

**FOREIGN DIRECT INVESTMENT AND THE PROTECTION OF
HUMAN RIGHTS: A CASE STUDY OF LABOUR RIGHTS,
ENVIRONMENTAL RIGHTS AND THE RIGHT TO
DEVELOPMENT IN RWANDA**

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DECLARATION

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DEDICATION

To my wife, Clémentine NYIRAMAJANA, for the love and support;

To my children Esther MBABAZI, René Serge MUHIRWA, NDAYISHIMIYE, Gideon MUHIRWA and Shekinah MUHIRWA for giving me the sense of living;

To my parents;

To my brothers and sisters.

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LIST OF ACRONYMS AND ABBREVIATIONS

AfCHPR:	African Convention on Human and Peoples' Rights
AIDS:	Acquired Immunodeficiency Syndrome
AmCHR:	American Convention on Human rights
AMEKI:	<i>Atelier de Meubles de Kigali</i> (Fournitures' workshop of Rwanda)
AMUR:	<i>Association des Musulmans du Rwanda</i> (Rwandan Muslim Association)
ASC_UMURIMO :	<i>Association des Chrétien- Umurimo</i> (association of Christians- Umurimo)
BACAR:	<i>Banque Continentale Africaine</i> (African Continental Bank)
BCR:	<i>Banque Commerciale du Rwanda</i> (Commercial Bank of Rwanda)
BIT:	Bilateral Investment Treaty
BOD:	Biochemical Oxygen Demand
BRALIRWA:	<i>Brasserie et Limonaderie du Rwanda</i>
CESTRAR:	<i>La centrale des syndicats des travailleurs du Rwanda</i> (Confederation of Trade Unions of Workers of Rwanda)
CET:	Common External Tariff
CHUK:	<i>Centre Hospitalier Universitaire de Kigali</i> (Center for University Hospital of Kigali)
CIDA:	Canadian International Development Agency
CIF:	Cost Insurance and Freight
CIMERWA:	<i>Cimenterie du Rwanda</i> (Cementery of Rwanda)
Co.Ltd:	Corporation Limited

COMESA:	Common Market for Eastern and Southern Africa
COSYLI :	<i>Conseil national des syndicats Libres</i> (The National Council of free trade unions)
COTRAF :	<i>Congrès du travail et de la Fraternité</i> (Congress of workers and brotherhood)
CS:	<i>Cour Seprême</i> (Supreme Court)
CSR:	Corporate Social Responsibility
CUTS:	Consumer Unity and Trust Society
DfID:	Department for International Development
DRC:	Democratic Republic of Congo
DTAs:	Double Tax Agreements
EAC:	East African Community
EAGI Ltd:	East African Granite Industry
ECHR:	European Convention on Human Rights
ECONEWS:	Economic News
EIA:	Environment Impact Assessment
EPZs:	Economic Processing Zones
FACB:	Freedom of Association and Collective Bargain
FDI:	Foreign Direct Investment
FONERWA:	<i>Fonds National de l'Environment</i> (National Fund for Environment)
FTC:	Federal Trade Commission

FTZ :	Free Trade Zones
GATS:	General Agreement on Trade in Services
GMD:	Geology and Mines Department
GT Bank:	Guarantee Trust Bank
I&M Bank:	Investments & Mortgages Bank Limited
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural rights
ICSID:	International Center for Settlement of Investment Dispute
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the Former Yugoslavia
Id.:	<i>Idem</i> (same author, same book and at the same page)
IISD:	International Institute for Sustainable Development
ILO:	International Labour Organization
IPA:	Investment Promotion Agency
IPPA:	Investment Promotion protection Agreements
Kg/Ha:	Kilograms per Hectare
M& As:	Multilateral Agreements
MAI:	Multilateral Agreement on Investment
MDGs:	Millennium Development Goals
MEAs:	Multilateral Environmental Agreements

MIGA:	Multilateral Investment Guarantee Agency
MINIRENA:	Ministry of Natural Resources
MINOCOM:	Ministry of Commerce and Industry Promotion
MNCs:	Multinational Corporations
MTN:	Mobile Telephone Network
NAFA:	National Forest Authority
NAFTA:	North America Free Trade Association
NGOs:	Non-Governmental Organisations
NPK:	Nitrogen Phosphorous Potassium
OECD:	Organisation of Economic Cooperation and Development
OGRR:	Official Gazette of the Republic of Rwanda
OHCHR:	Office of the High Commissioner on Human Rights
Op. cit:	<i>Opere citato</i> (previously cited)
PSF:	Private Sector Federation
RDB:	Rwanda Development Board
REMA:	Rwanda Environment Management Authority
Rev.:	Review
RIEPA:	Rwanda Investment and Export Promotion Agency
RNRA:	Rwanda National Resources Authority
RRA:	Rwanda Revenue Authority

RSOCAA:	<i>Rôle Social en appel</i> (Social Roll in the Appeal)
RSSB:	Rwanda Social Security Board
RWACOF:	Rwanda Coffee Federation
S.A:	<i>Société anonyme</i> (Public Limited Company)
SADC:	Southern African Development Community
SEEPZ:	Enterprise Export Processing Zone
SEZ:	Special Economic Zone
SEZAR:	Special Economic Zone Authority of Rwanda
SOEs:	State Owned Enterprises
SORWATHE:	<i>Société Rwandaise du thé</i> (Rwanda Tea Company)
TIFA:	Trade and Investment Framework Agreement
TNCs:	Transnational Corporations
TOLIRW:	<i>Tolerie du Rwanda</i> (Ironing Company of Rwanda)
TRIMs:	Trade Related Investment Measures
TRIP:	Agreement on Trade Related Intellectual Property Rights
UDHR:	Universal Declaration of Human Rights
ULK :	<i>Université Libre de Kigali</i> (Kigali Independent University)
UNCTAD:	United Nations Conference on Trade and Development
UTEXIRWA:	<i>Usine Textile du Rwanda</i> (Textile Factory of Rwanda)
VAT:	Value Added Tax

WBCSD: World Business Council on Sustainable Development

WHO: World Health Organization

WIPO: World Intellectual Property Organization

WTO: World Trade Organisation

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ABSTRACT

The issue of attracting investors in the country has lead countries all over the world to compete for the limited resources available. This competition for resources in order to build economies, develop industries, and alleviate poverty can sometimes lead to the “race to the bottom”. In developing countries, like Rwanda, new financial and economic laws have been enacted and others either modified or repealed. The implementation of this race by some countries has lead to an international debate on the approaches that countries would follow, that is, the promotion of foreign investment or the protection of human rights.

This study addresses the connection between poverty alleviation, development and the challenges facing Rwanda in attracting foreign direct investment. The main changes brought about by foreign direct investment in Rwandan have been in the areas of labour standards, environmental protection and development. Human rights scholars have identified these as the right to labour, the right to a clean and healthy environment, and the right to development, but with a view to ensuring that the changes do not affect, negatively, protection of these rights.

This thesis analyses the challenges facing Rwanda in the promotion and protection of these three indicators, namely, the right to a clean and healthy environment, labour rights and the right to development. The approach tests the Rwandan laws through benchmarks based on the human rights perspective. The thesis reviews the concessions granted by the Government of Rwanda to attract foreign investors within this context and discusses whether the concessions are successful in the promotion of foreign direct investment and the protection of human rights, with respect to labour standards, environment protection and development.

The thesis is divided in six chapters. Chapter one is the introductory chapter that defines the problem, the hypotheses, and research questions, among others. Chapter two discusses the interface between foreign direct investment and human rights. It analyses various theories dealing with liability of multinationals. It makes also clear the issue of criminal and civil liabilities of multinationals, the responsibility of parent companies for violations made by their subsidiaries, as well as the use of immunity in foreign direct investment. Chapter three assesses the relationship between foreign direct investment and labour standards. In this chapter, the research analyses the extent to which foreign companies respect and promote human rights related to labour conditions in Rwanda. Chapter four tackles the issue of foreign direct investment and the protection of environment. It assesses the application of the environmental impact assessment test (EIA) and various remedies or mechanisms of reparation in place in Rwanda in case of environment degradation. Chapter five, deals with foreign direct investment and development. It analyses the contribution of foreign investors to the economic growth of Rwanda. It looks at the relationship between foreign direct investment and the transfer of technology, the policy on corporate social responsibility, as well as the role foreign investors play in the balance of payments. The final chapter, chapter six, draws the conclusion of the study by summarising the major findings and makes recommendations on the way forward in addressing the legal and institutional challenges posed by foreign direct investment in Rwanda.

CHAPTER ONE

INTRODUCTION

1.1 Background

The relationship between foreign direct investment (FDI) and human rights can be approached from two angles that is, firstly, the way foreign investors are protected in the host countries¹ and secondly, the way rights of citizens of host countries are protected against adverse effects of acts of foreign investors.² The attraction of FDI by countries is driven by the purpose of increasing their developmental goals through job creation, increase of capital, entrepreneurship, exportation, efficient managerial techniques, technological transfer and innovation.³ The perception of the positive role to be played by foreign investors has pushed governments to provide both fiscal and non-fiscal incentives with the aim of attracting more investors in their respective countries.⁴

Even if the presence of FDI in host countries can be positively recognised, there is need for the existence of clear legal and institutional frameworks in order to avoid any potential harm that FDI may cause to inhabitants of the host country. Sometimes, host countries and their inhabitants have experienced cases of breaches of both domestic and international laws of human rights.⁵ Multinational Corporations (MNCs) taking the advantages of FDI provisions were sometimes responsible for environmental degradation,⁶ poor employment conditions and other violations of

¹ L.E. Peterson, *Human Rights, Trade and Investment Matters: Investment Protection Treaties and Human Rights*, Amnesty International, UK, 2006, p20. Available at <https://www.amnestyusa.org/sites/default/files/pdfs/hrtradeinvestmentmatters.pdf>, accessed on 23rd March 2016.

² M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed. Cambridge, New York, 2010, p.28.

³ S. Ritash, *The Impact of Core Labour Standards on Foreign Direct Investment in East Asia*, The Japan Institute for Labour Policy and Training Tokyo, Japan, October 2005, p.1.

⁴ OECD, *Checklist for Foreign Direct Investment Incentive Policies*, Paris, 2003, p.7. Available at <https://www.oecd.org/investment/investment-policy/2506900.pdf>, accessed on 23rd March 2016.

⁵ H. Hungju Koh, "Why do Nations Obey International Law?", (1997)Vol.106, *Yale Law school Scholarship Repository*, Yale Law School. p. 2644.

⁶ N. Mabey & R. McNally, *Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development*, A WWF-UK Report, August 1999, p.16.

human rights.⁷ These abuses of the law range mainly between poor labour practices, environmental degradation and more broadly affect the development of a host country. While international investment laws use the above terms to describe the breaches of laws by Multinational Corporations (MNCs), human rights laws use the terms right of labour, the right to a clean environment and the right to development.

Promotion of foreign investment and protection of human rights are two issues which have led to contradicting approaches among countries. Peterson L. E. argues that FDI is founded on a disregard for human rights law obligations; while some host countries fail to establish or implement these laws, others have advocated for the respect of rights of investors in host countries.⁸ It has been also stated that host countries do sometimes fear strongly opposing harmful activities by MNCs due to the fear of losing the investment and compensation payouts by MNCs.⁹ In many instances, countries fear to invoke the issue of human rights violation because they can sometimes be condemned for payment of damages based on the breach of agreement between them and investors under the contractual obligations. This fear makes countries unable to enforce their commitments to protect their citizens, even when they are victims of adverse acts of foreign investors.¹⁰

This situation has been aggravated by condemnations of some countries which have had the courage to sue MNCs for the breach of domestic and international laws. Two decisions of the International Center for Settlement of Investment Dispute (ICSID) set below illustrate this trend.

⁷ E. Durajaye, "the Viability of the Maastricht Principles on Extraterritorial Obligations of States on Socioeconomic Rights in Advancing Socioeconomic Rights in Developing Countries"(July 20014) Vol. 5 no 15, p67. *Mediterranean Journal of Social Sciences*.

⁸ L. E. Peterson, and R. Gray Kevin, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, 2003, paper prepared by the International Institute for Sustainable Development (IISD) for the Swiss Department of Foreign Affairs, at 8 f. available at https://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf

⁹ L. Davarnejad, *Strengthening the Social Dimension of International Investment Agreements by Integrating Codes of Conduct for Multinational Enterprises, session 2.2.: The policy Framework for Investment: the social and Environmental Dimensions*, p.7. available at <http://www.oecd.org/investment/globalforum/40352144.pdf>

¹⁰ UNCTAD, World Investment Report 2003, at 112 using environment as an example, noting that "if regulatory measures give rise to compensation, [...] a duty to compensate might inhibit a host country from enforcing its laws or from complying with international environmental agreements."

In an arbitration between *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID ordered Mexico to pay \$ 5.5 million in compensation to the Spanish corporation which had operated a landfill in Mexico prior to the denial, by a Mexican federal agency, of the renewal of the application for the landfill's operating permit.¹¹ The tribunal held that the non-renewal, which was predicated on environmental and health related violations of the permit conditions and on community opposition to the landfill, violated two of the investment protection provisions in the Bilateral Investment Treaties.¹² This was again confirmed by the ICSID decision in *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica* by holding that: "(...) measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains".¹³ These two decisions of ICSID show that it is very hard for host countries to take measures which counterbalance the role of foreign investors when they are involved in activities which infringe rights of individual.

This thesis draws together the concerns surrounding FDI and human rights within the confines of three areas, namely, the right to a clean environment, right to standard labour conditions, and right to development. It covers the novel approach by applying the analysis to the context of developing countries with specific reference to Rwanda. More concretely, it analyses the extent to which the Rwandan investment system in the frame of its legal instruments, policies, as well as institutional frameworks, take into account the respect of environmental rights, labour rights and the right to development.

¹¹www.icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC602_En&caseId=C186.

¹² L. Davarnejad, *Op. cit*, p.7.

¹³ ICSID, *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID case No. ARB/96/1, 15 ICSID (2000), *Review-Foreign Investment Law Journal*, 72, p.192 Quoted by L. Davarnejad, *Op cit*, p.7.

1.2 Problem Statement

The interconnection between human rights and activities of MNCs has always been questioned by various thinkers.¹⁴ Once a country signs an international human rights instrument, it is obliged to ensure that, firstly, the legal instrument is domesticated into its domestic laws in order to maintain all its obligations. Secondly, it should check if MNCs working in the country respect also those legal instruments. Obliging MNCs to abide by human rights standards in the course of their activities throughout their period of operation in host countries or putting into place tough laws which regulate the inflow of MNCs in a country are two burdens which lie on the shoulders of host countries.¹⁵ The problematic this theses seeks to address is whether host countries are allowed to modify their laws and policies in case they are found to be in breach of international laws and obligations or if they are obliged to refrain themselves from interfering in matters of investors even when they violate human rights in order to keep good relations with them.

In the past two decades, in order to properly fix challenges its economy was facing, The Government of Rwanda was engaged into reforms in the business sector. The main purpose was to put into place a regulatory framework which favours investors. In doing so, it has changed some laws in order to attract more investors. In the past six years reports of the World Bank on Doing business, Rwanda was listed among the best in Africa.¹⁶ In regard to this whole process, the question is to know if the Rwandan policymaker was not engaged into a process of weakening regulations and policies in order to gain a competitive edge. This problem seems to be peculiar concern in developing countries, because they sometimes ignore standards contained in international legal instruments to which they are signatory parties, in order to effectively compete in investment attraction.¹⁷

¹⁴ R. Mares (ed.), *The UN Guiding Principles on Business and Human Rights – Foundations and Implementation*, Martinus Nijhoff Publishers (Leiden, Boston 2012) pp1-9.

¹⁵ M. Sornarajah, *Op. cit.*, p.178.

¹⁶ World Bank, World Bank group Flagshipreport, Doing business 2016, Measuring regulatory quality and efficiency, <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB16-Chapters/DB16-Mini-Book.pdf>

¹⁷ R. Mares, *Op. cit.*, p. 4.

Developing countries like Rwanda dealing with MNCs, often perceive that the lessening of laws and policies are better way for them to earn development. However, over the past ten years, a contrary argument has risen stating that the fact of lessening regulations and policies in order to attract investor leads to a “race to the bottom”.¹⁸ This race to the bottom is a situation whereby countries lower their labour standards, environmental standards or provide fiscal and non fiscal incentives in order to attract foreign capital with the purpose of developing their economies.¹⁹ Countries do justify this race to the bottom on two predictions: firstly, MNCs choose to invest in countries with less restrictive standards. Secondly, foreign countries competitively undercut each other standards in order to attract FDI.²⁰

This situation, sometimes leads governments in developing countries to a dilemma: that is how to encourage and maintain the presence of FDI while ensuring the respect of the domestic laws? This The problem that this thesis seeks to address, which is also part of its originality, is how does Rwanda balance between attracting investors and the protection of human rights. The study will undertake a detailed evaluation of the existing laws and policies on foreign direct investment attraction. It will also assess their effectiveness and the way they are respected by foreign investors with specific focus on Rwanda.

1.3 Research Questions

This work aims at assessing if MNCs respect environmental rights, labour rights and principles of right to development in Rwanda. This question has however, other subsidiaries which follow:

¹⁸ N. Meisel, Nicolas (2004). *Governance Culture and Development: A Different Perspective on Corporate Governance*. Organization for Economic Co-operation and Development, p. 41

¹⁹ W. W., Olney, *A Race to the Bottom? Employment Protection and Foreign Direct Investment*,

Department of Economics, Williams College, Williamstown, 2013, p.1. Available at <http://web.williams.edu/Economics/wp/OlneyEmploymentProtectionAndFDI.pdf>, accessed on 23rd March 2016.

²⁰ *Ibidem*.

Firstly, do the Rwandan legal and institutional frameworks require foreign investors to respect core labour standard rights embodied in various human rights obligations, domestic laws and international labour conventions?

Secondly, do institutions in charge of the environment protection make a regular monitoring on how FDIs respect the right to a clean and health environment?

Lastly, are there any legal or institutional mechanisms through which Rwanda can ensure that the right to development is being achieved?

1.4 Hypotheses

This work is based on several assumptions.

Firstly, MNCs do not respect labour and environmental rights as well as the right to development of individuals in Rwanda.

Secondly, though Rwanda is party to all international labour conventions embodying labour standards, its implementation of the provisions thereof is not effective.

Thirdly, the Rwanda Development Board (RDB) and the Rwanda Environment Management Authority (REMA) do not collaborate to ensure that MNCs comply with the law on environmental management.

Lastly, the Rwandan legal and institutional frameworks on investment do not facilitate corporate social responsibility, transfer of technology, and poverty alleviation.

1.5 Justification

This research was motivated by the need to contribute to the discourse on FDI in Rwanda. It especially interrogates the way the Rwandan investment legal, as well as institutional frameworks deal with individuals' labour rights, community environmental rights and the general right to development.

The study is intended to understand and assess activities of various foreign companies operating in Rwanda. The purpose of this assessment is to see if the current Rwandan policy on foreign investment can bring the country to sustainable development and if the aforementioned rights are well protected. This will help policymakers set up guidelines or propose the change of laws in a way which addresses the development goals the country has set.

The study comes at an appropriate time. Rwanda is now working towards economic sustainable development. Thus, the work will make a useful contribution in demonstrating how the redefinition of investment policy in Rwanda would contribute to the reorientation of foreign investors in a way which helps achieve the goal of development.

In concluding this work, we will make suggestions which will allow the Rwandan policymakers in investment matters to fill the loopholes which characterize the Rwandan legal and institutional investment frameworks. This work will suggest measures aimed at a better protection of rights of individuals by putting into place mechanisms for a development oriented investment, for protecting human rights and the environment, and with a clear definition of transfer of technology.

Finally, the study will, hopefully, stimulate other researchers to work in the way that addresses the gap relating to FDI and human rights protection.

1.6 Objectives

This study pursues three main objectives. Firstly, to examine and analyse FDI impacts on human rights, with specific reference to labour rights, the right to a clean and healthy environment and the right to development. In this regard, the study focuses on laws and policies guiding human rights protection and promotion in the frame of foreign investment. Hence, it analyses Rwanda legal and institutional frameworks in place that serve the aim of attracting more investors for the purpose of achieving sustainable development.

Secondly, to tackle the Rwandan law of investment by considering its impact on the environmental rights, the transfer of technology, corporate social responsibility and the respect of labour rights. Lastly, the study aims at exploring, advocating and proposing reforms of laws and

policies that that will help in strengthening the protection of individuals from adverse acts of investors.

1.7 Research Methodology

This research relied on both primary and secondary sources of information. For that purpose, being an inquiry into legal and institutional frameworks of Rwanda on FDI, it relied on writings from various authors on related subjects. The desk review which was used comprises the review of international legal instruments, statutes, government reports, journals, periodicals and books. The virtual library was also used to collect data from various websites containing useful information. Court decisions though very few, have been also used in order to support arguments from various scholars.

Due to the limited amount of data available on Rwanda since 1994, various visits and discussions have been held with various persons and officials from various institutions involved in activities related to FDI, labour rights, environmental rights and the right to development. In this study, we have conducted interviews with key informants. Persons chosen are those whose daily business is to work with investors in Rwanda. Their choice was mainly based on the position they occupy in their respective institutions. The gaps in the Rwandan literature on the monitoring of the environment impact assessment, leads us to interview the in charge of Environment Impact assessment at the Rwandan Environment Management Authority and those in charge of One Stop Centre at the Rwanda Development Board in order to have a clear information on how the issue of environment in investment is dealt with. In the same vein, we have also interviewed the in charge of labour at the Ministry of Public Service and Labour, various labour inspectors and Legal officers from trade unions with the purpose of hearing from them the extent to which labour standards are observed by various investors.

Moreover, we have interviewed authorities from the Ministry of Trade and Industry, the Staff from the Ministry of Forestry and Natural Resources, the Staff of the Rwanda Revenue Authority

(RRA), Some members of the Rwanda Federation of Private Sector, the in charge of Rwanda Free Trade Zone Authority in order to get clear information on how the economy of Rwanda gains from FDI. The interview was focused on the role played by SEZAR in implementing the Rwanda Free Trade Zone, how RRA deals with the issue of tax incentives and what it gets in return, the role played by the Ministry of Trade and Industry in putting into place policies aiming at compelling investors to play an active role in development. Different questionnaires we have used are found in the appendix of this thesis.

Lastly, the researcher also visited some foreign investors and interviewed them. The purpose of the visit was to witness the extent to which they comply with the commitments they made at the time of their establishment. During the visit some of them were also interviewed. MNCs were identified based on the time they have been operating in Rwanda, their size and their domain of activities. For that purpose, most of MNCs visited are those working in the mining sector. The choice was motivated by the fact they all have direct implications on labour rights, environmental rights and the right to development.

1.8 Understanding FDI in the context of human rights

This thesis is built on these two concepts: foreign direct investment and human rights. Since these are concepts which may be subject to various interpretations according to the domain from which they are called to be used, it is of great importance to make clear what they mean in the context of this work. In addition, other concepts that are discussed include: right to labour and labour standards and right to a clean and safe environment and environment protection and the right to development.

1.8.1 Theory linking foreign direct investment and human rights

There is a need to make a joint analysis on the investment attraction and the protection of human rights. Activities of companies have great influence on our lives because we work for them in conditions which might sometimes be dangerous, we purchase their products which also might

be sometimes poisoned, we travel in their ferries and trains which are sometimes unsafe, we breathe the air into which they might have emitted their fumes.²¹

Generally, there is a governance gap in the relationship between efforts of countries in attracting investors and the way human rights of citizens of the host countries are respected. To narrow this gap there is a need for having effective regulations and policies as well as institutional efforts which make countries more responsible. These efforts can be oriented in three angles: the respect of human rights by the host country, the protection of human rights by the host country and the provision of remedies in case human rights are violated.²² Under the first effort which is the respect obligation, countries are obligated to abstain themselves from infringing human rights either by their acts or omissions. The second effort which is the obligation to protect requires States to prevent human rights abuses by any other person. Lastly, States are obliged to put into place effective remedies which can help victims of acts of foreign investors to be effectively restored into their rights.²³

The theory guiding this work is then that proposed by John Ruggie which is: the State responsibility to protect, respect and to remedy. For that, States must protect against human rights abuse within their territory which may be made by business enterprises. It also obliges States to prevent themselves from cooperating with business enterprises in human abuses and when human rights are violated, States must take appropriate measures to restore citizens in their rights. Concretely, States are obliged to take appropriate steps to prevent, investigate, punish and redress such abuses through effective laws, policies and other institutional mechanisms.²⁴

²¹ C.M.V Clarkson and H.M., Keating, *Criminal Law*, 4th edition, Sweet Maxwell, London, 2003, p.228.

²² J. Ruggie, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy*, Human Right Council, Geneva, April 2008, p.13.

²³ J. Blank, *Regulating Transnational Corporations: the Role of the Home State*, Master's Thesis, Uppsala University, 2013, p.24.

²⁴ *Ibidem*.

Normally, all States have duties and obligations to protect human rights of their citizens that are contained in various legal instruments, which may be administrated by some public agents or even by private sector actors. These obligations require that countries regulate the activity of private companies especially those involved in business to allow their citizens to enjoy their rights.²⁵ The reticence of countries in regulating activities of investors is of two folds: the fear of interfering in activities of investors even when they are violating human rights and the lack of a clear regulation which limits advice roles of activities of MNCs. This is the case for example, whenever there is a case of violation of rights of individuals, States can sometimes be reticent because they fear that they will be considered as interfering and undermining the aim of foreign investment.²⁶

The argument confirming that countries should be responsible for human rights violations which may be made by corporations has been confirmed by various international legal instruments, and various legal decisions in the European and American regional human rights courts.²⁷ Nick Mabey and Richard McNally have emphasized the adverse role of MNCs on the environment in the host countries. According to them, companies normally move their operations to less developed countries in order to take advantage of less stringent environmental regulations. In addition, all countries may purposely undervalue their environmental laws in order to attract new investment. Acts of MNCs can have adverse impacts on the environment in the host country where there is a poor system of protecting individuals against their activities. This requires greater clarity in public and private procedures surrounding investment screening and acceptance, and increased access to justice, both locally and worldwide.²⁸

²⁵ L. E. Peterson & K. R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, A Research paper prepared by the International Institute for Sustainable Development (IISD) for the Swiss Department of Foreign Affairs April 2003, p. 22.

²⁶ M. Sornarajah, *Op. cit.*, p.86.

²⁷ L. Ostra *et alii*, *Reports of Judgments and Decisions* 1998-I, No. 64 (Feb 19 1998), at para. 58.

²⁸N. Mabey & R. McNally, *Op. cit.*, August 1999, pp. 4-5.

In recent decades, it has been noted that corporations' activities have a great impact on poor communities in developing countries. This impact can sometimes lead to human rights abuses and other atrocities. This has been witnessed in cases from different parts of the world where MNCs have impacted human rights.²⁹ The relationship between FDI and human rights is complex. This is why this relationship is not easy to determine because it may be situated into a historical background composed of various stages of considerations. According to neo-imperialist tradition, FDI has been linked with negative developments that weakened human rights.³⁰ However, the new trend and new fundamentalist scholars, argue that FDI is a locomotive of economic growth and champion for human rights.³¹ These two considerations have brought other scholars, like Deborah Spar, to conclude that FDI is composed of three sectors, namely primary, secondary and tertiary. Spar argues that there has been a historical shift where the FDI had a positive impact and this is its primary stage which is motivated by searching for raw materials.³²

As for the secondary sector, MNCs have a wider range of possible investment sites from which to choose in this stage. Under this sector, MNCs start searching for low cost labour and they reach their bottom line where they do not care about the salary of workers, their safety, and training in order to increase their productivity. During this phase, the FDI is no longer synonymous with improved human rights and the interest of the population of the host country. The third generation, which Spar labels a spotlight phenomenon, is a phenomenon which helps

²⁹ Hot Chocolate: *How Cocoa fuelled the conflict in Cote d'Ivoire*, Global Witness, June 2007 quoted by *Jernej L et nar C erni c*, Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational enterprises, *Internationales Recht*, 2008, p. 6. Examples of violations of rights of individuals are numerous. There have been a series of disasters in which large number of persons have been killed. Among others we have the case of 1998 with Pipe Alpha where 167 people were killed after an explosion due to unsafe practices and grave shortcomings in which the management was responsible. See also the case of King's Cross fire in which 31 persons were killed due to failure of the various groups and individuals within the corporate structure to identify their areas of responsibilities. See for more Details CLARKSON C.M.V. and Keating, H.M., *Op. cit.*, pp.228-229.

³⁰ The foreign direct investment has been associated with the colonialism this is why it was negatively perceived. See for this various cases of nationalization of foreign companies after the independence of African countries.

³¹B. LETNES, *FDI and Human Rights: an Ambiguous Relationship*, p.1. available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.606.2940&rep=rep1&type=pdf>, Accessed on 23rd May 2014.

³² *Idem*, pp.2-3.

NGOs to direct media attention to human rights violations, and makes it more difficult for multinationals to deny their responsibilities.³³

In FDI, sustainable development bases its foundation in environmental protection, job creation, economic and social progress, and transfer of technology.³⁴ The exact delimitation of these factors and their applicability create many discussions. This thesis analyses the environmental rights, the respect of labour rights and the right to sustainable development.

I.8.2 Concept of foreign direct investment

Historically, FDI began in the days of Pharaoh, either through the State investment or by private companies from some countries of the Middle East like Egypt, Phoenicia and Greece, among others. Israel is also one of the countries that made huge investments during the time of King Solomon when he was building the temple.³⁵

In Africa, specifically South Africa, FDI first appeared on the continent in the form of the Dutch East India Company in 1652. On a bigger scale, the slave trade symbolized the push for greater investment in foreign territories. This kind of investment was made through a triangular trade system involving European nations that sold guns in Africa in exchange for slaves, who were taken to sugar plantations in the West Indies and sugar was exported to Europe on the same ships that brought slaves from Africa.³⁶

In the period between 1960 and 1980, the perception of multinationals in African countries was negative. This negative image by African countries toward metropolitans was mainly due to the

³³ *Ibid.*

³⁴ W. G. Markus, A Newcombe and M.C. Cordonier Segger, *An Introduction to Sustainable Development in World Investment Law*, 3–11. Kluwer Law International BV, The Netherlands, 2001, p.1.

³⁵ R. Doak Bishop *et al.*, *Foreign Investment Disputes: Cases, Materials and Commentary*, Kluwer Law International, the Hague, 2005, p.2.

³⁶ For further information on this kind of investment, see T Hugh, *The slave trade: the History of the Atlantic slave trade 1440-187*, (1998) available at www.encyclopedia.com, accessed 20 April 2012.

fact that it was considered as a form of neo-colonialism.³⁷ This sentiment was, however, replaced by the consideration that the multinational firms could bring to developing countries a large bundle of benefits. In the 1990s, the investment climate improved considerably following the recognition of profits from FDI. This was made through Multilateral Agreements which were motivated by the change in regulation and the enhancement of competition regulations that drove FDI.³⁸

In the period starting from 1998, some laws and policies have changed by putting a particular accent on liberalization and protection and promotion of foreign investment. This trend continues to date in both industrialized and developing countries in order to protect and attract foreign investment.³⁹ Rwanda also took considerable measures in promotion and protection of investors during that period. More concretely, it is during that year that the Rwanda Investment and Export Promotion Agency was created.⁴⁰

Coming back to its definition, the concept FDI is sometimes associated with prosperous people who think in terms of capital and income, while the more general notion of investment in international idiom, it is about wealth, power and economic development.⁴¹ In this research the researcher has tried to consider some of the definitions which seem to be more linked to the concept under analysis.

Investment would mean transfer of funds or materials from one country to another either directly or indirectly with the aim of participating in the benefits realized by that enterprise which invests in another country.⁴² FDI implies the transfer of both tangible and intangible assets from one

³⁷ *The MIA and Developing Countries*, available at www.ije.com, visited on 27th April 2012.

³⁸ E.M. Graham & P.R. Krugman, *Foreign Direct Investment in the United States*, 2nd Edition, Washington DC, Institute for International Economics, 1991, p.32.

³⁹ UNCTAD, "World Investment Report : Cross-border Mergers and Acquisitions and Development" (2000)

⁴⁰ RDB, 2012 year end achievements, Kigali, 2013, p.2 available at http://www.rdb.rw/fileadmin/user_upload/Documents/A-Reports/RDB_2012_Achievement_report.pdf, visited on 6th June 2016.

⁴¹ M. Hunter & A. Barbuk, *Reflections on the Definition of Investment*, p.383. Available at http://www.arbitration-icca.org/media/0/12232934696310/martin_and_alexei.pdf, accessed on 15th March 2016.

⁴² A. Gondwe, *A critical Analysis of Foreign Direct Investment as a Vehicle for Technology Transfer to Developing Countries: A case Study of Zambia*, Dissertation, University of Zambia, 2011, p.4.

country into another with the objective of generating benefits, while using partial or total control over the newly created company.⁴³

Laws and case law have also proposed some definitions. Article 2 (16°) of the Rwandan investment code defines investment as the use of tangible or intangible assets for profit-making purposes with the exception of all retail and wholesale trade. The United States model Bilateral Investment Treaties in its article 1 provides that investment means:

[...] every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk” or an enterprise, shares, bonds, futures, turnkey, intellectual property rights, licenses, other tangible or intangible, etc.⁴⁴

Although this definition seems to be complete, it is however, confusing because it repeats severally the concepts of investment and investors instead of defining them. Courts also have defined this concept in this way: In the case *BIWATER v United Republic of Tanzania* the tribunal defines the investment as the “every kind of asset involved in making profits”.⁴⁵ In the dispute between *Fedax NV v Venezuela*, the term “investment” was defined as:

[...] Contribution of money or other assets of economic value for an indefinite period or, all types of asset being tangible or intangible. This include: shares, stocks or any other form of participation in companies; returns reinvested, claims to money or any other rights to legitimate performance having financial value related to an investment; moveable and immoveable property, as well as any other rights *in rem* such as mortgages, liens, pledges and any other similar rights,⁴⁶ [...]; concessions contracts including concessions to search for, cultivate, extract.⁴⁷

⁴³ M. Sornarajah, *Op. Cit.*, p.7.

⁴⁴ US model Bilateral Investment Treaty (2004) at 8-9 as it is available on www.state.gov/documents/organisation/38710.pdf, [accessed 20 April 2013].

⁴⁵ ICSID case no ARB/05/22 paragraph 307.

⁴⁶ The same definition has been retained in the agreement between the Republic of Turkey and the Arab Republic of Egypt concerning the reciprocal promotion and protection of investment in its article 2. Available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1117>, visited on 7th July 2015.

⁴⁷ *FEDAX NV v Venezuela*, ICSID case no ARB/96/3 of 11 July 1997 para 23 available on www.investmentclaims.com, [accessed 20 April 2013].

Investment would mean undoubtedly the transfer of physical property such as equipment, agriculture plantations or processing products from farming and investing shares or other equities which have been brought from one country to another with the intention of getting profits.

FDI means a fact for a resident company established in another country for a lasting period with the aim of obtaining lasting interests. It can also mean any company whose voting power exceeding 10% is owned by foreigners.⁴⁸ The Financial Times on the other hand has defined FDI as an investment made from one country into another which includes the establishment of operations or the acquisition of tangible assets.⁴⁹ The Rwandan investment code has also defined the foreign investor as any natural persons who is not a Rwandan or a citizen of the East African Community or the Common Market for Eastern and Southern Africa or a business company registered in Rwanda whose foreign capital from countries which are not member States of the aforementioned communities is at least 51% of the invested capital.⁵⁰ For the purpose of this work, are foreign investors then any foreign businesses registered or not in Rwanda whose foreign capital invested in Rwanda exceeds 50% For the purpose of this research, are foreign investors any foreign business whether registered in Rwanda or not which undertakes their activities in Rwanda. This includes all companies from countries which belong to the same community with Rwanda like the EAC, COMESA and CEPGL.

I.8.3 Labour rights and labour standards

The issue of labour and FDI is envisaged in two different angles, that is FDI as a creator of jobs and FDI as a violator of rights of workers. When considering the aspect of job creation, the emphasis is put on the quality and quantity of jobs that FDI creates. The quality then leads to the respect of core labour standards by FDI. If these standards are not respected by foreign investors they lead to human rights violations.

⁴⁸ OECD, *OECD Benchmark Definition of foreign Direct Investment*, 4th Edition, 2008, p42, available at <https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf>, accessed on 5th April 2016.

⁴⁹ <http://lexicon.ft.com/Term?term=foreign-direct->, accessible on 5th April 2016.

⁵⁰ Article 2(24) of the Rwandan Investment Code.

In labour creation, there are a number of organisations which describe multinationals as sweatshops⁵¹ which mean that they exploit workers by paying low wages and subjecting them to violations of certain universal social norms or standards governing their employment.⁵² Globalization critics often point at sweatshops as a major example of the race to the bottom phenomenon. They say that when world markets are opened to multinationals without transnational labour guidelines and regulations, big corporations usually do invest in countries with the most related labour standards. Developing countries compete in order to attract these companies by lowering labour standards. For instance by accepting the minimum wage, or work places where safety requirements are not met, slave labour, workers compelled to work unpaid by totalitarian government eager to entertain western businesses.⁵³

The issue of human rights in the work place is a concern in developing countries. Labour rights are rights which are either exercised individually or collectively by workers basing on the mere fact of being a “worker”.⁵⁴ These rights include the right to freely choose the job, right to fair working conditions, right to belong to and be represented by a trade union, right to strike, etc.⁵⁵ Given the nature of these rights, some of them like the right to form and join a trade union and the right to privacy are considered as civil and political rights whereas the right to good working conditions or the right to strike are categorized as social and economic rights.⁵⁶

In 1998 the International Labour Organization (ILO) adopted a Declaration on Fundamental Principles and Rights at Work which binds all ILO Member States. The declaration contains four core rights: freedom of association and the right to collective bargaining, the elimination of

⁵¹ A *sweatshop* is a factory or workshop, especially in the clothing industry, where manual workers are employed at very low wages for long hours and under poor conditions.

⁵² B. Oien, *Revisiting “the Positive Case” of Economic Globalization*, Master Thesis in Political Science, Norwegian University of Technology, 2011, p.10. Available at <http://www.diva-portal.se/smash/get/diva2:443011/FULLTEXT01.pdf>, accessed on...

⁵³ R. Balko, *Sweatshops and Globalization*, available at www.aworldconnected.org., accessed on 1st July 2013.

⁵⁴ V. Montouvala, *Are Labour Rights Human Rights?*, UCL Labour Rights Institute, 2012, p.2. available at http://www.ucl.ac.uk/laws/lri/papers/VMantouvalou_Are_labour_rights_human_rights.pdf, accessed on 5th April 2016.

⁵⁵ *Ibidem*.

⁵⁶ *Idem*, p. 4.

forced or compulsory labour, the abolition of child labour and the elimination of discrimination in employment.⁵⁷

The Rwandan law has regulated these rights in various laws. On the one hand, the Constitution of Rwanda provides for labour rights in different articles. It proclaims the right to free choice of employment. The same article adds that persons with the same competence and ability have a right to equal pay for equal work without discrimination.⁵⁸ Furthermore, articles 38 and 39 proclaim the right to be a member of a trade union and the right to strike. On the other hand, the labour code besides the incorporation of these rights provided by the Constitution it adds other rights like the prohibition of child labour,⁵⁹ prohibition of forced labour.⁶⁰ For the purpose of this work, all labour rights embodied in various Rwandan laws shall be considered.

I.8.4 Rights to a clean and safe environment and environment protection

The issue of environment has been debated in two angles. Environmentalists have considered the aspect of protection of environment whereas human rights lawyers have considered it as a human right issue. This subsection tries to link these two approaches while emphasising on the human rights approach.

Environmentalists have defined the term “environment” as all extrinsic, physical and biotic factors effecting the life and behavior of all living things. It then includes land, water, air, human beings, plants and animals. It owes its genesis to a French word “environ” meaning “encircle”.⁶¹ In Rwanda, article 4 of the law on environment defines the concept “environment” using the same approach by considering it as a diversity of things made up of natural and artificial

⁵⁷Declaration available at

http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_176149.pdf

⁵⁸ Article 37 of the Constitution

⁵⁹ Article 4 of the Labour code.

