key issues in investor-State relations at an international level, and particularly with regard to the approach taken by the South African government in reviewing and rebalancing its obligations under the relevant international investment agreements. The chapter then proposes the findings to be relied on more specifically in crafting a more wholesome legal and policy environment for Kenya in relation to investment law.

4.2 Background

Critics of the international investment regime generally observe that it is in crisis and urgently needs reform. On this view, the colonial/imperialistic origins and motivations of international investment are an enduring problem.[1] A similar concern is that international investment law lacks and/or ignores the development agenda, privileges foreign investors

[1] See Uche Ewelukwa Ofodile, 'the Past and Future of African International Law Scholarship: International Trade and Investment Law', 107 *Proceedings of the Annual Meeting (American Society of International Law)*, International Law in a Multipolar World, 2013, 194-198, 197.

sometimes at advantage of domestic investors, and is structured in a way that restricts the authority of sovereign States to regulate in the public interest.

Accordingly, a growing number of countries are reviewing their BITs and IIAs; some are refusing to comply with orders of awards; the number of proposals of reform of the system is growing, and more "model BITs" are being developed. The method of investor-State dispute resolution is also increasingly being questioned.[2]

In this regard, Ofodile has observed that matters of primary and developing concern cannot be resolved in BITs negotiating methods.[3] The gravity is compounded by the fact that BITs are invasive, extending significantly into domestic policy space. This is engendered by binding rules in relation to investment, with important consequences for sustainable development. In the same measure, investment guidelines in BITs prevent developing country from demanding foreign investors to transfer technology, source inputs locally or train indigenous workers. In such a scheme, investment fails to inspire sustainable development. [4]

A number of regimes across the world are worried about the impressions and (failed) promises of investment hence adapting consequently to changes to the way agreements are being drafted.[5] Despite the fact that FDI might produce significant aids for the host economy that can be key for sustainable development, a country's capacity to attract FDI will be

[2] *Ibid* at 197.
[3] *Ibid*
[4] See *Ibid* at, 197.
[5] Nathalie Bernasconi-Osterwalder, Aaron Cosbey, Lise Johnson, and Damon Vis-Dunbar, *Investment treaties and why they matter to sustainable development: Questions and answers*, International Institute for Sustainable Development, Winnipeg, 2012, 1.

contingent upon various factors,[6] including the conduct of the investor, coupled with policies and circumstances of the host State.[7]

4.3 The State of the International Law on Foreign Investment

Sources of law which oversee foreign investment can be divided into three convergent spheres: domestic law, international investment contracts, and investment treaties.[8] The main source of law in this area is usually the domestic law of the State which is the host. The relevant regimes are investment laws, taxation laws, human rights laws, labour laws, property laws, banking regulations, and environmental laws relating to the potential influences on operational ventures. Some of the authors identified in this dissertation such as Ofodile noted that this array of laws is often weak or incomplete in least developed States.[9]

International investment contracts are the other source of law governing foreign investments; they are direct contracts between a host government and foreign investor. These are mutual in capital-intensive and long-lived investments into developing countries such as resource extraction and processing. They provide the nature of the investment and its value, any incentives for the investor, their special rights, and royalty plus taxation rules to apply to the investment if it is dissimilar from the general law, any requirements not included in domestic law and any extra social or development-related responsibilities an investor.[10]

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[6] These benefits include increasing employment, transferring technology to the host State, and increasing its competitiveness.
[7] See Supra 149.
[8] Nathalie Bernasconi-Osterwalder, Aaron Cosbey, Lise Johnson, and Damon Vis-Dunbar, *Investment treaties and why they matter to sustainable development:* at p 3.
[9] *Ibid* at 3-4.
[10] *Ibid* at 3.

Third source of law on international venture is international investment treaties, of which BITs are an example. These are treaties between States for the advancement of foreign investment applicable to investors from one home State investing into the territory a host State, they offer special safeguards under international law.

A bilateral investment agreement in theory guards investments on the basis of the reciprocity principle, meaning that either of the parties investing into the territory of another party is protected.[11] However, developing countries often have little capital and prospects to invest into developed countries. Consequently, bulk of developing, capital-importing States does not have sufficient negotiating influence to insert social provisions into BITs.[12]

However, a notable exception to this is the South African government and its revision of South African BITs. This review was partially motivated by a case against South Africa as already discussed under chapter one of this dissertation, where a group of investors initiated investment arbitration for a violation of a BIT, when South Africa enforced a post-apartheid mining rights legislation that aimed to promote and increase involvement of customarily deprived South Africans into the labour market.[13] One of the authors and contributors on this subject Levashova explains, in that case, that group of European investors argued before the arbitral tribunal that new South African legislation had interfered with their investment rights and specifically had violated their right to free and equitable treatment under the existing BITs. The South African government subsequently published a position paper[14] in June 2009 that expressed its concern that existing BITs were based on a 50-year old BIT model which

[11] Yulia Levashova, '*Role of sustainable development in Bilateral investment treaties*: recent trends and developments', *Journal of Sustainable Finance and Investments*, 2012, 1-8, 4.
[12] *Ibid* at 4.
[13] *Piero Foresti, Laura de Carli and others v Republic of South Africa* (ICSID Case No. ARB (AF)/07/1. See also *Ibid* at, p 4.
[14] South African Department of Trade and Industry, *Bilateral Investment Treaty Policy Framework Review: Government Position Paper*, 2009.

majorly focused on the rights of investors, and that most of the invasions involved have injurious consequences on sustainable development.[15] This illustration has been well handled in previous chapters such as chapter one of this dissertation.

Reportedly, some capital-exporting States have recognized the importance of sustainable development and hence have recently incorporated or are considering the inclusion of non-economic interests in their model BITs. Examples are the United States and Canada.[16] More proximately, in the abolished post-apartheid era (1994-1998), South Africa concluded 15 BITs mainly with European countries.[17] However, South Africa afterwards became conscious of challenges posed by investment treaties.[18] These events prompted South Africa to initiate an evaluation of BITs, after which certain conclusions came to light. It was found that FDI has a possibility to make a positive influence to development, and that this suggests a long-term investment in prolific activities with increased access to contemporary technology, managerial and organizational practices, skills and international markets. This notwithstanding, benefits to host countries are nevertheless, not automatic. This inference was reached on the basis that BITs require regulations placed at equilibrium for operational safeguard of investment with actions that ensure FDI support national growth, generates constructive linkages to domestic economy, augments national financial resources, nurtures innovativeness development, and expands technology plus skill and knowledge base of the economy.[19]

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[15] Quite notably, Bolivia has denounced the ICSID Convention and has terminated some of its BITs. In 2007, it announced its intention to revise 24 of them.

[16] Yulia Levashova, 'Role of sustainable development in Bilateral investment treaties: recent trends and developments', 5.

[17] Xavier Carim, South African Department of Trade and Industry,' Update on the review of bilateral investment treaties in South Africa,' Prepared for the Parliamentary Portfolio Committee on Trade and Industry, 2013, at https://www.thedti.gov.za. Accessed on 31st August 2018.

[18] The specific cases of *Piero Foresti, Laura de Carli and others v Republic of South Africa, ABB (AF) O7/01* and cases related to Switzerland in 2004 and Italy in 2006.

[19] Supra at p 3.

4.4 The South African Position

The South African government has pursued to address what have been seen to be shared apprehensions with first group of BITs relating to ambiguity/unpredictable plus interpretations of numerous provisions. The South African review noted explicit areas in this regard:[20]

(i) The meaning of ‘investor’ or investment” national treatment and most favoured nation treatment; expropriation (direct/indirect); fair and equitable treatment; “compensation” and transfer of funds. The broad meanings of “investor” or “investment” could include any asset (goodwill, holiday home and so on).

(ii) The most favoured nation requirement which will usually allow “importing” requirements from other treaties.

(iii) Expropriation and fair and impartial treatment provisions may be defined as any portion that stimulates use of assets that repudiates investors of probable economic advantage, and thus encouraging some unpredictability.

(iv) Free transmission obligation has been criticized as unreliable with the IMF Articles on safeguards for balance of payments problems.[21]

(v) Investor-State dispute settlement/ arbitration which is contentious, and the fact that provisions under BITs will entail the bypassing of the domestic court system.

(vi) The existence of a fragmented system without common standards and with unpredictable interpretations by panels.