⁶⁰ Article 8 of the Labour Code

⁶¹ X, http://shodhganga.inflibnet.ac.in/bitstream/10603/6868/6/07_chapter%202.pdf, accessed on 4th April 2016

environment. It includes chemical substances, biodiversity as well as socio-economic activities, cultural, aesthetic, and scientific factors likely to have direct or indirect, immediate or long term effects on the development of an area, biodiversity and on human activities.⁶²

The relationship between environment and rights has interested human rights lawyers because it has been proven that investors have most of time decided to invest in developing countries not because they want to invest in those countries, but because of the lowering of their level of standards in protecting the environment.⁶³ Furthermore, some countries may deliberately underrate their environment in order to attract new investment.⁶⁴ It has also been realised that economic growth produced by FDI is often fuelled at the expense of the natural and social environment, and the impact of FDI on host communities is often mixed in environmentally sensitive sectors.⁶⁵

Human rights lawyers have, on the other hand, defined environment by considering specific issues of human rights like the right to life, health, water, and property. In fact, under the Constitution of 2003 as revised, the right to a clean environment has been incorporated into the bill of rights. Article 22 of the Constitution proclaims that everyone has the right to live in a clean and healthy environment. Article 53 of the same Constitution obliges every person to protect, safeguard and promote the environment.⁶⁶ For the purpose of this thesis, the right to safe and healthy environment shall be analysed. The thesis will focus on the way environmental

⁶² Organic law n°4/2005 of 08/04/2005 Determining the Modalities of Protection, Conservation and Promotion of Environment in Rwanda, in *OGRR*, n°9 of 1st May, 2005.

⁶³ UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries*, p.2, M. COLE, A. Elliott. JR. Robert, *Growth, Foreign Direct Investment and Environment: Evidence from Chinese cities*, Frankfurt a.M. 2009, n°41, p. 3.

⁶⁴ N. Mabey & R. McNally, *Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development*, A WWF-UK Report, 1999, p. 3. The Author continued in the same book that The past decade has also seen all trends of environmental degradation accelerate – for example, greenhouse gas emissions, deforestation, loss of biodiversity. Such patterns of environmental destruction have been driven by increased economic activity, of which FDI has become an increasingly significant contributor. Flows of natural resource based commodities and investment are predicted to rise faster than economic output over the next twenty years. It is therefore critical to understand the environmental effects of private investment and identify appropriate responses.

⁶⁵ *Ibidem*.

⁶⁶ Article 53 (1) of the Constitution of the Republic of Rwanda of 2003 Revised in 2015.

rights either those embodied in the Constitution and other Rwandan laws or in international conventions, are respected in order to avoid activities which may infringe on the right of individuals to a clean and safe environment.

I.8.5 Rights to development and sustainable development

Development is a concept which can be used in different ways, depending on domains of persons who are using it. Human right lawyers perceive it as a right which can be claimed by its recipients, whereas economists perceive it as a policy which can be used by a country to achieve its economic goals.⁶⁷ This work will analyse the right to development. The concept of right to development can be confused with the sustainable development which is used by economists.

Economists define the role of FDI in sustainable development in these words:

FDI plays a significant role in the development process of host economies because it acts as a vehicle for obtaining foreign technology, knowledge, managerial skills and capital. Governments therefore are expected to determine what roles they want FDI to play in the development process of their economies and then design their FDI policies accordingly...⁶⁸

To date, the most frequently cited definition of sustainable development is the one which provides that sustainable development is the “development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs.”⁶⁹

The Jonesburg and the Rio conferences⁷⁰ have also adopted some other definitions of sustainable development. The Rio conference considered sustainable development primarily in terms of

⁶⁷ WTO, *Trade and Environment*, p. 3

Available at https://www.wto.org/english/thewto_e/20y_e/wto_environment_e.pdf, visited on 8th July 2015.

⁶⁸ K. Abeasi, *Host Country Policies on FDI with Particular Reference to Developing Countries A brief Commentary*, United Nations, New York and Geneva, 2003, p. 41.

⁶⁹ W. Markus Gehring & M.Cl. Cordonier Segger (eds), *Sustainable Development in World Trade Law*, The Hague: Kluwer Law International, 2005, p. 5. see also J. Dexhage and D. Murphy, *Sustainable Development. From Brundtland to Rio 2012*, International Institute for Sustainable Development, p. 8. Available at http://www.un.org/wcm/webdav/site/climatechange/shared/gsp/docs/GSP1-6_Background%20on%20Sustainable%20Devt.pdf. Accessed on 8th July 2015.

⁷⁰ In 2002 The World Summit on Sustainable Development took place in Johannesburg, South Africa, from 26 August to 4 September 2002. It was convened to discuss sustainable development by the United Nations. As the summit took place 10 years after the first Earth Summit in Rio de Janeiro it was therefore also informally nicknamed "Rio+10".

binary relationship between economic development and environmental protection.⁷¹ The Johannesburg conference emphasised that a general understanding that the development mentioned above must take into account these intersecting factors economic development and social (human rights) development and environmental protection.⁷² From the above mentioned definitions, sustainable development can be perceived as any element in lifestyle of people which leads to a human welfare.

Normally, countries think that attracting increased volumes of FDI is sufficient by itself but it must be tempered with acknowledgment of the usefulness of FDI. Efficiency is much more important than volume. Instead of attracting increased volumes of FDI, countries should think about a relatively low volume but high-quality FDI. Policies that enhance the efficacy and volume of FDI for the group of developing countries as a whole must be distinguished from policies that set one country against the other.⁷³

Even though, the objective of development is the key target of FDI, some countries have noticed that having a clear control over acceptability of new investment is of crucial importance for development policy making.⁷⁴ Sometimes, MNCs dodge the tax laws of host countries by engaging in transfer pricing. This is a practice which involves fixing an artificially high price for an item permitted to be imported at concessionary rates bought from the parent company.⁷⁵ Their intention here is to maximize the benefit to the transferor, but their indirect effect is to hurt the host economy.⁷⁶ How much a developing country can benefit from the technology transfer from FDI depends on how well educated and trained its workforce is, as well as, how much it is

⁷¹F. Duncan, *International Law and Policy of Sustainable Development*, Juris Publishing, Manchester University Press, 2005, p.22.

⁷²The 2002 World Summit on Sustainable Development.

⁷³V. Agiri Balasubramanyam, *Host Country FDI Policies and Development Objectives*, Proceedings of the Expert Meeting held in Geneva from 6 to 8 November 2002, p. 81.

⁷⁴“Stocktaking of India Bilateral Agreements for the Promotion and Protection of Investments,” WT/WGTI/W/71, April 13, 1999, at para 6 quoted by Luke Eric Peterson, *Op. cit.*, 32.

⁷⁵J.M., Taylor, *The United States’ Prohibition of FDI in Cuba- Enough Already?*, winter/Spring 2002, p. 133. Available at http://www.kslaw.com/library/pdf/foreign_direct_invest.pdf, visited on 8th July 2015.

⁷⁶M. Sornarajah, *Op. cit.*, p. 60.

willing to invest in research and development and how much it protects persons involved in the investment process.⁷⁷

Channels through which sustainable development go are among others, technology transfer, corporate social responsibility, job creation, increase of taxes, promotion of importation, etc. The development which is intended here, should take into account all these parameters otherwise it will need to be redefined in order to make these goals achievable. The technology gap between rich and poor countries remains wide in general. FDI is regarded as an organic amalgamation of capital, technology and management. Therefore, being the major creator of new and advanced technologies, transnational corporations have the potential to play the role in narrowing the gap.⁷⁸ Although they are not the only source of technology, they are very important actors in providing technological skills and providing an entire package of knowledge, and their research and development activities are useful in the expansion of technology.⁷⁹ The transfer of technology through FDI activities can take two forms, direct or indirect. It can be made indirectly using three main channels that is linkage with local companies, training of local employees and direct competition.⁸⁰ The right to development in this work will consider the way technology is transferred, the role of MNCs in corporate social responsibility, and the way they contribute to the export promotion.

Even if the concept of sustainable development is not a legal concept *per se*, it has political, social, economic and even moral connotations.⁸¹ It may have certain normative consequences.⁸² The issue with some legislators is that they focus on ways to attract foreign investors, considered as a tool for guaranteeing sustainability of development and they ignore to put in place a

⁷⁷ S. Kamali, *Investment, and all Investment, a Survey on Technology Transfer, The World Bank Development Research Group Trade*, May, 2000, p. 1.

⁷⁸ *Ibidem*.

⁷⁹ UNCTAD, *Foreign Direct Investment, the Transfer and Diffusion of Technology, and Sustainable Development, 2010*, p. 1.

⁸⁰ M.M. Kadah, *FDI and International Technology Transfer to Egypt*, Working Paper 0317, Economic Research Forum, p. 1. Available at http://www.erf.org.eg/CMS/uploads/pdf/0317_final.pdf. visited on 8th July 2015.

⁸¹ These are for example, *jus cogens, opinio juris, estoppel*.

⁸² F. Duncan, *Op. Cit.*, p.35.

framework which will be used in order to make easier the achievement, of the right to development.⁸³

1.9 Literature Review

This section continues the unpacking of the literature which was already started in the immediately preceding section. This section will now delve into the literature on foreign direct investment and the protection of human rights in Rwanda. It will interrogate the available literature in the domain. The relationship between FDI and human rights has interested thinkers of the modern era. The literature surrounding the role of FDI in host countries has been approached differently, basing on domains from which scholars belong to. Economists consider FDI as a gear to boost economies of host countries, whereas human rights lawyers focus their sight on how FIDs respect human rights.⁸⁴

Economists like Adeolu B. Ayalnwale argue that attracting FDI lies at the core of the economic development strategy of many countries in the developing world. Many countries especially developing ones have often provided extraordinary incentives to MNCs which intend to invest in their countries. This policy is mostly guided by the belief that foreign investment produces externalities in the form of technology transfer and diffusion.⁸⁵ Caves observed also that:

The rationale for increased efforts to attract more FDI stems from the belief that Foreign Direct Investment has several positive effects. Among these are productivity gains, technology transfers, and the introduction of new processes, managerial skills and know-how in the domestic market, employee training, international production networks, and access to markets.⁸⁶

⁸³ L. Paterson, *Bilateral Investment Treaties and Development Policy making*, International Institute for Sustainable Development and Swiss Agency for Development and Cooperation, 2004, pp.2-3.

⁸⁴ A. H. Muawya, "Impacts of Foreign Direct Investment on Economic Growth in the Gulf Cooperation Council (GCC) Countries, In International review of business research papers, Vol. 5 No. 3 April 2000, p. 363. Available at <http://www.bizresearchpapers.com/27.Mua..pd>, visited on 8th July 2015.

⁸⁵ A. B. Ayanwale, *FDI and Economic Growth: Evidence from Nigeria*, AERC Research Paper 165, African Economic Research Consortium, Nairobi, April 2007, p. 3.

⁸⁶ R.E. Caves, *Multinational Enterprise and Economic Analysis*. 2nd ed. Cambridge: Cambridge University Press, 1996, p. 2.

Paul Romer confirms the FDI's role in diffusing technology as linked to economic growth: for the poorest developing nations, letting multinational firms profit from the international transmission of ideas is the quickest and most reliable way to reduce the idea gaps that keep them poor.⁸⁷ Although the consideration of economics is justified to some extent basing on the role FDI plays in the development of a country, legal scholars and human rights activists have developed another approach from which FDI are not only actors of economic growth but also human rights violators if their activities are not clearly regulated.

Supporters of the respect of human rights by MNCs have developed their arguments starting by challenging the development which may be brought by MNCs. The development which is considered in the framework of FDI should be widely defined. In other words, it is development that goes together with the needs of the present generation without compromising the ability of future generations.⁸⁸ Its foundation is the belief that environmental, economic and social progress are linked in such way that in the long run none can be pursued at the expense of the other and that they must be achieved together.⁸⁹

According to this scholarship, countries do not have power to bargain with MNCs and the consequence is the conclusion of treaties which are imbalanced. Luke Eric Peterson has formulated some views toward this issue. According to him, investment treaties have been considered as one-sided instruments.⁹⁰ MNCs are concerned with limiting the actions that may be taken by governments against foreign investors or foreign owned investments. The treaties contain a series of rights for inward capital protection against expropriation, guarantees of non-discrimination, and freedom to transfer funds out of a host state but they lack any counter-

⁸⁷ P. Romer "Idea Gaps and Object Gaps in Economic Development," (1993) Vol. 32, *Journal of Monetary Economics*, p. 548.

⁸⁸ J. Dexhage and D. Murph, *Op. Cit.*, p. 1.

⁸⁹ M. J. Milne, B. Amanda and G. Rob, *Wither Ecology? The Triple Bottom Line, the Global Reporting Initiative, and the Institutionalization of Corporate Sustainability Reporting* Available at www.acis.canterbury.ac.nz/documents/Markus_Milne_Research_Programmes/Wither_Ecology_TBL,_GRI_and_Corporate_Sustainability_Reporting.pdf, accessed on 24th June 2015.

⁹⁰ L. E. Peterson, *Investment Protection Treaties and Human Rights*, Amnesty International, UK The Human Rights, May 2006, p. 20

balancing investor responsibilities.⁹¹ These treaties do not have also sufficient remedies to victims of violations and also investment protection does not condition investors to fulfil some minimum responsibilities or provide some mechanisms to challenge wrong doings of investors.
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According to Deborah Spar, corporate success depends heavily on the relationship between host countries and multinationals.⁹³ In recent time, MNCs have been involved in searching for low environment regulations, low cost labour and the consequence has been that they have reached their bottom line where they do not care about the salary of workers, their safety, and training in order to increase their productivity. K .R. Gray has argued that environmental regulation plays a significant role in decisions on where to locate investment because MNCs choose to invest in countries where rules and regulations on environment and labour standards are not strong.⁹⁴

Jernej Letnar Čerňič has added that foreign investors have adverse consequences on rights of individuals in the host countries. Rights which are mostly violated are fundamental labour rights, rights to security and safety and rights to non-discrimination.⁹⁵ In this light, Human rights Watch has stated that the relationship between investment movement and some human rights, particularly labour rights, should be well considered by limiting the adverse impact that the activities of MNCs would have on human lives.⁹⁶

⁹¹ Amnesty International, *Human Rights, Trade and Investment Matters*, Report, May 2006, p.20, available at www.amnestyusa.org/sites/default/files/pdfs/hrtradeinvestmentmatters.pdf, visited on 12th July 2015.

⁹² L. E. Peterson, *Op. Cit.*, p. 20.

⁹³ *Idem*, pp.2-3.

⁹⁴ K .R. Gray, *Foreign Direct Investment and Environmental Impacts- Is the Debate Over?* 'RECIEL' Blackwell Publishers Ltd, Oxford, Malden, n°. 11 (3), p. 1.

⁹⁵ J. Letnar Čerňič, *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises*, University of Aberdeen, 2008, p.73.

⁹⁶ HUMAN RIGHTS WATCH, *On the Margins of Profit*, 2008; Human Rights Watch, *Curse of Gold*, 2005, p. 4.

Mabey and McNally have also added that generally, global free trade would encourage polluting industries and processes to move to countries with weak environmental policy. The economic growth produced by FDI is often fuelled at the expense of the natural and social environment, and the impact of FDI on host communities and countries is often mixed in environmentally sensitive sectors. Official draft of the OECD Multilateral Agreement on Investment (MAI) showed how international investment rules can conflict with both multilateral environmental agreements (MEAs) and national environmental laws.⁹⁷ Mabey and McNally have added that, some mandatory rules prohibiting malicious conduct against the protection of environment must be introduced to prevent the undermining of best firms by unscrupulous competitors. These international minimum mandatory rules must take into account environment processes, clearness and consultation. If these regulations are enacted the approach will change, instead of there being the race to the bottom, it will be a “race to the top” in environmental standards.⁹⁸

Even if these scholars did a good job in analysing the linkage between FDI and human rights, they did not add too much on the way Rwanda deals with the issue. The novelty of this work relies on the fact that it will analyse the issue of FDI and human rights with a particular attention to Rwanda. The focus shall be made on labour rights, environmental rights and the right to development in Rwanda.

The issue of labour and FDI has also been envisaged by scholars in two angles. Firstly, FDI has been envisaged as jobs creator and secondly, as violator of rights of workers. Authors like Tonelson have argued that in FDI, workers shoulder globalization’s burdens, while western companies win cheap labour. Western consumers win cheap sneakers and straw hats, and corporate CEOs win eight figure salaries. The sweatshops are a way for corporations to exploit the poverty and desperation of the developing countries, while allowing them to circumvent the living wages, organisation rights, and workplace safety regulations.⁹⁹

The same author avers that, “current globalization policies have plunged a great majority of workers into a great worldwide race to the bottom, into a no-win scramble for work and

⁹⁷ N. Mabey & R. McNally, *Op. Cit*, p.7.

⁹⁸ Ibid

⁹⁹ A. Tonelson, *The Race to the Bottom*, Boulder, Westview Press, 2000, p.15.

livelihoods with hundreds of millions of their already impoverished counterparts across the globe”.¹⁰⁰ Even if Rwanda is among African countries which have been ranked the best in doing business especially its way of attracting investors, the role these investors play in the respect of fundamental labour rights, has less attracted the attention of researchers. The originality of this work is mainly found on the fact that it is the first to assess the protection given to workers in Rwanda in the frame of FDI in Rwanda.

Environmental rights in developing countries have been discussed by various scholars. According to Mabey and Richard McNally, companies normally move their operations to less developed countries in order to take advantage of less stringent environmental regulations. They have added that all countries may purposely undervalue their environmental laws in order to attract new investment.¹⁰¹ Similarly, UNCTAD has also argued that investors have most of time decided to invest in developing countries not because they want to invest in those countries, but because of the lowering of their level of standards in protecting the environment.¹⁰²

Rwandan environment has interested some scholars. A. F. Haidula, R. Ellmies and F. Kayumba, in their research, have assessed the respect of environmental principles in mining areas. In their research, they have found that the mining industry in Rwanda has a considerable adverse impact on the environment. The result of their research has been that even if before starting their activities, miners conduct an environment impact assessment, they do not comply with the commitment they have made in that document.¹⁰³ The Nile Basin Initiative has also made a research on the impact of the fishing industry on environment in Rwanda. In their research, they have found that bad elementary fishing techniques threaten water fauna. Fishing by beating and using nets with very small meshes is harmful to the conservation of fish resources and other aquatic animals. Another fishing method which also harms to water is the use of explosives.¹⁰⁴

¹⁰⁰ *Ibidem*.

¹⁰¹ N. Mabey & R. McNally, *Op. cit.*, August 1999, pp. 4-5.

¹⁰² UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries*, p.2, M. COLE, A. Elliott, J.R. Robert, *Growth, Foreign Direct Investment and Environment: Evidence from Chinese cities*, Frankfurt a.M. 2009, n°41, p. 3.

¹⁰³ A. F. Haidula, R. Ellmies and F. Kayumba, *Rwanda Environment Assessment Report, Environmental Monitoring of Small Scale Mining Areas in Rwanda*, 2011, p. 6.

¹⁰⁴ Nile Basin initiative Trans-Boundary Environmental Action Project, *National Nile Basin Water Quality Monitoring Baseline Report for Rwanda*, Kigali, 2005, p. 17.

Even these researches are very pertinent as regard to the impact of human activities on the environment in Rwanda; they did not consider all parameters of the environment. The originality of this research relies the fact that it will draw its attention not only on the status of environment degradation for which investors are responsible, but also, the Rwandan regulatory and institutional frameworks will be analysed and assess their adequacy.

The right to development was proclaimed in the Declaration on the Right to Development, adopted by the United Nations General Assembly. Its article 1 says that:

[t]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized¹⁰⁵

This right is also recognized in Article 22 of the African Charter on Human and Peoples' Rights which says that “States shall have the duty, individually or collectively, to ensure the exercise of the right to development”.¹⁰⁶ The UN Declaration while emphasizing on the equality, indivisibility as well as interdependency of all human rights,¹⁰⁷ it obliges also countries to take measures which facilitate the full realization of the right to development.¹⁰⁸ This work will concentrate on the analysis of laws and regulations which help in the achievement of the right to development. It shall consider both approaches: economic which is envisaged as a sustainable development and the human right which is perceived as a right to development. Dickson Malunda¹⁰⁹ has written on Corporate Tax Incentives and Double Taxation Agreements in

¹⁰⁵ Article 1 of the Resolution 41/128 of 1986 available at <http://www.un.org/en/events/righttodevelopment/declaration.shtml>, accessed on 6th April 2016.

¹⁰⁶ African Charter on Human and Peoples Rightsrights Adopted in Nairobi June 27, 1981, available at <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf> . The UN Declaration adopted by the Resolution 61/295 on the Rightsrights of Indigenous Peoples,indigenous peoples in article 23, says that “The Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions”

¹⁰⁷ Article 6(2) of the Declaration.

¹⁰⁸ Article 4 of the Declaration.

¹⁰⁹ D. Malunda, Corporate Tax Incentives and Double Taxation Agreements in Rwanda. *Is Rwanda getting a Fair Deal? A Cost Benefit Analysis, Report, IPAR, Kigali, 2014.*, p. 10

Rwanda. He made an assessment of what Rwanda gets in return after conceiving tax incentives to foreign investors. In his research, he found that Rwanda has experienced a huge loss.

Even are very pertinent in this dome, they have not touched all the parameters of right to development as linked to foreign direct investment in Rwanda. They did not touch the issue of technology transfer, the corporate social responsibility and the impact of FDI on the balance of payments. The contribution of this research is based on the fact that it will go beyond the issue of incentives and include the assessment of the technology transfer, the corporate social responsibility and the extent to which FDI contributes to the export promotion.

1.10 Limitation of the Research

This work has been limited in domain, space and time. The study concerns the impact of FDI on human rights. It concerns specifically labour rights, environmental rights and the right to development. This choice was made based on the fact that these rights are the ones mostly linked to activities of investors.¹¹⁰ For the territorial scope, the study is limited to Rwanda. This was mainly motivated by the fact that Rwanda, being a country which has come from a civil war and other conflicts which led to genocide against Tutsis, has been engaged into a holistic reform of its foreign investment policy and laws with the aim of attracting as many investors as possible. In this regard, it has been ranked among the best in the region, as well as worldwide, in doing business. Concerning the delimitation in time, we have chosen the period between 2005 and November 2015 the reason being that the year 2005 marks the adoption of the first investment code in Rwanda, whereas November 2015 is the time when data collection ended.

¹¹⁰ Mabey & R. McNally, *Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development*, A WWF-UK Report, August 1999, p7.

1.11 Breakdown of Chapters

The study is divided into six chapters the first being this introductory chapter and the last being the general conclusion. The introductory chapter has two major parts. The first part describes various elements of the introduction, including background of the topic, problem statement, research questions, hypotheses, justification of the study, and delimitation of the study and the breakdown of chapters. The second part discusses different conceptual considerations of FDI. It also analyses the key literature on FDI and human rights.

The second chapter considers the interface between FDI and human rights. This chapter has first of all analysed the role of MNCs in protecting human rights. It has also analysed the criminal liability of Corporations. Being a situation which has attracted the attention of various authors, the criminal liability of corporations has been denied by some of them basing on the maxim *societas delinquere non protest* a principle which means that corporations cannot be held criminally liable. This chapter analyses various theories dealing with liability of MNCs. It makes also clear the issue of criminal and civil liabilities of multinationals, the responsibility of parent companies for violations made by their subsidiaries as well as the use of immunity in FDI.

The third chapter assesses the relationship between FDI and rights to labour standards. In this chapter, the research analyses the extent to which foreign companies respect and promote human rights related to labour conditions in Rwanda. The research analyses various principles embodied into various International Labour Organisation's conventions. Working hours and work safety conditions are analysed while considering international labour and working conditions of international conventions that Rwanda has ratified.

The fourth chapter tackles the issue of foreign direct investment and the protection of environment. In this chapter, principles set forth by the Rwanda Environment Management Authority (REMA) are analysed and the extent to which they are respected. A special focus is given to investors who have their activities in sensitive environmental areas like marshlands, mining sector, etc. The chapter also assesses the application of the environment impact assessment test (EIA). This part looks at the evolution of EIA, how it was introduced in Rwanda, how it works and proposes some mechanisms which should be taken into account in order to enhance its clear applicability. The chapter assesses if there are remedies or other mechanisms of reparation which are in place.

The fifth chapter deals with FDI and sustainable development by analysing the link between the two aspects. The chapter analyses the contribution of FDI in the economic growth of the country. This chapter looks also at the relationship between FDI and the transfer of technology. Under this chapter the Rwandan legal and institutional frameworks on transfer of technology is made. Lastly, the chapter analyses the policy on corporate social responsibility as well as the role that FDI plays to balance of payment.

The sixth and last chapter contains the synthesis and key findings made in preceding chapters. It makes recommendations for a better state of the protection of individuals' human rights by MNCs in Rwanda. It suggests innovative ways for regulating FDI so as to ensure proper protection of individuals in Rwanda.

CHAPTER TWO

INTERFACE BETWEEN ACTIVITIES OF MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS

2.1 Introduction

In FDI, all forms of human rights can be subject to violations independently; whether they belong to the first, second or third generations. These rights include: health and safety standards, treatment of workers in labour contracts, a safe working environment, right to life, safety, freedom and protection against any form of discrimination, freedom of association, et cetera. All these rights can be violated by MNCs in their daily activities even if some of them have a constitutional character.¹¹¹ This is why in this chapter we analyse some legal issues surrounding the responsibility of MCs in host countries.

In assessing the liability and the accountability of MNCs we must consider approaches which have been taken by various legislations. MNCs being considered as the engine of economic, social and cultural rights countries do sometimes ignore their role in human rights violations,¹¹² pollution and other unhealthy damage to the environment to increase their profit margins.¹¹³

¹¹¹See articles from articles 10 to the article 51 of the Rwandan constitution of 4th June 2003, this is the title “fundamental human rights and the rights and duties of citizens”. See also the articles 19 to 51 of the Constitution of Kenya.

¹¹²H. Lewis, *Embracing Complexity: Human Rights in Critical Race Feminist Perspective*, 12 C Olum. J. G Ender & L. 510, 519 (2003) (“Transnational corporations exploit the low-wage status of women . . . and, in doing so; create new avenues for sexual abuse and harassment.”).

¹¹³ Fr. O. Adeola, *Environmental Injustice and Human Rights Abuse: The States, MNCs, and Repression of Minority Groups in the World System*, 53 (2004); 8 HUM. ECOLOGYREV. 39, 43-44 (2001); Int'l Comm'n of Jurists, Access to Justice: Human Rights Abuses Involving Corporations – Philippines, http://www.icj.org/dwn/img_prd/Philippines-ElecDist.pdf (last visited August . 6, 2013).

Sometimes they infringe on civil and political rights by displacing indigenous people and backing regimes that infringe on the rights of their citizens.¹¹⁴

The lack of consensus between countries to hold multinational corporations responsible for human rights abuses has long been a concern on human rights activists.¹¹⁵ International human rights law has been criticized for not effectively addressing the issue of negative corporate human rights behaviour and its impact.¹¹⁶

This chapter tries to tackle the issue of criminal and civil liabilities of investors; whether corporations or not. It will look into the individual responsibility of companies, both parent companies as well as their subsidiaries in order to deal with the issue of impunity. The immunity of state controlled companies in investment has also been used as an engine to perpetuate the impunity. This issue will also be discussed along these lines.

2.2 Obligations of MNCs to Promote and Respect Human Rights

Human rights are fundamental to the stability and development of countries all around the world. Great emphasis has been placed on international conventions and their implementation in order to ensure adherence to a universal standard of acceptability. These international conventions for the protection of human rights are state-centric. States are the primary concern in the obligation to promote human rights and not to violate them.¹¹⁷ However, according to DEVA “the advent of national and transnational private actors, especially multinational corporations (MNCs), in public

¹¹⁴ M. Wells Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights?*, (2011)39 *D ENV . J. INT’LL. & POL’Y* pp. 483, 484.

¹¹⁵ N. Dimitrieva, *The Accountability of Multinational Corporations for Human Rights Violations: a Comparative Analysis of Legal Redress Under the US Alien Tort Claims Act*, Master Thesis for the LL.M ,Department of Law University of Gothenburg School of Business, Economics and Law, 2009, p.19.

¹¹⁶ D. Shelton, “Protecting Human Rights in a Globalized World” , (2002)25 *REV B.C. INT’L&COMP . L.*pp. 273, 297).

¹¹⁷ C. Lafont, “Accountability and Global Governance: Challenging the Sate-Centric Conception of Human Hights”,(2010), *Ethics & Global Politics*, Vol. 3, no. 3, p193.

services has posed serious challenges to this model. States no longer enjoy the monopoly as violators of human rights and no longer solely bear the duty to protect human rights”.¹¹⁸

MNCs are powerful entities that impact on the lives and wellbeing of millions of people and are not subjects of international law because they are subjected to jurisdictions of States where they operate¹¹⁹. Unlike states and some international organizations that have international legal status, the MNCs are not international legal persons and as a consequence they are not subject to the rights and obligations of international law including international human rights law. This view, however, is being progressively corrected and some contemporary scholars defend granting MNCs some corporate rights and correlatively impose on them obligations to protect and promote human rights.¹²⁰

The International Community is conscious of the fact that a full and wide realization of human rights cannot be achieved if the umbrella of human rights obligations and their enforcement do not cover MNCs.¹²¹ Today the obligations of MNCs to promote and protect human rights is grounded in the interpretation of existing human rights treaties as to include MNCs as subjects to respect human rights and in new developments in the frameworks of the UN and other organisations attempting to set standards are expected to comply with.

2.2.1 UN Framework

The UN framework in setting human rights standards recommended to MNCs revolves around the following three instruments: the Universal Declaration of Human Rights, the Global Compact and the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’. The Universal Declaration of Human Rights (UDHR) adopted by the General Assembly in 1948, in its Preamble calls for “every

¹¹⁸S. Deva, “Human Rights Violations by Multinational Corporations and International Law: Where from Here?”(2003)Vol.19, *Connecticut Journal of International Law*, p.1.

¹¹⁹ S. Katuoka, M. Dailidaitė, “Responsibility of Transnational Corporations for Human Rights Violations: Deficiencies of International Legal Background and Solutions offered by National and Regional Legal Tools”(2012) Vol. 19(4), *Jurisprudence*, p.1303

¹²⁰ Damrosch, Lori ed., *International Law*, St. Paul, USA: West Publishing, 2001, pp. 809-812.

¹²¹S. DEVA, *op.cit* p.1

individual and every organ of society” to uphold and promote the principles contained in the Declaration. According to the prominent human rights authority, Louis Henkins, the expression every organ of society can be understood as including MNCs. He argues that "every individual includes juridical persons”. He adds that “Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.”¹²²

The UDHR, defining itself as “a common standard of achievement for all peoples and all nations”, it proclaims a set of fundamental values shared by the international community, and sets standards recognizing rights and the corresponding duties to protect those rights. The rights laid down in the UDHR have been further elaborated in other international treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). The UDHR and the two covenants are together referred to as the International Bill of Human Rights. All the rights in the International Bill of Human Rights are universal, interrelated, interdependent and indivisible.¹²³ The rights enshrined in international human rights treaties are, in many cases, incorporated in national laws when they are ratified by governments. It is worth to mention that, the wording of the Universal Declaration of Human Rights is expressed in general terms that do not address the practical aspects relating to the process of monitoring and implementing the obligations enshrined therein by MNCs.¹²⁴

In 1999, in a speech addressed to business leaders during the World Economic Forum in Davos, that became later the basis of what was called the UN Global Compact, Kofi Annan, the then UN Secretary General stated the following:

You can uphold human rights and decent labour and environmental standards directly, by your own conduct of your own business. Indeed, you can use these universal values as the cement binding together your global corporations, since they are values people all

¹²²Henkin L., “The Universal Declaration at 50 and the Challenge of Global Market” (1999), 25 *Brook. Journal of International Law*, p. 25, see also Mayer, A. M. “Human Rights as a Dimension of CSR: The Blurred Lines Between Legal and Non-Legal Categories”(2009) Vol. 88, *Journal of Business Ethics.*, p. 568.

¹²³See the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights (Vienna, 1993), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>.

¹²⁴Barbara A. Frey, “The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International of Human Rights”, (1997) 6 *Minnesota Journal of Global Trade*, p.155.

over the world will recognize as their own. You can make sure that in your own corporate practices you uphold and respect human rights; and that you are not yourselves complicit in human rights abuse.¹²⁵

One year later within the UN was developed the Global Compact as a “policy platform and a practical framework for companies that are committed to sustainability and responsible business practices”.¹²⁶ The United Nations’ Global Compact is a voluntary initiative asking participating companies to embrace, support and enact, within their sphere of influence, 10 principles concerning human rights, labour rights, environment protection, and anti-corruption. The first two principles are focused on human rights, “principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and principle 2: make sure that they are not complicit in human rights abuses.”¹²⁷

Another instrument developed with the UN framework is the "Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework" that were developed in the report of John Ruggie, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, a report released in March 2011.¹²⁸ These guiding principles were endorsed by the Human Rights Council on June 16, 2011. They reflect a standard with which it is expected businesses will comply¹²⁹.

These principles proposed by John Ruggie:

. . . are grounded in recognition of (a) states’ existing obligations to respect, protect and fulfill human rights and fundamental freedoms;(b) the role of business enterprises as specialized organs of society performing specialized functions, requiring to comply with

¹²⁵ Press Release, SG/SM/6881 (1 February 1999).

¹²⁶Ruggie J. : *Guiding Principles on Business and Human Rights to Implement the United Nations ‘Protect, Respect and Remedy’ Framework*, UN Doc. A/HRC/17/31, 21 March 2011 (The Guiding Principles were endorsed by the Human Rights Council Res. 17/4, 6 July 2011, para. 1), see Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, Human Rights Council, 17th session, A/HRC/17/31. , p. 1.

¹²⁷UN Global Compact Office and OHCHR, *Embedding Human Rights in Business Practice* (2004), available at: <http://www.unglobalcompact.org/docs/news_events/8.1/EHRBPII_Final.pdf>.

¹²⁸Ruggie J. *Op. cit.*, p1.

Online at <http://daccess-ddsny.un.org/doc/UNDOC/GEN/G11/121/90/PDF/G1112190.pdf?OpenElement>

¹²⁹ R. M.M. Wallace : « Business and Human Rights » in SababiBorzu. *et al.* (eds), *A revolution in the International Rule of Law: Essays in Honor of Don Wallace, Jr.* (2014), New York, Juris Publishing, Inc, p.196.

all applicable laws and to respect human rights; and (c) the need for rights and obligations to be matched to appropriate and effective remedies when breached.¹³⁰

These general principles have been termed as the three pillars, on which the guiding principles are based, namely the state duty to protect, the corporate responsibility to respect and the access to remedy principle.¹³¹ In total, these standards proposed by John Ruggie are composed of 31 articles, each of which is followed by an elaborate commentary. However, as stated by Wallace, “the Guiding Principles are not a panacea and, although widely acknowledged and contributed to the debate on the interaction between human rights and business, they have not escaped criticism”.¹³²

Kamatali Jean Marie sums up the critiques by arguing that the guiding principles have done little to offer an “authoritative global standard” solution to the longstanding and deeply divisive debate over the human rights responsibilities of companies.¹³³ Some argued that the recognition of the victim is not enough and that what is required is legal protection and remedies and that it is a matter of right, not of charity.¹³⁴ The non-binding nature of the guiding principles and the lack of a proper mechanism to ensure compliance are other weaknesses that do not help to make the respect of human rights by business corporations a “duty” rather than just a “responsibility”.¹³⁵ To make clear the issue, there should be global legal instruments with authoritative measures which provide for sanctions in case companies have violated human rights.

2.2.2 Other international standards

¹³⁰ Guiding Principles, para 1.

¹³¹J-M. Kamatali, “The new guiding principles on business and human rights’ contribution in ending the Divisive debate over human rights Responsibilities of companies: is it Time for an ICJ advisory opinion?”(2012), 20 *CARDOZO Journal of International and Comparative Law*, p.435 From the SelectedWorks of Jean-Marie Kamatali, p.2Available at: http://works.bepress.com/jean-marie_kamatali/1/; see also U.N. Special Representative of the Secretary-General, Rep. of the Human Rights Council, Protect, Respect and Remedy: a Framework for Business and Human Rights, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

¹³² Wallace R. M.M., *op.cit.*, pp. 204-205

¹³³J-M. Kamatali., *Op. cit.*, p. 437.

¹³⁴R. M.M . Wallace., *Op.cit.*, pp. 206

¹³⁵J-M. Kamatali, *Op. cit.*, p. 438.

There are also other international standards that directly impose human rights obligations on companies, these include the International Labour Organization Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy of 1977¹³⁶, revised twice in 2000 and in 2006 and the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises of 1976 revised in 2000 and updated in 2011.¹³⁷ Though these instruments are in the category of “soft law” i.e. not binding, and so do not create legal duties to observe the standards contained therein, they do create an expectation that MNCs will observe such minimum standards in the conduct of their operations, and they provide interested NGOs with a benchmark against which to compare corporate behaviour.¹³⁸

2.2.2.1 ILO Tripartite Declaration of principles concerning multinational enterprises and social policy

Because of the labour-related concerns and social policy issues to which the activities of MNCs gave rise, especially that MNCs and their affiliated organizations could contribute to abusive workplace practices, either directly or indirectly, the principles in the Tripartite Declaration intends to guide governments, employers, workers, and MNCs on how to act in accordance with the principles espoused by the ILO.¹³⁹

The Tripartite Declaration of principles concerning multinational enterprises and social policy is one of the most important international instruments as far as corporate responsibility for human rights is concerned.¹⁴⁰ It was negotiated between Workers and Employers Organizations and

¹³⁶ ILO, *Official Bulletin* (Geneva 1978) vol LXI, series A, no I, pp 49-56, reproduced in UNCTAD, *International Investment agreements : a compendium* · pp.89-102.

¹³⁷ OECD, 2011 Update of the OECD Guidelines for Multinational Enterprises online at <http://www.oecd.org/daf/inv/mne/2011update.htm>

¹³⁸ Muchlinski, P.T., “Human Rights and Multinationals: is there a Problem?”(2001) Vol 77, I, *International Affairs*, p. 37.

¹³⁹ Hang S., “Investing in Human Rights: Using Bilateral Investment Treaties to Hold Multinational Corporations Liable for Labor Rights Violations”(2014), Vol. 37, Issue 4, *Fordham International Law Journal*, pp 1214-1215

¹⁴⁰ J.L. Černič., “Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy”(2009), vol. 6, n^o1, *Miskolc Journal of International Law*, p.26

Governments and adopted by the Governing body of the International Labour Office on 16 November 1977¹⁴¹ and amended in November 2000¹⁴² and in March 2006.¹⁴³

2.3 Criminal liability of multinational corporations as linked to foreign direct investment

Most companies which operate in FDI are subsidiaries of other Multinationals located in many other countries which provide subsidies to them.¹⁴⁴ Multinational enterprises when they invest in developing states, they sometimes benefit from total impunity when they commit human rights violations. The criminal responsibility of corporations has been subject to various debates. For some, a corporation cannot commit a crime whereas others have adhered to the theory from which corporations can be delinquent. The following subsection debates the issue as regard to investment.

2.3.1 Arguments supporting the criminal irresponsibility of corporations

Holding corporations criminally liable has been a controversial issue in this day and age too. Authors have been engaged in attacking and discussing the feasibility of this kind of criminal liability.¹⁴⁵ Some hold the view that corporations cannot commit crimes on their own. These authors have based their arguments on the principle of *societas delinquere non protest* which means that corporations cannot be held criminally liable.¹⁴⁶ The principle is that an intangible

¹⁴¹ILO, Tripartite Declaration of Principles concerning Concerning Multinational Enterprises and Social Policy, ILO Doc. 28197701, OB Vol. LXI, 1978, Ser. A, no. 1 (1977).

¹⁴²ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, (3d ed. 2001), <http://www.ilo.org/public/english/employment/multi/download/english.pdf>

¹⁴³ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, (4th ed. 2006), <http://www.ilo.org/public/english/employment/multi/download/declaration2006.pdf>

¹⁴⁴ D. B. Sascha, "Civil Liability of Corporate and Non-state Aiders and Abettors of International Terrorism as an Evolving Notion under International Law", (2011) Vol. 6, Issue 1, *Journal of International Commercial Law and Technology*, p. 1.

¹⁴⁵ J. Chella, *The Complicity of Multinational Corporations in International Crimes: an Examination of Principles*, PhD thesis, Law Faculty, Bond University, 2012, p. 3.

¹⁴⁶ Literally, "corporations cannot commit crimes". This maxim is the genesis of the traditional French model. Inasmuch as the corporation lacks a mind with which to formulate a criminal intent, imputation of criminal liability to corporations was viewed as anathema to the principle that the guilty mind formed the basis for criminal law. Nor could a corporation commit the *actus reus* warranting criminal sanction. Interestingly, the *ancient regime* did recognize penal responsibility of corporations. However the bourgeois revolutions' individualist ideal abolished collective responsibility (e.g. 'corruption of the blood', the idea that descendants of a criminal are implicated in the ascendant's crime are unconstitutional in the U.S.). Orland notes that

thing cannot kill a person only human beings can commit crimes in the name of the corporation.¹⁴⁷ This type of liability was denied on the basis that companies have their own legal personalities different from that of directors and shareholders. Supporters of this thesis based their arguments on the principle of the corporate veil; a principle according to which a company has a separate legal personality different from that of shareholders and they cannot be held liable to unlawful acts committed by individuals by the virtue of being shareholder or for the conduct of its subsidiaries in which it invests.¹⁴⁸ If the legal personality of the company is different from that of shareholders, any criminal act committed by any of the shareholders or employees, the latter will be held liable themselves not the company.¹⁴⁹ This is justified by the fact that, if the will which was expressed is that of its employees or shareholders then they are the one to be individually held liable as the corporation did not express its will.¹⁵⁰

As the criminal liability is personal, only individuals should be held responsible of their actions reasons laid down by supporters of this opinion is the lack of legal capacity to commit crimes and consequently lack of culpability, and the incompatibility of criminal sanctions like imprisonment.¹⁵¹ A corporation could not be criminally liable because corporations are a result of legal fiction with no independent wills. Felonies, treasons and other crimes are committed by human beings, not by intangible juristic persons. It is very clear that only natural persons can commit crimes like murder, genocide, war crimes as a corporation cannot use a gun or a machete to kill someone.¹⁵²

“before the French Revolution . . . criminal sanctioning of corporations was generally accepted on the continent” and the “the French *Grande Ordonnance Criminelle* of 1670 mentioned the subject in great detail;” however, “the French Revolution ideal of individualism . . . did away with the concept see G. S. Tessens, “Corporate Criminal Liability: A Comparative Perspective”, (1994)43 *INT’L & COMP. L.Q.*, p 493- 494. See also Eric Engle, *Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?*, University of Tartu, Estonia, p. 1

¹⁴⁷ Some countries, like Germany, refuses to accept the criminal liability of corporations and remain Royal to the maxim *Societas delinquere non potest*.

¹⁴⁸G. Nora, “Legal Personality of the Corporation and International Criminal Law: Globalization Corporate Human Rights Abuses and the Rome Statute”, (2008), Vol.1, Number 1, the *University of Queensland*, Australia, p43.

¹⁴⁹ This goes with the principle set out by the constitution that criminal liability is personal. See for example, the article 17 of the Rwandan Constitution.

¹⁵⁰ C.M.V. Clarkson & H.M. Keating, *Op. cit.*, p. 233.

¹⁵¹ A. Iulia Pop, *Criminal Liability of Corporations—Comparative Jurisprudence*, Michigan State University College of Law, 2006, p 6. available at http://www.law.msu.edu/king/2006/2006_Pop.pdf

¹⁵² L. Orland & CH. Cachera, “Corporate Crime and Punishment in France: Criminal Responsibility of Legal Entities (Personnes Morales) under the New French Criminal Code (Nouveau Code Pénal)”, (1995) 11 *C ONN.J.INT’L L.* pp.

Another reason for the non-adoption of criminal liability of corporations was mainly based on the fact that the principal remedy for crime was imprisonment, corporal punishment or execution. It is very clear that such punishments could not be applied to companies.¹⁵³ If we consider the main objectives of criminal sanctions, that is, deterrence, prevention of future crimes and retribution, we can see that they can also be applied to corporations. Though in the early history the argument was clear and supportable, it has grown redundant with time. Punishment for crimes now includes lesser penalties, such as fines, public service, and other non carceral remedies.¹⁵⁴ Corporations can, for example, be punished by being denied the right to do business in a given country or even by revocation of authorization it got from the authority in charge vested with the power to grant them.¹⁵⁵

In the judgment *Tesco Supermarket Ltd v. Nattrass* before the House of Lords, Lord REID affirmed that:

A living person has a mind which can have knowledge or intention or being negligent and has hands to carry out his intentions. A corporation has none of these: it must act through living persons. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company”.¹⁵⁶

This judgement supports the idea from which a corporation can be held criminally liable because they have also the mind and hands to commit crimes and they can be punished as any other

111-117.

¹⁵³S. W. Laufer, *Corporate Bodies and Guilty Minds*, 43 Emory L. J. 648, 651–55 (1994) (discussing evolution of corporate criminal liability in United States).

¹⁵⁴ Article 32 of the Rwandan Criminal Code. See also the article 24 of the Penal code of Kenya. Punishments are no longer only, death penalty and imprisonment other punishments have been introduced in the arsenal of criminal code.

¹⁵⁵ See also articles from 289 to 397 of the Rwandan criminal law.

¹⁵⁶ [Bailii >> Databases >> United Kingdom House of Lords Decisions >> Tesco Supermarkets Ltd v Nattrass \[1971\] UKHL 1](http://www.bailii.org/uk/cases/UKHL/1971/1.html) (31 March 1971) : <http://www.bailii.org/uk/cases/UKHL/1971/1.html>

offender using punishments we have in various codes.¹⁵⁷ It is worth to mention that, this view has benefited from the support of other many authors.

2.3.2 Arguments supporting the criminal responsibility of corporations

Criminal liability has been supported by a number of authors including court decisions. In the *H.L Bolton Co. Ltd V TJ Graham & son* it has been said that:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tool and act in accordance with directions from the centre. Some of the people in the company mere servants and agents who are not nothing more than hands to do work and cannot be said to represent the mind or will others, are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.¹⁵⁸

When considering the theory of legal personality of juristic persons, it has been argued that corporations have an identifiable personal in the capacity to express moral judgments.¹⁵⁹ Corporations have a unique presence in the society different from that of shareholders or managers and what makes them different from them is the fact that they have the ethos.¹⁶⁰ The US Supreme Court has decided that corporations have the capacity to express independent points of view and moral judgments, and their freedom of speech should not be abridged without a compelling state interest.¹⁶¹ All corporations which have been personified by legal personality must be personally liable.

¹⁵⁷ The Rwandan Criminal Code is clear about because it provides for sanctions to corporations which may be responsible for criminal acts.

¹⁵⁸ *Hl Bolton (engineering) co Ltd v TJ Graham and son's ltd: ca 1957.*

¹⁵⁹ L. Friedman, "In Defense of Corporate Criminal Liability", (2000) 23, *Harv. J.L. & Pub. Pol'y*, pp. 833-846.

¹⁶⁰ E. Lederman, Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity, (2000).4, *Buff. Crim. L. R.* 694,

¹⁶¹ *Bank of Boston v. Bellotti*, 435 U.S. 765, 787-95 (1978).

In 1901, the English court decided that syndicates could be held criminally liable, if the law acknowledges their capacity to own property and commit defamation, then they should bear responsibility for their unlawful acts. But following their protests, the English Parliament adopted a law in 1906 conferring upon them immunity from criminal liability unlike in the USA where they bear criminal liability.¹⁶² The Supreme Court held in *United Mine Workers V. Coronado Coal Co* that trade unions can violate criminal provisions this is why they should not escape the application of criminal law. As they manage enormous sums of money and their memberships are also numerous, in case of misconduct it is not realistic to sue them individually. Instead, their trade unions should be sued.¹⁶³

Holding corporation's accountability needs to make clear some conditions from which a person being natural or juristic can be criminally liable. Criminal liability cannot exist when the *mens rea* and the *actus reus* are not established this is why in the following lines we will analyse if these conditions are possible as regard to the criminal liability of corporations.

2.3.2.1 Meaning of *Mens rea* and *actus reus*

Thoughts, desires and intentions are reprehensible as evil deeds only when there are means to detect such criminal tendencies.¹⁶⁴ Generally, the law does not punish people for thinking evil thoughts or having evil intentions.¹⁶⁵ The law interferes only when there are some physical manifestations or conducts of the evil intention. This is why there is need for combination of these two elements for criminal liability to be there. The terms *actus reus* and *mens rea* originated from the principles namely, *actus non facit reum nisi mens sit rea*, which means: "an

¹⁶² Florin Streteanu & Radu Chirita, *Raspunderea Penala a Persoanei Juridice 7* (Rosetti ed., 2002) (one example is the action against the City of Cheronea; the city was found not-guilty, which saved it from destruction).at 90.

¹⁶³ *United Mine Workers v. Coronado Coal Co.* 259 U.S. 344 (1922)

¹⁶⁴ A. O. Akindutire, *Judicial Attitude to Homicide in Nigeria*, Bachelors dissertation, Faculty of law university of Ilorin, Nigeria, may 2011, p. 15.

¹⁶⁵ This perspective is different from the Bible approach. It is said in Exodus chapter 20 verse 17 that "You shall not covet your neighbor's house. You shall not covet your neighbor's wife, or his male or female servant, his ox or donkey, or anything that belongs to your neighbor." (New International Version). Here it is very clear that desiring is an offence which can be punished according to the Bible

act does not make a person guilty unless their mind is also guilty".¹⁶⁶ A person cannot and should not be guilty of a crime unless: he has both caused or is otherwise responsible for the external event prohibited by law (*actus reus*) and he had a special mental state with respect to that external event (*mens rea*).¹⁶⁷ The *mens rea*, the *actus reus* and the principles of legality play an important role in the criminal.¹⁶⁸ In criminal law, a person can be held liable only when there is a union of *mens rea* or the intention to commit a crime or the fault element and *actus reus* or the material element or the external element of the offence in one person. In these lines we will try to demonstrate how these are possible in corporate criminal liability.

2.3.2.2 Mens rea of corporations

For a person to be criminally liable there must not be only a demonstration of the act or omission which is legally prohibited but also show that the author acted with the full mindset.¹⁶⁹ According to Kenny's definition, *mens rea* is such result of human conduct as the law seeks to prevent".¹⁷⁰ *Mens rea* or the moral element is defined as the knowledge that the acts made by the aider and abettor help the perpetration of the specific crime of the principle. Whereas the *actus reus* in case of aiding and abetting requires that the accused carry out acts particularly directed to help, encourage or lend moral assistance to the offender of a certain specific crime and that support has a significant effect upon the perpetration of the offence.¹⁷¹

¹⁶⁶ M. Jung, *Actus non Facit Reum, Nisi Mens Sit Rea* "An investigation into the Treatment of Mens Rea in the Quest to Hold Individuals Accountable for Genocide, Faculty Mentor: Kimi King, Department of Political Science, p. 5.

Available at http://digital.library.unt.edu/ark:/67531/metadc84320/m2/1/high_res_d/Andrew%20Jung.pdf.

¹⁶⁷ AP. Simister, & Sullivan, *Criminal Law, Theory and Doctrine*, Hart Publishing, Oxford, 2000, p. 59.

¹⁶⁸ According to the principle of legality; The *Nullum Crimen Nulla Poena Sine Lege*, a person cannot be condemned when the act he/she committed or omission to which he/she is responsible is not provided by the law. The article 3 of the Rwandan criminal code says that "a person shall not be punished on account of an act or omission that did not constitute an offence at the time of commission under national or international law".

¹⁶⁹ A. Singhvi, "Corporate Crime and Sentencing in India: Required Amendments in Law", (2006) Vol 1 Issue.2 July, *International Journal of Criminal Justice Sciences*, p. 2.

¹⁷⁰ AP. Simister, and Sullivan, *Op. cit.*, p. 60.

¹⁷¹ Prosecutor V. Furundzija, 1998, ICTY 3, available at www.worldlii.org/int/cases/ICTY/1998/3.hotmail. The court has used the phrase specifically directed on order to address the issue of whether assistance must be direct. In Tadic Case, the ICTY trial court had conducted an extensive survey of the international precedent, focusing particularly on the Nuremberg trials, and had concluded that the assistance which "directly and substantially affected the commission" of an offence would support aiding and abetting liability. See these comments at http://efchr.mcgill.ca/pdf/presbyterian_church_talisman.pdf, p. 26.

Mens rea dates back from the time of Plato.¹⁷² Plato posited that a person can only be criminally liable after considering his level of intent to commit a crime. It means that the alleged perpetrator of a crime acted with a rightful spirit and in a rightful manner. There is no criminal liability if the actor has acted unintentionally.¹⁷³ In criminal law, it is common to impute criminal knowledge to defendants in cases of their wilful blindness as to wrongful activities. Though *mens rea* is crucial when establishing the criminal liability, it is obvious that it is deducted from the objective manifestation because the subjective states of mind are impossible to prove. As far as the *mens rea* of corporations is concerned we think it can also be deducted from activities imputable to them. Even if a company in the past could not be held responsible for offences which require *mens rea* the situation has changed.

Generally the *mens rea* of corporations was denied on the ground that they have no will which is independent from that of employees and shareholders. Today, most jurisdictions have attributed corporations the *mens rea* via its employees, directors or shareholders.¹⁷⁴ Any crime imputed to the corporation, is founded on the principle that the author of the offence must be a physical person. The paradox is how the *mens rea* of a physical person can be attributed to a corporation? The technique which solves this problem is to base arguments on the theory of agency or on a theory of identity.

Currently, corporations may be held criminally liable for crimes perpetrated in the course of employment made in furtherance of commerce of company and its imbibed traditions.¹⁷⁵ Hence, it is not strange in criminal law to impose criminal sanctions on a corporate since it can have a mind of its own and also an environment wherein crime is cultivated.¹⁷⁶ As it has been adopted by some courts in the USA, the punishment of corporate crime is based on the doctrine of

¹⁷² C. H. FINN, *The Responsible Corporate Officer, Criminal Liability, and Mens Rea: limitations on the RCO Doctrine*, American University, Washington College of law, 2009, p. 548.

¹⁷³ *Ibid*

¹⁷⁴ E. Engle, *Op. Cit.*, p. 294.

¹⁷⁵ A. Singhvi, *Op. Cit.*, p 4.

¹⁷⁶ *Ibid*.

“Respondent Superior” a doctrine according to which “corporation may be held criminally liable for the acts, omissions, or failures of an agent acting within the scope of his employment.”¹⁷⁷

When establishing the *mens rea* of corporations there are two approaches which ought to be considered: the use of the intention of the physical person to determine the *mens rea* of the corporation, and the straightway of instituting the *mens rea* of companies in which *mens rea* is derived from circumstances closely related to the corporation itself.

a. Direct way of establishing the mens rea of corporations

The straightway of instituting the *mens rea* of corporations is mostly found in cases of negligence. This can be done for example in case of gross negligence or the failure to act accordingly following standards of conduct.¹⁷⁸ If that failure has caused death, or manslaughter the *mens rea* of the company will be established.¹⁷⁹ The criminal law distinguishes between offences of strict liability and crimes which can be committed by negligence. The only element needed in the case of offences of negligence is the proof that the conduct of the accused did not conform to an objective standard of care. Then the defence of that accused person may be based on whether to act was reasonable of a result of negligence.¹⁸⁰

The theory of criminal liability in case of negligence can be directly associated with the principle from which the criminal liability can result from consequences of that act. According to H.L.A Hart’s theory of criminal responsibility, the criminal responsibility must be based on consequences. Hart proposes consequences as a condition of criminal liability to justify the criminal negligence.¹⁸¹ This is why many countries have incorporated in their criminal codes, crimes committed by negligence or recklessness.

The Rwandan Criminal Code, in its articles 156 and 157, has espoused that theory by setting into

¹⁷⁷ N.Y. Cent. & R.R. Hudson River Co. v. United States, 212 U.S. 481, 491-95 (1909). Quoted by A. Singhvi, *Op. Cit.*, p. 6.

¹⁷⁸ To behave like a *bonus pater familia* or to what could be the behavior of another person under the same circumstances.

¹⁷⁹ B.F. Keulen & E. Gritter, “Corporate Criminal Liability in the Netherlands”, *Electronic Journal of Comparative Law*, (December 2010) Vol. 14.3 , p.6, Available at <http://www.ejcl.org>.

¹⁸⁰ V. Victor & J. Ramra, “Criminal Negligence and the Standard of Care”(1999) *Singapore Journal of legal studies*, pp. 678-693.

¹⁸¹ H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford, Clarendon Press, 1968, p. 201.

crime the involuntary homicide and unintentional bodily injuries. The article 156 states: any person who through clumsiness, carelessness, inattention, negligence, failure to observe rules or any other lack of precaution and foresight, causes harm but with no intent to endanger the life of another person shall be guilty of homicide or intentional bodily injuries. The same Code, in its article 415, says that the offence of lack of environment impact assessment of project can be committed by physical or moral persons.¹⁸²

These two examples show that in the case of environment destruction, the carelessness of the corporation resulting in widespread harm, can lead to a corporation being held liable and the *mens rea* will be assessed from the consequence, not on the examination of the mind of the offender. Polluting the environment or its degradation suffice by themselves to retain the liability of a corporation without assessing if there was an element of the mind which can help to establish the liability of the company. The same is used in case of involuntary homicide and body injury.

A company can be held liable when its representatives contributed to gross human rights violations or if they simply had knowledge those activities of their company were likely to contribute to such violations.¹⁸³ A company may also be held responsible when these persons were not aware of the occurrence of the risk of harm, but there were grounds from which they would know its existence, especially when the risk was a foreseeable one. The author of the criminal act can then be responsible not because he/she commits a fault but he/she acts contrary to the normal way of behaving of the *bonus pater familiae*,¹⁸⁴ which means that a company has acted as a reasonable person or not.

¹⁸² Organic law n°1/2012 of 02/05/2012 instituting the Penal code, *OGRR*, n° Special of 14 June 2012.

¹⁸³ *Ibid.*

¹⁸⁴ In law, the term *bonus pater familias* or good family father, refers to a standard of care, analogous to that of the reasonable man.

In recent years, many Multinationals have been accused of violations of human rights including rights of workers, requiring unreasonable overtime, and providing unsafe working conditions.¹⁸⁵ It is then indubitably that the *mens rea* of corporations can be assessed not only by basing it on an objective criteria like for the case of human beings, but by deducting it either from negligence or harmful acts which were taken by persons representing its organs when they were undertaken on its behalf. Moreover, they can also be accomplice of other criminals.

b. Mens rea in the case of complicity

In determining if the corporation was an accomplice to a given offence, the assistance must be both direct and substantial.¹⁸⁶ However, people may think that as the assistance needs to be direct that this implies that it should be tangible. This has been denied in *Furundzaja* case.¹⁸⁷ The court concluded that requiring that the acts of aider and abettor be specifically directed to assist the principal it requires that the action of the aider to be deliberate and intentional without creating confusion about the practical impact of the action. When a corporation supports people who violate human rights with funds, it can also be seen as an act of *mens rea* of a corporation through conducts of its managers¹⁸⁸.

The mere fact of helping the principal knowing that he is committing a crime can be considered

¹⁸⁵ This is for example the case of NIKE and the GAP. See Cristina Baez et al., Multinational Enterprises and human rights, 8 U. Minami Int'l & Comp L. Rev. 183, 1999/2000, p. 244-46.

¹⁸⁶ Sage publications, Parties to Crime and Vicarious Liability, p. 114. available at <http://www.sagepub.com/lippmancccl2e/study/supplements/Florida/FL06.pdf>

¹⁸⁷ Lašva Valley, Prosecutor v Furundžija (Anto), Trial Judgment, Case No IT-95-17/1-T, (1999) 38 ILM 317, (2002) 21 ILR 213, [1998] ICTY 3, ICL 17 (ICTY 1998), 10th December 1998, Trial Chamber II (ICTY).

¹⁸⁸ In assessing if the company knew about the existence of these abuses Angela, Walker has set an number of criteria to be consider: A company's own inquiries produce information, or a company should have undertaken such inquiries; Information brought to the company's attention by outside source, such as a government regulatory authority or nongovernmental organization; Publicly available information, including reports by the UN, media, and NGOs; Unusual circumstances that would put a reasonable person on notice of suspicion purpose for particular transaction. Duration of the business relationship with the perpetrator ;Position of an individual business official in the company if he or she was a member of decision making boards. Angela, Walker, The Hidden Flaw in KIobel: Under the alien tort statute the mens rea standard for the corporate aiding and abetting is knowledge, Northwestern Journal of International Human rights, V.10:2. 2011, p. 128.

as a direct and substantial aid. The ICTY, in the *Vasiljevic* case, decided that if the accomplice knew that the principal perpetrators of the crimes intended to commit the crimes with that knowledge he assisted the commission of the crimes in one way that had a substantial effect upon the perpetration of the crimes.¹⁸⁹

In *Kiobe*¹⁹⁰, Nigerian Plaintiffs accused Shell Petroleum Development Company of Nigeria and its parent company the Royal Dutch Petroleum Company and Shell Transport and Trading Company as either as an offender or accomplice. The offender was accused of having perpetrated human rights abuses in the Ogoni region of Southern region of Nigeria. The case was that these two companies helped significantly the government of Nigeria in the period between 1993 and 1994 when Nigerian forces shot and killed Ogoni people and attacked their villages.¹⁹¹

The following elements precise that the assistance was direct and substantial: They have facilitated the transportation to Nigerian military; they permitted the use of their property to be used as a staging ground for attacks, they provided food to members of the forces involved in the attacks, and they provided rewards to those members of the armed forces.¹⁹² From this case the *mens rea* may be situated to the fact that the defendants have helped Nigerian militaries when committing those atrocities. Helping the perpetrator in any way must engage the personal liability of a corporation.

c. Mens rea of corporations under the theory of agency or on a theory of identity

The theory of agency imposes responsibility on the company for the wrongful acts committed by its employees. By means of its agent or managers, a corporation can be considered as an offender if these persons have been given power to act in the name of the company. If for example in a court, a corporation makes confession that it was known within the company that fraudulent acts

¹⁸⁹ See Prosecutor v.Kvocka, CaseNo.IT9830/1A,Judgement ,P89 (App.Chamber,Feb.28, 2005), and Prosecutor v.Blaskic, Case No .IT9514A, judgement,P45 (App. Chamber , July 29, 2004. T

¹⁹⁰ www.supremecourt.gov/opinions/12pdf/10-1491_16gn..

¹⁹¹ *Ibid.*

¹⁹² A.Walker, *Op. cit.*, pp.129-130.

happened but authorities had decided to be reticent, it shows that the legal person intended that fraud.¹⁹³ And this may be considered as the *mens rea* of the corporation deducted from circumstances.

In the context of criminal proceedings, the doctrine of identification is used, if an individual who sufficiently represents symbolically the "mind of the company commits a crime within the course of his or her employment, act and *mens rea* are attributed to the company, which is then said to be identified". Therefore companies and individuals can be responsible for offences they have committed.¹⁹⁴ The theory of identification imputes liability on a corporation for the blameful conduct of an officer or director. Under this theory, the corporate veil is taken into account. This means that the distinction between the corporation and its officer is ignored.¹⁹⁵

d. Risk profit and criminal liability of corporations

In tort liability, there has been developed a theory called "risk profit theory".¹⁹⁶ This theory has been used to motivate the existence of the personal liability of a corporation basing on profits it has earned in acts which have led to the violations of rights of individuals. It has been said that "One who earns profits by commercial exploitation or abuse of fundamental human rights can successfully shield those profits from victims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form".¹⁹⁷ The objectives of civil liability cannot be achieved unless liability is imposed on the corporation, because they have earned the

¹⁹³ See for example the article 260 Of the Rwandan civil code book III where it says that « *On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde. (...). Les maîtres et les commettants, du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés* ».

¹⁹⁴ D. Chaiton, *The Controlling Mind in Company Law: an Examination of Corporate Identity and the Corporate Veil*, February 2013, p.6 at http://www.oba.org/en/pdf/sec_news_bus_jan13_cha_con.pdf. The same Author has also quoted the decision of the privy in these words "The doctrine was considered in a civil context in the significant Privy Council decision of *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

¹⁹⁵ *Ibid.*

¹⁹⁶ The theory means that whoever earns profit from a given act must also be responsible for any liability which may be caused by that act.

¹⁹⁷ Expert Legal Panel on corporate complicity in Int'l crimes, Int'l Comm's of Jurists, corporate complicity and legal accountability: Facing the facts and charting a legal path, 12, 2008. The commission argues that the holding corporations unaccountable under the ATS (Alien Tort Statute) signifies the following "protection from liability will be granted to corporation for assisting in acts of genocide, sex slavery, piracy as long as the perpetrators incorporate themselves as a business. See also A. Walker, "The Hidden Flaw in Klobel: Under the Alien Tort Statute the *Mens Rea* Standard for the Corporate Aiding and Abetting is Knowledge", (2011) V.10:2., *Northwestern Journal of International Human rights*, p. 3.

principal profit from the violation of others' rights. The goal of compensation of victims likely cannot be achieved if they have remedies only against the persons who acted on the corporation's behalf.¹⁹⁸

According to the International Corporate Social Responsibility Movement, there has been violation of human rights where corporations have been considered as paramount of those violations. These cases were undertaken in the workplace and in the surrounding communities; it elicited shocking accounts of businesses reaping profit from grave violations of human rights.¹⁹⁹ Radu Mares argues that:

There is a view that it is not fair and reasonable to allow a company to set up, purchase or control a company operating in a developing country, and potentially to take profits from it whilst enjoying the protection of limited liability, without imposing a duty on the company at least to take reasonable steps to protect the workforce or others foreseeably affected by its operations from foreseeable risks, particularly where those affected are vulnerable due to matters such as lack of education and poverty, and even more so where the local legal system may not be adequate to protect them.²⁰⁰

The culpability of corporations should be deduced from acts committed from which the corporation has gained profits. The net result realized should not serve as a unit of measures because the company may invest in a risky area (in case of war). If the patrimony is looted this cannot exonerate the company from bearing its criminal responsibility. In Rwanda, the theory is supported by the article 260 para3 which says that "masters and employers are responsible for the damage caused by their servants and employees in the functions to which they are employed". Any activity which was being undertaken by an employee on behalf of the company, damages which may result from thereof, will be supported by the company.

2.3.2.3 Actus reus of corporations

To be held liable for human rights violations, a corporation must not only express its status of

¹⁹⁸ A. Walke, *Op. cit.*, p. 125.

¹⁹⁹ M. Radu, *Defining the Limits of Corporate Responsibilities Against the Concept of Legal Positive Obligations*, <http://rwi.lu.se/wp-content/uploads/2012/06/2009-Defining-the-Limits-of-Corporate-Responsibilities.pdf>.

²⁰⁰ *Ibid.*

mind but also to show that it participated in the perpetration. In determining the *actus reus* of corporations two criteria can be taken into consideration. These are the fact that the company gained interest from the criminalized act or commits a crime in the normal conduct of the company's activities. To criminalize the corporation, those who are called to establish its responsibility must consider both situations. What the corporation itself did and what a reasonable company being under the same circumstances can do. If with the information reasonably accessible at the time, it would have known that the risk is certain and that risk would harm a person then that company must be held criminally liable.²⁰¹ If, for example, a company to prevent demonstrations or protests facilitates the armed forces knowing that they are going to torture trade unionists who are demonstrating, it does not need to be clear at the time that armed forces would particularly inflict persecution. As long as a company should have known about the associated risks of its conduct, the knowledge of risks has no importance which would be the consequence of that act.²⁰²

The company cannot allege that it did not intend to contribute to a human rights violation as an accomplice therefore it is innocent.²⁰³ What is assessed here is to know if the conduct of the company was normal or abnormal. The Supreme Court of the Netherlands groups circumstances which can help to sort out the issue. When the case concerns an act or an omission of someone who works for the corporation, whether or not under formal contract of employment; the conduct concerned fits the everyday normal business of the corporation; the corporation gained profit from the conduct concerned; the course of action was at the disposal of the corporation, and the corporation has accepted the conduct; or when the company failed to take reasonable care to prevent the conduct from being performed.²⁰⁴

As the issue of *mens rea and actus rea* has been made clear and companies must not remain unpunished when they are involved in criminal atrocities. Like other African legal systems, the

²⁰¹ A. Walke, *Op. Cit.*, p. 125.

²⁰² This principle has been confirmed by the ICTY and ICTR in their decisions in forming that to prove the complicity, a plaintiff must show that the corporation "knew or had reason to know that its action assisted the crime.

²⁰³ A. Walke, *Op. cit.*, p. 127.

²⁰⁴ B.F. Keulen & E. Gritter, "Corporate Criminal Liability in the Netherland"s, (December 2010) Vol. 14.3, *Electronic Journal of Comparative Law*, p.4, <http://www.ejcl.org>.

Rwandan legal system was inherited from colonisers. Logically, analyzing the perception of criminal liability of corporations in Rwanda while ignoring those systems from which it derived from would be incomplete. In the following lines, we shall analyse the criminal liability in some legal systems which have influenced ours.

2.3.2.4 Criminal liability of corporations in Rwanda

Up to 2000, the Rwandan Criminal Code was silent on the issue of criminal liability. After the 1994 Tutsis genocide, people started asking themselves about the probable criminal liability of corporations.²⁰⁵ In 2001, the first law criminalizing organisations was enacted.²⁰⁶ The law on Prevention, repression and punishment of the crime of discrimination and sectarianism in its article 6²⁰⁷ says that:

Any association, political party, or non-profit making organisation found guilty of offences of discrimination is penalized with a suspension of between six months and one year and fine between 5.000.000 and 10.000.000 Rwandan Francs, Depending on the seriousness of the consequences of that act of discrimination on the population, the court may double the penalty, or decide to dissolve the concerned association, political party or non-profit making organisation, according to the law governing the dissolution of associations, political parties and non-profit making organisations.²⁰⁸

The law on punishment of corruption and other related crimes on the other hand says that, legal entities whether public or private are liable for corruption and related offences when these offences have been committed by their representatives or other employees who act on behalf of these legal entities on the basis of: power of representation, power to take decisions, power of

²⁰⁵ After the Tutsi genocide of 1994 various organizations including that of genocide survivors started campaigning on the liability of states like France, churches like the Roman Catholic, political parties like MRND, CDR and others.

²⁰⁶ Law no 47/2001 on Prevention, Suppression and Punishment of the crime of discrimination and sectarianism. After this it came the Law n° 23/2003 Relating to the Punishment of Corruption and Related Offences (the law was promulgated on 07/08/2003).

²⁰⁷ In the Organic law establishing the Rwandan Criminal Code, it is the article 136.

²⁰⁸ This article is similar to the article 7 of the Organic law n° 18/2008 of 23/07/2008 Relating to the Punishment of the Crime of Genocide Ideology.

supervision, and those who have been accomplices or those who have encouraged authors of offences to commit them.²⁰⁹

This shows clearly that organisations and companies can respond to criminal acts if they were committed in their names. The law on corruption repression in its article 34 adds that legal representatives of these legal entities cannot be prosecuted for offences whose liability is incumbent upon the legal entities that they represent except in cases of individual liability. This is a remarkable step since corporations can be punished first and then their legal representative.

Another important law punishing corporations is the organic law on protection of environment in Rwanda.²¹⁰ The law punishes corporations which start their activities in Rwanda before undertaking environmental impact assessment. The law says that

anyone or association that does not carry out environmental impact assessment prior to launching any project that may have harmful effects on the environment is punished by suspension of his or her activities and closure of his or her association and without prejudice to be ordered to rehabilitate the damaged property, the environment, people and the property. Falsification and alteration of documents of environmental impact assessment is punished in the same manner as what is provided for in paragraph one of this article.²¹¹

It is then important to precise that all these repressive provisions have been incorporated in the current criminal code. In its article 113, it states that companies being public or private or other organisation with legal personality are criminally liable for offences committed by their organs or representatives on their behalf.²¹² The issue in Rwanda is that only crimes to which corporations can be held responsible are listed in an exhaustive way. Since the legislation accepts that corporations can be held liable, the legislator should make the issue very clear to allow courts to extend the application of the principle to all kinds of crimes.

²⁰⁹ Article 31 of the law n° 23/2003 Related to the Punishment of Corruption and Related Offences in *Official Gazette* n° Special bis of 03 September 2003.

²¹⁰ Organic law n° 04/2005 of 08/04/2005 Determining the Modalities of Protection, Conservation and Promotion of Environment in Rwanda

²¹¹ Article 95

²¹² Article 113 of the Organic law n°01/2012/OL of 02/05/2012 Instituting the Penal Code in the *Official Gazette* n° special of 14 June 2012.

2.3.2.5 Responsibility of parent companies for damage caused by their subsidiaries

The question here is that of knowing whether parent companies can be held criminally liable for acts committed by their subsidiaries. The relationship between related companies is one of the most controversial areas in modern company law. Shareholders, creditors, employees, and to some extent potential employees may face serious risks and legal uncertainty in the context of highly integrated groups.²¹³ Establishing the responsibility of parent companies is very important since doing business across borders may be perceived to be more risky than internally. If parent companies interfere with the management of the subsidiaries and exercise control in a way this can lead to its liability.²¹⁴

One of challenges for which victims of human rights violations face is to establish liability of parent companies in their home countries. Either courts do not have jurisdiction over them or they hide themselves under the corporate veil principle or the enforcement of judgments remains also impossible. The corporate veil principle, is a principle according to which, a company with separate legal personality cannot be held liable to unlawful acts committed by another company simply on the reason that it has shares or for the conduct of its subsidiaries in which it invests.²¹⁵ According to supporters of the theory, to hold a parent company answerable for the act committed by its subsidiary would weaken the distinct legal personality which distinguishes a corporation from its shareholders and to consider that rights or liabilities of corporations as being that of its shareholders.²¹⁶

Even though the principle of corporate veil can be seen as an obstacle to the liability of parent companies for acts committed by their subsidiaries, in some jurisdictions, it has been decided that the corporate veil can be lifted in circumstances when preserving it will lead to impunity.

²¹³ I. Philip. Blumberg, "Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems", *American Society of Comparative law*, p. 2, available at www.jstor.org/stable/840887,

²¹⁴ *Ibid.*

²¹⁵ See *Salomon V Salomon and Co Ltd* (1897). Solomon has incorporated his boot and shoe repair business. (see my article 22 ULK.

²¹⁶ Phitttt I. Blumberg, *Op. cit.*, p. 494., see also M. C. Oliver, and A. Menid, *Company law*, 12th Edition, London, Pitman, Publishing, p. 12

JENKINSON J., argues that

the separate legal personality of a company is to be disregarded if the court can see that there is, in fact or in law, a partnership in a group, or that there is a mere sham of façade in which that company is playing a role, or that the creation or use of the company was designed to enable a legal or fiduciary obligation to be evaded or a fraud to be perpetrated.²¹⁷

In the UK, lifting the corporate veil has been accepted in the case of direct negligence of the parent company for harm caused by its own wrongdoing. This responsibility is mainly based on the duty of care which it owed to individuals affected by its overseas operations and that this breach resulted in harm.²¹⁸

The issue of duty of care of a multinational parent was formulated by the Court of Appeal in Lubbe in these words:

Whether a parent company which is proved to exercise de facto control over the operations of a subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company.²¹⁹

There should not be an objection to the imposition of a duty of a care on an MNC parent that has a control over a subsidiary or a parent company which manages or designs operations and processes all activities of the company. This principle can even borrow from the principle of consumer law in the case of “product liability” which establishes the liability between a manufacturer and a consumer aims at imposing legal obligation in the absence of a contractual link.²²⁰

²¹⁷IM Ramsay & D. B Noakes, “Piercing the Corporate Veil in Australia”, (2001) , *Company and Securities Law Journal*, p. 7.

²¹⁸ Articles 258-260 of the Rwandan civil code book III, See also R. Meeran, “An Overview of the Position Outside of the United States”, (2011)Volume 3:1, *City University of Hong Kong Law Review*, p. 6.

²¹⁹ R. Meeran, *Op. Cit*, p. 7.

²²⁰ B. Hay & Kathryn E. Spier, *Manufacturer Liability for Harms Caused by Consumers to Others*, <http://www.law.harvard.edu/faculty/spier/pdf/manufacturerliabilityaer.pdf>, Accessed on 28th October 2013. Authors gave examples on a gunfire producer and conclude that that company should take much care in order to avoid its misuse. They said Manufacturers might also be held liable if the consumer intentionally causes harm, for example, when a gun is used to commit murder. Indeed, recently many lawsuits have been brought against firearms manufacturers for the deaths and injuries caused by criminals who use guns. An owners can take greater care while handling and storing their guns (to avoid accidental shootings) and can refrain from committing crimes; likewise, gun manufacturers can make investments in safety features such as mechanical

This negligence was clearly analysed in the case of *Shell* in the Netherlands. The inattention in the relation to the supervision of the Nigerian operations, safeguarding of pipelines and control of clean-up of oil pills.²²¹ In England, the Court of Appeal concluded that: In appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case:

(1) The businesses of the parent and subsidiary are in a relevant respect the same; (2) The parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) The subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) The parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary.²²²

The court here may base its decision on whether the proof demonstrates that the parent company has a habit of overruling in the trading operations of the subsidiary company, for instance manufacture and financing activities.²²³

For the sole proprietor companies, it is very clear that parent can be held liable for acts committed by subsidiaries. It was decided in *Amoco Transport*; a Liberian corporation; which was merely a nominal owner of the Amoco, Cadiz and Standard Oil companies which controlled the design, construction, operation and management of the tanker and treated it as if it belonged to Standard Oil. Standard Oil was liable for its careless management of its subsidiaries. The Court considered it to be unfair treating Standard Oil separately from its subsidiaries. The parent company was then responsible for acts committed by subsidiaries.²²⁴

gun locks (reducing the likelihood that a child inadvertently shoots a sibling) or can refrain from producing highly lethal products, such as armor-piercing bullets.

²²¹ Ibid. the liability of Shell Netherlands has been considered for these grounds: (1) it owed a duty of care to the Nigerian farmers (this harm was foreseeable). (2) it had the power to ensure that adequate steps were taken to avoid the harm, but it breaches that duty by failing to ensure that the appropriate safeguards were taken. In this subpoena named Lubbe and Connolly as legal authorities supporting the existence of a duty of care.

²²² R. MEERAN, *Op. cit.*, p. 10.

²²³ Ibid.

²²⁴ Vancouver Registry Doc. L001638 (B.C.S.C.). 2000, The full case can be seen at www.courts.gov.bc.ca/jdb-txt/sc/00/16/s00-1698.htm.

The same can be applied in the case of a subsidiary which no longer exists. In the *Beazer and Atlantic v. Environmental Appeal Board* by the British Columbia Supreme Court in late 2000, has decided for faults committed by a subsidiary which no longer exists when the order was given because that subsidiary was amalgamated. The successor company was responsible for acts committed by the company it has succeeded. The case then was against the successor or being simply oriented to the parent company because it is considered as a past “operator” of the site.²²⁵

The Court of Appeal provided some broad direction on the situations in which a parent company may have a clear duty of care for the health and safety of the workers of its subsidiaries. In *Caparo v Dickman*, the court established criteria when met, the parent company will be held liable. It has been decided that in a situation where, as in the instant case:

(1) The businesses of the parent and subsidiary are in a relevant respect the same; (2) The parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) The subsidiary’s system of work is unsafe as the parent company knew, or ought to have known; and (4) The parent knew or ought to have foreseen that the subsidiary or its employees would rely on it using that superior knowledge for the employees’ protection.²²⁶

If these factors are present then the parent company will be regarded as having assumed a direct duty to the employees of the subsidiary. It is very important to emphasise that the parent has the habit of intervening in the health and safety policies of the subsidiary. The court has to consider the wide relationship between the parent company and the subsidiary. It may for example, show that the parent company used to intervene in business of the subsidiary, for manufacturing and financing activities.²²⁷

²²⁵ Br. Waldemar & P. Wilson, *Parent Corporation Liability for Foreign Subsidiaries*, Fasken Martineau Dumoulin LLP, at <http://www.fasken.com/files/Publication/03f8fcd4-b06b-45c8-8572-c077387d5df7>, accessed on 11th August 2013.