Thus, fresh group BITs purpose to reduce risks which were integral in earlier contracts through more exact drafting of provisions. The new style places wide-ranging growth and sustainable development at midpoint of efforts to entice and profit from investments. It also

[20] *Ibid* at’ p 4.
[21] See https://www.wto.org, Accessed on 31 August, 2018.

secures the right of governments to regulate in the public interest on matters of environment and public health, as well as tracing investment safeguard within the broader human rights framework.[22] This review development was also significantly influenced by the fact that first generation BITs contained provisions that were inconsistent with the South African Constitution and domestic law.[23]

To remedy these gaps, the review process has sought to strengthen/clarify national investor safeguard to align BITs to international developments. Particularly, the measures adopted were to:

(i) Foster and enact a Foreign Investment Act to codify and clarify typical BITs provisions into domestic law, while at the same time providing solidification of investor protection;

(ii) Revoke the first set of BITs and offer contracting entities the opportunity to renegotiate;

(iii) Desist from entering into BITs in the future, unless there are compelling political and economic explanations;

(iv) Initiate a new model BIT as the basis for (re-)negotiation; and

(v) Inaugurate an inter-ministerial working group to supervise the entire process.

The condition attached to the Foreign Investment Act, was that it:

(i) Updates, modernizes and supports investor safeguard in South Africa;

(ii) Includes BITs-type provisions into domestic regulation ensuring uniformity with the Constitution and the national law of the country

(iii) For the State to continue being open to FDI

(iv) Offer security and safeguard to all investors and government; and

[22] Xavier Carim: *Update on the review of bilateral investment treaties in South Africa*, South African Department of Trade and Industry at p 4.

[23] See section 24- 25 of the RSA Constitution of 1996

(v) Preserves the right to regulate in the public interest.

Beyond this, it suffices to say South Africa has systematically strengthened its investment protection regime since 1994.[24] Protection against expropriation without compensation is guaranteed in the Constitution adopted in 1996.[25] There is an array of laws guarding against arbitrariness in the treatment of the investors, including the Companies Act, Competition Acts, intellectual property laws, and administrative justice laws.[26]

Thus, as was elucidated in the previous chapter, BITs clear the way for foreign investors to challenge virtually any portion considered to emasculate their 'expectation' of increased revenue, and can accordingly posture a severe peril to legitimate policy making in the public interest.

In review process, there is discernible departure from the notion that investment safeguard is the only drive of the investment agreement. This is by the recognition of defenses often on the basis of the significance of the international law generally, human rights and the environment in particular.[27] Treaties presented in the recent days are being seen as including concerns relating to labour rights, human rights and environmental protection which in view of this analysis goes a long way to attainment of real sustainable development, anything short of such legitimate expectations becomes a breeding ground for stagnation to much desired development of any country.[28]

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[24] Xavier Carim, *South African Department of Trade and Industry, 'How foreign Investments into South and Southern Africa should be regulated and protected*, at http://www.saiia.org.za. Accessed on 31 August, 2018

[25] See Section 25 (3) of the RSA Constitution of 1996

[26] *Ibid* at note 24.

[27] Sornajah M, *The international law on foreign investment*, 3rd Edn, Cambridge University Press, 2010, xvi.

[28] *Ibid* at p xvi.

4.5 Kenyan Position

Having evaluated South African position, it is imperative to take a comparative approach and trace the Kenyan position in regard to its efforts to attain sustainable development, this can best be analyzed based on the current position in terms of BITs and the regulatory framework Kenya has established to promote FDI and by extension achieve her agenda of economic growth by the year 2030.

4.5.1 Policy Framework

Kenya does not have a robust policy framework on international investment ventures.[29] Instead, the Kenyan policy framework is founded on a number of sessional papers. These include Sessional Paper No. 1 of 1986 on economic management for renewed growth and Sessional Paper No. 1 of 1994 on recovery and sustainable development. It has been noted that these policies mainly underscores on the augmented role of the private sector in economic progress.[30] Through these instruments, the country has assumed economic reforms with a view to encourage both domestic and foreign investments which include, rationalizing and reducing import tariffs, liberalization of foreign exchange and price controls as well as partial liberalization of the capital markets.[31] Currently Kenya allows free movement of labor among East African sister States and by extension other African States which requires visa can obtain them at the frontier entry points.