²²⁶ H. Smith, “Parent Company Liability for Environmental, Health and Safety Incidents and the Implications of *Chandler v Cape PLC*” in *Energy and Environment bulletin*, at <http://www.herbertsmithfreehills.com/-/media/HS/L17051211710.pdf>

²²⁷ Ibid

In the US, the Tenth Circuit to determine the liability of parent companies for acts committed by subsidiaries has set the so called "injustice" test to necessitate an investigation of ten fact-specific criteria set forth. In *Fish v. East* it decided that in order to determine whether the subsidiary used to be under the control of the parent corporation the following conditions must be met:

1) The parent corporation owns all or a majority of the capital stock of the subsidiary; 2) The parent and subsidiary corporations have common directors and officers; 3) The parent corporation finances the subsidiary; 4) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise controls its incorporation; 5) The subsidiary has grossly inadequate capital; 6) The parent corporation pays the salaries or expenses or losses of the subsidiary; 7) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation; 8) In the papers of the parent corporation, and in the statements of its officers, "the subsidiary" is referred to as such or as a department or division; 9) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary, but take direction from the parent corporation; and 10) The formal legal requirements of the subsidiary as a separate and independent corporation are not observed.²²⁸

From these illustrations, it is very clear that whenever there is a case of violation of rights of individuals by corporations, their parent companies may be sued in various instances highlighted in previous lines. The issue of veil of corporation cannot constitute an obstacle to the application of liability of parent companies for acts committed by their subsidiaries. As this is not the practical issue we may have in company law, it is also good to analyse the issue of immunity in foreign direct investment more especially when it is made by government owned companies.

2.4 Multinationals' liability and the application of immunities

In FDI, immunity can be seen when State controlled companies invest in a foreign country. These are for example, central banks, pension funds, sovereign wealth funds, et cetera. Though, they are very beneficial to the host country, they are sometimes a source of concern. Immunity bars courts of the host country from judging or enforcing some cases against alien States or

²²⁸ C. Miller and Nancy A. Mangone, "Natural Resource and Environmental Notes, Environmental Law, Parent Corporation Liability Under CERCLA After *United States v. Bestfoods*," 1999 Vol. 28, No. 3, March, p. 6.

organisations or being a party to proceedings in the forum state. Their properties cannot also be seized to satisfy a judgment.²²⁹

2.4.1 General Considerations on immunities

Immunity is a doctrine of public international law which originates from the equality of sovereign states.²³⁰ It operates to prevent the courts of one State from exercising jurisdiction over a foreign State. Immunity could not be confused with impunity because the State remains liable for its violations whether it is obliged to appear before foreign courts or if an exception to immunity applies in the circumstance of a particular case.²³¹ State immunity is justified on variety of grounds. Primarily, it is based on the principle of equality which is attached to independent sovereign states, which prevents one state from exercising jurisdiction over another. The principle guiding immunity of states is that of *par in parem non habet jurisdictionem* which means that a sovereign State is not subject to the jurisdiction of courts of another country.²³²

The issue of immunity in foreign direct investment is often raised when countries sign agreements with State-controlled entities. If that host country wants to arbitrate disputes or execute judgments, these entities raise the defence of sovereign immunity to challenge jurisdiction of courts in that country or to avoid the enforcement of an arbitral award.²³³ Immunity can then be regarded at both stages: jurisdiction and enforcement. The consequence of immunity is that a company which enjoys immunity from jurisdiction and cannot be party to a

²²⁹ D. Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors*, OECD Working Papers on International Investment 2010/2, OECD, France, p10.

²³⁰ N. Toleikytė, *The Concept of State Immunity and the Main Challenges*, Vilnius University, Lithuania, p. 346, available at http://www.tf.vu.lt/dokumentai/Admin/Doktorant%C5%B3_konferencija/Toleikyte.pdf, accessed on 26th June 2015.

²³¹ Cl. Chance, *Sate Immunity and State Owned Enterprises, Report for the Special Representative of the UN Secretary General on Business and Human Rights*, 2008, p.1.

²³² The French Cour de Cassation has argued in these words: “ *L’indépendance des Etats est l’un des principes les plus universellement reconnu du droit des gens. De ce principe, il résulte qu’un gouvernement ne peut être soumis, pour les engagements qu’il contracte à la juridiction d’un Etat étranger.* » French Cour de cassation, Sirey 1849, I, p. 81.

²³³ B. Seema *et. alii*, *Sovereign Immunity and Enforcement of Arbitral Awards: Navigating International Boundaries*, Mayer Brown, p 2.

lawsuit before a host court and no judgment can be rendered and no enforcement measures can be taken against that company.²³⁴

2.4.2 Entities and activities which enjoy immunity

In assessing if activities of State controlled companies are purely commercial or not, a distinction must be drawn between the property of States and the property of State instrumentalities or separate State entity.²³⁵ A distinct entity of the State is defined as an organ which is different from the executive body of the administration of the country and capable of suing and being sued. To determine how the degree of distinctiveness from the State is fulfilled, the entity's constitution, functions, power and activities and its relationship with the State have to be examined.²³⁶ The explanatory notes of European convention has cited political subdivision, national banks and railways administrations as State entities *a contrario* other remaining institutions can be considered as separate entities.²³⁷

The French *Cour de Cassation* has introduced another element of distinction. According to that superior court, in determining if the entity is different from the State, the emphasis should be put on the purpose of the operative State act not on their nature. It held that even States cannot be immunized in all situations. Immunity is based on performed acts in the interest of public service.²³⁸

²³⁴ J.Foakes and E. Wilshurst, *State Immunity: The United Nations Convention and its effect*, 2005, p. 6, available at <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/bpstateimmunity.pdf>, accessed on 26th June 2015.

²³⁵ V. Heiskanen, *State As A Private: The Participation of States in International Commercial Arbitration*, 2010, pp2-3. Paper presented on 3 April 2009 in Ankara at an international arbitration seminar in organized by the Turkish National Committee of the International Chamber of Commerce ("ICC Turkey") and published in the ICC Turkey conference papers available at https://www.iccnai.org/locations/vhe_State_as_a_Private%3B_The_Participation_of_States_in_International_Commercial_Arbitration.pdf. accessed on 26th June 2015.

²³⁶ A. Dickson *et alii*, *State Immunity: Selected Materials and Commentary*, 2004, p. 404.

²³⁷ *Idem*, p. 62.

²³⁸ L. M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, Legal associate, White & Case, Washington, D.C, p744. Available at <http://www.asil.org/ajil/caplan.pdf>. Accessed on 11th September 2013.

In 2003 the US Supreme Court in the *Dole* case, clarified the number of agencies or instrumentality companies. It found in *Dole* that the condition for a company to be qualified as such, a majority of shares owned by a foreign State, must be satisfied neither by indirectly held company or privatized as of the date of the complaint. These companies can then be treated as private companies.²³⁹ Foreign companies, in this situation, can enjoy immunities according to the number of shares the State has in it. If found that majority of shares are held by private it becomes automatically private.

Generally, if it is clear that the State owned enterprise is independent and has all prerogatives to act independent, the immunity will be dependent on whether activities were commercial or not. If it is found that activities were purely commercial, that State owned enterprise can never claim for the protection from immunity it will then be considered as a private company, but if activities of the company are clearly linked to sovereignty of the company, it will benefit from the state immunity.²⁴⁰ When a state is engaged in commercial transactions, it is then considered as a trader and does not act as an independent sovereign State because it has ceased to act using its *jure imperii* function and uses its *jure gestionis*. It cannot then enjoy any immunity.²⁴¹

The famous *Empire of Iran* case illustrates the issues about the expansion of immunity that results from reliance on the purpose of the transaction:

[T]he distinction between sovereign and non-sovereign cannot be drawn according to the purpose of the State transaction and whether it stands in a recognizable relations to the sovereign duties of the State. For, ultimately, activities of the State, if not wholly, then to the widest degree, serve sovereign purposes and duties.²⁴²

²³⁹US FSIA § 1603(b)(2). The Supreme Court Granted Certiorari in 2007 on whether a Canadian power company indirectly-held by a province was an “organ,” see *Powerex Corp. v. Reliant Energy Servs.*, 127 S.Ct. 1144 (2007), but the majority decision dismissed the case on jurisdictional grounds. *Powerex Corp. v. Reliant Energy Servs.*, 127 S.Ct. 2411 (2007).

²⁴⁰ D. Gaukrodger, *Op. Cit.*, p.18.

²⁴¹ In French administrative law, there is a difference between “contrats administratifs” and “contrats de l’administration”. The first concerns activities of the state which fall under that major objective of the state as an organizer(Administration). For this, it uses prérogatives of the public power(en Principe un contrat n’est administratif que si une personne publique est partie au contrat, il renferme des clauses exorbitantes de droit commun c’est a dire, des clauses ayant pour objet de conférer aux parties des droits ou de mettre à leur charge des obligations étrangères par leur nature a celles qui sont susceptibles d’être librement consenties par quelconque dans le cadre des lois civiles ou commerciales). The second, it is when a state acts as an individual. As it can also buy or sold like any other person, this why it does not enjoy those prerogatives. See C. Leclercq, *Droit Administratif*, 2e Edition, Litec, Paris, 1986, pp.290-291.

²⁴² When it is about determining the difference between acts *jure imperii* and *jure gestionis* one should instead consider the nature of the State transaction or the resulting legal relationships; and not the motive or purpose of the State activity.

United Nations Convention on Jurisdictional Immunities of States and Their Property article 2(c) defines

commercial transactions” to cover a wide range of contracts and transactions:(i) Any commercial contract or transaction for the sale of goods or supply of services; (ii) Any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; (iii) Any other contract or transaction of a commercial, industrial or trading or professional nature, but not including a contract of employment of persons.²⁴³

Courts in some countries have extended the test from which an act may be considered as an act of administration or a private act by including the purpose of the acts. In the *I Congreso del Partido* case judges decided that in assessing if the act is to benefit from immunity, the whole context of the transaction of the act must be considered.²⁴⁴ France, on the other hand, has considered the nature and purpose of the acts which need to be assessed when granting the immunity.²⁴⁵ It has been decided in French law also that activity of the administration, which must enjoy the immunity is that act undertaken by a public or private entity using a prerogative of the public power. Regardless of whether the act was regulatory or not, or taken in the frame of organisation or functioning of the public service. The activity may be administrative, commercial or industrial. What is necessary is the use of prerogatives of the public power.²⁴⁶

From this consideration of the French law, we may conclude that to be administrative and then enjoy immunity, an act must not be administrative, commercial or industrial. What matters is the fact that was undertaken by the public administration, one of its agencies or even private entities, using public power and prerogatives of the public administration acting for the general interest.

²⁴³ United Nations Convention on Jurisdictional Immunity of States and Property, adopted at New York on 2nd December 2004. Adopted during 65th plenary meeting of the General Assembly by resolution A/59/38 of December 2004. Available at http://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf.

²⁴⁴ *I Congreso del Partido*, UK House of Lords, [1983] 1 AC 244, 64 ILR 307.

²⁴⁵ P. Mayer and V. Heuzé, *Droit International Privé* (9th ed. 2007) § 325, they have required that the act either be an "*acte de puissance publique*" to mean the act undertaken by the state itself with its prerogatives or that it have been carried out "*dans l'intérêt d'un service public*" which means that it must be for the general interest.

²⁴⁶ C. Leclercq, *Droit Administratif*, 2e Edition, Litec, Paris, p.266. This is my own translation. In French it is *Devrait recevoir la qualification d'acte administratif, l'acte édicté par l'autorité publique ou privée dans l'exercice d'une prérogative de puissance publique. Peu importe dans ces conditions, que l'acte soit réglementaire ou individuel, qu'il soit pris pour l'organisation ou le fonctionnement d'un service public, que ce service public soit administratif, industriel ou commercial. Seule compte la mise œuvre ou non de prérogatives de puissances publique.*

This is also the view of Professor Paul Lagarde when he says that the immunity should not be regarded in whether the act *jure imperii* or not but it concerns also their interest. He said:

*les considérations Propres aux Etats interfèrent largement avec l'interprétation prétendue du droit international dans l'élaboration de leur propre droit national des immunités. [...]Ce sont largement les intérêts des Etats et de leurs entreprises qui commandent les réglementations nationales des immunités des Etats étrangers.*²⁴⁷

In all circumstances, the economic interests of states can be considered as leading in the case of immunity. Another question which may be raised is the change in qualification. Acts at the beginning of a transaction may be qualified of commercial nature, but in case of litigation, courts may find that it was an act of administration which must enjoy immunity. For instance, the Italian Court of Cassation decided in the sense that, when the government invests in buying bonds in commercial companies, it will be considered as a private person which cannot benefit from immunity in anyway. In consequence, the government of Argentina which has invested in private companies with the aim of solving serious economic crisis which falls under its mission as a sovereign country has been refused immunity on the ground that it was a commercial act not an act of sovereignty which should enjoy immunity.²⁴⁸ From this, it is very clear that at the beginning the act was commercial which should not enjoy any form of immunity but after realizing the rational from which it was undertaken it changes the nature. We then, think the issue of immunity must not be based on a formula which is pre-established but rather it should be resulted from a court decision basing on a particular case.

In *AIG v. Republic of Kazakhstan*, the court considered that a SWF²⁴⁹ has benefitted from an immunity because when considering the general purpose of the act which was the gathering assets in public interest. The invested funds benefitted from an immunity of execution because it is a sovereign act. The decision was after arbitration from the ICSID and the award which condemned the Republic of Kazakhstan was accepted as a judgment which should be enforced in England, but at the time of execution, the Central Bank of Kazakhstan made an opposition that

²⁴⁷ P. Lagarde, 'Conclusions générales, Droit des Immunités et Exigences du Procès Equitable' (2004), in I. Pingel, p.152.

²⁴⁸ See *Borri Loca v. Republic of Argentina*, Cassazione civile (sez. un.), decision no. 11225 of 27 May 2005 quoted by D Gaukrodger, *Op. Cit*, p. 20.

²⁴⁹ Sovereign Wealth Fund.

cash and securities which were in a London Bank that were affected to a public interest, and then cannot be seized.²⁵⁰

2.4.3 Enforcement of court decisions on properties of the State Owned Enterprises

The immunity of execution is the most complicated in relations between States. Obviously, the use of coercive measures against a State by another State is by itself impossible. Second is the absence of a clear line of demarcation between goods of the public domain of the administration and the private domain of the administration. Generally, public domain of the administration is out of commercial as long as they are affected to the public interest.²⁵¹ To be commercialized, they must be disaffected and this requires a law which must be taken by competent public organs.²⁵² It is then impossible to make a forced execution on properties of the administration which fall under this classification.

French and the US use another terminology which is different from that of Rwanda but with similar meaning. For them they distinguished between properties used for sovereign as opposed to private purposes to know if they can enjoy immunities or if they can be seized as properties of any person. In *Sonatrach*, the Cour de Cassation, it has been decided that a distinction must be made between a foreign State and its agencies which have separate legal personalities. If assets invested in private commercial companies, are those of agencies with separate legal personality, they cannot benefit from immunity. They can then be seized and executed as properties of private persons.²⁵³

²⁵⁰ D. gaukrodger, *Op. Cit*, p. 21.

²⁵¹ *Res extra commercium* or a thing outside commerce

²⁵² Article 10 of Rwandan civil code Book II, in décret du 20 juillet 1920) B.O., 1920, p. 870, Rendu exécutoire au Rwanda par O.R.U., n° 8 du 8 mars 1927 (B.O.R.U., 1927, p. 264).

²⁵³ *Société Sonatrach v. Migeon*, French Court of Cassation (1 October 1985), 77 ILR 525 [“Les biens des organismes publics, personnalisés ou non, distincts de l'Etat étranger, lorsqu'ils font partie d'un patrimoine que celui-ci a affecté à une activité principale relevant du droit privé, peuvent être saisis par tous les créanciers, quels qu'ils soient, de cet organisme“ .]; see US FSIA § 1610(b)(2).

Countries of civil law jurisdictions have also considered the same approach by differentiating between properties which are being used for sovereign purposes and property used for commercial purposes. The constitution court of Germany took the decision in line with the aforementioned principle in the *Philippine Embassy* case.²⁵⁴ The UN convention has established a list of properties which are for public use, therefore excluded from commercial use.²⁵⁵

In the US, the Act on tortious does not distinguish between sovereign activity and commercial activity. According to the Act, the immunity can be withdrawn in all cases even when a tort is committed in the exercise of governmental function.²⁵⁶ States enjoy immunities apart from these specific exceptions; because the list is exhaustive then courts cannot deal with the issue of immunity.²⁵⁷ But the same section has refused that immunity and privilege to separate entities which are distinct from the executive organs of the government of the State and are capable of suing or being sued.²⁵⁸

The fact that entities are excluded in UK is copied from the European Convention on State Immunity, which excludes from the expression “Contracting State,” as used in the Convention, “any legal entity of a Contracting State which is distinct therefore and is capable of suing or

²⁵⁴ The *Philippine Embassy* case, 65 ILR 146 (1977); *Condor and Filvem v. Minister of Justice*, Italian Constitutional Court, 101 ILR 394 (1992); *Abbott v. South Africa*, Spanish Constitutional Court, 113 ILR 411 (1992)

²⁵⁵ Article 20 says that the following categories, in particular, of property of a state shall not be considered as property specifically in use or intended for use by the state for other than government non commercial purposes under article 19 subparagraph (c) which says that

(a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organisations or delegations to organs of international organisations or to international conferences;

(b) Property of a military character or used or intended for use in the performance of military functions;

(c) Property of the central bank or other monetary authority of the State;

(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale. 2. Paragraph 1 is without prejudice to article 18 and article 19, subparagraphs (a) and (b).

²⁵⁶ *Letelier V Republic of Chile* 488F665 (DDC 1980).

²⁵⁷ Section 1(1).

²⁵⁸ Section 14. In determining if the entity is a separate entity from the executive organs of government, the analysis requires a thorough examination of the entity’s constitution, functions, powers and activities and its relationship with the State in order to determine whether the required degree of separation exists(see *Coreck Maritime Gmg, H V. Sevrybokholodflot* (1994) 107 ILR 659 in Scotland.

being sued, even if that entity has been entrusted with public functions”²⁵⁹ Explanatory notes of the article made this clear that the entities to which this article(27) refers to include political subdivisions or State agencies, such as national banks or railways administrations others are therefore excluded.

Generally, the execution of properties of foreign States by private companies is always difficult because of lack of clear proof that the property was located for commercial use not. There are many cases which prove clearly that creditors have attempted in vain to obtain satisfaction for judgments or arbitration awards.²⁶⁰ The immunity is any exemption from a duty, liability, or service of process which is granted to States, public officials, et cetera. The State immunity means the immunity from civil suit afforded to entities of sovereign status. It includes Head of States in their public activities. Based on that theory, foreign states can therefore claim for immunity in local courts. This immunity allows them to undertake their public activities without any fear and interference.²⁶¹

Absolute immunity means a complete exception from civil responsibility, which is given to officials when their undertaking their specific roles such as parliamentarians when voting for laws and judges when judging over lawsuits.²⁶² This kind of immunity provides its beneficiary with all rights attached to it without any restriction.

Even if this doctrine is good to States which may enjoy it, it can cause harm and can be considered as unjust when the State has for example dealt with private entities. In some countries, it was assessed whether the immunity of States should continue to be applied or not

²⁵⁹ Article 27(1) of the European Convention on immunities.

²⁶⁰ V. Noga, *State of Russia Case in Fox*, p. 653-655. Quoted by D. Gaukrodger, *Op. cit.*, p. 23.

²⁶¹ F. Hazel, *The Law of State Immunity*, Oxford University Press, 2002, p.15, quoted by MARLAR, “Recent Trends in the Principle of State Immunity”, (2006) n°. 35, p. 2.

²⁶² *Ibid.*

when States are implicated in trade. The consequence has been the doctrine of absolute immunity is not applied throughout the entire world.²⁶³

The fact that countries have been involved also in commercial activities, countries have adopted the theory of restrictive immunity in which foreign states can be accepted only in case of *acts jure imperii*. The principle of restrictive immunity has been adopted by many countries of Western Europe. It is in that vein that British courts had abandoned the theory of absolute immunity in the case *Trendtex Trading Corp'n v. Central Bank of Nigeria* case; the Court of Appeal accepted the validity of the restrictive approach as going in the direction of justice comity, and international practice.²⁶⁴

In the US the famous act in this domain is the “Tate Letter”. This is a statement of the Department of State known as the Tate Letter which was issued on May 19, 1952. According to the act, restrictive principle of immunity for a foreign state is restricted to the suits involving its public acts (*jure imperii*) and extended to commercial or private acts (*jure gestionis*), to ensure the application of this restrictive principle in the courts and not by the State Department to provide a statutory procedure which can establish personal jurisdiction over a foreign state, and to remedy private litigants by obtaining execution of a judgment against a foreign state.²⁶⁵

2.4.4 Investment by Central Banks and Immunities

Courts have always had discretionary power to determine if properties or Funds are to be used for commercial purposes or not. In the case between the Nigerian Central Bank and Germany, it was decided that cash and securities that were not being presently used in the public service did not benefit from immunity simply because they were intended to be used to finance future State Business.²⁶⁶ The same has been applied by the Swiss Federal tribunal when it denied immunity to the assets of the Libyan Central Bank on the ground that foreign central bank assets could in

²⁶³ *Ibid.*

²⁶⁴ *Id.*, p. 2.

²⁶⁵ F. HazeL, *Op. Cit.*, p.188.

²⁶⁶ D. Gaukrodger, *Op. Cit.*, p. 24.

general be considered as currency reserves not subject to forced execution.²⁶⁷ States must give details of the designed purpose of a bank deposit in the name of the Central bank. They have to prove that the investment was for public interests not for mere commercial purposes. In UK, matters are very simple, for them the section 14(4) of the State Immunity Act is clear on the issue. Every property of the Central Bank shall not be considered as used for commercial purposes consequently they enjoy an absolute immunity for the execution as a matter of law not considering if it is to be used for commercial purposes or not.²⁶⁸

The US Foreign Sovereign Immunity Act also provides special protection to Central Banks but not with the same ampler. According to the law, there may be funds in the Central bank in the accounts which can be used for private purposes. Then, the funds in Central bank account used to finance commercial transactions of private parties are not immune because the funds were not held for its own account.²⁶⁹

The Chinese law of 1995 provides for absolute immunity from execution for the property of Central banks.²⁷⁰ The above mentioned law tries to illustrate properties which can benefit from that immunity. In its article 2, it says: for the purpose of this law, the property of foreign central banks includes the cash, notes, bank deposits, securities, foreign exchange reserves and gold reserves of the foreign central banks and the banks' immovable property and other property".

The French law has also provided for stronger protection but not absolute immunity to Central Banks. It provides immunity to properties of central banks of any nature which is held or managed by that central bank either for that very same country or even for other foreign countries.²⁷¹ The immunity here is accorded to all such central banks or State assets held or

²⁶⁷ *Ibid.*

²⁶⁸ It is said that in all cases, whatever the nature of the property right of the central bank, the assets concerned are immune from the enforcement process. In Kazakhstan case, it was undisputed that the property held by the central bank as the trust manager remained under the full ownership of the SWF. See D. Gaukrodger., *Op Cit.*, note 67.

²⁶⁹ *Waston & Cie de Finance et d'Investissement sa. V Ecuador*, 823F Supp. 1106(SDNY.1993).

²⁷⁰ Law of the People's Republic of China on Judicial Immunity from measures of constraint of the property of foreign Central Banks adopted on 25/10/2005).

²⁷¹ L'immunité concerne leurs biens de toute nature, qu'elles détiennent ou gèrent pour leur compte ou celui de l'Etat ou des Etats étrangers dont elles relèvent. Article 51 of the n° 2005-842 of 26 July 2005 adding article 153-1 of the monetary and financial code. The reference to a central bank depending on several states would appear to the European central bank.

managed by the central bank. That article has however, provided an exception for properties which are clearly used for a principal activity of a private law nature.²⁷² The law applies the test which has been adopted by the *Cour de Cassation* in the Sonatrach where that principle for activities merely used in private law was applied to central banks properties.²⁷³

It is now clear that the investment made by central banks to benefit from immunity is not automatic. The investor must show that cash is for purposes which are not commercial and, if not, they shall not benefit from any immunity.

2.4.5 Waiver of immunity

Waiver of immunity is an act by which, a beneficiary of immunity gives up the rights against self-incrimination and proceedings to testify. It may occur in a treaty, in a diplomatic communication, or by actual submission to the proceeding before the court.²⁷⁴ Waiver of immunity may be implied or express. It must be clear at all times that it concerns either the immunity from execution not the waiver of immunity from jurisdiction.²⁷⁵

It is generally accepted that immunity from enforcement measures may be waived by a State. The UN Convention, in its article 18, says that “no pre-judgment measures of constraint, such as attachment or arrest, against property of a State may be taken in convention with proceeding before a court of another state unless and except to the extent that:

The State has expressly consented to the taking of such measures as indicated: by international agreement; by an arbitration agreement or in a written contract; or by a declaration before the court or by a written communication after a dispute between the parties has arisen; or; the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding”.

This article provides for waiver in the proceeding stage. The article 19 provides the waiver but at the post judgment stage. To what is said in the previous article, it adds the immunity when properties are intended for other purposes not commercial. It says:

²⁷² Les bines qui fond partie d'un patrimoine affecté à une activité principale relevant du droit privé.

²⁷³ D. Gaukrodger, *Op. Cit.*, p. 26.

²⁷⁴ M. Marlar, *Op. Cit.*, p. 105.

²⁷⁵ *Ibid.*

(...) (c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

The US Foreign Sovereign Immunity Act of 1976 (FSIA) provides section 605(a)1 that a foreign state is not immune where it has waived its immunity either expressly or by implication, notwithstanding and withdrawal of the waiver which the foreign state may support to effect, except in accordance with terms of the waiver. This law covers three types of waiver of immunity: the waiver from adjudication, waiver from execution after judgment and waiver from attachment prior to the entry of judgment.²⁷⁶

The execution or the application of immunities in commercial matters depends on the forum state. Section 1610(a) of the United States of America Foreign sovereign Immunity Act sets forth various circumstances under which attachment is permitted, subject to the prerequisite that the property subject to attachment must be property in the US of sovereign state and must have been used for a commercial activity at time writ of attachment or execution is executed. The consequence is that even if a foreign state completely waives its immunity from execution, courts may execute against property that meets the criteria of the law above mentioned.²⁷⁷

The English law, has on its side, provided for another element, the submission of the waiver to the appreciation of the court. According to the Act of 1978, section 2, the consent of waiver must be submitted to the jurisdiction of courts. The same section adds four situations in which a State may give or be considered to give its approval to the proceeding. It can be done either: by submission after dispute, by prior written agreement; by institution of proceedings; by intervening or taking any step in the proceeding other than to claim immunity or assert an interest in property in certain cases.²⁷⁸

²⁷⁶ M.N Shaw, *Op. Cit*, p. 687.

²⁷⁷ *FG hemisphere Assocs. V. Democratic Republic of Congo*, 637 F3d373,380(DC cri. 2011) See for further information Bruno, *et. alii*, *Sovereign Immunity and Enforcement of Arbitral Awards: Navigating International Boundaries*, Mayer Brown, p.7.

²⁷⁸ F. Hazel, *Op. Cit*, p.191.

The issue of criminal liability of corporations has now been clarified. As companies can commit offences against human beings, and have *mens rea* and *actus reus* this is why they have to bear their responsibilities whenever they have been found guilty of violating human rights in their activities. The immunity can no longer serve as a pretext to avoid punishments against corporations. The following chapters will then assess the way foreign direct investment has impacted on human rights in Rwanda.

2.5 Chapter Conclusion

The relationship between foreign direct investment and human rights is not a new topic. Various authors have debated on it and found that if tough measures are not taken, MNCs can sometimes be involved in human rights violations. The issue of responsibility of MNCs in host countries can appear in two ways either by providing a clear assistance to those who violate human rights or by intervening in activities which violate human rights.

The assistance can for example be providing food, transport or any other means to persons who are violating human rights. For person activities, it is when MNCs are involved in activities which harm rights of individuals like extraction of minerals using stuffs which are not appropriate and then pollute water, use of pesticides in farming regardless the harm they may cause to lives of people, et cetera.

Even if the liability of corporations is obvious, some resistances have been made in order to keep their activities unpunished. Some of the pretexts which have been used; we have the non-application of criminal sanctions to corporations, the use of immunity in case the Company accused for human rights abuse is a State owned company et cetera. In this chapter we have tried to make these issues clear in the sense that all these should be analysed in ways intending to criminalise them with the aim of restoring victims of their acts in their rights.

The following chapters will tackle particular issues relating to human rights violations by corporations in Rwanda.

CHAPTER THREE

FOREIGN DIRECT INVESTMENT AND THE RESPECT OF LABOUR STANDARDS IN RWANDA

3.1 Introduction

The relationship between foreign direct investment and labour standards is a concern which must be considered by all countries, especially developing ones. This relationship is governed by a number of laws and regulations aiming at maintaining the equilibrium between interests of social partners because it is always characterized by antagonism of interest which needs an intervention of the legislator in order to manifest an attitude of vigilance which reduces the imbalance in the employment contract. Internationally, compliant labour standards are among rights of which inhabitants of host countries are sometimes denied.

Labour rights have always been at risk of violation at the hands of employers. Such instances of violations may be more visible where the employer is a foreign investor. The severe and persistent violations of basic freedoms of association and collective bargaining rights have led to lower labour costs, and in some instances workers are paid less than others, for similar productive work. Another prominent contributing factor is that investors are reasonably expected to avoid investing in areas where labour costs run high.²⁷⁹ The 21st Century has been considered as one where developing countries have invested incentives to attract foreign investors. This policy has brought about competition between countries which try to outdo each other by trying

²⁷⁹ D. Rodrik, *Globalization Gone Too Far?* Institute for International Economics, Washington, DC, 199, p. 2.

to offer foreign investors the best incentives. In doing so, regulatory functions in some of these developing countries have been weakened, and such countries have consequently ranked poorly in this regard.²⁸⁰

Rodrik introduced the so called “conventional wisdom about low-standard countries being a heaven for foreign investors” as pertaining to labour standards in FDI.²⁸¹ According to the said principle, foreign investors prefer where union representation is weaker.²⁸² Freeman argues that the effect of labour standards on comparative advantage and trade is one of empirical magnitude, which further research should be able to clarify. He emphasizes that they need studies with alternative measures of standards, models, and samples of countries.²⁸³ Robert M. Stern and Katherine Terell have argued that “unfair” labour practices and conditions exist in many developing countries. Trading partners need to be offset by appropriate trade policy measures in order to “level the playing field”.²⁸⁴ Human rights activists have also added that workers in developing countries are subject to exploitative and abusive working conditions and that their wages are suppressed”.²⁸⁵ The UNCTAD, in its reports, has recommended countries to protect labour rights.²⁸⁶

Labour rights which need to be protected in relation to foreign direct investment are: freedom of association and the effective recognition of the right to collective bargaining, the effective abolition of child labour, the elimination of discrimination in respect of employment and occupation and the elimination of all forms of forced work, child labour, occupational health and

²⁸⁰ The OECD research concluded that there is no decisive evidence of any inexorable tendency towards global bidding wars’ among countries in their competition to attract FDI, but that the “prisoner’s dilemma” nature of competition creates a permanent danger of such wars, see in D. Kucera, “Core Labour Standards and Foreign Direct Investment”, (2002) n ° 1-2, Vol. 141, in *International Labour Review*, p 1.

²⁸¹ D. Rodrik, *Op cit*, p. 4.

²⁸² Ibid

²⁸³ R. Freeman, *International Labour Standards and World Trade: Friends or Foes?* in Jeffrey Schott (ed.) *The World Trading System: Challenges Ahead*. Washington, D.C.: Institute for International Economics, 1996, p.103.

²⁸⁴ M. Robert Stern and K. Terell, *Labour Standards and the World Trade Organisation, A Position Paper*, University of Michigan, August, 2003, p.1. available at <http://fordschool.umich.edu/rsie/workingpapers/Papers476-500/r499.pdf>. visited on 6th July 2015.

²⁸⁵ Ibid.

²⁸⁶ UNCTAD, *World Investment Report 2013*, New York, Geneva, 2013, p.185. available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf

safety, *et caetera*.²⁸⁷ This chapter will make an assessment on the extent to which labour rights are respected by foreign investors in Rwanda. The study will analyse various laws and conventions relating to labour standards as well as the way principles set out by these laws are implemented.

3.2 Generalities on labour standards

When studying labour laws, it seems difficult to find a common and unanimous list of labour standards. They vary from country to country depending on several factors including the stage of development, the political background, social and cultural conditions and institutional organisation.²⁸⁸ At the international level however, efforts have been made to have a consensus on list of elements which would fall under the qualification of labour standards.²⁸⁹ The universal consideration of these core labour standards is derived from the adoption of a number of international instruments like the Universal Declaration on Human Rights in 1948 and the ILO declaration on fundamental principles and human rights at work in 1998.²⁹⁰ International labour standards are rules agreed upon by member states of the ILO which contain various basic principles aiming at protecting workers in the working place. The major aim of these conventions is to improve terms of employment on a global scale.²⁹¹ These standards institute a universal minimum level of protection from malpractice which may be used by employers. At the level of regulatory framework, these principles serve as a clear basis from which human being must be protected at their work places.²⁹²

²⁸⁷ These principles are contained in the ILO Declaration of 1998 in its article 2.

²⁸⁸ M. Robert Stern and K. Terell, *Op. cit.*, p. 4.

²⁸⁹ *Ibid.*

²⁹⁰ The Universal Declaration of Human rights adapted by the UN General Assembly on 10th December 1948 and the ILO declaration of Philadelphia in 1944.

²⁹¹ Bureau of Labour Relations, Reference materials workplace relations: concepts and application: an overview of Philippine labour relations system, p. 1. available at http://www.bwc.dole.gov.ph/userfiles/file/module_workplace_relations_june3.pdf , visited on 29th June 2015.

²⁹² K. Brown, et alii. "International Labour Standards and Trade: A Theoretical Analysis", *Fair trade and harmonization: Prerequisites for free trade?* Cambridge, MA: MIT Press, 1996, pp 227–272.

According to the OECD 2000 report, there are eight fundamental international labour standards conventions that have been unanimously accepted by ILO's members.²⁹³ These conventions are the Convention n°29 and 105 on prohibition of forced labour; the Conventions n°87 and 98 on freedom of association and protection of the rights to organize and collective bargaining; Convention n° 100 on equal remuneration for men and women for work of equal value; Convention n° 111 on non-discrimination in employment and occupation and Conventions n° 138 and 182 on minimum age of employment of children and abolition of the worse forms of child labour, right to a minimum wage; limitation on working hours; and occupational safety and health in the workplace.²⁹⁴

Most of these conventions have been ratified by Rwanda. Those which have been ratified by Rwanda are: The Convention n°4 Of 1919 On Night Work For Women²⁹⁵, Convention n° 11 Of 1921 On Right Of Association²⁹⁶, Convention n°12 of 1921 weekly Rest Convention²⁹⁷; Convention n°18 Of 1925 On Workmen Compensation In Case of Occupational Diseases²⁹⁸, Convention N° 29 Of 1930 On Forced Labour,²⁹⁹ Labour Inspection Convention; Convention n° 81 of 1947,³⁰⁰ Convention n°87 of 1948 On Freedom of Association,³⁰¹ Convention n°98 On Rights To Organize Collective Bargain,³⁰² Convention n°105 of 1957 On Abolition Of Forced Labour,³⁰³ Convention n°123 On Minimum Age³⁰⁴ And The Convention n°135 On Workers'

²⁹³ ILO, *Guide on Employment Policy and International Labour Standards*, International labour organisation International training center of the, Geneva, 2013, p.13. available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_233783.pdf, accessed on 6th July 2015.

²⁹⁴ K. Brown, F. Deardorf and Stern, *For the Definitions and Principles of Core and other Labour Standards that are Articulated in US Trade Law*, Lyle, 1991, pp.20-31 quoted by M. Robert Stern and K. Terell, *Op. cit.*, p. 4.

²⁹⁵ Ratified on 18.09.1962.

²⁹⁶ Ratified on 18.09.1962.

²⁹⁷ Ratified on 18.09.1962.

²⁹⁸ Ratified on 18.09.1962.

²⁹⁹ Ratified on 18.09.1962.

³⁰⁰ Ratified on 2.12.1980.

³⁰¹ Ratified on 8.11.1988

³⁰² Ratified on 8.11.1980.

³⁰³ Ratified on 18/09/1962.

³⁰⁴ Ratified on 1.06.1970.

Representatives.³⁰⁵ For the purpose of this research, we have chosen to analyse some of these core labour standards, especially those which have been ratified by Rwanda.

3.3 Freedom of association and collective bargain

This labour standard consists of rights of employees which allow them to participate in trade union formation, and participate in strikes as well as negotiation of collective bargains without any interference.³⁰⁶ This standard also gives workers the right to negotiate change of working conditions including the negotiation for higher wages, and this in turn increases the average labour costs and affects FDI.³⁰⁷ This principle around the world is a fundamental requirement because of its most essential structural characteristic.³⁰⁸ OECD also argues that the observance of FACB standards can counterbalance the negative consequences of earnings if they generate a secured social environment through better employment contract relationship.³⁰⁹ Freedom of association and collective bargaining is considered as one of the means which can be used by employees in decision making of their company by negotiating pay structures for salaries and other improving other labour conditions. This can be done by workers themselves or by their representatives and the employers.³¹⁰

The freedom of association as a human right is a topic which has not received adequate attention from advocates of human rights. Their attention has mainly been on other pressing problems such as arbitrary detention and torture, the massacre of indigenous peoples and ethnic minorities,

³⁰⁵ Ratified on 8.11.1988.

³⁰⁶ R. Sarna, *The impact of Core Labour Standards on Foreign Direct Investment in East Asia*, The Japan Institute for Labour Policy and Training Tokyo, Japan, October 2005 , p. 10. Available at <http://www.jil.go.jp/profile/documents/Sarna.pdf>. visited on 6th July 2015.

³⁰⁷ Ibid.

³⁰⁸ According to A. Odero and H. Guido in *ILO Law on Freedom of Association, Standards and Procedure*, International Labour Office, Geneva, 1995, p.6., This characteristic is tripartite because of important responsibilities based on the Constitution and ILO instrument that employers' and workers' organizations which are called upon to exercise within the Organization itself as well as in different member States.

³⁰⁹ Ibid.

³¹⁰ S. Sriyan, Collective bargaining negotiations, ILO, ACT/IMP publications available at <http://www.ilo.org/public/english/dialogue/actemp/downloads/publications/srscbarg.pdf> visited on 29th June 2015.

atrocities of war and civil war, and other gross human rights violations.³¹¹ Even if, sometimes ignored, freedom of association is among the rights which are frequently violated by employers despite its constitutional character.³¹² The application of this right has been sometimes been denied by some employers because this standard relocates some powers to the workers.³¹³ Employers fear that unions may unnecessarily cause strikes, play on the landscape politics and encumber output therefore degrading investment.³¹⁴ Freedom of association is now universally acknowledged as a fundamental right and international norms have established standards for worker's freedom of association covering right to organize, the right to bargain collectively and the right to strike.³¹⁵

FACB has enjoyed international support because, in the absence of strong associations of workers endowed with the essential rights and guarantees for furtherance and protection of rights of workers and progression of the social wellbeing, the standard of tripartite can be weakened or ignored.³¹⁶ In any company, the freedom of association is necessary for its progress. This has been reaffirmed by the Philadelphia Declaration concerning the aims and purposes of the International Labour Organisation in its point I (b) .³¹⁷ The need for freedom of association cannot be attributed to only developing countries but concerns every country including developed ones.³¹⁸ At the ILO levels two conventions have been considered and these are the convention n°87 and the convention n° 98.

³¹¹ L. Compa, *Freedom of Association in the United States The Gap between Ideals and Practice*, Cornell University ILR school, 2003, available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1377&context=articles>. Visited on 6th July 2015. See also Human Right watch, *Unfair advantage: worker's freedom of association in the United Sates under International human rights standards*, New York, Washington, London and Brussels, 2000, p.49.

³¹² Article 35 of the Rwandan Constitution.

³¹³ L. Compa, *Op. cit.*, p. 49.

³¹⁴ Article 35 of the Rwandan constitution, Article 36 of the Constitution of the republic of Kenya, etc.

³¹⁵ J.A Gross, "A Human Rights Perspective on United States Labour Relation Law: A violation of the Right of Freedom of Association", (1999), *Employee rights and employment policy journal* Chicago- Kent College of Law, p 65.

³¹⁶ B. Gernigon, A. Odero and H. Guido, "ILO Principles Concerning the Right to Strike", (1998), V.137, n°4, *The International Labour Review*, p. 3.

³¹⁷ It is said that "The Freedom of Expression and of Association are Essential to Sustained Progress" available at http://www.ilocarib.org.tt/cariblex/pdfs/ILO_dec_philadelphia.pdf.

³¹⁸ *Ibid.*

3.3.1 Freedom of association and international legal instruments

Sources of international labour law on worker's freedom of association can be found at both international and regional levels. These laws contain principles worked through by worker, employer and government representatives at the International Labour Organisation, and labour rights clauses in international trade agreements.³¹⁹ The freedom of association is recognised by international instruments as well as national legal instruments. At the international level, we have the Universal Declaration on Human Rights, International Covenant on Civil and Political Rights and various ILO Conventions; whereas at the national level we have the Constitution of the Republic of Rwanda, the labour code and other ministerial orders.

3.3.1.1 UDHR and ICCPR and freedom of association

The United Nations system has provided for freedom of association in various instruments. The most important are UDHR³²⁰ and ICCPR.³²¹ Despite their importance, these two international instruments, lack enforcement mechanisms from which the violator can be punished. The Universal Declaration of Human Rights has some provisions providing for freedom of association and collective bargain. Article 19 states that every person is entitled to have freedom of opinion and expression. This includes the freedom to have an opinion without interference and to seek, receive and convey information and ideas through media and regardless of frontiers.³²² The same declaration proclaims the freedom of assembly and association and gives rights to individuals to belong to an association of their choices.³²³ Article 23 says that everyone has the right to form and to join trade unions for the protection of his interests.

³¹⁹ These instruments include for example: the Universal Declaration of Human Rights (1948) in its article 23(4)

³²⁰ Universal Declaration of Human Rights, adopted on 10th December 1948 by the UN General assembly.

³²¹ International Covenant on Civil and Political Rights adopted by the General Assembly of the UN on 19 December 1966.

³²² Article 19(2) of the ICCPR

³²³ Article 20 of the Universal Declaration on Human rights.

Beside the IDHR, the ICCPR also contains also some provisions proclaiming rights to workers with useful emphasis on the freedom of association and collective bargain.³²⁴ ICCPR says, "everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of their interests."³²⁵ This article adds that nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning freedom of association and protection of the right to organize legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the exercise of this right, the guarantees provided for in that Convention.³²⁶

3.3.1.2 ILO Conventions on FACB

The ILO committee on Freedom of Association has elaborated a number of conventions after decades of struggle following the infringement of employees' rights.³²⁷ These conventions hold rules for the implementation of the right to organize, the right to bargain collectively and the right to strike. Conventions we have been elaborated are: the Convention n°87 on Freedom of association and protection of right to organize³²⁸, The Convention n°98³²⁹ On the Enjoyment of Efficient Protection Against Acts of Anti-Union Discrimination and the ILO declaration on Fundamental principles and rights at work.

a. ILO convention 87

This convention was adopted in the General Conference convened at San Francisco by the Governing body of the International Labour Organisation in its 31st Session organized on 17 June 1948. The convention emphasizes on the fact that freedom of association is considered as a

³²⁴ Article 22(1).

³²⁵ Article 22(2).

³²⁶ Article 22(3).

³²⁷ L.A. Compa, "Workers' Freedom of Association and the United States : the Gap Between Ideals and Practice", (2003), Cornell University ILR school Digital commons, ILR collection, p.6. available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1377&context=articles>

³²⁸ http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232

³²⁹ http://www.ilocarib.org.tt/cariblex/pdfs/ILO_Convention_98.pdf

means of improving conditions of labour and of establishing peace.³³⁰ It confirms the Philadelphia Declaration where it reaffirms that freedom of expression and of association is crucial to strong and well-built advancement.³³¹

The convention gives workers and employers the right to join organisations of their choice without seeking prior authorization.³³² It also gives these organisations the right to establish and join federations and confederations which may also have rights to affiliate with international organisations of workers and employers,³³³ and also the right to draw up their own constitutions and rules, to elect their representatives in full freedom, to organize their own administration and activities and also to formulate their own programmes.³³⁴ In the convention, state authorities are obliged to abstain themselves from any intrusion which would limit this right or hinder the legal exercise thereof.³³⁵ Public authorities cannot have any influence or play any role in time of dissolution or suspension.³³⁶

b. Convention C97

The convention C97 was adopted in the General Conference of the ILO convened at Geneva by the Body of the ILO office in its thirty second session on 8 June 1949. This convention gives workers a special protection against acts of discrimination at their workplaces. The article adds that

“Such protection shall apply more particularly in respect of acts calculated to (a) make the employment of a worker subject to the condition that shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours”.³³⁷

The convention obliges employers not to interfere in the administration of such organisations. It prohibits them also from supporting financially or by other means workers organisations with the

³³⁰ Preamble of the Constitution of ILO.

³³¹ See the preamble of the Convention 87.

³³² Article 2 of the convention.

³³³ Article 5.

³³⁴ Article 3(1).

³³⁵ Article 3(2).

³³⁶ Article 4

³³⁷ Article 1 of the C97.

intention of controlling those organisations.³³⁸ The support which must be given by the employer must be aimed at protecting the right to organize.³³⁹

The convention recommends that governments adopt appropriate measures at their levels which give important role to voluntary negotiation between employers or employers' organisations, for aiming at regulating the clauses and conditions of employment using collective conventions.³⁴⁰

3.3.1.3 Respect of trade union rights and civil rights

International trade and foreign direct investment are among the determinants of employment and labour conditions around the world. Trade unions and their bargaining behaviour play a major role in changing employment conditions. Though they function differently, their interaction cannot be ignored.³⁴¹ Some questions arise from the analysis of this interaction: Are there free trade unions and peasant organisations or equivalent, and is there effective collective bargaining? Do trade unions support the strengthening of labour standards? Are there free professional and other private organisations? Is there equality of opportunities, including freedom from exploitation by or dependency on landlords, employers, union traders, bureaucrats, or other types of obstacle to a share of legitimate economic gain?³⁴² These are among questions which need to be answered when assessing protection of workers in Rwandan business.

In the discussion of FDI in developing countries, it has been said by many that investors often choose countries where the labour standards are not very demanding and where the laws are not very rigorous. This has an incidence on the treatment of workers in the host country whenever corporations are using low labour standards, knowing that there is not going to be consequences.

³³⁸ Article 2 of the convention

³³⁹ Article 3 of the convention

³⁴⁰ B. Saul, D. Kinley, and J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights, Commentary, Cases, and Materials*, Oxford University Press, UK, 2004, p. 605.

³⁴¹ A. Donado and K. Walde, *Globalisation, Trade Unions and Labour Standards in the North*, ILO Employment working paper no 119, ILO, Geneva, 2012, p. xi.

³⁴² D. Kacera and S. Ritash, *How do Trade Unions Rights Affect Trade Competitiveness?* Working paper, Policy Integration Department Statistical; Development and Analysis Group, ILO, Geneva, 2004, p. 5.

The issue of respect for trade unions strengthening and foreign direct investment has grabbed the attention of scholars. Generally, when there are strong trade unions in a country, the country tends to be less attractive to foreign direct investment because trade unions usually limit the profitability of their investments and subsequently they will base their operations in countries with uncoordinated bargaining workers organisations, where the rights of trade unions are restricted, as well as where the power of determining wages and fixing other work conditions are solely given to those investors.³⁴³ It is reasonable to trace a likelihood of investing abroad, with the degree of ease with which investment abroad can be carried out. The degree of ease is closely related to the technological development in telecommunication and transportation as well as institutional changes such as NAFTA and WTO, which facilitate international transactions.³⁴⁴

An increase of mobility of workers is not compared to that of employers. Employers will take advantage of that unequal mobility between labour and capital. If there are differences in mobility, the less mobile workers will be more affected by an increase in capital mobility. Normally, skilled workers have more mobility than unskilled ones.³⁴⁵ If trade unions are more active in a given enterprise, they will impose high labour standards because generally, employers regard those standards as an extra cost which diminishes their profits. Companies which open their businesses in developing countries, tend to deteriorate labour conditions. These companies are generally forced to reduce their labour standards in order to keep up with the increase competition.³⁴⁶

3.3.2 Respect of freedom of association and collective bargain by MNCs in Rwanda

Freedom of association and collective bargain are among rights of workers which are clearly provided by various Rwandan laws.³⁴⁷ Having clear laws on FACB and implementing them

³⁴³ R. Radulescu and M. Robson, *Trade Unions, Wage Bargaining Coordination and Foreign Direct Investment*, Old Elvert, Durham, 2006, p. 4.

³⁴⁴ *Ibid*

³⁴⁵ *Ibid*.

³⁴⁶ A. Donado and K. Walde, *Op. cit*, p. 1.

³⁴⁷ Constitution of the Republic of Rwanda, Labour Code and various Ministerial Orders

properly are two different principles. This subsection intends to assess the extent to which these rights are respected.

3.3.2.1 Freedom of association and trade unions in Rwanda

The protection of trade union freedom is enshrined in the Constitution of the Republic of Rwanda in these terms: “the right to form trade unions for the defence and promotion of legitimate professional interests is recognized”.³⁴⁸ This means that workers can defend their rights through their labour organisations basing on laws and regulations of their countries. The same article says that, any worker can join any trade union of his/her choice. Rwanda has ratified the ILO Convention n°87 on freedom of Association and Protection of Right to Organize.³⁴⁹

The Rwandan labour Code, in its article 101, guarantees the freedom of association by allowing employers and employees to create their own professional organisations and to join any trade union or employers’ professional organisation of their choice.³⁵⁰ The same article gives rights to trade unions to work out on their own constitutions and internal rules and regulations. They are also free to choose their representatives and organize their activities as well as the design of their action plan.³⁵¹ They are free to allocate their assets to activities of their choice provided that it has been decided by its members.³⁵² They have also right to post all their communications which are related to their trade union without a prior authorization.³⁵³

This shows clearly that Rwandan legal framework is favourable to the creation of measures to improve the working environment. It is also seen in the existence of such organizations in Rwanda. Currently, there are four main trade unions in Rwanda: *la Centrale des Syndicats des*

³⁴⁸ Article 38 of the Constitution of the Republic of Rwanda of 2003 as amended.

³⁴⁹ Supra note 23.

³⁵⁰ The article says that “workers and employers may set up freely and without prior authorization their respective professional organization. They are also free to join any trade union or employers’ professional organization of their choice.

³⁵¹ Article 101 paragraph 2.

³⁵² Article 105.

³⁵³ Article 110.

Travailleurs du Rwanda (CESTRAR)³⁵⁴; *Association des Chrétiens - Umurimo* (ASC_UMURIMO); *le Conseil national des Syndicats Libres* (COSYLI) and *le Congrès du Travail et de la Fraternité* (COTRAF).³⁵⁵ CESTRAR is considered to be the first trade union created in Rwanda. It became operational in 1991 when the Constitution which came into force at that time allowed for a Multi-party political system in Rwanda.³⁵⁶ The only employers' federation which currently exists is the Rwanda Private Sector Federation. This is an employers' organisation which succeeded the Rwanda Chamber of Commerce.³⁵⁷ This federation is composed of various economic operators including banks, insurance companies, transporters, industrialists, etc.³⁵⁸

In any company, trade unionists must be given sufficient time to carry out their representation tasks and to benefit from an annual leaves for their training.³⁵⁹ Companies which employ more than twenty workers are obliged to provide offices to trade unions. This must be facilitated by the manager of the firm in order to permit trade unionists to run their activities and also to organize their meetings.³⁶⁰ Even if this condition is required by the law, it is regrettable that employers do not respect it. In a visit we made in various institutions, we have found that no single institution has provided for offices and other facilities for trade unionists.³⁶¹

³⁵⁴ L. Mutuyimana, *Rôle des Syndicats des Travailleurs dans l'Elaboration des Normes Internationales du Travail : cas de la CESTRALE*, Dissertation, ULK, 2010, p. 14.

³⁵⁵ Ibid.

³⁵⁶ Article 7 of the Constitution of 30 May 1991, *OG*, 10 June 1991.

³⁵⁷ This was a government driven institution.

³⁵⁸ Membership of PSF are business professional organisations set as chambers, associations, industry chains. Membership at PSF is drawn from business companies grouped into geographical and professional organisations committed to address the challenges associated with the development of Rwanda's private sector.

http://www.psf.org.rw/members/ordinary_members#sthash.P6aVR9PE.dpuf . Rights of members are among others: 1. Becoming part of a larger professional body working together to lobby policy making processes that stimulate and spur growth of private businesses in Rwanda. 2. Access to Business Development Services such as entrepreneurship skills; Business counseling; business health check, business plan development at a discounted rates. 3. Participation in the decision making process within PSF Organs. 4. Benefiting from the funds available through the Projects managed by PSF. The various products/services include: Business Development Services, Training of individual enterprises, Business Plan Support, grants and collateral programme, etc 5. Enjoying discounted rates on fee based activities: trainings, seminars; conferences; exhibitions e.t.c 6. Involvement and participation in various business forums, sector working groups on policy that might affect the private sector, 7. Getting regular first hand information and business opportunities in Rwanda, East African Community and other trading blocks in the world, 8Access to information at PSF Resource Center, 9 - Participation in PSF networking meetings and member activities. See more at: http://www.psf.org.rw/members/ordinary_members#sthash.7cqPPJdc.dpuf

³⁵⁹ Article 109.

³⁶⁰ Article 111.

³⁶¹ Visit made in various security companies(FODEY Security, KK security and Intersec) and a textile industry (Utexirwa).

The law prohibits employers from adhering to a trade union which can be imposed on workers in order for them to take more benefits from that trade union or to take unfair decisions which may concern employees or working conditions in general. This prohibition also covers the deduction of the worker's salary for subscription of a trade union without their prior written consent. The article adds that the employer cannot deduct trade union's subscriptions from worker's salary or to use any means of pressure for or against any trade union.³⁶² There is no clear evidence that employers are guilty of a breach in this regard, since trade unions are quasi inexistent in many companies.

The Rwandan labour code gives organisations of employees with legal status rights to represent workers or employers. In doing so, trade unions have rights to:

File a case on behalf of its members and to represent them in any court case lodged under the labour law, Access the firm premises upon request to conduct trade union business, Have the subscription fees deducted from the member's salary, Merge with other registered trade unions to form a confederation, Join federations of trade unions and participate in their activities, Enter into agreement with an employer or take part in collective convention where it is an authorized trade union; Join any international workers' organisations and participate in their activities.³⁶³

However, even if this right is very clear in the labour code, it is aberrant that no single trade union has dared to exercise the right to stand on behalf of its members in Rwanda. Despite the existence of a favourable legal framework and such organisations, it seems like in practice, nothing is being done to implement those rights. The next paragraph will illustrate some of the aspects of the inefficiency of the trade unions in the context of Rwanda.

3.3.1.3 Ineffectiveness of Rwandan trade unions in protecting employee's rights

Relationships between employees, employers and trade unions have improved in Rwanda over the years. The law has, for example, introduced new forms of managing the working time by

³⁶² Article 114.

³⁶³ Article 115.

using a kind of tripartite synergy between these three levels.³⁶⁴ Those new forms of management of working conditions require a permanent follow up exercise by competent parties in order to ensure the application of the labour norms. Trade unions act here only for the purpose of protecting interest of workers.³⁶⁵ Even if this seems to provide a semblance of protection, some aspects remain difficult. Employees and trade unions do not work properly because of a number of obstacles including ignorance and fear of being fired on the side of workers. Among the problems that workers are faced with, we include for example, the non-payment of the salary or compensation for overtime worked, problems of implementing equality of salaries for workers exercising the same work with the same intellectual capacity and academic qualification. These are some of the delicate problems to which workers are victims of. Whenever there is a breach of these rights, they fear reporting this to their trade unions fearing that they will be fired from the company and this why implementation is problematic.

In the context of Rwanda, it is clear that there is no balance between the power of the employer and the power of the employees. The later often do not claim for their rights and prefer to work under despicable conditions, for fear of being dismissed. Since many people are looking for employment, the one who refuses to work under those conditions is simply shown the door. Employers in Rwanda often do not take into consideration the abusive nature of unjustified dismissal this shown by the fact that most of the disagreements between employer and employees that end up in courts are ruled in favour of the employees. Most of the cases instituted between employee and employer in Rwandan courts are for unfair illegal dismissal, i.e. breach contractual agreement.

In the case of *Rwanteli Ntagara Innocent vs Phoenix Metal* (a Tin selter company owned by US NMC Metals Inc.) for instance, the Supreme Court confirmed the guiltiness of Phoenix Metal, confirming the previous ruling of the High Court. The Supreme Court obliged Phoenix M. to pay an amount of Rwf 3,199,500 to M. Rwanteli for unlawfully being sent into retirement. The previous decision of the High Court on the matter, obligated Phoenix to pay Rwf 25,380,000, the

³⁶⁴ Article 3 of the Ministerial order n° 04/19.19 of 17 September 2009.

³⁶⁵ F. MUKAMUTARA, *Role of Trade Unions in the Protection of Employees' Rights under Rwandan Labour law*, Dissertation, ULK, 2012, p.28, unpublished.

decision was appealed by Phoenix M.³⁶⁶ The non-payment of overtime and unfair dismissals stand at the top because employers do not respect the work calendar and terms of the contract they themselves have established. These two cases are the most remarkable in the employment relation during disputes between employers and employees.

Another case to illustrate this is one of Mbanzarugamba Fiacre and his co-workers against the Lutheran World Federation (LWF) in Rwanda. The claimants were allegedly dismissed illegally and did not receive remuneration for the extra hours they worked as well as the remunerations for their leave days. They introduced their claim to the Intermediary Court of Ngoma which issued a judgment obliging the LWF to pay indemnities ranging from 1 to 1.3 Million of Rwandan francs for each of all seven claimants. Some of them were not satisfied with the outcome of this judgment and introduced an appeal at the High Court branch of Rwamagana. The outcome was again against the LWF which was forced to pay out 50 Million Rwandan francs to all of them. The LWF disagreed on the decision and filed an appeal at the Supreme Court. The Supreme Court upheld the previous judgment but reduced the amount of indemnities to 12.1 Million francs.³⁶⁷

The role of trade unions is then crucial here. It is clear that whenever there is a good climate of cooperation between employers and trade unions, most of these problems are preventable following the active involvement of the unions without which both parties can neglect protecting the right of workers. From this consideration, the fact is that the role of trade union in protecting employees is not sufficient since we cannot have any case where this role is duly played.

Rwandan trade unions are not interested in protecting the employees this might be explained in various ways. Considering the volume of what is at stake, one could argue that there is no real interest for the union to oblige the employers to improve the conditions of the employees. This might be justified, to our understanding, by the fact that there is a considerable discrepancy between the number of job offered and that of potential workers. Since the last is a very large

³⁶⁶ Judgment, Rwanteri Ntaraga Innocent v. Phoenix Metal (RSOC AA 0023/09/CS), Supreme Court, 18/06/2010

³⁶⁷ Judgment, Mbanzarugamba Fiacre et cons. v. Lutheran World Federation (RSOC AA 0007/09/CS), Supreme Court, 12/02/2010

number, there is no risk for the employer to run out of option when it comes to hiring. Also, for the same reason, even a skilled potential worker will take on any position offered to him and under any conditions. This has as consequence that the employer does not feel the necessity of spending more resources to ensure that the working conditions are being ameliorated, and this also impacts the actions of the trade unions.

As a consequence, trade unions do not challenge employers' behaviour because the victims; the abused employees are afraid to speak out. Furthermore, the scarcity of employment is being exploited by the majority of employers in Rwanda and justifies, to some extent, this idleness of the trade union.

Furthermore, trade unions do not exploit the opportunity offered to them by the article 115 of the labour code which says that trade unions have a right to file a case on behalf of its members and to represent them in any court case lodged under the labour law. The reasons may also be numerous. One of the eloquent reasons which illustrate this, is the restriction provided in the law on Kigali Bar association which was repealed in 2013. That law gave limited legal representation to advocates alone.³⁶⁸ It is good that the law which is into force now has at least accepted that representation by lawyers from NGOs.³⁶⁹ Lawyers from trade unions are now accepted to represent their clients before courts.

Article 10 of the Rwandan Criminal Procedure, gives activists associations the rights to exercise rights of civil parties victims of human rights violations.³⁷⁰ There may be questions as to whether this *locus standi* is also given to trade unions. Interviews conducted with various trade union members revealed that so far no case has been lodged by them and no single representation has

³⁶⁸ Article 47 of the law of 1997 which has been repealed said "only advocates shall be entitled to plead before courts, unless there are exceptions provided for by the law(...).

³⁶⁹ Law n°83/2013 of 11/09/2013 establishing the Bar Association in Rwanda and determining its organisation and functioning, Official Gazette n° 44 of 4.11.2013 gives rights to lawyers of NGOs which provide legal aid service to vulnerable people to represent them before courts (article 38(4)).

³⁷⁰ Article 10 of the Law n° 13/2004 of 17/5/2004, Relating to the code of criminal procedure, *O.G* Special n° of 30/07/2004.

been done.³⁷¹ As mentioned above, we believe this can find its explanation in the fact that they do not see the necessity to act since the stakeholders themselves are not bothered by being ‘mistreated’. It is quite possible that even the *locus standi* given to those associations fighting against violence is not clear. The concept used; *to exercise*; is ambiguous. It is not certain whether it refers to the filing of a case before the court or if it also includes representation. This explains why the exercise of this right by trade unions in Rwanda inadequate.

Another cause of the inefficiency of labour syndicates in protecting employees’ rights is also found in the article 117 of the labour code which in an ambiguous form makes trade unions accountable to their member on the way they undertake their activities. This article does not clearly show how this right of workers can be exercised. Generally, when this obligation is not fulfilled by trade unions, the only decision which is likely taken by employees is resigning from its membership. Such an ambiguous provision gives way to idleness on the part of the concerned stakeholders. As long as there is no penalizing form of enforcement, it is very unlikely that such a provision will bear enforceable weight. And since there is not much interest at stake here for the unions, no one will be willing to get involved or to risk unnecessary resources.

3.3.3 Negotiation of collective agreements in Rwandan law

As stated earlier, the right to collective bargaining is recognized in both domestic laws and international ILO conventions Rwanda has ratified.³⁷² The Labour Code, provides that a collective agreement is made between one or several registered employers’ organisations, one or several employers, and on the other hand, one or several employees’ organizations.³⁷³ Negotiation of collective agreements is one of the ways workers can see their rights respected by avoiding labour agreements which contain clauses that may violate their rights. If labour agreements are pre-negotiated collectively they consider at least minimum protections which will be seen as compulsory to employers.

³⁷¹ Interview conducted on 2nd June 2014 at Head Quarters of CESTRAR.

³⁷² Convention n° 98 on the right to collective bargaining. It was ratified on 8.11.1988.

³⁷³ Article 119 of the Rwandan Labor Code.

As most of workers in Rwanda are from the public sector, the only collective agreement which was negotiated by CESTRAR, which is the largest trade union confederation, was between that trade union confederation and the Government of Rwanda.³⁷⁴ But for private companies, generally, when attracting investors, countries restrict rights of union in their legislations as a way of creating incentives to attract FDI. Countries lessen their social laws as an engagement motivated by a desire to draw FDI. This diminishes the strength of legislation by host countries, to have an effect on the power of unions.³⁷⁵ This obviously has also an impact on application of different provisions and principles pertaining to employees' rights and working conditions.

The incentive granted by host countries to restrict unions' degree of bargaining power depends on the competitive position of the host country to attract more investors in the country. The more laws are very protective of rights of employees and favourable to trade unions, the less likely will the country be to attract more foreign investors.³⁷⁶ It seems to be growing into a culture that whenever workers feel uncomfortable with conditions under which they work, they may strike in order to make their cases more understandable. The following subsection analyses the exercise of the right to strike.

3.3.4 Rights to strike under Rwandan law

Labour disputes which consist of disagreements between one or several employers on one hand, and workers on the other hand can sometimes lead to a strike. The right to strike constitutes a component of the collective bargaining. Strike is defined as a concerted decision made by a group of workers leading to temporary contract cessation of work aiming at bringing the employer to modify some of work conditions which seem to be uncomfortable to workers.³⁷⁷

³⁷⁴ Interview conducted on 2nd June 2014 at Head Quarters of CESTRAR.

³⁷⁵ L. Dermot and C. Montagna, *Union Bargaining Power, Labour Standards and Foreign Direct Investment*, Research paper, the University of Nottingham, 2004/19, p. 2.

³⁷⁶ *Idem*, p.18.

³⁷⁷ www.dictionary.reference.com/browse/strike, visited on 17th July 2015.

This disagreement results most of time from claims for the improvement of labour conditions which may put at risk the successful organisation or social harmony of the company.³⁷⁸

The Rwandan labour code regulates the right to strike and interdiction of lockout from the article 151 to the article 155. In this code, the legislator has provided for individual and collective labour disputes. The latter is done through conciliation and arbitration and this part of the labour code gives workers the right to strike in case of a collective labour disagreement once these measures have been respected.

The labour code says that workers have a right to strike in a manner consistent with the law. Workers must give the employer a four-day notice for the strike to be legally accepted. It is appropriate when the arbitration committee has exceeded fifteen 15 days without taking decision; the conciliation resolution on collective dispute or the court award being enforceable has not been implemented.³⁷⁹

It must be noted that trade unions and a delegation of workers should play an elementary role in the prevention and settlement of labour disputes. When a strike is declared illegal, it may lead to sanctions to its authors. The law says that they may be subject to the payment of compensation for damage deliberately caused to goods and equipment. Secondly, the employer can also initiate legal action against workers, trade unions, or federations.³⁸⁰

Employees in Rwanda do not use the right to strike in order to make their rights understood; they rather prefer using individual settlement of disputes. The unemployment rate in Rwanda may be helpful in explaining the rationale behind this behaviour. As we mentioned above, there is a great disproportion of job seekers and labour market in Rwanda. The ones that are 'lucky' enough to have an employment will not jeopardize this opportunity by initiating a strike, knowing that they can easily be replaced. They are willing to comply with abusive work conditions to keep their source of income.

³⁷⁸ Article 1(12) of the labour code

³⁷⁹ Article 151 of the labour code.

³⁸⁰ Article 153 of the law regulating labour in Rwanda.

3.4 Working conditions and FDI in Rwanda

Working conditions form the most important relationships between employers and employees. Working conditions include among others: working time, leaves or time off work, holidays, health safety and the protection against discrimination.³⁸¹ This section will consider these conditions and see whether they are respected by foreign investors.

3.4.1 Legal duration of work in Rwandan labour law

As we said early, developing countries see FDI as source of economic development and modernization. In their policies, they have thus liberalized their FDI regimes by seemingly weakening their laws in order to attract more investors.³⁸² In doing so, countries sometimes have modified their working conditions in order to make their business climate more conducive in this regard. Rwanda has not made an exception to the trend by which labour conditions should be modified in order to attract investors. In its policy of doing business, a number of laws including the labour code have been modified or repealed.³⁸³ Article 45 of the Labour Code for examples, provides that the legal employment duration is forty-five hours per week. Hours beyond this margin should constitute overtime. This period of 45 five hours replaced that of forty hours.³⁸⁴ This situation infringes the progressive nature which characterises labour law.³⁸⁵

The Ministerial order on modalities of implementing working hours imposes all organisations to fix a timetable on how employees in those institutions will apply this forty hour week. This timetable is made after consultation of the staff delegates for companies have them. That ministerial order emphasizes that the maximum of hours to be worked a day must not exceed 10 per day and the timetable must be in Kinyarwanda and in French or English and be displayed in valves intended for communication to all employees of that institution. It further adds that its

³⁸¹ <http://www.ilo.org/global/topics/working-conditions/lang--en/index.htm>

³⁸² The race to the bottom theory

³⁸³ Laws which have been repealed include inter alia: the labour code, the company act, the law on negotiable instruments, the law on movable interests, etc.

³⁸⁴ The forty five hours a week was first introduced in Rwanda by the law of 28/2/1967 governing labour code. This duration was reduced to forty hours per week by the law n° 51/2001 Of 30/12/2001 establishing labour code.

³⁸⁵ According to the principle, the aim of labour law is to improve lives of employees not worsening them.

modification must be communicated to the labour inspector before being implemented.³⁸⁶ It is worth mentioning that in all companies we have visited, this obligation was not respected and the has been that extra hours are not paid the consequence being that workers do not claim for their rights because of the ignorance and employers are better off financially by being lax about it.³⁸⁷

It is very clear that this turnaround constitutes a kind of regression of working conditions; a situation contrary to the progressive character of the labour code as intended for social progress. In France for example, the duration of work has passed from 15 hours per day in 1841 to 12 hours in 1848, 10 hours in 1919 and 8 hours in 1919.³⁸⁸ The principle of respect of acquired rights is another example which means that the new legislation would only be accepted if it improves the working conditions. Parties may also stipulate in their contract other advantages which are not provided for by the labour laws.³⁸⁹

The Rwandan worker is still in a weak position to negotiate the terms of their employment. This is illustrated clearly in the various ways their conditions have been modified. Increasing working hours from 40 to 45 hours clearly implies that the conditions have become more difficult for the employees, which is contrary to principles that should govern a normal labour code. Many have told us that they know that they should not be working those extra hours but still do and refrain from asking for compensation because they feel lucky to have that job in the first place. The scarcity of employment opportunities justifies their reaction of laying back.³⁹⁰

3.4.2 Leaves and holidays

Generally, in all labour contracts, employers and employees provide in their contracts the working calendar. The Rwandan labour code organizes a number of leave days and the organisation of the working days and rests. Leaves are among others: the annual leave,

³⁸⁶ Article 6 of the Ministerial Order of 2003.

³⁸⁷ Interview with people from Securities companies. All guards in Rwanda work six days per week for a period of twelve hours per day. The total number of hours being 72 hours per week but none of them has dared claim the payment of extra hours.

³⁸⁸ F. X, Kalinda, *Droit Social*, manuel pour étudiant, Ed. de l'UNR, Butare, 2006, p .43.

³⁸⁹ Ibid.

³⁹⁰ See in supra, note 83

circumstantial leaves, and maternity leaves. In this part we will try to analyse each of them by putting a particular accent on the way they are respected by foreign investors in Rwanda.

3.4.2.1 Weekly rest

It is a principle that all workers have right to rest two days a week on which Sunday is compulsory. Article 52 of the Rwandan labour code makes obligatory³⁹¹ the weekly rest for all workers. The law adds that this rest shall not be less than twenty four consecutive hours per week. This rest must be granted at the same time to all workers of the same organisation unless if proven that it is not possible.³⁹²

The evidence shows that employees of both foreign investors and local employers do not enjoy these rights because of the increased activities in companies.³⁹³ The consequence of this among employees is acute fatigue which can sometimes lead to death. In our research we asked ourselves the reason why this legal obligation is not respected since in many companies in Rwanda, Saturdays and Sundays have become normal working days. One of the main reasons why this situation persists is that the Labour Code itself does not regulate the exceptions to weekly rest and provide for sanctions in case of infringement. This has created a sort of ‘culture’ of acceptance on the part of the employees as whenever he is asked to work in the weekend he would not refuse since it has been like that for a long time. This, coupled by the scarcity of jobs, will make the employee in a position to perceive it normal to work the weekend and expect nothing in terms of compensation for working in the weekend.³⁹⁴

In countries where the protection of employees is effective and efficiently guaranteed, workers employed on Sunday are entitled to compulsory rest of twenty four consecutive hours.³⁹⁵ On our view, if this compensation seems to be difficult to companies, a special rate of salary to be paid

³⁹¹ The English version has used the term “necessary” as if it is a suggestion. But when reading the French and Kinyarwanda versions, it is very clear that is a must not a suggestion.

³⁹² Article 52 of the Rwandan labour code.

³⁹³ Interview with the in charge of legal department at CESTRAL on 2nd June 2014.

³⁹⁴ Ibid.

³⁹⁵ T Treu, *Op cit*, p. 75.

to them should be put into place in lieu of that rest of twenty four hours for those whose work obliges them to work even on Sunday.

3.4.2.2 Leaves

The problem of leave and holidays in Rwanda is very acute. Even though laws and regulations regulate the issue of leaves, sometimes these laws are not respected because employers put restrictions on what is made obligation by the labour code. In this paragraph we will analyse maternity leave. The leave for professional training and upgrading shall be analysed in another paragraph. For official holidays, their monitoring is made by local authority and they are generally respected except in some companies which have been granted a special authorization.

The labour code provides that every employee is entitled to a paid leave at the employer's expense, on the basis of one and a half working days every month of effective continued service.³⁹⁶ The same code says that public holidays cannot be deducted from the annual leave. Workers should thus take one and a half day every month, which amounts to 18 days annually. The employee benefits from one day per year for any year of experience but total days cannot in any time exceed twenty-one working days.³⁹⁷

Workers who are under 18 years old are entitled to a leave of two working days per month of continued work. Any worker, who has completed one-year effective service duration, has the right to an annual leave.³⁹⁸ If the contract is breached or terminated for any reason before the worker has taken his leave, a compensatory indemnity is calculated on the basis of rights due by the virtue of the law.³⁹⁹

The paid annual leave's breakdown is authorized only when both parties so convene. The employer cannot prevent the work from going to the place of his choice to enjoy his leave. The

³⁹⁶ Article 53 of the Labour Code

³⁹⁷ See the same article

³⁹⁸ Article 53 par 2. of the Labour Code.

³⁹⁹ Article 57(2) of the same code.

leave period cannot be delayed or anticipated by the employer for more than a three-month period. It is worth to mention that, when worker and employer so convene, the leave period may be postponed.⁴⁰⁰ Normally, the leave is meant to allow the employee to recuperate. The compensatory allowance in lieu of that leave is formally prohibited in all cases. Some employees do however prefer this indemnity instead of taking their leaves.⁴⁰¹ The issue of indemnity to compensate leaves is discussed in another subsection.

The Labour Code of 2009 has brought a situation which is favourable to employees to address the financial conundrum of taking leave: the payment of the leave allocation. This law obliges employers to pay to their workers an equivalent of his/her monthly salary and other advantages before they go for their annual leave⁴⁰² because they spend more than what they spend when they are working. Even if this obligation is provided by the law, no single employer has complied with this provision which in my view has fallen under desuetude. The reason for this seems to be that there were no sanctions provided by the law for inobservance of this obligation. Employers usually refuse to implement the obligation of this provision because of the impact leave allocations may have on their budgets. They refuse this right of employees even when all conditions to benefit from this leave allocation are met. Employers have thus abusively profited from this loophole of the legislation.⁴⁰³

Workers from various institutions with whom we conducted interviews made us understand that this right is ignored on the basis that it might lead to misunderstandings between employer and employees unless it is done on the initiative of the employer, which happen very rarely if ever. Employees who have these claims are mainly those who have been dismissed.⁴⁰⁴ This again clearly demonstrates the imbalance of the power employers have over their employees. In

⁴⁰⁰ Article 54 of the same code.

⁴⁰¹ Article 57 of the same code.

⁴⁰² Article 55 of the same code.

⁴⁰³ Interview with the in charge of legal department at CESTRAL on 2nd June 2014.

⁴⁰⁴ The right to leave has been decided by courts whenever the labour contract between the worker and the employer has been terminated. This provision is under revision. In a project which is under exam it has been taken out for reasons which are not cleared in the Travaux Préparatoires of that law. On our view we think that this has been motivated by the fact that it would harm rights of investors while Rwanda.

Rwanda, generally, employees forfeit their prerogatives for the sake of being among the few on a payroll; jobs are so scarce that their wellbeing is relegated to the second plan.

3.4.2.3 Leave compensative indemnity

Normally, this leave is given to the employees for the only reason of allowing him/her to take a break.⁴⁰⁵ The grant of a compensatory allowance in replacement of a leave is formally prohibited in all other cases. Some employees prefer this indemnity in the place of taking their leave. This is due to the fact that the leisure activities ideally associated with leave requires financial backing. Leave allocation was thought to cope with this crucial issue.

The labour code in Rwanda obliges an employer to pay a salary equal to the average of his/her annual salary divided to twelve. The salary paid must include all advantages the employee is entitled to.⁴⁰⁶ The implementation of this article is still contentious in many institutions. Due to the impact that leave allocation is likely to have on employers' budgets, they prefer to deny this right to employees even when all the pre-conditions required for an employee to benefit from this leave allocation are met. Question is raised as to the judicial position. Courts would take on the issue if such cases were brought before them.

An interesting case in this regard was the one of Gatashya Callixte and his co-workers versus AMSAR Burundi (Rwandan extension), decision rendered on 8/11/2010. In this case, the claimants were allegedly refused compensation for the annual leave, and severance pay, among other. In its decision, the Intermediary Court of Nyarugenge admitted that the claimants' allegations had ground on some aspects and decided that AMSAR should indemnify them for unfair dismissal, obliging it to pay an amount of Rwf 763,358. As for the remaining claims, it decided that they had ground but there was no enough evidence to justify that they did indeed

⁴⁰⁵ Article 57 of the law n°13/2009 of 27/5/2009 on labour code.

⁴⁰⁶ Article 55 of of the Labour Code

work during the weekend as well as extra hours.⁴⁰⁷ In most of the related cases we managed to consult, it was clear that whenever the employee would ask for compensation for extra hours, the Court would not dismiss the claim but rather ask for concrete evidence showing that those hours should actually be subjected to compensation. Seeing the nature of the context, employees who most of the time learn of their rights after they are fired lack tangible elements of evidence to make their claims be considered by the judges.⁴⁰⁸

3.4.2.4 Incidental leaves

The law gives worker's rights to a leave based on events such as weddings and births or deaths. Number of days from which the employee is entitled to are defined by an order of the Minister in charge of labour.⁴⁰⁹ However, it should be noted that article 3 of the same ministerial order says that in case this incidental leave happens together with another legal leave, the incidental leave suspends the legal one, which shall continue directly after the end of the incidental leave's period.

Article 2 of the Ministerial Order n°03 of 13/07/2010 determines the legally permissible situations for circumstantial leave.⁴¹⁰ The said law provides that: "Apart from more favourable conventional provisions, every worker shall enjoy circumstantial leaves with full payment in the event of one of the following occurring in his/her family: Worker's civil wedding: two (2) working days; Worker's wife delivery: four (4) working days; Death of spouse: six (6) working days; Death of first direct line ascendants/ descendants: three (3) working days; Death of a brother or sister: two (2) working days; Death of a father-in-law or mother-in-law: two (2) working days; Death of a brother-in-law or sister-in-law: (1) working day; Worker's transfer to another province or district: two (2) working days."⁴¹¹ As these are among rights which are well known by all workers, it has been noticed that they are among rights of workers which are

⁴⁰⁷ Judgement Gatashya Callixte, Habakwihana Felix and Safari Appolinaire versus AMSAR Burundi (RSOC 0170/09/TGI/Nyge)

⁴⁰⁸ See for instance Judgment Kayirangirwa Alice versus ECOBANK (RSOC 0261/09/TGI/Nyge), Intermediary Court of Nyarugenge, 29/11/2010; Judgement Nzakirwa Frederic versus Thomas et Piron Grands Lacs (RSOC 0198/09/TGI/Nyge), Intermediary Court of Nyarugenge, 22/11/2010

⁴⁰⁹ Article 63 of labour in Rwanda.

⁴¹⁰ Ministerial Order n°03 of 13/07/2010 determines the circumstantial leaves in *Official Gazette* n° 30 of 26/07/2010.

⁴¹¹ Article 2 of the same Ministerial Order n°03 of 13/07/2010.

mostly respected by employers.⁴¹² An incidental leave must be expressly requested by the employee, except when it is not possible due to some circumstances like in case of birth, death or any other incident which can be anticipated due to its nature. In case the employee was unable to inform the employer based on circumstances aforementioned, he must inform him/her in a period not exceeding 48 hours.⁴¹³

3.4.2.5 Maternity leave

Article 64 § 1 of the Rwandan labour⁴¹⁴ code says that every employed woman has the right to a maternity leave of 12 uninterrupted weeks. Such a woman may choose to start benefiting from this leave two (2) weeks prior to the presumed date of delivery. A woman who gives birth to a still-born child or whose infant of less than one month of age is dead shall benefit from a leave of four weeks as of the day the event occurred⁴¹⁵. The same law in its article 66 has brought also a situation which infringes the principle of acquired rights in labour law. That article says that the mother who is in maternity leave shall only receive the totality of her salary during only six weeks. If she opts to resume her work after only six weeks of her maternity leave, she will get the entire salary and benefit from two hours of breastfeeding period every day. If, however, she opts to remain in the maternity leave after six weeks, she will have rights to only 20% of her salary.⁴¹⁶

3.4.2.6 Leave for professional training and upgrading

The Rwandan labour code obliges employers to provide employees with training which will help them to upgrade their knowledge.⁴¹⁷ Costs relating to that training can be borne by either the employer or the employee or be shared.⁴¹⁸ The law authorizes the employee to be absent from his work in order to pursue certain courses while retaining his/her salary.⁴¹⁹ Thus, the worker

⁴¹² See in Supra note 83.