In 2016, the Kenyan government developed the draft Kenya investment policy, which was revised in 2017.[32] It pursues to provide the role of private investment in economic development and describe the roles of numerous national and county government agencies. In

[29] Sikuta M, '*A critical appraisal of the legal framework governing international trade and foreign investments in Kenya'*, Unpublished LLM thesis, UON, Nairobi, 2016, 36.
[30] *Ibid*
[31] *Ibid*
[32] Republic of Kenya, Ministry of Industry, Trade and Cooperatives, draft Kenya National Investment Policy, available at https://kepsa.or.ke. Accessed on 5 September 2018.

response to challenges conveyed by investors, and the need to reinforce the country's competitiveness and commercial effectiveness Kenya formulated this policy to address the concerns of the investors as a means of encouraging and attracting sustainable development"[33]

According to the policy, its adoption will lead to establishment of increased enterprises capable of providing extra employment openings and contributing significantly to broadening economic base of the country for sustainable development.[34] The term "sustainable development" within the policy is applied to signify recognition of the need to stimulate investment that "responsibly stewards the environment, boosts efficient resource exploitation and enables the nation to achieve the objectives of Vision 2030, SDGs, and (Africa's) Agenda 2063."[35]

Notwithstanding lacking a detailed discussion of sustainable development as a concept in itself within Kenya's investment environment, which concept is a stated guiding principle of the policy, the policy does at least contain provisions on "responsible investment."[36] As part of responsible investment, the policy expects all businesses and investors either domestic or foreign operating in Kenya, to uphold appropriate minimum values of corporate behavior and protect the environment.

On this point however, except statements to the effect that relevant requirement on the part of investors is compliance with local and international laws, the Policy does not, even in general terms, provide that sustainable development imperatives are essential to any venture

[33] *Ibid* at p 6.
[34] *Ibid* at p, 7.
[35] Republic of Kenya, Ministry of Industry, Trade and Cooperatives, Draft Kenya National Investment Policy, at 13.
[36] *Ibid* at , 34.

undertaken by an investor, let alone a deal-maker or breaker. Such "compliance" as provided for does not go beyond "acting in harmony with the Kenya Constitution and applicable national legislation governing labour and human rights", and "complying with the nation's laws against corruption."[37]

On environmental front, the policy notes that the government is dedicated to sustainable development without obliteration of her natural resources. Predictably, the policy provides that investors should observe with relevant laws and regulations of the country. However, it is noteworthy that the same provision stipulates that where the activity causes damage to the environment, the government shall mandate the investors concerned to restore the environment "to the level appropriate and feasible", while guaranteeing fair reimbursement is paid by those impacted adversely.[38] From a general analysis perspective, the country has provided safeguards and penalties against any person who may violate such provisions. The government desire for environmental conservation was so dear that the provisions had to be protected under the 2010 Constitution[39]

Considering corporate social responsibility to be a component of responsible investment, the policy proceeds to encourage firms to advance and integrate corporate social responsibility practices into their essential business activities in such a way as to meet the acceptable international standards. More explicitly, the policy notes that it ensures international investment agreements (IIAs) are balanced providing out rights and commitments of the State and investors. It goes on to provide that under the Ministry responsible for investments, a body within the National Investment Promotion Agency shall be established, with the mandate of researching and negotiating Kenya's position with respect to investment

[37] See the bill of rights under chapter four Kenyan Constitution 2010 and Kenyan labor laws 2007
[38] *Ibid* at 37.
[39] See article 69 – 72 of Kenyan Constitution on environment.

agreements and treaties. The instantaneous measure here, according to the policy, was that a standing national agency responsible for negotiating BITs was to be established and gazetted, though well thought and acknowledged it has not yet been gazetted as envisaged for it to commence its functions hence providing a further delay of implementing a well thought idea .

The policy also provides for a review of the existing treaty network to be in harmony to "best practice" is commenced and procedures put in place to frequently review agreements and treaties for "effectiveness and relevance" to ensure that they adapt to ever changing expansion dynamics."[40] The Ministry of foreign affairs has entire department dealing with treaties not to mention the attorney general's chambers which has sufficient technical experts in this field. This provision will be discussed in the next chapter in view of its soundness from a relative perspective, specifically in comparison with the equivalent process in South Africa.

In terms of investment safeguard and agreements, the policy provides that with regard to national treatment, foreign investors are to receive the same treatment as domestic investors once established in Kenya. Notably, the policy notes that necessary exceptions may be recognized to pursue the country's development objectives in a transparent and open manner. The policy also notes that "like circumstances" would necessitate scrutiny on a case-by-case basis of various circumstances.[41]

These provisions will be critically evaluated in the following chapter in line with the central arguments of this study and in response to research objectives as formulated under chapter one.