⁴¹³ Article 4 of the Ministerial Order n° 03 of 13/7/2010 determining circumstantial leaves.

⁴¹⁴ law n°13/2009 of 27/5/2009 Regulating labour in Rwanda

⁴¹⁵ Article 64 § 2 of the Law n° 13/2009 of 27/5/2009

⁴¹⁶ Article 66 of the labour code.

⁴¹⁷ Article 70 Of the labour code.

⁴¹⁸ Articles 4 of the Ministerial Order n° 08 of 13/07/2010 determining the implementation modalities for professional training and its related leave, in *Official Gazette* n° 30 of 26/07/2010

⁴¹⁹ Article 5 of the same Ministerial Order.

who is authorized by his/her employer to take part into a professional training or upgrading course is rightly entitled to his/her full salary and-allowances for the course of training if this period does not exceed six months.⁴²⁰

3.4.2.7 Official Holidays

Article 59(1) of the Rwandan labour law provides that official holidays are fixed by a Presidential Order. It is in this framework that the Presidential Order N°42/03of 30/6/2015 determines official holidays.⁴²¹ These public holidays are respected by all employees except when the nature of the work requires so. In the interview we have conducted, we have found that investors in sectors like hotels, restaurants and security companies do not respect these holidays. The reason invoked is that the nature of their works does not accept to benefit from public holidays. For this, we think workers who are obligated to work during public holidays, should be compensated in whatever mode.

A part from the official holidays, employees may be absent at work due to the accomplishment of a duty imposed by law or when such absences are authorized by the Minister having labour services in his attributions according to article 78 of labour code, these absences are also to be paid.

⁴²⁰ Article 6 of the above mentioned Ministerial Order.

⁴²¹ Employees are entitled to benefit from their entire salary during all official holidays. Below is the list of official holidays:

1. New year : 1st January;
2. Day after new year's day : 2nd January
3. Hero's day : 1st February;
4. Good Friday: (date varies annually)
5. Genocide memorial day: 7th April;
6. Labour day : 1st May;
7. Independence day : 1st July;
8. Liberation day : 4th July;
9. Umuganura :Friday of first week of August
10. Assumption day : 15th August;
11. Christmas day : 25th December;
12. Boxing day : 26th December;
13. EID-EL-FITR : The date shall be announced each year by the Rwanda Muslim Association (AMUR)
14. EID AL –ADHA : The date shall be announced each year by the Rwanda Muslim Association (AMUR)

3.5 Problem of Minimum Wage in Rwanda

In the discussion of labour standards, the issue of minimum wage is crucial. It can be one of the indicators of how the working conditions have improved or not in a given country. In the case of Rwanda, this question is more pronounced since it exposes some of the flaws both in the legislation as well as in practice. The legal reference for the problem of minimum wage dated from the 1970s when 100 FRw was legally constituted as the minimum guaranteed wage⁴²² and this consideration remains valid until now. In the following lines, we will explore this inadequacy and see how it is dealt with in practice.

3.5.1 Origins of the concept of minimum wage

The origins of minimum wage can be traced way back to the end of the 19th century. New Zealand is said to be the first country to pass a law on minimum wage back in 1894.⁴²³ Following this experiment, other countries also adopted related laws to improve the conditions of employees. This concept was introduced in the United States by Franklin D. Roosevelt in 1938 as part of the Fair Labour Standards Act (FLSA).⁴²⁴ According to Eric Rauchway⁴²⁵, it started as a measure to protect bakers and resulted in the state of New York passing the Bakeshop Act in 1895, which did not set a minimum wage but called for better working conditions. From this, efforts were made by President Roosevelt until a minimum wage bill was passed by the Supreme Court in 1937.⁴²⁶ It is worth to mention that the revolution in this domain in the US had a very big impact on the behaviour of many countries worldwide. The rationale behind the requirement of minimum wage beyond helping the impoverished, it is about fairness, the value of work, and the opportunity that work provides. Employers should not be allowed to benefit from exploiting the lack of negotiation power of low-wage workers.⁴²⁷

⁴²² The minimum wage was provided by the labour code of 1974.

⁴²³ According to www.bebusinessed.com article “History of Minimum Wage”, this 1894 law covered all businesses and industries throughout the country.

⁴²⁴ Eric Rauchway is a historian at the University of California, cited by Kathleen Elkins, ‘How President Roosevelt Tricked the Supreme Court into Creating a Minimum Wage’, BusinessInsider.com, 3/07/2015

⁴²⁵ Ibid

⁴²⁶ Ibid.

3.5.2 Minimum wage in Rwanda

The legal reference in terms of minimum wage in Rwanda today remains the provisions of the 1974 Labour Code. In the labour code, article 76 provides that “the minimum guaranteed wage (MGW) shall be determined by an order of the minister in charge of labour after collective consultation with the concerned organs”.⁴²⁸ From this, it is clear that there is no such thing as minimum wage today in Rwanda, and thus the closest reference to such legal provision remains the Rwf 100 provided by the 1974 Code.

There has been countless discussion about this reality in Rwanda and it has been proposed that the minimum wage should be raised. The two main unions in the country, CESTRAR), and COTRAF, have argued that based on surveys conducted countrywide, there is a need to increase the minimum wage from Rwf 100 to 1500.⁴²⁹ From the different interviews we conducted in different settings, we concluded that the employees feel that an absence of clarification in the law has been detrimental to them. The cost of living has skyrocketed despite the relative economy growth, and many casual workers have accused employers of exploitation.

In the absence of proper regulation on minimum wage, there is an impression that the working condition of the Rwandan worker is very precarious due to the limited number of job opportunities. With no legal provision protecting the workers from the abuses of investors, it seems there is favourable ground to disregard the rights and prerogatives workers should benefit. This has made the concerned institutions in Rwanda to work upon it. The National Labour Council has said that it has passed a proposed minimum wage law to the Ministry of Public Service and Labour (MIFOTRA) for approval. According to this document, the draft law proposes minimum wages depending on professional category. It is necessary to have a known

⁴²⁸ Law No. 13/2009 of 27/05/2009 regulating Labour in Rwanda, in Official Gazette of the Republic of Rwanda, n° Special of 27/05/2009

⁴²⁹ ‘Workers unions want raise in minimum wages’, Umukozi.com, June 2012

minimum wage in order to protect the employees to be protected from abusive investors and employers who use cheap labour to flourish their businesses.⁴³⁰

3.6 Child Labour and FDI in Rwanda

Child labour is one of violations for which investors are often responsible. Being a category of manpower which does not require a high level of payment, investors prefer to employ children instead of adults since the last would arguably cost more. This section tends to explain the nature of the issue in Rwanda.

3.6.1 Extent of the issue of child labour in FDI

The elimination of child labour throughout the world is one of the important areas which need a particular attention. According to the report of the world labour organisation, there are more than 245 million child labourers worldwide.⁴³¹ The problem of child labour has been deemed to be a crucial concern in Sub-Saharan Africa and Asia-Pacific region where an average, between 19% and 29% of the children aged 5-14 earn their own incomes.⁴³² In sub-Saharan Africa, in countries like Burundi and Mali it has been estimated that approximately half of the total child population (aged 10-14) is employed.⁴³³ The consequence is that child labour amounts to a significant percentage of the total workforce in developing countries; most of which are located in Africa.⁴³⁴

Child labour is about any commercial activity, no matter the time spent at work in exchange of income in cash or in kind. It denotes the recruitment of children in any prohibited work, and more specifically, all types of work identified as socially and morally undesirable as guided by national legislation or provision of the ILO.⁴³⁵ Child labour denotes work that is exploitative and detrimental to the development of the child. This definition excludes activities such as light work

⁴³⁰ Interview with the Director in charge of legal department at CESTRAL on 2nd June 2014.

⁴³¹ ILO report on child labour 2002.

⁴³² M. Busse and S. Braun, *Export Structure, FDI and Child Labour*, Hamburgisches Welt-Wirtschafts Archiv, 2003, p .1.

⁴³³ Ibid.

⁴³⁴ Ibid.

⁴³⁵ R. Abi habib-khoury, *Rapid Assessment on Child Labour in North Lebanon (Tripoli and Akkar) and Bekaa Governorates* International Labour Organisation Regional Office for Arab States, Geneva, 2012, p. 13.

undertaken after school or any work which does not necessary jeopardise the development of young people which can even be advantageous to them.⁴³⁶

Jobs that may be dangerous to the health of the child shall include among others: work that may affect the child's health, either physically or psychologically, work that is carried out using machines or other dangerous materials that may affect the health of the child or that require lifting or carrying heavy load; work related to fishing using boats; domestic works carried on outside of their family circles for a salary or whatever gain; work that requires children to carry loads that are heavier than their physical capacity; work carried out for long hours and at night between 8pm and 6 am for a salary or other direct or indirect wages; construction work carried out using ropes and other materials; construction and demolition work, heavy lifting machines and other dangerous instruments; work that involves lifting or removing heavy products using lifting machines if they are not operated form far and in an enclosed area; work that requires the driving of heavy machines and vehicles that lift loads, and those that are used to level the ground; work involving visiting, verifying, and servicing of machines that are turned on except where those machines have protective parts to avoid contract with parts in motion; work carried out in places with machines that are turned on or off automatically and other annexed machines that do not have guards to prevent free access.⁴³⁷

The issue of protection against child labour has been very difficult to implement. The proof is that the 1990 WTO Round failed to tackle the issue. Later on, in 2001, the European Union insisted in vain on the inclusion of labour standards in the new multilateral trade round.⁴³⁸ These sentiments have been reiterated by M. Busse and S Braun, who say that it is surprising that there is little empirical evidence on linkage between the increasing economic integration of the world economy and the extent of child labour.⁴³⁹

⁴³⁶ Ibid.

⁴³⁷ Article 5 of the aforementioned Ministerial order.

⁴³⁸ M. BussE and S. Braun, *Op. cit.*, p. 6.

⁴³⁹ Ibid.

Children all over the world are involved in the manufacture of goods which do not require high skills like toys, clothing, textiles, footwear, etc.⁴⁴⁰ In India, Pakistan and Nepal for instance, the study showed that children have been used for the production of carpets, textiles and clothing. These commodities are exported to North America and Europe which led to concerns that the offending states have had an unfair advantage because children were paid very low wages, which resulting in production of egregiously cheap goods.⁴⁴¹ Some nongovernmental organisations like Amnesty International have also been accused of employing child labour in their overseas production facilities.⁴⁴²

In Rwanda, like in some Asian countries, children have been involved in child labour, mainly in the agricultural sector. This kind of work is very harmful to children since farmers sometimes use pesticides which are obviously harmful to children's health.⁴⁴³ Also having children work for several hours under very difficult conditions could be considered harmful to them. A survey conducted by the Rwandan National statistic institution revealed that 6.6% of Rwandan children aged 5 to 17 year were child labourers. Considering geographical prevalence, the phenomenon is further stressed in the Eastern province than in the Western province, where 1/10 aged 5-17 years is obliged to undertake child labour.⁴⁴⁴ The issue of child labour in Rwanda shows that most of children in employment are female. Furthermore, the percentage of girls occupied in child labour is higher than that of boys in engaged in the same area (6.7% against 4.6%).⁴⁴⁵ For the hazardous work, the research shows that 2.3% of Rwandan children aged 5-17 years perform hazardous work (65 628 children). This phenomenon is prevalent in the City of Kigali where 60.4% of children aged 5-17 years in employment are involved in hazardous work.⁴⁴⁶ In Rwanda, the older a child grows, the greater the probability that he or she will be involved in hazardous work.⁴⁴⁷ Around 65,628 children aged 5 to 17 perform hazardous work, which presents 1/3 of children carrying out child labour.

⁴⁴⁰ *Idem*, p. 15.

⁴⁴¹ *Idem*, p. 7.

⁴⁴² Report of Amnesty International 2002 on behavior of multinational enterprises in developing countries

⁴⁴³ *Ibid.*

⁴⁴⁴ Rwanda Statistic Institute Report p. 49.

⁴⁴⁵ *Idem*, p. 50

⁴⁴⁶ *Idem*, p. 51.

⁴⁴⁷ *Idem*, p. 55.

In our research, we have found that some children are employed in mining and quarry institutions and in constructions. In Muhanga district, we have found a number of children who have dropped their studies and start working in quarries and mining in various sites. In an interview with the person in charge of labour inspection in that district, we learnt that the authorities have tried to address the issue in vain, despite the fact that measures have been taken, including sensitization of parents and schools about the dangers of child labour.⁴⁴⁸ The district should take serious measures against whomever employs a child. It is abnormal that no single district has attempted to sanction those who have behaved against the spirit of this ministerial order.

In punishing child labour, the Rwandan legislation has only considered worse of forms of child labour. This law considers neither the specific age of the child labourer nor the time during which the person is at work.⁴⁴⁹ The penal part of the labour code says that, a person found guilty of the offence referred to in article 72⁴⁵⁰ of the law regulating labour in Rwanda, shall be liable to a term of imprisonment ranging from six to twenty years and a fine of five hundred thousand to five million Rwandan francs or to one of these penalties. The same criminal punishes with an imprisonment sentence going from three to five years and a fine from five hundred thousand to two million Rwandan francs or one of these penalties responsible of forced labour.⁴⁵¹

The worse forms of child labour which is punished by the labour code include: to indulge children in slavery or similar practices; child trafficking; to turn children into debt bondage; to have children replace grownups in forced labour; to use children in armed-conflicts and wars; the recruitment, use, procuring or offering of a child for prostitution or for the production of pornography or for pornographic performances; the use, recruitment and production or offering

⁴⁴⁸ Visit made on in the district of Muhanga 17th July 2014.

⁴⁴⁹ Tasks that may affect the health, security or morality of the child shall include the following: Jobs carried out on the earth's surface or underground aimed at mining; or works carried out underneath the water, places with high heights or congested places; Jobs carried out in the drainage of marshlands, cutting down of trees, utilizing fertilizers and pesticides; Jobs carried out in unhygienic places that may expose children to dangerous products and chemicals, conditions of very high temperature, noise and vibrations that may affect the lives of the children; Jobs related to demolitions.

⁴⁵⁰ That article punishes authors of offences to worst forms of child labour.

⁴⁵¹ Article 167 of the labour code

of a child for illicit activities such manufacture and marketing of drugs, and any work which is likely to harm the health, safety or morals of a child.⁴⁵²

3.6.2 Institutions prohibited to children

There are certain institutions in which children will be deemed to be undertaking tasks that are considered unfit to their health. The ministerial order on prohibition of child labour enumerates institutions which do not fit and should not employ children. These include: institutions that produce pornographic materials or pornographic shows; institutions that manufacture, sell, advertise draw, or print different publications that are contrary to morality and which are punishable by law in case of their sale, exposed or distributed to public; mining and quarry institutions whether public or private; institutions that carry out slaughtering of animals, or the rearing of dangerous or poisonous animals; institutions that are involved in the manufacture and trafficking of drugs; military camps or paramilitary organisations; Institutions that carry out work stipulated in article 3 of the Ministerial order determining the list of worst forms of child labour, their nature, categories of institutions that are not allowed to employ them and their prevention mechanisms; institutions that produce and sell alcoholic drinks; construction institutions; bricks and tiles manufacturing institutions; Institutions that carry out the works mentioned in article 4 of this order.⁴⁵³

3.7 Forced labour and FDI in Rwanda

Forced labour has its roots in the slavery which characterized the World in the period before 20th Century.⁴⁵⁴ The first initiative to abolish slavery dated as far back as 1805 in the Vienna congress where the participating countries expressed their desire to abolish slavery, basing their cause on the principles of humanity and morality. Slavery was considered bane to Africans and

⁴⁵² Article 3 Ministerial Order n° 06 of 13/07/2010 determining the list of worst forms of child labour, their nature, categories of institutions that are not allowed to employ them and their prevention mechanisms, in OG, n° 30 of 26/07/2010.

⁴⁵³ Article 6 of the Ministerial Order.

⁴⁵⁴ Article 1 of the convention of 1926 a convention which was amended in 1953 (reproduced in *United Nations Treaty Series UNTS*), 1953, Vol. CLXXXII, No. 2422, pp. 51-72.

shame to Europe which inflicted human being such treatment for so long.⁴⁵⁵ After this congress, important initiatives commenced at both nation and international level. At the international level, treaties were signed under the patronage of the World powers, with the aim of rebuking other countries to abolish slavery.⁴⁵⁶ An example is the Treaty of London of December 20th, 1841 on the suppression of the African slave trade.⁴⁵⁷ Other examples include: the General Act of the Berlin conference of 26th February 1885 prohibiting the slavery in the Congo basin,⁴⁵⁸ the General Act of the Brussels Anti-slavery Conference held from 18th November 1889 to 2 July 1890 which lead to the suppression of the triangle trade⁴⁵⁹, the 1904 International Agreement, as well as the 1910 International convention for the suppression of the White slave Traffic⁴⁶⁰ and the 1921 International convention for the suppression of women traffic and children.⁴⁶¹ After the First World War, slavery and other related practices were pressing questions to be solved by the League of Nations. The effort made by this organisation was immense and fruitful. During its time, nearly all States adopted legislations to prevent slavery not just within the country, but sale of persons in other countries.⁴⁶²

⁴⁵⁵ Final Act of the Congress of Vienna, reproduced in De Martens, *Nouveau Recueil de Traités (NRT)*, 1814-1815, Tome II, p. 433.

⁴⁵⁶ The Treaty of London was signed by France, Great Britain, Austria, Russia and Prussia (reproduced in De Martens, *NRG*, 1841, available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar3.htm> , accessed on 1st July 2015.

⁴⁵⁷ Ibid.

⁴⁵⁸ Art. 9, General Act of the Berlin Conference (reproduced in De Martens, *NRG*, 1853-85, Tome X, p. 419) see http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar3.htm#N_8

⁴⁵⁹ Reproduced in De Martens, *NRG*, 1881-90, IIème Série, Tome XVI, pp. 3-29. The General Act of Berlin of 26 Feb. 1885 and the General Act of the Brussels Conference were revised by the Convention signed at Saint-Germain-en-Laye on 10 Sep. 1919 under the terms of which the Signatory Powers "will endeavour to secure the complete suppression of slavery in all its forms and of the slave trade by land and sea" (reproduced in *League of Nations Treaty Series (LNTS)*, 1922, Vol. VIII, No. 202, p. 35). Finally, at the Brussels Conference, the Treaty for the Suppression of the African Slave Trade was signed between Great Britain and Spain (reproduced in De Martens, *NRG*, 1882-93, IIème Série, Tome XVIII, pp. 168-173). Quoted by the ILO report on forced labour in Myanmar(Burma). Available at http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar3.htm#N_8

⁴⁶⁰ International Agreement with a view to securing the Effectual Suppression of the Criminal Traffic known as the "white slave traffic", signed in Paris on 18 May 1904 See http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar3.htm#N_8

⁴⁶¹The convention was signed by Albania, Germany, Austria, Belgium, Brazil, the British Empire (with Canada, the Commonwealth of Australia, the Union of South Africa, New Zealand and India), Chile, China, Colombia, Costa Rica, Cuba, Estonia, Greece, Hungary, Italy, Japan, Latvia, Lithuania, Norway, Netherlands, Persia, Poland (with Danzig), Portugal, Romania, Siam, Sweden, Switzerland and Czechoslovakia http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar3.htm#N_8

⁴⁶² See http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar3.htm#N_8

States recognizing the negative consequences of the slavery and forced labour committed themselves to take all necessary measures to prevent and abolish these degrading practices in all their forms. The convention of 1926 endeavoured to limit circumstances under which forced labour and or slavery could be exacted.⁴⁶³ In 1945, at the national level, many independent States manifested their willingness to abolish forced labour and slavery. In doing so, countries would put a provision into their constitutions abolishing slavery and prohibiting forced labour.⁴⁶⁴ Although slavery was banished by many countries many years ago, it continues to appear in another form where millions of people continue be victims of forced labour.⁴⁶⁵ Although some may think that analyzing the issue of forced labour in this area is an exaggeration, some eloquent examples may help to illustrate this. In Burma for example, the civilian population was compelled by the ruling military regime to work in road repairs, construction and as porters of the army without any salary.⁴⁶⁶

In 1930, the ILO adopted its Forced Labour Convention⁴⁶⁷ which defines forced labour as “all work or service which is drawn from any person under the threat of any penalty and for which the aforesaid person has not offered himself voluntarily.”⁴⁶⁸ Forced labour simply means, compelling someone to work against his/her will under the fear of some penalties. The forced Labour Convention obliges all countries signatories to eradicate forced labour in whatever forms, within the briefest time possible.⁴⁶⁹

Even if the Convention was adopted many years ago, forced labour is still a common issue which affects the world. In 2005, the ILO projected that at least 12.3 million people were victims of

⁴⁶³ *Ibid.*

⁴⁶⁴ <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar3.htm>

⁴⁶⁵ A. Kelly, What is modern-day slavery?, The Guardian, Wednesday, 3 April 2013, available at <http://www.theguardian.com/global-development/2013/apr/03/modern-day-slavery-e>

⁴⁶⁶ ITUC, *How to combat forced labour and trafficking. Best practices manual for trade unions*, Brussels, Belgium, 2010, p.11. available at www.ituc-csi.org/IMG/pdf/TU_Guide_Forced_labour_EN.pdf.

⁴⁶⁷ Convention n°29.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*

forced labour. The ILO estimates that 20.9 million people are victims of forced labour around the world. Findings show that the Asia-Pacific has the highest degree of forced labour with 56% of the global total.⁴⁷⁰ The second highest number is found in Africa with 18% and Latin America and Caribbean come after with 9%.⁴⁷¹ The report adds that over 90% of victims of forced labour are exploited in the private economy by individuals or enterprises where they work in areas like agriculture, construction, domestic work or manufacturing.⁴⁷² According to ILO, women and children are the most affected. They account for 56% of violations whereas men and boys account for 45%.

The Rwandan situation is promising because cases of forced labour are quasi absent. It is good that in Rwanda we did not find any issue relating to forced labour. Even if, this violation of human right is absent in Rwanda, the Rwandan labour code has however provided punishment of forced labour. The Labour Code refers to the Criminal Code in punishing forced labour. In its article 167, it stipulates that anyone found guilty of forced labour should be liable to a term of imprisonment ranging from three to five years and a fine of five hundred thousand to two million Rwandan Francs. The same article adds that it shall be an offence to cause, to provoke, to allow or to impose, directly or indirectly, any kind of forced work.

The same article excludes from the list some works which cannot be considered as forced labour. According to the article, forced labour shall not include:

Any kind of work executed in accordance with the law governing military Service; Any kind of work executed for the purpose of implementing the civic education; Any kind of work or service which is part of the normal civic obligations of the citizens of Rwanda; Any kind of work or service required of a person according to a decision of the court and which is executed under responsibility and control of a public institution or authority; Any work or service required in case of emergency such as during the time of war or disaster.

⁴⁷⁰ ILO, Results and Methodology, Special Action Programme to Combat Forced Labour, Geneva, Switzerland, 2012, p.2. available at http://www.ilo.org/wcmsp5/groups/public/--ed_norm/--declaration/documents/publication, visited on 6th July 2015.

⁴⁷¹ ILO 2012 Global estimate of forced labour, available at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_181953.pdf

⁴⁷² Ibid.

It should be noted that even those activities which constitute the exception to the child labour should also consider the issue of consent otherwise some of them may also fall under the qualification of child labour. Military service, works implemented in civic education for example should be submitted to the consent of both parties.

3.8 FDI and health and security at work in Rwanda

Investors, like other employers, have to ensure that their employees work in an environment which is safe and which respects minimum standards. They must strengthen the capacity of watchdog associations in order to marshal full respect of core labour rights and standards.⁴⁷³

Generally high production or output cannot be expected from the employees when their safety and health at work is at risk. Responsibilities of the employers to this regard can be analysed either as a duty or as a way of increasing their production. This obligation implies ensuring that work premises and equipment are not detrimental to workers' health, declaration of occupational risks and emergency box and medical care.⁴⁷⁴

As most times employers cannot themselves guarantee the existence of those standards, trade unions should be given enough space to engage on the issue. In the UNCTAD 2013 report, it was suggested that the Government of Bangladesh ought to modify its regulations to permit garment employees to form trade unions without prior authorization from the factory owners, and to proclaim a plan to elevate the conditions of workers.⁴⁷⁵ At the ILO as well as at the national levels good initiatives having the aim of putting into place principles leading to health and safety at work but the issue remains in their implementation.

The ILO convention n°155 obliges countries which have ratified it, to take into account main domains of action because they are on the top to affect occupational safety and health and the

⁴⁷³ UNCTAD, World Investment Report 2013, New York & Geneva, 2013, p.185. available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf

⁴⁷⁴ T. HABUMUGISHA, *Social law*, ULK, 2014, p. 50.

⁴⁷⁵ Ibid

labour condition in general.⁴⁷⁶ The convention recommends that, in order to avoid contradiction between local policy and laws and actions for its application, each ratifying State must, after consultation at the earliest possible stage with the most representative organisations of employers and workers.⁴⁷⁷

Even if, Rwanda did not ratify all the conventions and recommendations related to safety and health at the workplace,⁴⁷⁸ the issue of occupational security and health in Rwanda has been incorporated into the legislation. The labour code and various Ministerial orders have also put an emphasis on the issue of safety and health at workplace.⁴⁷⁹ This subsection will highlight some of the merits and weaknesses of those legal instruments.

3.8.1 Employer's responsibilities in providing health and safety conditions

Companies must have sufficient knowledge to ensure that they avoid any hazard from which employees may be victim. They must then provide their employees with information on safety and health and put into place guidelines on the choice of skill and on how the employment is to be undertaken.⁴⁸⁰ Employers must give workers sufficient knowledge on how they undertake their jobs. Furthermore, they must be aware on the way their lives and health of their co-workers shall be safeguarded while working.⁴⁸¹

Managers and supervisors must ensure that workers are adequately trained for the work that they are expected to undertake. Health and safety committees must ensure that all suitable actions have been taken to provide training for workers and update their knowledge in the domain of

⁴⁷⁶ ILO International Training Center of the ILO, *Guide to International Labour Standards*, International Labour standards department, Geneva, p. 113. Available at http://www.ilo.org/wcmsp5/groups/public/ed_norm/normes/documents/publication/wcms_086223.pdf visited on 1st July 2015.

⁴⁷⁷ *Idem*, p.115.

⁴⁷⁸ Conventions n°187, 155, Recommendation 197.

⁴⁷⁹ See for example, the Ministerial Order n007of 13/07/2010 determining the modalities of functioning of labour inspector, Prime Ministerial order n0 125/03 of 25/10/2010 determining the mission, organization and functioning of the national labour council, Ministerial Order determining modalities of establishing and functioning of occupational health and safety committees., etc.

⁴⁸⁰ This is in line with the OECD Guidelines, II.8. General policies which says that company must promote employees awareness of , and compliance with, company policies through appropriate dissemination of these policies including training programs.

⁴⁸¹ B. O. Alli, *Op. cit*, p. 20.

health and safety in the working place.⁴⁸² Training must be organized every year⁴⁸³ and must be focused on how workers can prevent or minimize exposure to hazards. Employees must be able to use first-aid facilities.⁴⁸⁴ The safety and health to which employers are responsible concerns lives of employees, knowledge they must have in order to prevent any harm, equipment aimed at preventing occupational diseases and accidents and basing assistance in case of emergency.

3.8.2 Protection Equipment

The law says that the employers should be able to provide to their employees with work premises and tools that are appropriate for the work to be done and adequately protect the worker from any damage to his/her health.⁴⁸⁵ It obliges employees to put at their premises all essential and suitable protection equipment; and to make an appropriate control on how they are used. They must keep informed of all risks related to technical progress and organize security accordingly through precautionary actions.⁴⁸⁶ The employer must take all necessary measures that need to be taken in order to provide the workplace with all necessary equipment.⁴⁸⁷ In doing so, the company must provide and maintain workplaces, machinery and equipment and give the necessary instructions and training to managers and staff, taking account of the functions and capacities of different categories of workers on how these machinery and equipments are used. Employers must also ensure that chemical, physical and biological substances and agents under their control are without excessive risk to health. This can be done by providing adequate

⁴⁸² Article 7(10) of the Ministerial Order n° 1 of 15/05/2012 determining modalities of establishing and functioning of occupational health and safety committees, *OGRR*, n° special of 25/05/2012.

⁴⁸³ Article 9 of the Ministerial order n° 1 of 15/05/2012.

⁴⁸⁴ B. O. Alli, *op cit*, p. 21.

⁴⁸⁵ Article 90 of the law n°13/2009 of 27/5/2009 Regulating Labour Law in Rwanda.

⁴⁸⁶ Article 91 of the same code.

⁴⁸⁷ The law says that employer should be able to assure the workers, in consideration of their activities, of regular, reliable and timely renewal of collective and individual means for specific; conduct a prior identification and analysis of hazards and risks that may result from the nature of the work such as its location and the work environment, machinery, materials and products to be used, as well as the process and conditions under which the work is done and to take effective protective measures; inform employees about any risks likely to result from the use of new technologies and any imminent danger; ensure that information linked to the protection system is in a clear, legible and understandable language and is regularly displayed on all premises likely to cause risk; ensure respect for measures on protection of health and safety at the work place as taken by competent authorities; make no deductions from an employee's remuneration, levy or charge an employee in respect of anything done or provided in pursuance of this order or any regulation made hereunder; notify the national occupational safety and health professional/expert and the labour inspector in the respective District, and the social security organ of any accident, dangerous occurrence, or occupational poisoning which has occurred at the workplace. Such notification should be made within four (4) days of the occurrence of the accident.

supervision of work.⁴⁸⁸ The laws prohibits employers to import, exhibit, trade, rent out, give away under any circumstances or to use machines, apparatus and pieces of equipment which do not guarantee the safety and health at workplace.⁴⁸⁹ The safety and health is not limited to equipments and machinery, it concerns also buildings used for professional activities.

3.8.3 Safety and health of work places

The Rwandan labour code law stresses that working buildings must be maintained in a state of sanitation and must comply with security and health conditions essential for the employee's life; they must be organized so as to assure the workers' protection.⁴⁹⁰ It adds that at workplace, buildings must have all basic necessities relating to health and safety. Before building any structure to be used for professional activities, its extension or transformation its projected plan must be approved by the Ministry in charge of Labour for inspection and certification as to whether they respect all required conditions which would make them compatible with health and safety norms.⁴⁹¹

The employer has an obligation to instruct his/her employees on hygiene and security and to place in the work premises instructions relating to health and security in order to be observed with regard to safeguarding health and prevention of hazards.⁴⁹² To this end, there must be a committee in charge of safety and health at work place whose size will depend on the nature and size of the company. Employers are responsible for occupational hazards arising at the workplace. In doing so, they have to ensure that the working environment is safe and healthy. Employers must protect workers from occupational risks.⁴⁹³ Workers are also bound to respect health and safety instructions provided in the internal rules and regulations as well as the necessary protection equipment; and to care for their correct use.

⁴⁸⁸ B. O. Alli, *Op. cit.*, pp.46-47.

⁴⁸⁹ Article 92 § 3 of the law n°13/2009 of 27/5/2009 regulating labour law in Rwanda.

⁴⁹⁰ Article 90 of the law n°13/2009 of 27/5/2009 regulating labour law in Rwanda

⁴⁹¹ Article 92 § 1 and 2 of the law n°13/2009 of 27/5/2009 regulating labour law in Rwanda

⁴⁹² *Ibid*

⁴⁹³ B. O. Alli, *Fundamental Principles of Occupational Health and Safety*, ILO, 2001, p.20. available at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_093550.pdf

In our research we have found that most of companies do comply with the obligation of keeping working place cleaned but, the obligation of submitting projected plans of building to be used for professional activities has never been respected. The labour inspector of Muhanga district⁴⁹⁴ as well as the personal in charge of health and safety in the Ministry of Public Service and labour they told us that they have never received any request submitted requesting the approval of the Ministry.⁴⁹⁵ The government of Rwanda should therefore take all possible measures in order to bring all employers to abide with requirements which ensure that premises contain equipment which enhance the protection of workers at their working places.

3.8.4 Announcement of risks at workplaces

The Rwandan law obliges employers to announce to Rwanda social security board and labour inspector in the district where they are established in a period which does not exceed four working days all accidents or diseases noted in their workplaces.⁴⁹⁶ This obligation exists also when it is found that their workplace is likely to cause occupational diseases before the use of that building.⁴⁹⁷ In instances of accidents, the law obliges also the victim or his/her legal representative to do it in a period of two years from the time when the incident took place. Though this obligation results from the law, all labour inspectors we have contacted, have revealed to us that they have never received any report from these employers.

3.8.5 Emergency box and medical care

All companies have the obligation of putting at the disposal of employees a first aid box. These boxes are crucial in the case of the occurrence of any accident. In case of professional accident, company has the obligation of evacuating injured to the nearest health centre.⁴⁹⁸ Apart from putting in the disposal of the workers all medical necessary equipment, he/she is also obliged to put into place preventive measures. In doing so, he must provide equipment, machinery and

⁴⁹⁴ Visit made on 17th July 2014..

⁴⁹⁵ Interview with M F the personnel of MIFOTRA in charge of the labour Inspection on 25th May 2015.

⁴⁹⁶ Article 94 of the law n°13/2009 of 27/5/2009 regulating labour law in Rwanda

⁴⁹⁷ Article 94 § 2 and 3 of the labour law in Rwanda.

⁴⁹⁸ Article 96 § 1 and 2 of the labour law in Rwanda

other devices. All protective tools must be inspected regularly basing on instructions or other recommendations from the manufacturer or any other expert in the field. The result of the inspection must be in an ad hoc register where all necessary information including the date of the persons who has checked it, the data as well as the signature of the checker must appear in that register.⁴⁹⁹ Moreover, the employer must ensure that these equipments are adequately used and cannot also any harm to employees.

All workers must also have sufficient information on how the fist aid box is used.⁵⁰⁰In addition to this, the employer is obliged to ensure medical tests relating to all employees in the entity. The law says that every employer is also obligated subject all employees to certain medical tests at his/her expense before they are employed, during their employment and after the termination of their employment.⁵⁰¹ It is aberrant that no single establishment has respected this requirement contained in the Ministerial order and the ministry of labour has to put into place sanctions which would punish or deter any employer who may be attempted to disregard this obligation.

3.8.6 Establishment of committees in charge of occupational health and safety

Various laws have provided that in every company, there should be a committee in charge of health and security. This committee has the mandate of supervising the implementation of principles relating to the occupational security and health. Even if provided by the Rwandan law, it is abnormal that no single company in Rwanda being foreign or national has complied with this obligation. In the research conducted by the confederation of trade unions in Rwanda (CESTRAR) in 2013, only two companies, namely, the Rwanda Brewery Company (BRARIRWA) and the Thee Factory (SORWATHE) were found to have properly functioning

⁴⁹⁹ Article 27 of the Ministerial Order n°02 of 17/05/2012 Determining Conditions for Occupational Health and Safety, *OGRR, n° special of 25/05/2012*

⁵⁰⁰ Article 28

⁵⁰¹ Article 48 of the ministerial order n°02 of 17/05/2012 determining conditions for occupational health and safety, *OGRR, n° special of 25/05/2012*

committees in place.⁵⁰² These entities not only have working committees, but they also have another organ dealing with other issues regarding workers. In this light, we are going to highlight some of the principles provided by the Rwandan law to this regard.⁵⁰³

Article 3 of the Ministerial order above mentioned says that

any institution employing at least twenty workers and which operates in the industrial sector, public works and construction or is engaged in mechanical works or mining shall have to establish a workplace health and safety committee. Institutions and companies operating in sectors other than those specified above and employing at least fifty persons are also to put in place a health and safety committee.”

The law requires companies which do not have the requisite number to choose their representative and his/her deputy. This principle applies also to other sectors such as transport where the driver and the conductor are to be adequately equipped to assume the responsibility pertaining to occupational health and safety.⁵⁰⁴ The law says that the workplace health and safety committee must be composed of three persons: a representative of staff nominated by his/her peer who must be the chairperson, a trade union representative nominated by members of the trade union committee who must be the Vice-President and a representative of the employer.⁵⁰⁵ Members of the health and safety committee are nominated for a renewable three-year term.⁵⁰⁶ Their names must be displayed within the premises of the institution or company and a copy thereof shall be availed to the labour Inspector of the area.⁵⁰⁷

This committee has rights to make investigation on cases concerning health and security at work place. It also gives advice to the employer on how principles relating to health and safety can be properly implemented. The committee gives also a report to various institutions including the ministry of labour on how principles of health and safety are respected in their

⁵⁰² CESTRAR, *Baseline survey on the social dialogue situation in Rwanda*, June 2013, p. 43. This is also the point of view of Mpakanyi Gaspard, the in charge of Research at the Rwanda Trade Unions Confederation (CESTRAR) in the Interview conducted on 2nd June 2014.

⁵⁰³ Ibid.

⁵⁰⁴ Article 3 of the Ministerial Order n° 1 of 15/05/2012.

⁵⁰⁵ Article 4 of the same Ministerial order

⁵⁰⁶ Article 5 of the same Ministerial Order.

⁵⁰⁷ Article 6 of the same Ministerial Order.

companies.⁵⁰⁸ These persons are also responsible for following up on the implementation of prevention measures prepared by the workplace health and safety committee and the implementation of the annual program of the workplace health and safety committee.⁵⁰⁹

The Workplace health and safety committee shall make a quarterly report on the state of health and safety within the institution to be addressed to the employer with a copy thereof to be furnished to the Labour Inspector of the area. The Ministry in charge of Labour and the Rwanda Social Security Board are to ensure the implementation of the recommendations made. That committee must have a register containing all findings relating to any investigation made and remarks they have proposed to the company for the improvement of safety and health at work.⁵¹⁰

The above mentioned register shall comprise three parts: The first part contains the findings of investigations conducted by members of the health and safety committee as part of their mission, as well as reports of the visits; The second part shall contain all occupational accidents and diseases which occurred in the institution; The third part is reserved for the observations of the officer of Rwanda Social Security Board, the Labour Inspector and those of occupational health and safety professional/expert at national level.⁵¹¹

The above mentioned institutions have to be informed because they represent the government of Rwanda in those institutions. The professional expert in charge of occupational health and safety at national level, the labour inspector, the officer of the RSSB and the occupational health and safety professional of the institution shall have the specific responsibility of monitoring the daily operations of the workplace health and safety committee.⁵¹²

The non respect of principles concerning health and security can be punished by the law. The law

⁵⁰⁸ Article 7 of the Ministerial order n° 1 of 15/05/2012.

⁵⁰⁹ *Ibid.*

⁵¹⁰ Article 8 of the same Ministerial Order.

⁵¹¹ Article 11 of the Ministerial order n° 1 of 15/05/2012.

⁵¹² Article 13 of the same Ministerial Order.

says that an employer can be sanctioned by having his/her establishment suspended for a period ranging from seven days to two months or being obliged to close if he has failed to comply with health and safety standards.⁵¹³

As highlighted in the preceding section, it is unfortunate that these good measures have never been implemented by any of the main stakeholders in Rwanda. Both companies and public institutions have defaulted in their statutory duties pertaining to employee protection. We think it does not seem to be in their priorities and at the same time, the stakeholders do not react to it. In all companies we visited, we found that no single company has put into place the legally required commission. At the district level, inspectors of labour do not also make any active steps to show their commitment to the implementation of the provisions of this legislation.⁵¹⁴

3.9 Chapter Conclusion

The relationship between FDI and labour standards is among issues which have retained the attention of organisations and human rights activists. The ILO has put into place various conventions with the only aim of protecting workers from any abuse either from the employer or the nature of work they are called to undertake. The same step has been made by the government of Rwanda in establishing laws and regulations having the same aim.

⁵¹³ According to the article 12 of the Ministerial Order,

⁵¹⁴ See supra note n°83.

In our research we have found that the Rwandan legal framework in the protection of workers is well built but the issue we have identified is the lack of a clear follow-up. Principles laid down by various ministerial orders have been found inapplicable by various employers and the government of Rwanda through labour inspectors do not take measures which may eradicate this adverse behaviour which can be detrimental to the life of the workers. We have found that labour conditions as appeared in various legal instruments like the respect of working hours, the freedom of association and bargain, child labour are not fully respected. We have also found that some employees work beyond the prescribed legal period. In some business sectors we have also found that they do employ children who have not yet reached the required age. Besides this, all requirements for health and safety at work are not also respected. To some extent, it looks like the context of the labour market in Rwanda has also a role to play in the disregard of labour standards. Opportunities of employment are scarce which make the employees to agree on abusive contracts and working conditions. They refrain from claiming their rights in fear of being dismissed and quickly replaced. On a big scale, this has created a sort of culture of accepted violation of labour rights in Rwanda.

Putting in place principles aiming at regulating the labour relationship is one thing but making a follow up on its implementation is also another important phase which should be clearly observed by all persons who have the mandate controlling these companies. As we have seen during our research, the issue of labour standards has progressively become a pressing matter and we can only encourage initiatives which go in that sense. Sensitizing the unions to reinforce their capacities in addressing their members' issues, encouraging favourable legislations for the workers – for instance the law on minimum wage should be some of the measures which can help improve the situation as it is today. However, efforts should also be put in confronting the foreign investors in order for them to respect basic human rights and working conditions for their employees; this should be subject to reinforced measures because we know the power that some international corporations can have in third world countries.

CHAPTER FOUR
FOREIGN DIRECT INVESTMENT AND THE ENVIRONMENTAL
RIGHTS IN RWANDA

4.1 Introduction

Environment degradation and depletion of natural resources made by human activities have brought concerns in modern days. It has been perceived that environmental regulation plays a significant role in decisions on where to locate investment because MNCs choose to invest in countries where rules and regulations on environment and labour standards are not strong.⁵¹⁵ The protection of environment has an impact on life, health, private life, and property of individual humans rather than on other states or the environment in general. Governments have to take all necessary measures in order to prevent environmental nuisances, including those caused by corporations. They must also enforce environment laws and judicial decision.⁵¹⁶

In addressing this issue, states are called upon to pay close attention on the impact any human activity may have on the environment. In doing so, countries may, for example, put into place laws and policies aiming at ensuring the appropriate frame for the protection and the respect of environmental rights. In case these rights are violated, there must be effective remedies to restore victims in their rights. In order to deal with the issue of environment pollutants at the global level, Rwanda has shown its commitment by establishment of the National Implementation Plan of Stockholm Convention on Persistent Organic Pollutants.⁵¹⁷ Commitments made in the frame of the Stockholm Convention came to reinforce initiatives and priority actions undertaken by the Government of Rwanda through sectorial policies in order to achieve its objectives related to environment protection.⁵¹⁸ This chapter will assess the extent to which foreign direct investment impacts on rights to a clean and safe environment in Rwanda. Analysis will be firstly made on the existing Rwandan legal framework and then it will assess the extent to which foreign investors cope with the requirements of those laws.

4.2 Rwandan regulatory and institutional frameworks on environmental rights

⁵¹⁵ K .R. Gray, *Foreign Direct Investment and Environmental Impacts- Is the Debate Over? 'RECIEL'* Blackwell Publishers Ltd, Oxford, Malden, n°. 11 (3), p. 1.

⁵¹⁶ *Ibid.*

⁵¹⁷ Plan 2007-2025. The Plan was established by the Ministry in charge of lands, environment, forestry and mines in December 2006. This plan constitutes a complementary expression of Rwanda's willingness to bring corrective measures to the process of sustainable development within the framework of vision 2020.

⁵¹⁸ RBS, *Op. cit.*, p. 33.

The Rwandan legislator has given an important consideration to the protection of environment. This has been materialized by the putting into place some laws⁵¹⁹, policies⁵²⁰ as well as institutional framework dealing with the environment protection.⁵²¹ This analysis has considered various Rwandan laws and international conventions which have been ratified by Rwanda.⁵²² Furthermore, it has analysed also various institutions involved in environment protection.

4.2.1 Environment under international human rights instruments

The Right to a clean environment has been provided by international instruments directly or indirectly. The relationship between human rights and environment in international instruments can be put into three theoretical approaches. The first considers the environment as a precondition to the enjoyment of human rights; the second considers human rights as tools to address environmental issues and the third integrates human rights and the environment under the concept of sustainable development.⁵²³

In 2009, a report from the Office of the High Commissioner on Human Rights (OHCHR) emphasizes the key point that

While the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing.⁵²⁴

⁵¹⁹ Organic law n° 04/2005 of 08/04/2005 Determining the modalities of protection, conservation and promotion of environment in Rwanda, official Gazette n° 9 of 1st May 2005.

⁵²⁰ http://minirena.gov.rw/fileadmin/Environment_Subsector/Laws_Policies_and_Programmes/Policies/POLITIQUE_ENVIRO_N_-_Anglais.pdf

⁵²¹ Law n°53/2010 Of 25/01/2011 establishing Rwanda Natural Resources Authority (RNRA) and determining its mission, Orgnaization and functioning, the law n°63/2013 Of 27/08/2013 Determining the mission, organisation and functioning of Rwanda Environment Management Authority(REMA), and others.

⁵²² The Constitution of the Republic of Rwanda in its article 190 gives international treaties and agreements a more binding force than organic laws and ordinary laws.

⁵²³ A. Boyle, *Op. cit.*, pp. 616-617.

⁵²⁴ OHCHR, *Analytical Study on the Relationship Between Human Rights and the Environment* (hereafter 'OHCHR 2011 Report'), UN Doc. A/HRC/19/34, 16 Dec. 2011, at para. 2.

The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Social and a cultural right (ICESCR), the European Convention on Human rights (ECHR), the American Convention on Human rights (AmCHR), and the African Convention on Human and Peoples' Rights (AfCHPR) have affirmed that environment is a human rights issue.⁵²⁵ The Stockholm Declaration on the other hand says that a man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.⁵²⁶

At the European level, it has been attempted in vain, to add a protocol on environment to the ECHR. But some principles set forth by various cases have showed the need for having a clear additional protocol dealing with environment as human rights.⁵²⁷ This approach was also supported by courts. Among principles which have attracted the attention of courts are the right to private life, or the right to life, facts which can be used to compel governments to regulate environmental risks, enforce environmental laws, or disclose environmental information.⁵²⁸

The right to a healthy environment is not found directly in human rights documents such as the Universal Declaration of Human Rights (1948)⁵²⁹, the International Covenant on Civil and Political Rights (1966)⁵³⁰, or the International Covenant on Economic, Social, and Cultural Rights (1966).⁵³¹ When considering rights provided by those instruments though, in an indirect

⁵²⁵ In ICESCR 1966 in its article 12; the European social Charter of 1961, Article 11, Additional Protocol to the AmCHR 1988, Art. 11; Convention on Rights of the Child 1989, art. 24(2) (c).

⁵²⁶ Article 1 of the Stockholm Declaration. This was considered as the first formal recognition of the right to a healthy environment came in the *Stockholm Declaration*, which emerged from the pioneering global eco-summit in 1972. The declaration is available at http://sitemaker.umich.edu/drwcasebook/files/stockholm_declaration.pdf

⁵²⁷ Cases quoted by Alan Boyle *Op. cit.*, p. 615, are *Guerra*, *Lopez Ostra*, *Öneryıldız*, *Taskin*, *Fadeyeva*, *Budayeva*, and *Tatar*.

⁵²⁸ *Lopez Ostra v. Spain*, 20 EHRR (1994) 277; *Guerra v. Italy*, 26 EHRR (1998) 357; *Fadeyeva v. Russia*, 45 EHRR (2007) 10; *Öneryıldız v. Turkey*, 41 EHRR (2005) 20; *Taskin v. Turkey*, 42 EHRR (2006) 50, at paras 113–119; *Tatar v. Romania* [2009] ECtHR, at para. 88; *Budayeva v. Russia* [2008] ECtHR. Quoted by Alan Boyle *Op. cit.*, p. 615.

⁵²⁹ Articles from 2 to 6 of the Declaration

⁵³⁰ Articles 2, 6, etc of the ICCPR

⁵³¹ Articles 1, 3,4, 10, 11, etc of the ICESCR

way, we may deduce the existence of the rights to a clean and healthy environment. As we said early, Rwandan law has also considered some of these rights in different legal instruments.

4.2.2 Protection of environment under the Rwandan law

Besides the international law which regulates the protection and conservation of the environment, the Rwandan law contains also some laws which aim at regulating environment. These laws are of various levels from the constitution to other low levelled laws.

4.2.2.1 Right to a clean and a healthy environment in the Constitution of Rwanda

Wondering whether rights to a clean and healthy environment is a constitutional right is to wonder whether right to life, right to health, safety, and clean water are constitutional rights. Even more importantly, despite their recent vintage, environmental rights are included in more than 90 national constitutions.⁵³² The Rwandan constitution has not ignored the rights to a health environment. According to its article 49, every citizen is entitled to healthy and satisfying environment.⁵³³ This provision shows that the right to a healthy environment is a constitutional right. This character is confirmed by the fact that these rights stand together with other constitutional rights contained in the part entitled “Fundamental human rights and duties of citizens.”⁵³⁴

The Constitutional character of the right to a clean and healthy environment has been confirmed by the International Human Rights Clinic at Harvard School of law. According to that legal

⁵³²D. R. Boyd, *The Constitutional Right to a Healthy Environment*,

at <http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html>

⁵³³ Constitution of the Republic of Rwanda of 4th June 2003

⁵³⁴ This title starts from the article 10 up to the article 51. As it appears in the title, this part is divided into two chapters the first being fundamental human rights and the second is on the rights and duties of citizens. The rights to a safe and clean environment are have been considered as rights which are not fundamental.

clinic, rights to a clean environment are among rights which need to be incorporated in Constitution because it provides the right of present and future generations of citizens of the State. Consequently, the right to an ecological healthy environment must be ensured. Rights which are provided here must contain among others, the enjoyment of clean air, pure water, and scenic lands; freedom from unwanted exposure to toxic chemicals and other contaminants; and a secure climate. The environmental rights enumerated in this section are held to be fundamental to present and future generations of citizens and shall be weighed equally with other rights found by state courts to be fundamental.⁵³⁵

Making the environmental rights constitutional, is very logical because protecting life of citizens constitutes obligation which lies on the state. It has been argued that State holds its natural resources in trust for its people and has the duty to use its powers to conserve, protect, and improve these resources for the benefit of present and future generations. In furtherance of this duty, the State shall take precautionary approaches to the use of natural resources and the development and proliferation of new technologies.⁵³⁶

The Rwandan constitution has also provided for right to a clean and healthy environment in indirect way. The right to life is a right which is attached to the environment. In its article 10 it provides that the human person is sacred and inviolable. The State and all public administration organs have the absolute obligation to respect protect and defend him or her. The article 12 adds that every person has right to life. No person shall be arbitrarily deprived of life. These rights and others have been confirmed by the Stockholm Declaration. It says man has fundamental right to freedom, equality and adequate conditions of life, in an environment of quality which permits a life of dignity and well-being. Racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.⁵³⁷

⁵³⁵ The International Human Rights Clinic at Harvard Law School, An environmental right for future generations, Model state constitutional provisions and Model statute, p. 10, November 2008, available at <http://www.law.harvard.edu/programs/hrp>

⁵³⁶ Idem, p.13.

⁵³⁷ Stockholm Declaration its principle one.

The second form of right which can indirectly lead to environmental right is the recognition by the constitution the right to physical and moral integrity. In its article 15, the Rwandan constitution says that every person has the right to physical and mental integrity. No person shall be subjected to torture, physical abuse or cruel, inhuman or degrading treatment. Beside the Constitution of the Republic of Rwanda, the issue of environment protection in general and the right to a clean and healthy environment have been provided by various other laws in Rwanda and these laws are hereafter discussed.

4.2.2.2 Organic law determining the modalities of protection, conservation and promotion of environment in Rwanda

The organic law on protection of environment is the first ever of that nature containing various mechanisms aimed at enhancing the protection of environment in Rwanda. This law acknowledges that the environment in Rwanda constitutes a common national heritage for all Rwandans and then every person has the duty to protect and conserve it.⁵³⁸ It has some important provisions as regard to the protection of the environment in general, and sets out a link between environment and investment.

The organic law on the protection of the environment has set forth some principles in various articles with the aim of protecting the environment. Article one of this organic law provides that “the conservation of the environment and protection of inhabitants must be a guaranteed.” This provision further makes preservation of the environment one of the fundamental principles of protection of the environment. The promotion of the social welfare of the population considering equal distribution of the existing wealth is also among guarantees of this organic law.

⁵³⁸ Article 2 Organic Law n° 04/2005 of 08/04/2005 determining the modalities of protection, conservation and promotion of environment in Rwanda in the OG of 1st May 2005.

Another principle provided by the first article is the emphasis on the link between protection of environment and the right to sustainable development.⁵³⁹ This law considers also the precaution principle or preventive measures. According to the organic law on protection of environment, the precaution principle is important because it helps reduce the disastrous effects on environment. Precaution or preventive measures result from an environmental evaluation of policies, plans, projects or developmental activities aimed at identifying the consequences of certain activities and hinders their commencement in case they arise. These consequences are identified by an environmental impact assessment.⁵⁴⁰

Protecting environment helps to serve money which would be used to solve adverse effects which may be generated by that lack of precaution. The environmental degradation which results from the inapplicability of precautionary measures may cause irreversible and severe problems. It is then worth noting that activities considered or suspected to have negative impacts on environment shall not be implemented even if such impacts have not yet been scientifically proved.⁵⁴¹

The Rwandan legislation has also adopted the principle of polluter pays. According to the organic law, every person who demonstrates behaviour or activities that cause or may cause adverse effects on environment is punished or is ordered to make restitution or being ordered to rehabilitate the environment where possible.⁵⁴² It is good that the principle appears in the law but still it has some problems because it is not detailed on activities which may pollute the environment. In some developed countries, principles for which a person or company may be considered as the pollutant have been listed.⁵⁴³

⁵³⁹ Article 1 of the organic law.

⁵⁴⁰ Article 7 of the Organic law

⁵⁴¹ Ibid.

⁵⁴² Article 7 of the organic law on environment protection.

⁵⁴³ The Public Private Partnership is normally implemented through two different policy approaches: command-and-control and market-based. Command-and-control approaches include performance and technology standards. Market-based instruments include pollution taxes, tradable pollution permits and product labeling. The elimination of subsidies is also an important part of the application of the Public Private Partnership.

The law on environment makes obligatory the assessment of the impact a project can have on environment before obtaining authorisation for its implementation.⁵⁴⁴ The law adds that every government project or private individual activities cannot be permitted to operate if they are contrary to their plan and shall aim at considering the strategies of conservation of environment as provided for by law.⁵⁴⁵ The law adds elements which can be taken into consideration when assessing the impact the project can have on the environment. It also adds that an order of the Minister having environment in his or her attributions shall specify the details of the provisions of this article.⁵⁴⁶ Besides the submission to the environment impact assessment, companies which undertake their activities in Rwanda must respect also rules applicable to the protection of environment. The law says that any activities that may pollute the atmospheric pressure like burning of garbage, waste or any other object (tyres, plastics, polythene bags and others) shall respect regulations of competent authorities.⁵⁴⁷ Mode of application of the EIA in Rwanda will be widely discussed in the second section of this chapter.

The organic law on environment protection has also prohibited some activities which pollute the environment. Activities which are prohibited according to the law are any dumping or disposal of any solid, liquid waste or hazardous gaseous substances in a stream, river and lake and in their surroundings. Other prohibited activities include damaging the quality of air and of the surface or underground water; killing and destroying flora and fauna; endangering the health of biodiversity and damaging the historical sites and touristic beauty at the lakes, rivers and

⁵⁴⁴ Article 67 of the Organic law

⁵⁴⁵ Article 31 of the Organic law

⁵⁴⁶ The article 68 of the Organic law says that:

1° a brief description of the project and its variants;

2° a study of direct or indirect projected effects on a place;

3° analysis relating to the initial state of a place;

4° measures envisaged to reduce, prevent or compensate for the damage;

5° reasons based on in selecting such a place;

6° a brief description of points from 1° to 5° of this article;

7° an explanation of the methods that will be used in monitoring and evaluating the state of the environment before, during the activities of the project, in using the installation but particularly after completion of the project;

8° an estimation of the cost of the measures recommended to prevent, reduce or compensate for the negative effects the project may cause on the environment as well as the measures for examining and controlling the status of the environment.

⁵⁴⁷ Article 26 of the organic law

streams.⁵⁴⁸ It is good that these activities have been prohibited by the law, but these interdictions should be respected.

The law also prohibits any activity that may damage the quality of water.⁵⁴⁹ To this, it is prohibited to construct houses in wetlands (rivers, lakes, big or small swamps), in urban or rural areas, to build markets there, a sewage plant, a cemetery and any other buildings that may damage such a place in various ways. All buildings shall be constructed in a distance of at least twenty (20) metres away from the bank of the swamp. If it is considered necessary, construction of buildings intended for the promotion of tourism may be authorised by the Minister having environment in his or her attributions.⁵⁵⁰

It is again prohibited to sell, import, export, store ordinary drugs or chemical substances with intention to sell or distribute even if it is free of charge except authorisation or temporary permission is issued by competent authorities.⁵⁵¹ Acts related to purchase, sale, import, export, transit, store and pile chemicals, diversity of chemicals and other polluting or dangerous substances are prohibited in the whole country. An order of the Prime Minister determines a list of chemicals and other polluting substances that are not permitted.⁵⁵² Beside a number of laws on protection of environment, they are also some institutions which have the mission of monitoring the implementation of these laws.

4.2.3 Institutional framework on the environment protection

The protection of environment in Rwanda has been assigned to various institutions. Public institutions in charge of the environment protection in Rwanda are the Rwanda Environment Management Authority (REMA): a public establishment with legal personality, The National Fund for Environment in Rwanda ('FONERWA) is an institution in charge of soliciting and managing financial resources, and the National Forest Authority (NAFA).

⁵⁴⁸ Article 82

⁵⁴⁹ Article 83

⁵⁵⁰ Article 87

⁵⁵¹ Article 92

⁵⁵² Article 91

4.2.3.1 Rwanda Environment Management Authority (REMA)

REMA is a public institution which was created by the law n° 63/2013 of 27/08/2013 which repealed the law n°16/2006 of 03/04/2006 determining the organisation, functioning and responsibilities of Rwanda Environment Management Authority.⁵⁵³ This institution has legal personality, with administrative and financial autonomy.⁵⁵⁴ The main mission of REMA is to supervise, to monitor and to ensure that issues relating to environment are integrated in all national development programs.⁵⁵⁵ To accomplish that, it implements government environmental policy; it advises the government on policies, strategies and legislation related to the management of the environment as well as the implementation of environment related international conventions when it is deemed necessary.⁵⁵⁶

In order to fulfil the mission provided under this law, REMA has the power to request any concerned institution or organ to submit an environment status report. It can also visit without prior notice any project, building, industrial and business site in order to conduct inspection of activities harmful to environment or to investigate offence in accordance with Organic Law

⁵⁵³ The law was published in the Official Gazette n°41 of 14/10/2013.

⁵⁵⁴ Article 1 paragraph 2 of the aforementioned law.

⁵⁵⁵ Article 3 para 1

⁵⁵⁶ Article 3. As detailed by the law, it has these missions:

- to conduct thorough inspection of environmental management in order to prepare a report on the status of environment in Rwanda that shall be published every two (2) years;
- to put in place measures designed to prevent climate change and cope with its impacts;
- to conduct studies, research, investigations and other relevant activities in the field of environment and publish the findings;
- to closely monitor and assess development programs to ensure compliance with the laws on environment during their preparation and implementation;
- to participate in the preparation of activities strategies designed to prevent risks and other phenomena which may cause environmental degradation and propose remedial measures;
- to provide, where it is necessary, advice and technical support to individuals or entities engaged in natural resources management and environmental conservation;
- to prepare, publish and disseminate education materials relating to guidelines and laws relating to environmental management and protection and reduce environmental degradation risks;
- to monitor and supervise impact assessment, environmental audit, strategic environmental assessment and any other environmental study. REMA may authorize, in writing, any other person to analyse and approve these studies;
- to establish relationships and cooperate with national and international institutions and organisations in charge of environment and any other bodies that may help REMA to fulfill its mission.

determining the modalities of protection, conservation and promotion of environment in Rwanda.⁵⁵⁷

After finding that the person is not respecting what the organic law determines for better protection of environment, REMA is entitled to order the suspension of activities contrary to the provisions of Organic Law determining modalities of protection, conservation and promotion of the environment in Rwanda and other laws relating to the protection of environment or to confiscate from any person various objects prohibited by laws relating to the protection of environment.⁵⁵⁸ REMA is not the only Public institution dealing with issues of environment protection there others whose role cannot be ignored. In the following lines we are also going to develop on FONERWA.

4.2.3.2 National Fund for Environment (FONERWA)

FONERWA⁵⁵⁹ is a fund created with the aim of protecting environment which is under the supervision of the Ministry of forest and natural resource management. This fund has among others, the responsibilities to mobilize and manage resources used in activities aiming at protecting environment and natural resources or funds to be used in the fight against the climate changes and its impacts and funds to support public organs, associations and individuals aimed at protecting environment, research as well as managing climate change.⁵⁶⁰

This fund gets funding from various sources. Among these there is the government allocated budget; grants and subsidies; special grants and subsidies aiming at management of climate change and its impacts, donations and bequests; fines emanating from penalties determined by different laws aiming at environmental, water and forestry protection and laws on mining and quarry exploitation; zero point one per cent (0,1%) of a project total cost of which environmental impact assessment has been carried out minus the working capital; fees coming

⁵⁵⁷ Article 4 of the law on REMA

⁵⁵⁸ Ibid

⁵⁵⁹ FONERWA is a French abbreviation which means “*Fonds National de l’Environnement*”. It means literally: National Fund for Environment.

⁵⁶⁰ Article 2 of the law n°16/20012 of 22/05/2012 Determining the Organisation, Functioning and Mission of the National Fund for Environment, Official Gazette n°26 of 25/06/2012.

from proceeds from cutting wood belonging to the State, the Districts and private persons and from forestry exploitation; such fees shall be fixed by an Order of the Minister supervising FONERWA, which also shall determine modalities of their payment; property formerly owned by the National Forestry Fund; and Other fees determined by law.⁵⁶¹

4.2.3.3 National Forest Authority (NAFA)

NAFA a Rwandan institution in charge of supervision, following up and ensuring that issues relating to forestry receive attention in all national development plans. Among activities of the NAFA is to implement Government forestry policy as well as to promote agro forestry; to advise the Government on policies, strategies and legislation related to the forestry management as well as the implementation of forestry related international conventions and protect natural resources such as land, water and forest biodiversity.⁵⁶²

While undertaking these activities it provides support to organs that are in charge of fighting soil erosion with the aim of safeguarding forest vegetation. It also prepares national afforestation programs, and forests management. NAFA also helps districts prepare their own forest management, processing, supervision and implementation of such programs; to make and update the list of tree species to be planted as well as their respective suitable areas according to the type of soil and the expected usage of such trees. Furthermore it provides advice with regard to related products to be imported.⁵⁶³

NAFA also prepares studies, investigations and other relevant activities with regard to the importance of forestry in the national economy and to the exploitation of forestry related products and disseminate the findings after that research. It disseminates the research findings on the technology in the field of planting trees in land for cultivation and in pastures and in specific afforestation, good maintenance of the forests an utilization of such resource for income

⁵⁶¹ Article 7 of the same law

⁵⁶² Article 4.

⁵⁶³ Ibid

generation, rational utilization of the forests and related products and in collecting all the data on forestry and related products.

All in all, it ensures adequate monitoring and evaluates development programs in order to adhere to the standards in the management and rational utilization of forests in the planning and implementation of all development projects, as well as those already in existence, and which are likely to have a negative impact on the environment. In order to ensure efficient management and utilization of resources from the national forestry fund, it works closely with other institutions, projects for developing agricultural and livestock products, environment protection and tourism promotion in the country and Collaborate with other national and international Institutions and organisations.⁵⁶⁴

4.3 Environment Impact Assessment and the Respect of Environmental Rights in Rwanda

The environment impact assessment is one of the tools used to assess the eventual consequence investment can have on environment. The process is called “environment impact assessment” The environmental impact assessment shall describe direct and indirect consequences on the environment.⁵⁶⁵ The Rwandan legislator requires every business which intends to start its activities in Rwanda to submit an environmental impact assessment report.⁵⁶⁶ The law adds that every development project shall be required to undergo environment impact assessment prior to its establishment in Rwanda.⁵⁶⁷ In this part we assess the extent to which this provision is enforced in the following parts of this section.

⁵⁶⁴ *Ibid.*

⁵⁶⁵ Article 70 of the same law.

⁵⁶⁶ Article 67 of the Organic Law on environment protection.

⁵⁶⁷ In order to enable them to pursue its mission, described in this law and in the framework of protection, preservation and of tracking all those who abuse forestry resources yet without interfering with the provisions on environment , NAFA has been invested with the following powers:

- The Minister in charge of Justice may give the employees of NAFA the same powers as those of criminal investigators;
- NAFA may order suspension of activities which do not respect the provisions of organic law determining the modalities of afforestation and commercialization of forestry products,

4.3.1 Definition of EIA

Environmental Impact Assessment has been defined by scholars as the systematic identification and evaluation of potential impact of proposed project plans, programmes relative to the physical-chemical, biological, cultural and socio-economical components of the total environment.⁵⁶⁸ According to REMA⁵⁶⁹, EIA is a systematic, reproducible and multilevel of identification, prediction and analysis of significant environmental impact being positive or negative of proposed project or activity and its practical alternatives on the physical, biological, cultural and socio-economic characteristics of a particular geographical area in order to provide information necessary for enhancing decision making. The objective of the EIA is to prevent and mitigate adverse impacts, enhance positive impacts and assist the rationale use of resources, hence maximizing the benefit of socio- economic development projects and ensuring sustainable development. It then assess if the project is ecological viable and facilitates decision-making on its authorization and certification.⁵⁷⁰

Environmental Impact Assessment (EIA) can be them be defined as a process of evaluating the likely environmental impacts of a proposed project or development, taking into account inter-related socio-economic, cultural and human-health impacts, both beneficial and adverse. As a key tool to assess the impact of FDI on environment, our development will first of all analyse it in general, and then see its application in Rwanda as regard to the licensing and monitoring of Investors.

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- Give to districts, to public institutions, associations, and to the private sector, relevant instructions concerning forestry.
 - Visit without notice, everywhere forestry activities are carried out,
 - To receive aid, assistance or grant through the Ministry in charge of forestry.

⁵⁶⁸ S. Govind, *To Study the Inception and Eevolution of Environmental Impact Assessment in the World and in India and to Analyse and Comment upon the Environmental Clearance Process in the Country*, Mater's Thesis, University of Delhi, 2007, p. 1.

⁵⁶⁹ REMA is an English acronym which stands for Rwanda Environment Management Authority. It is a public institution dealing with day to day issues of environment in Rwanda.

⁵⁷⁰ REMA, *General Guidelines and Procedure for Environmental Impact Assessment*, November 2006, p.7.

4.3.2 Purpose of the EIA in investment activities

The more there is an increase of FDI in a country, the worrying on its impact for the ecosystem of the host country increases also. It has generally been observed that foreign investors seek to invest in countries which are not very strict with their environment regulation or the so called “pollution haven”.⁵⁷¹ As a matter of facts, host countries attempt to lessen their regulatory requirements in order to attract investment and this leads to the “race to the bottom” of environmental rights and other standards.⁵⁷² The situation has been proven where investors have decided to invest in developing countries not because they want to invest in those countries, but because of the lowering of their level of standards in protecting environment.⁵⁷³

Environment regulations play a significant role in determining whether to invest in a given country or not.⁵⁷⁴ The legal system is said to be strong when environmental laws are influenced by several factors, including local community pressures, a strong civil society movement or even initiated by the private sector. The weak system on the other side will be characterized by the absence of laws and institutions which protect environment. The assessment of the impact of corporations can also be based on the existence or the absence of a clear study on this impact.⁵⁷⁵ It is good for every country which intends to protect its environment to put into place strong measures because studies have provided that resource and pollution intensive industries do prefer locate in areas of low environment standards.⁵⁷⁶

4.3.3 Political justification of EIA Practice in Rwanda

⁵⁷¹R. K. Gray, *Environment Impacts- is the Debate Over?* p. 306.

⁵⁷² Ibid.

⁵⁷³ UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries*, p.2, M. Cole., A. Elliott. JR Robert, *Growth, Foreign Direct Investment and Environment: Evidence from Chinese Cities*, Frankfurt a.M. 2009, n^o41, p. 3.

⁵⁷⁴ N. Mabey and R. MC Nally, *Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development*, A WWF-UK Report, August 1999, p. 3.

⁵⁷⁵ R. Kevin, *Op. cit*, p. 307.

⁵⁷⁶ Ibid.

As we said earlier, the Rwandan Constitution provides that protection and sustainable management of environment must be ensured. The Rwanda investment and export strategic plan⁵⁷⁷ and the Vision 2020 has also emphasized on well regulated environment management system that takes into account principles of sustainable development.⁵⁷⁸ The organic law on environment protection says that non-project can receive authorization for implementation unless it has been awarded a certificate of clearance.⁵⁷⁹ In implementing this principle a ministerial order⁵⁸⁰ and guidelines on EIA have been adopted.⁵⁸¹ The Rwandan investment code makes also obligatory the submission of the EIA certificate before being registered as an investor in Rwanda.⁵⁸²

All these legal instruments show the commitment of the government of Rwanda in the protection of its citizens against activities which may abuse the right to a safe and healthy environment. The issue here would be that knowing the strength which is put into enforcement so as to prevent any possible violation of these rights as well as punishing those who have breached them. In order for the government of Rwanda control the implementation of the EIA it has provided for four phases which are below analysed.

4.3.4 Phases of EIA in Rwanda and their compliances by FDI

The EIA in Rwanda follows four stages namely: the environmental impact initiation phase involving application (1), the second phase is the screening, scoping and the impact study phase (2), the third being the decision making and authorization (3) and the last being the follow up phase and the EIA audit(4).

⁵⁷⁷ Same article of the above mentioned law.

⁵⁷⁸ Republic of Rwanda, *Vision 2020(5.2.)*, p. 19 and MINICOFIN, *National investment strategy*, 2002, p. 25.

⁵⁷⁹ Article 67 of the Organic law on environment protection

⁵⁸⁰ Ministerial Order n ° 003/2008 of 15/08/2015 Relating to the Requirements and Procedure for Environment Impact Assessment, *OG*, n ° 22 of 15/11/2008.

⁵⁸¹ REMA, *General Guidelines and Procedure for Environmental Impact Assessment*, November 2006.

⁵⁸² Article 11(3°) of the Investment Code of 2015.

4.3.4.1 Environmental impact initiation phase

The environmental impact assessment starts from the application made by the intending performer of a project. According to the Ministerial order on EIA, the developer submits an official application which includes a project brief of the proposed project to the RDB.⁵⁸³ The purpose of including the project brief is to provide sufficient information on the project to enable the Rwanda Development Board to make its own assessment on the eventual environmental harm which may be caused by the project. It also helps to categorize the project in order to know how to mitigate its consequences it may have on the environment.⁵⁸⁴

The guidelines on the EIA in Rwanda have provided for most important elements to be followed when applying for the EIA. Among elements to be included in the application, there must be the name, description of the activity, and its location conform to existing laws, regulations and policies governing such project and the use of the site/area proposed for its location, Any likely environmental impacts that may arise due to implementing various phases/stages of the project and proposed mitigation measures thereto.⁵⁸⁵

This phase is divided into other many sub-phases: after the application it follows the categorization of the project before being screened. Projects performers have to fill in forms composed of various items which may help to make an assessment of the project. In the visit we had we found that this phase is respected by all persons who intend to operate in Rwanda but the

⁵⁸³ Article 3 of the EIA Ministerial Order

⁵⁸⁴ Guide for the EIA in Rwanda, p. 7.

⁵⁸⁵ At a minimum, a Project Brief submitted to the Authority shall contain the following information:

- i) Name, title and address of developer.
- ii) Name, purpose, objectives and nature of project, including attributes such as size of project, design, activities that shall be undertaken during and after the establishment of the project, products and inputs, sources of inputs, etc.
- iii) Description of the proposed project site and its surroundings and alternative sites, if any, where the project is to be located.
- iv) Description of how the proposed project and its location conform to existing laws, regulations and policies governing such project and the use of the site/area proposed for its location.
- v) Any likely environmental impacts that may arise due to implementing various phases/stages of the project and proposed mitigation measures thereto.
- vi) Description of any other alternatives, which are being considered (e.g. siting, technology, construction and operation procedures, sources of raw materials, handling of wastes etc., decommissioning/closure and site restoration).
- vii) Any other information that may be useful in determining the level of EIA required.

only problem is those who submit those projects do not understand really what they will do after being licensed.⁵⁸⁶

4.3.4.2 Screening of projects

After applying for the EAI test the stage which follows is the screening of the project. The screening of the projects is a process of determining the impact level of a proposed project.⁵⁸⁷ The screening of a project helps to review if the project requires an EIA assessment or not. If the project falls under the category of those from which the EIA is required, the screening team identifies the eventual impact it may have on natural resources like the excessive resource and waste generation.⁵⁸⁸

The requirements for screening and the procedure to be followed are often defined in the applicable EIA law or regulations.⁵⁸⁹ Companies which need an EIA process are sometimes, annexed to laws providing for the EIA.⁵⁹⁰ The screening process intends to ensure that the form of any EIA review is commensurate with the importance of the issues the possible environmental problems rose by the project. It thus involves making a preliminary determination of the expected impact of a proposal on the environment and of its relative significance.⁵⁹¹

Under Rwandan law, the process of screening is usually conducted basing on the annex number two of the guidelines on EIA. It verifies the fulfilment of required conditions if nothing can impact on the environment. From this process, projects can be classified into various categories.

⁵⁸⁶ In an interview we had with Remy the REMA staff in charge of EIA. According to that person, at RDB, they told me that there is team of experts in drafting applications for the EIA. The application made by them cannot at any time be rejected because it is well drafted. The problem will be then its implementation by non expert. At RDB even in various districts I visited, they told me that the major problems reside in the implantation than in the application.

⁵⁸⁷ Guidelines on EIA in Rwanda, *Op. cit.*, p. 7.

⁵⁸⁸ *Ibid*

⁵⁸⁹ UNEP, *EIA Training Resource Manual*, available http://www.unep.ch/etu/publications/EIA_2ed/EIA_E_top4_body.PDF

⁵⁹⁰ In Rwanda for example it is attached to the annex to the Ministerial Order n°004/2008 of 15/08/2008 Establishing the list of works, activities and projects that have to undertake an environmental impact assessment.

⁵⁹¹ UNEP, *Op. cit.*, at http://www.unep.ch/etu/publications/EIA_2ed/EIA_E_top4_body.PDF

The first category is composed of companies which do not need an EIA process, the second is about companies which need a partial EIA and lastly those which need a full EIA.⁵⁹² It is important to note that in an interview we had with various stakeholders, we have found that this process is scrupulously respected.⁵⁹³ In our research we have found that all projects submitted to RDB have been screened using the procedure provided by the law.

4.3.4.3 Public hearing

After the screening process, it follows the decision which is given to authorities in charge of EIA for approval but before taking the provisional decision, there must be a public hearing. The law gives REMA the responsibility to conduct public hearings during the EIA process.⁵⁹⁴ However, in practice the process has been given to RDB, an institution in charge of the promotion and attraction of investors a situation which may not allow its strict application because of the conflict of interest.⁵⁹⁵

The guidelines provide that RDB after receiving the report on the EIA, it forwards it to local authorities for their comments.⁵⁹⁶ Though this was not clearly revealed by persons in charge of environment at the district level, it has been however noticed that from the time when the process of EIA was given to RDB, their role has been reduced. They told us that they only deal with the follow up process than dealing with the decision making at the time of licensing investors.⁵⁹⁷

The purpose of a public hearing is to provide to the directly interested and affected parties and the public with an opportunity to comment on, or raise issues relevant to an application for

⁵⁹² These guidelines are annexed to the Organic law on environment protection.

⁵⁹³ REMA, RDB and various investors, we have found that this process is respected though it is not made by REMA as it is provided by the article 69 of the Organic law

⁵⁹⁴ Article 8 of the Ministerial Order on EIA.

⁵⁹⁵ The same institution which has the mission of attracting investors can not at the same time impose tough regulations to those companies which intend to invest in Rwanda.

⁵⁹⁶ Guidelines on EIA, p. 14.

⁵⁹⁷ This was the view of persons in charge of Environment at district level.

environmental authorization. In this process, the developer makes a presentation to stakeholders by describing the project by also showing the way he/she solve environmental problems, if any, which may happen while undertaking his/her project. He/she also makes a comment on results of the EIA which has been conducted.⁵⁹⁸

In our research, we have found that this process is not properly respected. Persons contacted have revealed that they only see investors coming to their places without knowing if really their activities are compatible with their lives or not.⁵⁹⁹ They have proposed that tough measures be taken by local authorities to prevent any harmful activities which may be undertaken by investors.⁶⁰⁰ Violation of this principle should be punished by the law as provided by the organic law on environment protection either by suspension of activities or even closure activities of any person or association which did not respect the EIA before starting its activities.

4.3.4.4 Authorization Licensing after the EIA

In its final decision, the RDB issues a Certificate of Authorization after a proposed project is approved. The certificate which is given to the developer authorizes him or her to implement a proposed project. It is however, not the only decision which is can be taken by the RDB is not to grant certificate only; the RBD can also reject the proposed project. This situation puts the RDB into a situation of conflict of interest since it is difficult to conceive a situation where the Public institution in charge of attracting investors, will put tough measure which may end up discouraging some foreign investors to from investing in Rwanda.⁶⁰¹ If the proposal is then rejected the developer can make an appeal.

⁵⁹⁸ Guidelines on EIA, p. 14.

⁵⁹⁹ Sometimes they see investors coming to install their equipments which may even harm to their lives: some of examples gained is the construction of a cement factory at Giticyinyoni, a petrol station at Kinyinya, etc. without the consultation of the population.

⁶⁰⁰ This was discussed with some persons found in sites in NGORORERO and MUHANGA Districts

⁶⁰¹ Though our worries were mitigated by RDB personnel in charge of EAI, anyone can however, find this illogical for RDB to conduct such contradicting activities.

In case the project is rejected after reviewing an environment impact report, the developer can abandon the project or improve and resubmit a revised EIA report or appeal⁶⁰² to the Minister having environment in his/her attribution.⁶⁰³ If the developer successfully appeals against the Authority's decision, the Authority is required to issue a certificate accepting him the performance of the project.⁶⁰⁴

4.3.4.5 Environmental Auditing and Monitoring

Monitoring refers to the regular collection of environmental data at the project site, while environmental auditing, is a systematic and periodic documentation as well as objective evaluation of protection and management of the environment.⁶⁰⁵ This monitoring is undertaken by both REMA and RDB.⁶⁰⁶ The audit and monitoring intend to ensure that mitigation measures and recommendations of the environmental impact study have been implemented to avoid adverse environmental impacts. The aim of Monitoring and audit is to ensure that recommendations made during the EIA process have been respected. This stage is very crucial because, it is the finality of the EIA. Even if the process may be properly undertaken, if the commitment of the developer is not there, all efforts made will be null this is why the focus would be oriented towards this stage.

The monitoring process must be a dual process which has to be executed by both the developer and REMA. The developer should undertake self-monitoring, self-record-keeping and self-

⁶⁰² According to the article 11 of the Ministerial Order, the appeal file shall contain the following:

- a) A duly signed petition;
- b) Copy of the record of decision;
- c) Any other document deemed relevant.

Where necessary, the Ministry may use an independent expert to analyse the developer's appeal, however the costs involved are incurred by the developer. The Ministry shall communicate its decision in writing to the developer after analyzing his/her appeal

⁶⁰³ Guidelines, p. 16.

⁶⁰⁴ Ibid. according to the guidelines, the appeal must contain: i) a written letter stating all facts and grounds of the appeal. ii) All relevant documents or their copies, which are certified by a Commissioner of Oaths as true documents, must accompany the appeal. iii) The Minister shall, after considering all relevant facts and supporting documents uphold the original decision outright, with modification or reverse the decision.