[40] *Ibid* at p 47.

[41] The "like circumstances" envisioned include effects on the community, effects on the local, disadvantaged, regional or national environment; effects on the investment's sector; aim of measures concerned; regulatory processes applied in relation to the measure concerned.

4.5.2 Legislative Framework

Prominently, the policy notes that investor commitments established in various laws and regulations may not be explicit or in finality.[42] Despite this study's primary concern with the policy environment surrounding BITs, the relevant legal framework in Kenya is worth considering in brief. The following are the laws significantly related to international investment that aimed at promoting economic growth and sustainable development.

(i) The Constitution of Kenya (2010)

The constitution which is the grand-norm was promulgated in 2010 after several years of the clamor for constitutional change by several political and lobbyist to replace the 1963 Lancaster constitution which had undergone several amendments. The 2010 constitution had to be subjected to a national referendum and it was promulgated in 2010, this saw introduction of progressive articles which promotes and protects private investments. It contains key provisions on the right to property,[43] restrictions on landholding for foreigners and protection of environmental and natural resources.[44]

(ii) The Investment Promotion Act, Cap 485B

The Act was enacted with the main objective to promote and facilitate investment by aiding investors in gaining licenses essential to invest and by providing other inducements. This was in line of government commitment to encourage investments with a view of achieving sustainable development; it also categorizes and describes who the local and foreign investor is.

[42] Republic of Kenya, Ministry of Industry, Trade and Cooperatives, Draft Kenya National Investment Policy, 34.
[43] Article 40, of the Constitution of Kenya (2010) also see Article 69 and 72
[44] *Ibid* Article 69-72

(iii) Foreign Investment Act of 2012

The Act outlines the rights of a foreign investor. It lays down assurances on capital repatriation on proceeds accumulated while doing business in Kenya and remittance of dividends and interest. Foreign investors are allowed to convert and repatriate profits, including retained profits which have not been capitalized, after payment of the relevant taxes and the principal and interest associated with any debt.

It also sanctions the issuance of investment certificates which confer numerous incentives to investors who invest a minimum capital of USD 100,000. Such assurance by the government has made Kenya to be one of the most attractable places for foreign investments.

(iv) Capital Markets Act Cap 485A

This is the parent Act which creates the CMA in Kenya, its function is for supporting, regulating and simplifying the growth of a systematic, fair and efficient capital market in Kenya, and participants may sometimes be foreign entities or actors. This is a forum where all traders are given an opportunity to trade and even take part in several stock exchanges such as Nairobi stock market.

(v) National Construction Authority Act No. 41 of 2011

Establishment of the National Construction Authority (NCA) in 2012 Act No 41 of 2012 provided for a new State parastatal and providing for the registration of local contractors and accreditation of companies incorporated outside Kenya. The harmonization by National Construction Authority Regulations 2014 offer for the registration of foreign firms. Under the Regulations, the foreign company must accept in writing that it shall subcontract or form a joint venture with a local person or firm for not less than 30% of the value of the contract work for which provisional registration is required, as well as the obligation to transfer technical skills not available locally. The Regulations also offer that personnel shall be competitively recruited from the labour market locally while the recruitment of foreign technical or expert workers shall only be done with the approval of the Authority when such skills are not available locally in Kenya this provision is well supported by the citizenship and immigration Act No 12 of 2011.

4.6 Conclusion

This chapter has observed that there is a dominant wave of thought and practice objected to the traditional nature of BITs and particularly in terms of consequences that these agreements have for host States.

Among the strongest States countering these deleterious effects of first generation BITs is South Africa. In the past decade, the nation's government initiated sweeping reforms in its review of its BITs. The process yielded specific findings that are relevant for host States seeking to make their BITs more sensitive of sustainable development objectives as well as free up their latitude to make legitimate regulatory measures which would otherwise be highly risky under the traditional BITs regime.

This chapter has concluded by seeking to single out specific measures and insights that could be gleaned from South Africa's approach that would be relevant for other developing host States, and in particular, Kenya. By discussing the policy and legal framework in Kenya, the chapter has established the entry points to be made in terms of best practice from the observations from South Africa.

The subsequent chapter will discuss these findings in specific and attempt to craft a workable formula or approach that Kenya could consider in a bid to operationalize its sustainable development agenda, and to bring its investment law regime in closer conformity with the Constitution and the law.

CHAPTER FIVE

5.0 FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

5.1 Introduction

This chapter takes a deeper analytical perspective in comparing Kenya's policy and legal environment to that of South Africa. It concentrates on the provisions noted earlier in previous chapters that are of relevance to the incorporation of sustainable development imperatives in BITs. It concludes on the major findings, eventually proposing recommendations that could be of significance in ensuring the BITs entered into by Kenya ensure the realization of the sustainable development agenda.

5.2 Summary of the Findings

In general, the research has established that there is little demonstrable constructive connotation between the volume of BITs and attraction of FDI. Conversely, it has been found that BITs have a weighty relevance and implication on sustainable development, and capability of host States in achieving the sustainable development agenda. The study has also found that the vast majority of BITs seek, by design, to primarily provide safeguards of interests of foreign investors, as opposed to the host State. Importantly, the particular components of these BITs serve to, effectively, limit the latitude of host States to regulate for the public interest. Therefore, it has been proposed that it is imperative for developing countries to rebalance their positions in respect to these investment agreements.

Subsequently the development of Sustainable Development Goals (SDGs) agenda and even before that with the Millennium development Goals (MDGs), Kenya has declared its objective of implementing, monitoring and evaluating the Agenda.[1] In 2013, Kenya had the largest economy in East Africa and the fourth largest in Sub Saharan Africa.[2] Her Gross Domestic Product (GDP) per capita was at $1700 as of 2011 in purchasing power parity (PPP). South Africa has, on the other hand, has been among leading economy in the African continent. It was also established that both Kenya and South Africa are categorized under the Medium Human Development (MHD) class, at number sixteen and nine respectively.[3] Under the Gross Domestic Product (GDP) category, South Africa is at potion two while Kenya is at position eight in Africa.

Pursuant to the SDG elements relating to the social, environmental and economic spheres,[4] Kenya has already begun implementing an economic blueprint for hastening transformation of the country into a speedily industrializing medium income country by the year 2030 with the same pillars.[5] However, as seen in Chapters one and two, this headway has not extended, in any significant and documented sense, to the rebalancing of its obligations under its international investment agreements in general and BITs in particular.

In large measure, the position of Kenya is that of developing countries largely referenced throughout this study. On a comparative level, Kenya has been subject to the same treaty-making dynamics as South Africa, as African countries negotiating BITs with Western entities against their balance of power. Additionally both Kenyan and South Africa

[1] Ministry of Devolution and Planning of Kenya, *'Implementation of the Agenda 2030 for sustainable development in Kenya',* June 2017,at 5.

[2] Haradhan Kumar Mohajan,'Poverty and Economic Development In Kenya', *International Journal for Information Technology and Business Management,* Vol 18. No 1, 2013, Faculty of Business Studies, Premier University, Bangladesh.

[3] Please see the Human Development Index (HDI) for countries in Africa as included in a United Nations Development programme on human development and the GDP report which was published in 2016

[4] O Blanchard, Buchs A, '*Clarifying Sustainable Development Concepts through Role Play',* SAGE Journals, 1 January 2015.

[5] *Ibid* note one

Constitutions have explicit safeguards aimed at promoting sustainable development and environmental protection.[6]

Accordingly, the nature of contentious provisions under BITs would be the same for Kenya. The primary difference between the two regimes in relation to BITs is in terms of volume of agreements entered into and the prevailing policy and legal space. As is explained below, these are critical differences that could impact significantly on the potential of Kenya to satisfactorily achieve the sustainable development agenda.

On the volume of agreements entered into, Kenya was, as of 2015, party to some eight BITs.[7] As of 2009 (well into the phase of revision), South Africa was party to 49 agreements. The remarkable difference amongst the two governments, however, is in the nature of the legal and policy space. Whereas the Kenyan space remains traditional (surrounding enabling legislation might exist but the BITs are the ultimate authoritative legal instrument on the nature of the investor-State legal relationship), South Africa has, in contrast, conducted a robust review of its BITs. The review, as explained, has centered on rebalancing the nation's international obligations under BITs and reasserting the government's place in protecting its legitimate role in regulating investment ventures in the public interest.

As noted in the previous chapter, Kenya's Draft Investment Policy contains a (cautiously-phrased) provision on for review of international investment agreements. Despite this mildly promising provision, the same is lacking in several ways in this respect. It fails to recognize the background informing the need for any review process regarding BITs. It then follows

[6] See Article 69 to 72 and Section 24- 25 of Kenyan and South African Constitutions respectively which *inter alia* provides for sustainable development, protection of environment and natural resources

[7] See Dani Rodrik,' Understanding South Africa's Economic puzzles', *Economics of Transition*, Volume 16(4) 2008, John F Kennedy School of Business, Harvard University, Massachusetts, 769 – 797. The contracting states here include Italy, Japan, the United Kingdom, Switzerland, Netherlands, Germany, Kuwait, and Finland.

that there is no clear perspective or philosophy through which a review process is to be conducted, meaning that such a process would be lacking an operational principle hence making the possible consequences unpredictable. In the same measure, it is impossible, from the cautious phraseology of the policy, to know definitively the full extent of the expected review process, and the implications for BITs already in place as well as for future expected negotiations. Suffice it to say that this provision is by no means clearly groundbreaking, let alone revolutionary.

As seen earlier, rebalancing of host States' obligations under investment agreements is crucial in incorporating sustainable development imperatives into the (foreign direct) investment agenda. South Africa's review process has yielded the following targets as essential in achieving this aim:

(i) Developing domestic legislation to codify and clarify distinctive BIT provisions into national law and to reinforce investor safeguards;

(ii) Terminating first set of BITs and offering investors the option to renegotiate;

(iii) Desisting from entering into BITs, except where there are persuasive economic and political aims for the benefit of national interest.

(iv) In the alternative, developing model BITs to form the basis for (re-)negotiation; and

(v) On a logistical or technical level, establishing an inter-ministerial committee to supervise plus review and renegotiation procedure.

5.3 Conclusion

From the foregoing study, it can now be concluded that notably South Africa has enacted the Investment Act[8] to offer for the safeguard of investors their protection and the elevation of investment, aimed at attaining a balance of rights and responsibilities applicable to all investors.[9] The Act expressly recognizes the importance that investment plays in, among other matters, sustainable development. Additionally, the Act, gives a concrete definition of what an "investment" is, as well as providing a concrete exposition of what "fair administrative action" necessitates, providing that the government must not "operate in a way that is arbitrary or that renounces administrative and procedural justice to investors in respect of their investments as provided for under the constitution and appropriate legislation."[10]

Even more significant is the national treatment provision, which emphasizes that foreign investors and their investments must not be treated less favourably than South African investors in like circumstances. It proceeds, importantly, to elaborate on what such "like circumstances" will constitute. In this way, this law avoids some of the problems that plague standard BITs, as noted in Chapter there. "Like circumstances" is used to connote the requirement for an overall examination of the merits of the case by taking into account all the terms of a foreign investment, including the effect of the investment in question on the country, plus the cumulative effect of all investments; the sector within which the investments are; the aim of any measure relating to such investment; considerations relating to the foreign investment in relation to the measure concerned, including effects on third persons and the local community, employment, and the indirect and direct effects on the environment.[11]

[8] Investment Act, Act No. 22 of 2015, Official Gazette, Vol. 66, No. 39514.
[9] See preamble of the Investment Act of South Africa.
[10] *Ibid* at Section 6,
[11] Section 8, Investment Act of South Africa.

The provision further states that the national treatment guarantee is not to be interpreted in such a manner as to require the State to extend to investors the benefit of any privilege, preference, or treatment resulting from:

(a) Taxation provisions in any international contract or arrangement or any law of the Republic;
(b) Government procurement procedures;
(c) Subsidies or grants offered by the government or any organ of State;
(d) Any law or other measure, the purpose of which is to achieve equality;
(e) Any law or measure the aim of which is to promote and preserve cultural heritages
(f) Any special gains rendered in the Republic by development financial institutions established for the tenacity of development support or the development of small and medium sized businesses or new industries."

Importantly, though providing a list of possible determinants of "like circumstances", the Kenyan equivalent of the national treatment provision as expressed in the investment policy is not watertight, when measured against the South African standard.[12] It is not as exhaustive, and thus may not cover for some gaps which may be exploited by investors in a bid to limit the latitude of government to regulate for the public interest though the Kenyan constitution does have a watertight proviso on protection of public interest, this was well settled in the LAPSSET case discussed under chapter one in this dissertation where the court held that rights of the locals who depended on fishing were violated and that the locals were not consulted before the project was initiated.[13]

[12] The "like circumstances" envisioned include effects on the community, effects on the local, disadvantaged, regional or national environment; effects on the investment's sector; aim of measures concerned; regulatory processes applied in relation to the measure concerned.
[13] Also see Article 118 Kenyan Constitution on public access and participation

Most importantly, the South African law provides for an express right to regulate, which empowers the State to take particular regulatory measures in specified instances, thus avoiding the classical problem facing host nations entering into BITs.

Accordingly, with regard to the first objective of this study, it has been seen that there is a strong relationship between BITs and sustainable development norms, in the sense that robust sustainable development and investment should ideally form a mutually-reinforcing relationship. However, the connection between BITs and FDI is rather shaky, as most evidence suggests that there is actually no positive correlation between the two.

With regard to the second objective, this research has shown that apart from the constitution Kenya's policy and legal regime on international investment does not specifically take into account the imperatives of sustainable development.

With regard to the South African position, it has been shown that there has been a robust incorporation of sustainable development imperatives following the BITs review process, and this has culminated in the renegotiation of BITs as well as a revolutionary change in legislation applying to foreign investment, a move meant to strengthen South Africa's bargaining position and ability to regulate in the public interest.

5.4 Recommendations

To achieve the sustainable development agenda in all the areas it implicates, there has to be an enabling policy and legal environment. It is proposed, in the case of Kenya, that the following specific points be taken into account:

a) The Kenyan Parliament should enact set of unified, comprehensive, and current legislation applying to foreign investment generally and in the specific case of bilateral and multilateral engagements. At present, what can be cited in place are scattered pieces of legislation that have a bearing on foreign investment.

b) The proposed enactment should have an orientation expressly responsive to the historical facts attending to BITs engagements especially for developing countries, including Kenya, as well as the unstable connection between BITs and FDI. This should provide an opportunity for developing countries such as Kenya to increase their latitude to regulate for sustainable development since; to begin with, the contribution of BITs to FDI is not monumental.

c) The existing provisions on national treatment discussed in chapter four above should be narrowed down further and a more concrete test developed, such as allowing Kenya as a host State to qualify its relevant obligation for the public interest as provided for under the constitution article 10 (2) (d), 69-72 and 118. Such a provision must be narrow enough to cover the “like circumstances” requirement, as well as giving the State a margin of appreciation on the obligation aimed at promotion of sustainable development by ensuring environmental concerns are factored in and allow citizen public participation before enactment . A mere inclusive test, as exists now, to be applied on a “case by case” basis is not sufficient ground.

d) All domestic legislations should be harmonized to support the express right of the government to regulate. This will pre-empt a future obligation, especially under BITs, to curtail this power, and thus allow for healthy regulation oriented towards sustainable development.

e) The draft investment policy should be expanded to permit a more specific and holistic conceptualization of the investment review process to attain unified objective. This should give particular details about the implications of unfavourable findings to certain BITs. Similarly, the review process should be guided by its proper organizing principle: an understanding that the connection between BITs and FDI is tenuous and that BITs are by design primarily protective of the interests of foreign investors or developing States (from which investors with a surplus of capital usually come from).

f) In general, the Kenyan government should increase its efforts in its international treaty-making activity to rebalance its obligations and reassert its right to regulate domestically in the public interest. With regard to South Africa, less discernible policy weakness in terms of sustainable development has been disclosed in the course of this study. Therefore, it is proposed that the new legal and policy regime be taken into account to the letter in the renegotiation and entrance into international investment treaties. The treaties must endeavor to ensure observance of environmental protection and take into account emerging technology advancement associated with globalization.

6.0 Areas for further Research

Due to the Scope of the study and limited time frame for this research, Kenya must, as a matter of necessity, formulate a unified BITs legal framework aimed at promoting sustainable development on priority bases in their respective jurisdiction, hence an area to be considered for further research to evaluate how best this can be attained.

Secondly, there is need for African States under the auspices of African Union (AU) to consider entire unified BITS of African States. To achieve this, further research is recommended benchmarking with best practices such as the EU. This can only be attained if there is commitment of all African heads of State who purpose to set aside more resources and funding for further research and harmonization process focused at propelling African States to achieve sustainable development and attain the African agenda of 1963.

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