⁶⁰⁵ Guidelines, p.15.

⁶⁰⁶ Interview with Remy, the in charge of environment protection at REMA.

reporting. During this process, he/she/it shall measure specific environmental indicators determined by prevailing national standards and regulations or any other relevant legislation.⁶⁰⁷ REMA also should undertake parallel Monitoring which follows a plan detailing a schedule for inspecting basing on key indicators of the environmental quality and impacts.

While monitoring, measures must be taken. If for example, the developer is found noncompliant, necessary measures to mitigate any on-going adverse environmental impacts can urgently be taken. This is why REMA must have an oversight function to ensure that monitoring is conducted and that the developer implements measures arising out of such monitoring.⁶⁰⁸

In the interview we conducted and visits made in various areas, we have found that monitoring and auditing have never been conducted. Government officials in charge of environment monitoring, deal with only punctual cases of environment pollution instead of preventing risks which may occur throughout the project implementation.⁶⁰⁹ The following sections show clearly how foreign investment impacts on environment and no serious measures have been taken.

In the follow up or audit which may be made, the regulatory body may also impose punitive measures. The law says that the person or association which has prejudiced the environment while contravening to principles of EAI can be compelled to rehabilitate the damaged property, the environment, people and the property. The falsification and alteration of documents of environmental impact assessment is also punished in the same manner as what is provided for in paragraph one of this article.⁶¹⁰ Even if the Rwandan legal framework seems good in protecting environmental rights, however, some cases of environment pollution have been registered in various areas of life. The following sections will analyse some of these areas and lastly we shall look at available remedies in the Rwandan law while analysing their effectiveness.

⁶⁰⁷ Guidelines, p. 15.

⁶⁰⁸ Ibid.

⁶⁰⁹ These authorities intervene when there is a case of water pollution, when there is a case of death which has been reported, etc.

⁶¹⁰ Article 95

4.4 Water pollution by MNCs in Rwanda

Even if Rwanda is considered as a part of the Great Lakes Region of Africa, it is among countries which are characterized by water scarcity due to its topography which is made by a vast number of hills and mountains, a fact which results in high soil erosion and loss of water.⁶¹¹ Water is among essential resource for human life like agriculture and industry. The Rwandan policy in water has been firstly incorporated in the 2020 vision of Rwanda. According to the program, the number of people with access to water, which is presently, now at 44%, was to increase up to 80% in 2015 and 100% in 2020.⁶¹²

The issue of water and FDI may sometimes concern its scarcity which was caused by the non-respect of principle guiding water protection and the pollution of water which affects the water quality which is mostly worsen, or being simply analysed when there is a case of water pollution.⁶¹³ Among factors which alter the quality of water, there are human activities in the surrounding water resources. Studying the impact of foreign direct investment on human rights implies of course the assessment of those human activities which have a close link with water pollution. The pollution on water which is assessed is classified into “blue” and green water.⁶¹⁴ Blue water refers to liquid water in the form of ground water and surface water, and green water being the evaporating water or unused water which stored in the soil, absorbed and transpired by plants.⁶¹⁵

4.4.1 Water pollution in fishing projects in Rwanda

⁶¹¹ Ch. Sekomo Birame, *et alii* ., *Water Quality Monitoring in Rwanda: Report I*(October –November 2011), p. 4.

⁶¹² MINAGRI, *EAI Report for Karangazi- Rwangingo-marchlands in Nyagatare anf Gatsibo districts*, 3rd Rural Sector Support Project, May 2013, p. 34. These were projections but they have not been reached. Recent studies have shown that people who access cleaned water are below 50%.

⁶¹³ Key forms of water pollution include: ammonia, nitrate, phosphate and pesticide residues pollution from agriculture; fecal coli-forms; industrial organic substances; heavy metals from industries and weathered bedrock; traces of radionuclide like uranium -238, radium -226, radon-222, sediment from human- induced to streams, rivers, lakes and reservoirs.

⁶¹⁴ A. Blues, *Agricultural Foreign Direct Investment and Water Rights: an Institutional Analysis from Ethiopia*, Paper presented at the International Conference on Global Land Grabbing, 6-8 April 2011, p. 2.

⁶¹⁵ *Ibid*

Fishing investment projects affect highly the institutional arrangement for water management this is why their management has to be negotiated between parties involved in those activities. In countries where a large percentage of the population depends on agriculture, negotiation of water rights can become a question of vital importance.⁶¹⁶ The investment which is made in water can easily pollute water. Water is for example polluted by the elementary fishing methods. The bad elementary fishing techniques threaten water fauna. Fishing by beating and using nets with very small meshes is harmful to the conservation of fish resources and other aquatic animals. Another fishing method which also harms to water is the use of explosives.⁶¹⁷

The use of explosives and toxic products has been reported to be very harmful. These techniques which are rudimentary and homemade fishing are very destructive and can lead to ecological imbalance of animal and plant species.⁶¹⁸ This rudimentary method of fishing catches also other aquatic animals which are not intended. These include; crocodiles, hippopotami, ducks, etc. these aquatic animals can get entangled in the nets and drowned.⁶¹⁹

To cope with this exigency needs, the government of Rwanda has put in place policies and laws which improve the water protection. Among laws and policies which have been adopted we have the Ministerial Order determining the procedure for declaration, authorization and concession for the utilization of water.⁶²⁰ That ministerial order obliges all persons who may need to be engaged into concession of water and depending on the nature of the project to have a written document showing the authorization of exploitation. The authorization given, must take into consideration

⁶¹⁶ *Ibid.*

⁶¹⁷ Nile Basin initiative Trans-Boundary Environmental Action Project, *National Nile Basin Water Quality Monitoring Baseline Report for Rwanda*, Kigali, 2005, p. 17.

⁶¹⁸ *Ibid*

⁶¹⁹ *Ibid*

⁶²⁰ Ministerial Order determining the procedure for declaration, authorization and concession for the utilization of water, OGRR, n° Special of 30/05/2013, In copying with this requirement, the Minister has issued an instruction on the use and concession of water in Rwanda. This is the letter of 11/07/2014.

the situation whether aquaculture and fishing activities comply with regulations regarding the use and management of water resources.⁶²¹

The authorization is not however, the only condition. They must show also the existence of a follow up system whereby they make a follow up on the implementation of the concession contract.⁶²² If it is realized that the concessionaire is not respecting the commitment he/she has made, he can see his/her contract cancelled.⁶²³ The ministerial order has gone far by even proposing a model of a contract of concession. That model provides for conditions of both parties.⁶²⁴ After seeing this Ministerial Order, we have tried to ask some people who are engaged into fishing activities in order to see their level of compliance.

In this research we have found that persons working with fishing enterprises do not use explosives. The only use other rudimentary methods but the latter is still harmful to the environment is the use of the method.⁶²⁵ The people we have contacted told us that they all have authorization allowing them to work but they are not submitted to any other control on their compliance with environment protection. The same was reflected in administration which is in charge of ensuring regular follow up; although they argued that their control is only limited to the issuance of documents and tax collection.⁶²⁶

⁶²¹ Article 4 of the Ministerial Order.

⁶²² See in the same article

⁶²³ Article 6 of the same law.

⁶²⁴ The concessionaire shall respect among others the following:

- To carry out the activities using equipments and installations as indicated in the technical document annexed to this contract. the technical document shall be an integral part of this contract.
- to respect the Laws and Regulations relating to aquaculture and fishing;
- to respect the terms and conditions of this contract;
- . to allow the representatives of the conceding authority to have free access to the fishing concession. In addition, the concession holder shall permit any scientific fishing operation approved by the conceding authority;
- to keep detailed statistical data on the captures;
- to make a monthly report in which the statistical data mentioned in point 5° of this Article and any useful information shall be included.

⁶²⁵ Ibid.

⁶²⁶ These are information gathered from fishing activities in Kivu and Cyohoha Lakes.

4.4.2 Water pollution in the agriculture industry in Rwanda

Another sector which often results in environmental degradation is the agro-industry investment which is often found guilty of water pollution. In Rwanda, surface water is also polluted by anthropogenic activities as a result of the use of fertilizers and pesticides in agriculture. Rwandan people utilize industrial fertilizers such as NPK and urea as well as pesticides to improve the yield productivity, even as the quality of soil increasingly becomes degraded. These chemicals, which are highly soluble, reach the surface water by way of runoff.⁶²⁷ Undertaking agricultural and farming activities in valleys near rivers and streams may pollute water and lead to the process of eutrophication and extension of ecosystem. Water is then polluted by dumping solids waste and releasing liquid wastes containing pollutants like cadmium, chromium lead, zinc, etc.⁶²⁸

In order to increase soil fertility, farmers use fertilizers, pesticides and herbicides thereby significantly affecting the environment. These pesticides are chemical compounds which are toxic to certain living organisms, from bacteria and fungi up to higher plants and even mammals, as they do not occur naturally and therefore detectable concentrations often indicate pollution.⁶²⁹

The mode of action of a pesticide is determined by its chemical structure. This toxic level of these pesticides depends on their classes. For example: organochlorine pesticides, organophosphorus pesticides, the carbamate pesticides, the triazine herbicides and chlorphenolic acids have an adverse impact on the environment.⁶³⁰ These pesticides are very harmful to the environment and particularly for ground and surface water. There is a wide range of pesticides in common agricultural use, and many of them break down into toxic products. The most used in Rwanda are DDT and its metabolites (DDD, DDE) are still high in many environments,

⁶²⁷ RNRA, *water quality monitoring in Rwanda*, 2011, p. 7.

⁶²⁸ Ibid.

⁶²⁹ The most pesticides used by farmers are insecticides (for extermination of insects), herbicides (for extermination of weeds and other undesirable plants) and fungicides (for preventing fungal diseases).

⁶³⁰ RNRA, *Op. cit.*, p. 7.

especially in arid areas, NPK type of commercial formula 17-17-17 are use for the fertilization of soils.⁶³¹

The high concentrations of such chemical products in drinking water are dangerous for human health and environment.⁶³² Agro-farmers industries do not harm the environment only because of chemical products they use. Bad exploitation of lands causes landslides and erosion which also affects water due to the sedimentation of lakes and rivers on slopes which are often bare or farmed without measures of soil conservation. Materials and sediments carried along cause chemical, biological and geological pollution of water resources due to the presence of nutriments from various sources deposited in the water.⁶³³

The Minister in charge of water protection has issued a Ministerial order containing all possible water pollutants products.⁶³⁴ The list provided by the Ministerial Order, though appearing to be exhaustive, does not include all possible water pollutants.⁶³⁵ To solve this problem, it has been included in the article 3 of the Ministerial order the possibility of modifying the list whenever considered necessary by competent authorities.

The dumping of alkaline wastewater coming from the bottle washing process contribute to the increase of pH and then water characterized by high pH, is not favourable to irrigation process.⁶³⁶ If these activities are conducted in an area deserves for agriculture, this will be a problem.⁶³⁷ PH generally, is attributed to the nature of the soil which has calcium and

⁶³¹ Ibid

⁶³² Ibid

⁶³³ Ibid

⁶³⁴ Ministerial order n°004/16.01 of 24/05/2013 determining the list of water pollutants

⁶³⁵ Water Pollutants may either be organic or inorganic chemical products. For inorganic pollutants the Ministerial order cites Cadmium, Selenium, Lead, Chromium, Mercury, Antimony, Arsenic, Nickel, Copper, Silver, Barium, Mercury metal, Thallium, Cyanic groups, Asbestos, Beryllium, Magnesium, Calcium, Vanadium, Molybdenum, Lithium, Cobalt, Nitrate, Nitrite, Ammonia, Aluminium, Chloride, Fluoride, Iron, Manganese, Sulfate, Zinc, Sodium, Bromate, Chlorite, Chloramines(ascl2) Chlorine (ascl2) Chlorine dioxide (ascl2) Phosphorus, Phosphate, Potassium, Carbonates and Boron.

⁶³⁶ Researchers have concluded that BRALIRWA activities can pollute water.

⁶³⁷ Niyigena & Masengesho, 2010 quoted RNRA, *Op. cit*, p. 26.

magnesium carbonate in its structure.⁶³⁸ In our research we have found that farmers in the district of Nyaruguru, Nyamagabe and Huye use some of these fertilizers in order to increase their production. The Ministry of Agriculture and animal resource puts an emphasis on the use of fertilizers in order to the Rwandan agriculture more intensive. This can be illustrated with this projection in the use of fertilizers in Rwanda. Fertilizer use increased from 4Kg/Ha in 2006 to 30Kg/Ha in 2013, while fertilizer availability increased from annual quantities of 8,000MT to 35,000 MT PSTA 3 targets that fertilizer availability increases to 55,000MT per year and fertilizer use increases to 45kg/ha in 2017/18.⁶³⁹ When using fertilizers farmers do not care about the impact they may have on lives of persons this is why tough measures should be taken to avoid any misuse by farmers of fertilizers. It is regrettable that the Rwandan legislator did not clearly prohibit the use of fertilizers which are not environmental friendly. There should be some punitive measures which are aimed at discouraging any person who may intend to use them.

4.4.3 Pollution of water by other industries and human activities

Another pollutant identified is the Chemical oxygen demand which is susceptible to oxidation of the organic and inorganic materials in water bodies and in the effluents from sewage and industrial plants. When this chemical oxygen demand is high compared to the standard for surface water and this serves as an indicator of the water pollution. This pollutant as we said is created by wastes from industries or other human activities such as wastewater, industrial or agricultural activity in surrounding area.⁶⁴⁰ In the research conducted, it has been realized that almost all the rivers near the Nile basin in Rwanda, have been affected by this form of pollution.⁶⁴¹

⁶³⁸ RNRA, *Op. cit*, p.26.

⁶³⁹ MINAGRI, National Fertilizer Policy, Kigali, June, 2014, p.2. available at http://www.minagri.gov.rw/fileadmin/user_upload/documents/STRAT.PLC/FERTILIZER_POLICY_-FINAL.pdf

⁶⁴⁰ RNRA, *Op. cit*, p. 26.

⁶⁴¹ Ibid.

Generally, industries in Rwanda are not many and most of them are agriculture industry based or produce detergents, breweries or other small and medium industries.⁶⁴² These few industries present in Rwanda are almost all found in or near wetlands and throw all their effluents and by-products in the water. This is so with the textile industry⁶⁴³, the iron industry which makes iron sheets, paint factories⁶⁴⁴, sugar factories and mines⁶⁴⁵ found in different regions of the country. What is abnormal all industrial discharges and effluents are fed directly into the water and in nature without any form of prior treatment.⁶⁴⁶

Used domestic water mainly from septic tanks, latrines, animal waste and refuse infest drinking water cause diseases such as epidemics of typhoid, cholera, and gastro-intestinal diseases, dysentery.⁶⁴⁷ Most of the culprits are hotels, bars and restaurants. A few small water treatment stations operate in the city of Kigali. They focus in the purification of the CHUK.⁶⁴⁸ Some of the non compliant hotels include Hotel des Mille Collines, Hotel Meridien Umubano, and SERENA Hotel. Other investors do not care about management of their waste waters.⁶⁴⁹

Persistent organic pollutants are highly resistant to degradation of biological, photolytic or chemical means. Because of their high level of halogenations, they have lower water solubility and high lipid solubility leading to their propensity to pass readily through the phospholipids structure of biological membranes and accumulate in fat deposits.⁶⁵⁰

In this category of biochemical, researchers have identified the biochemical oxygen demand (BOD) which is common measure of water quality that reflects the degree of organic pollution of

⁶⁴² The World Bank, *Rwanda Economic Update, 2011, p. 1.*

⁶⁴³ See for example the case of UTEXIRWA is situated in Kagugu sector in Kigali City

⁶⁴⁴ AMEKI Colour A Ugandan Company registered in Rwanda.

⁶⁴⁵ Most of them are conducted in rivers

⁶⁴⁶ Nile Basin Initiative Trans-boundary Environmental Action Project, *National Nile Basin Water Quality Monitoring Baseline Report for Rwanda*, Kigali, 2005, p. 32.

⁶⁴⁷ *Ibid*

⁶⁴⁸ Centre Hospitalier de Kigali (Hospital of the University of Rwanda its branch of Kigali).

⁶⁴⁹ Nile Basin initiative Transboundary environmental action project, *Op. cit.* p. 33.

⁶⁵⁰ RBS Newsletter Issue no 13, p.32.

water.⁶⁵¹ This pollutant has been identified in the Congo basin. BOD is 2 mg/L O₂ or less whereas in polluted areas, they are 10 mg/L O₂ or more. In Karambo river in RUBAVU district, the study shows that it goes up to 44,9 a situation which is clearly abnormal.⁶⁵²

In the analysis made by a team of researchers on the pollution of Nyabarongo river, it has been identified a high turbidity through Mpazi river, due to high concentrations of TSS in wastewater discharged from the Nyabugogo abattoir and all activities surrounding Mpazi.⁶⁵³ Another pollutant identified is the metal lead. According to the same team, there is a high value of lead in Mpazi river especially in the dry season due to Nyabugogo tannery which uses a lot of chemicals. This pollutant in Nyabarongo which very high, should as suggested by the researchers, needs further actions.⁶⁵⁴

Another reported pollutant is the presence chromium in various rivers of Rwanda. In Nyabarongo it has been identified a high level of chromium due to the Kabuye sugar refinery factory which discharge wastewater there. According to Usaneza *et alii*, the same pollutant has been also identified in Muhazi lake which is attributed to both natural and industrial discharges

⁶⁵¹ According to the <http://www.fivecreeks.org/monitor/bod.shtml>, Biochemical oxygen demand is a measure of the quantity of oxygen used by microorganisms (e.g., aerobic bacteria) in the oxidation of organic matter. Natural sources of organic matter include plant decay and leaf fall. However, plant growth and decay may be unnaturally accelerated when nutrients and sunlight are overly abundant due to human influence. Urban runoff carries pet wastes from streets and sidewalks; nutrients from lawn fertilizers; leaves, grass clippings, and paper from residential areas, which increase oxygen demand. Oxygen consumed in the decomposition process robs other aquatic organisms of the oxygen they need to live. Organisms that are more tolerant of lower dissolved oxygen levels may replace a diversity of more sensitive organisms. Other pollutants according to the Ministerial Order, are organic pollutants. These organic pollutants are Orano metallic (Me, Se, Tin, Lead,) Aerylamide, Alachlor, Atrazine, Benzene and derivatives (benzopyrène, carbofuron,), Carbon tetrachloride, Chlordane, Chrolobenzène, 2,4-D (dichlorophenoxyacetic acid), Dolapon, 1,2 dibromo-3-chloropropane (DBCP), 0-dichlorobenzene, p-dichloroethane, 1,2-dichloroethylene, 1,1-dichloroethylene, Cis-dichloroethylene, Trans-1,2- dichloroethylene, Dichloromethane, 1,2-dichloromethane, Di(2-ethylhexyl) adipate, Di(2-ethylhexyl) phthalate, Dinoseb Dioxin, Diquat, Endothal, Endrin, Epichlorohydrin, Ethylbenzene, Ethylene dibromide, Glyphosate, Heptachlor, Heptachlor epoxide, Hexachlorobenzene, Hexachlorocyclope ntadiene, Lindane, Methoxychlor, Oxamyl Vydate, Polychlorimated biphenyls, Pentachlorophenol, Picloram, Simazine, Styrene, Tetrachloroethylene, Tolvene, Taxaphene, 2,4,5-TP Silvex, 1,2,4-Trichlorobenzene, 1,1-trichloroethane, 1,1,2-trichloroethane, Trichloroethylene, Vinyl chloride, Total Xylenes, Foaming agents, Total trihalomethans, Haloacetic acids, Oil Greases, Chlorophends, Chloroform, Aldriore, Dreldrine, Trichlorophend, Methoxychlor, 2,4,6 Tri chloroethylene, DDTand Benzo-a-pyrene

⁶⁵² RNRA, *Op. cit.*, p. 13. Other places affected are Sebaya river, Rusizi River and Cyunyu river. All these are results of human activities near these rivers (Mining in most of the cases, cementers and breweries factories).

⁶⁵³ Nhapi, *et alii*, "Assessment of water pollution levels in the Nyabugogo catchment Rwanda" The Open environment engineering journal, 2011, 4, 40-53, p. 43.

⁶⁵⁴ Idem, p. 47.

although the researchers were doubting on how to attribute each.⁶⁵⁵ Nyabarongo waters are highly polluted not only due to the high pollution of Nyabugogo; its affluent, but also due to pollutants from other affluent which are polluted by miners and other investors in water.⁶⁵⁶

This increases water pollution and the chemical components used in these industries have negative effects to human and animal health and environment in general. These industrial waste waters, for most loaded of organic and/or inorganic chemical pollutants, solid matters in suspension constitute serious threats to the biological diversity of the water plans (rivers, lakes, wetlands) and for the health of the population consumers of this water.

Another factory which has stood out is *UTEXRWA*, a textile industry situated in the city of Kigali. This factory has been considered an important source of pollution of the Nyabugogo River. The waste waters rich in products of scalding of cloths use, as the caustic sodium carbonate, the peroxide of hydrogen and the silicate of sodium, as well as a multitude of dyes yesterday known for their carcinogenic character among the mammals, are poured in river without any previous treatment.⁶⁵⁷

The *SODEPARAL*, a factory of tannery treating leathers and skins produces the garbage which are very toxic. The main pollutants of the factory are the compounds of the arsenic, the DDT and a range of benzenedichloride.⁶⁵⁸ A certain number of painting producers exists of which there are the *AMEKI COLOR*, *SIRWA COLOR*, *RWANDA PAINTS*, *SIGMA COLOR* all these contribute enormously to the pollution of waters and soils in the city of Kigali and other parts of the country the country.⁶⁵⁹ The pollutants of industrial origin have for example been identified from the sewage of the Sugar Works Factory of Kabuye and this constitutes an important source of pollution. Other pollutants from that factory are the garbage of the cane, the cellulosic matter and the alcohol.

⁶⁵⁵U sanzineza *et alii*, *Distribution of Heavy Metals in Lake Muhazi, Rwanda*, in 10th Water net?WARFSA/ GWP, symposium, IWRM: environmental sustainability, climate change and liverhoods, October, 2009, p. 8.

⁶⁵⁶NHAPI, *et alii*, , Op. cit, p. 47.

⁶⁵⁷ Nile Basin Initiative Transboundary Environmental Action Project, Kigali, Rwanda 2005, p. 36. Available at http://www.nilerak.hatfieldgroup.com/French/NRAK/Resources/Document_centre/WQ_Baseline_report_Rwanda.pdf

⁶⁵⁸ Ibid

⁶⁵⁹ Ibid

As we said iron companies also contribute to the environment pollution. The *TOLIRWA*, iron factory of the sheet metal and use various categories of paintings and other chemicals that are dumped into the rivers. The bad effect is also found in breweries industries like *BRALIRWA*: situated near the Kivu Lake and polluted the lake without previous treatment. The garbage toxic not treated, mainly the caustic sodium carbonate, come from the washing of the bottles. The polluting matters of *BRALIRWA* coming from the brewer's yeast, the alcohol and organic matter of solid waste.⁶⁶⁰

4.5 Mining Industries and the Environmental Degradation in Rwandan

Mining is one of sectors which largely contribute directly to the economy of a country. This can be considered as such only when negative environmental and social impacts are avoided or minimized otherwise; the result here will be of short-run.⁶⁶¹ In Rwanda, mining competes with agriculture and often results in significant and irreversible impacts on the environment.⁶⁶² It has been argued that most Africa's FDI flows occur in natural resources sector especially in oil, gas and mining.⁶⁶³ Mining and its processing activities release waste material containing toxic elements into rivers, surrounding agricultural lands and settlements. These negative effects are seriously harmful to the human being's health and the quality of farm and products and livestock.⁶⁶⁴

4.5.1 Extractive Industries and Environment Degradation

Minerals are non-renewable and limited natural resources which are highly needed as raw materials by various industries. Its naturally extraction has adversary impacted on the environment. The key impacts of mining are on wildlife and fishery habitats, the water balance, local climates and pattern of rainfall, sedimentation, the depletion of forests and disruption of the

⁶⁶⁰Ibid.

⁶⁶¹ According to the TV news reported on 30th September 2014, minerals have brought to Rwanda more than one hundred billions US Dollars last year.

⁶⁶² A. F. Haidula, R. Ellmies and F. Kayumba, *Rwanda Environment Assessment Report, Environmental Monitoring of Small Scale Mining Areas in Rwanda*, 2011, p. 6.

⁶⁶³ A. Ganiou Mijiyawa, *How African Countries can Diversify inward FDI* http://ccsi.columbia.edu/files/2014/01/FDI_97.pdf

⁶⁶⁴ Ibid.

geology.⁶⁶⁵ The mining sector, though very important to the growth of the economy of countries, it must be closely associated with environmental protection and preservation strategy.⁶⁶⁶

Contracts between the government and the mining companies regarding how to carry out their activities differ depending on the category of each company. But there is a clause that calls for suspension if the companies carry out their activities in ways that MINIRENA deems detrimental to the environment.⁶⁶⁷ This approach was also confirmed by the then Governor of the western Province, Kabahizi Celestin. According to the Governor, the government must ensure that while striving for maximum profits in the mining sector in provinces, there is also a need not to undermine factors that may be detrimental to the environment and social responsibilities to communities in which these companies are operating from.⁶⁶⁸ Biryabarema and Franken affirm that many companies are subject to limited requirements for EIA and EMP because they do not respect existing laws and regulations regarding mining with minimal regard for the environment and management of natural resources according to principle of sustainability.⁶⁶⁹

The extraction of tin and the wolfram in some regions of the country and shortcoming that results from this type of activity; cause the erosion of soil and landslides. The lost earth ends up in the water, increasing the rate of sedimentation of the lakes, rivers and the turbidity of water thus with chemical components (minerals) dangerous for the human consumption and for the aquatic life.⁶⁷⁰ According to Rwanda Focus, ten mining companies which were operating near Sebeya River were suspended due to their implication in the environment pollution. “It has been found out that the mining activities around Sebeya River have been a serious threat in as far as

⁶⁶⁵ S. M. Pradeep, *The Indian Mining Sector: Effects on the Environment and FDI inflows*, OECD, 2002, p. 1.

⁶⁶⁶ *Ibid.*

⁶⁶⁷ *Ibid.*

⁶⁶⁸ *Ibid.*

⁶⁶⁹ A. Haidula, F., Rainer Ellmies and F. Kayumba, *Op. cit.*, p. 6.

⁶⁷⁰ Nile Basin initiative Transboundary environmental action project, *Op. cit.*, p. 34.

environmental protection is concerned in that area and it's in this regard that our ministry decided to temporarily suspend all the mining companies operating around that River,"⁶⁷¹

Michael Biryabarema, then Director General of Geology and Mines Department (GMD) in the Ministry of Natural Resources told The Rwanda Focus that, their decision to suspend the companies came after the ministry found out that the mining activities in the area were a serious hazard to the river he added that the river's waters were dirty due to the mining activities that have been taking place around it.⁶⁷²

This was also the opinion of the chairman of the Rwanda Mining Association Jean Malic Kalimahe in his words:

I believe that the government decision to suspend mining companies around River Sebeya was right because these companies have been carrying out their activities in ways that destroy the environment. But our association is going to carry out a study on how the water around the river can be treated after mining activities there.⁶⁷³

The same incident was again report in Rwinkwavu site. Processing of ores by gravity methods pollutes also water, as plenty of water is used constituting a pollutant downstream from the mine sites. The study revealed that the effluent waters carry only relatively small of contaminants in solution but are heavily loaded with finely milled ore and gangue material which gives the rivers their beige-brown colour.⁶⁷⁴ This has been found in Rwinkwavu site, in the District of Kayonza. The arsenic contamination is huge in reservoirs downstream of mining area exceeds the East Africa standards for drinking water. Water to be used in the agriculture should then be closely monitored.⁶⁷⁵

Even if we strongly support the government decision to suspend activities of miners involved in environment pollution, however, all sanctions as resulted from the penal code should be applied. They should be for example obliged to pay fines and being obliged to rehabilitate the

⁶⁷¹ S. Mugisha, MINIRENA suspends mining over pollution, *The Rwanda Focus*, 8 October 2011, available at <http://focus.rw/wp/2012/10/minirena-suspends-mining-over-pollution>

⁶⁷² *Ibid.*

⁶⁷³ *Ibid.*

⁶⁷⁴ *Ibid.*

⁶⁷⁵ *Ibid.*

environment they have polluted. Another form of pollution which is caused by activities of miners is the air pollution.

4.5.2 Mining sector and Air pollution

The World Health Organisation defines air pollution as "substances put into the air by the activity of mankind into concentrations sufficient to cause harmful effects to health, property, crop yield or to interfere with the enjoyment of property."⁶⁷⁶ Air pollution means:

the presence or threatened discharge, from whatever source, of solid, semisolid, liquid or gaseous matter or any combination thereof, in the ambient air in sufficient quantities and of such characteristics and duration which: Injures or threatens to injure human, plant or animal life; or damages or threatens to damage property; or unreasonably interferes with the comfortable enjoyment of life and property.⁶⁷⁷

The Rwandan law determining the modalities of protection, conservation and promotion of the environment in Rwanda defines the atmospheric pollution as

a voluntary or accidental contamination of the atmosphere and the surrounding air, gas, smoke, any particles or substances that may endanger biodiversity, human health and their security or disrupt agricultural activities, disrupt installations or the nature of tourist sites and mountains.⁶⁷⁸

The traditional mode of mining produces dust from blasting operations and haul roads. It releases methane, greenhouse gas. Smelter operations with insufficient safeguards in place have potential to pollute air with heavy metals, sulphur dioxide, and other pollutants.⁶⁷⁹ This research has found that the Rwandan industry does not affect the air as it is a case in various other countries.

Though this form of pollution seems to be absent in mining sector, in a research conducted under the auspice of REMA on the air pollution in the City Kigali, it has been found that the air pollution from vehicles, industries and indoors in Rwanda is significant.⁶⁸⁰ The team collected data and information on chronic respiratory diseases from epidemiological recorded by health

⁶⁷⁶ WHO, 1997a

⁶⁷⁷ *Ibid*

⁶⁷⁸ Government of Rwanda, 2005.

⁶⁷⁹ *Id.*, p. 2.

⁶⁸⁰ H. Nsengiyumva *et alii*, *A study on Air Pollution in Rwanda with Reference to Kigali City and Vehicle Emissions*, 2011. p.20.

centres and hospitals within Kigali City in the following health facilities: Kabuye Health Center, Kicukiro Health Centre, Kibagabaga District Hospital, Muhima District Hospital, Kimironko Prison Hospital, Kanombe Military Hospital, CHUK Reference Hospital, King Faysal Reference Hospital and Polyiclic du Carrefour Health Centre. The effect assessed was found to be high.⁶⁸¹ Pollution found on air in Rwanda according to results from those hospitals, were mortality and morbidity levels in respect of their acute character and link they have with chronic respiratory illness such as asthma, reduced lung function; lung cancer; cardiovascular disease and stress-related disorders.⁶⁸²

4.5.3 Effects of Mining industries on human lives in Rwanda

The effect of the pollutants on human beings is enormous. Human activities affect human lives in various ways. They for example affect: nervous system, creates problems related to reproduction and development, to cancer and genetic impact.⁶⁸³ Researchers have reported that HBC poisoning of food in South-East Turkey, leads to the death of many persons. This pollutant may have clear incidence on hepatic cirrhosis, porphyria and urinary, arthritic and neurological disorders.⁶⁸⁴

Deaths of mine workers are common. It can result from various sources such as strike, accidents due to lack of proper protection, etc. A strike at a mine in South Africa in few years ago where the Police shot dead miners on strike at the Marikana platinum mine, north-west of Johannesburg can serve as an eloquent example on how rights of workers in mining sector have been violated.⁶⁸⁵ Another example is accidents due to lack of protection of miners where deaths have been reported following shaft collapsed in mines in the worldwide. The high visibility of the deaths at Marikana and a spate of recent industrial accidents have illustrated the human toll of extraction, and how dependent many of the world's industries are on workers in poor parts of the

⁶⁸¹ Id, p. 21.

⁶⁸² Ibid

⁶⁸³ RBS, Op. cit, p. 32.

⁶⁸⁴ Ibid.

⁶⁸⁵ N. Maseko, "Marikana Shooting: Lonmin Apologies for South Africa Deaths", *BBC News Marikana*, available at <http://www.bbc.com/news/world-africa-23730268>

world.⁶⁸⁶ Rwanda does not also make exception on the issue of mining and human lives. According to reports from various newspapers, unprotect miners have been killed in various mining sites due to accidents.⁶⁸⁷ Workers who dig or extract mines are at risk of death when they enter an unprotected trench and the walls collapse. Walls collapse suddenly, and workers do not have time to move out of the way.⁶⁸⁸

A few months ago four workers at a mining extraction valley site in Bigogwe Sector, Nyabihu District, and three other people died in similar circumstances in Kintobo Sector in the same district, early in 2015.⁶⁸⁹ The same incident was also reported in Twumba sector in Karongi district were two miners who were working for Bill Quam, a US investment company in extracting cassiterite and the tin oxide mineral died⁶⁹⁰ and in Mwendo in the same districts other two miners were also killed by the collapse of the land where they were digging.⁶⁹¹ All these workers were killed not because their employers wanted to kill them, but because they were not properly protected. The government of Rwanda should put into place a list of compulsory tools which miners must have before starting their activities.

According to Evode Imena, the State Minister in charge of mining, some mines have tried to abide themselves to standards but others have not. The quarries owned by major construction firms like CIMERWA, Ruliba, Clays and East African Granite Industry (EAGI Ltd) are high-end and they have got clear standards to abide by, the minister stated.⁶⁹² Among the tools which should be used in mining according to OSHA to prevent environmental degradation include,

⁶⁸⁶ Ibid.

⁶⁸⁷ KARUHANGA, J., “How Safe Are our Quarries, Mines”? *The New times*, May 14, 2014 available at <http://www.newtimes.co.rw/news/index.php?i=15722&a=76789>

⁶⁸⁸ T.J Lentz, S. Afanuh, and G. Matt, “Preventing Worker Deaths from Trench Caves in”, in *National institute for occupational safety and health, Columbia, 2010, p.1.* available at <http://www.cdc.gov/niosh/topic>.

⁶⁸⁹ *Ibid*

⁶⁹⁰ S. Nkurunziza, “Two Miners Killed in Quarry Mishap”, *The new time*, May 16, 2011.

⁶⁹¹ Radios reporting on 29th September 2014.

⁶⁹² E. Imena, The State Minister in Charge of Mines Interviewed on 20th March 2014.

sloping the ground, benching the ground, shoring the trench with supports such as planking or hydraulic jacks and shielding the trench.⁶⁹³

As the main purpose of the investment promotion is the high need of improving lives of citizens of a given country. It would be disastrous if the activities of foreign investors would be allowed to harm the lives of local populations. Serious measures should then be taken to avoid any adverse effects on environment which is directly linked to the life of human beings. As we said the attraction of investors is about the economic improvement. The following chapter will assess the extent to which this goal has been achieved in Rwanda. After these analyses on how environment has been violated by investors in Rwanda not because of the lack of a proper legal framework but due to ineffective monitoring of activities of investors. The following section analysed various punitive measures in place in Rwanda. We shall also analyse some available remedies in Rwanda in case their rights are violated.

4.6 Punitive measures on environment violation under Rwandan Law

Sanctions of environment violation are contained in the organic law on environment protection and in the Rwandan penal code. These two organic laws contain a number of provisions which punish any persons who violate environment. This part analyses the extent to which measures effectively dissuade the violation of the right to a clean and healthy environment. Among acts which are considered as crimes we have: the lack of a proper undertaking of the EIA, offences against water, and offences against environment degradation, offences relating to mining and quarry exploitation and punishment of other activities which may pollute the environment.

4.6.1 Offences related to the improper EIA

⁶⁹³ T.J. Lentz, S. Afanuh and Matt, G, *Op cit*, p. 1.

The organic law on environment protection punishes any one or association that does not carry out environmental impact assessment prior to launching any project that may have an effect on the environment. That person or association is punished by suspension or closure of his or her activities. He/she can also be ordered to rehabilitate the damaged property, the environment, people and the property.⁶⁹⁴ The falsification and alteration of documents of environmental impact assessment is punished in the same manner as what is provided for in paragraph one of this article.⁶⁹⁵

These sanctions appear to be very soft given the nature of acts which have been committed by the offender. Firstly, imposing only the closure without imposing that person to fines and repair what he has damaged during the period of operation is not giving justice to those who have been victimised by the act. Secondly, the falsification and alteration our view should lead to a personal criminal liability of the physical person involved in that act in case of companies and then be punished basing on the provisions related to forging and alternation of documents. The penal code punishes any person who has been found guilty of the crime of forging and altering documents using forged signatures falsified documents, impersonation, fingerprint shall be punished to an imprisonment of more 5 years which does not exceeds 7 years and a fine of 300,000 to 3,000,000 Frws.⁶⁹⁶

4.6.2 Offences relating to mining and quarry exploitation

The criminal code has provided also for sanctions against offenders in mining and quarry exploitation. Acts which are punished by the criminal code are the undertaking of illegal research or illegal commercial of minerals, use of inappropriate working techniques, undertaking mining activities and quarry without authorization, falsification of reports, forger-ring of tags, etc.

⁶⁹⁴Article 415 of the Organic Law n°01/2012 of 02/05/2012 Instituting the Penal Code , *OG*, n° Special of 14 June 2012

⁶⁹⁵ Article 95 of the Organic Law on Environment Protection

⁶⁹⁶ Article 609 of the same Penal Code

The law punishes with imprisonment of six (6) months to one (1) year and a fine of three million (3,000,000) to ten million (10,000,000) Rwandan francs or one of these penalties, any person who undertakes illegal research or illegally carries out commercial activities in valuable minerals.⁶⁹⁷ Even if, this offence seems not be directly in line with environment protection, but the illegal research or commercialization of mines can have negative impact on environment when the offender for example abstain him/herself from respecting laws due to the fact that he/she could not get authorization due to place of exploitation. The law also punishes, any person who receives or exports minerals and quarry substances without authorization to a term of imprisonment of one (1) year to three (3) years and a fine of two (2) times the amount of the value of the received or exported substances.⁶⁹⁸

The article 441 on the other hand punishes any person who submits false or irregular research and exploitation reports shall be liable to a fine of one hundred thousand (100,000) to one million (1,000,000). The legislator should consider penalties provided by the article 607 of the same code which provides for imprisonment to a person who has been found guilty of the use of a forged or an altered document. Another offence punished in mining activities is the undertaking of inappropriate techniques in mineral exploration and mining. The law says that whoever liable of such offence shall be punished to a fine of three hundred thousand (300,000) to one million (1,000,000) Rwandan francs⁶⁹⁹. Inappropriate techniques meant are, on our view, techniques which are not environmental friendly. Whoever uses for example, archaic techniques which will not allow the exploiter to cover holes dug will be considered as an offence on the eyes of the criminal law.

Any person with mining and quarry exploitation licensee who refuses competent authority access to mining or quarry exploration and exploitation area shall be liable to a fine of five hundred thousand (500,000) to five million (5,000,000) Rwandan francs.⁷⁰⁰ Again the issue here would be the contradiction between this provision and the article 529 which defines the rebellion. The

⁶⁹⁷ Article 438

⁶⁹⁸ Article 440

⁶⁹⁹ Article 439

⁷⁰⁰ Article 444

article 529 defines a rebellion as “any attack and resistance with violence, assault or threats to authorities, civil servants, and private sector employers, security agents enforcing the laws, regulations, administrative instructions and judgments”. That fact for a quarry exploitation licensee to refuse the access by authority is not different from the rebellion above defined. We wonder if the judge seized with the case can use either of these articles. The legislator has provided for a solution to this issue where he accepts the application of severe penalties to offences against mining and quarries provided by the penal code to similar offences.⁷⁰¹

Though, the Rwandan legal framework on punishment seems to be very tough it is unfortunate that no single person has been prosecuted and condemned because of the violation of environmental rules despite the enormous cases of violation of these rules. The only sanctions which are of usage in Rwanda are only suspensions of activities of companies responsible for human rights violations.⁷⁰²

4.6.3 Offences relating to the use and exploitation of water

The penal code has provided for a chapter on offences against water and electricity.⁷⁰³ This law punishes any person who may be engaged into activities which are contrary to the use, conservation, protection and management of water resources. The article 387 punishes those acts enumerated above with different sanctions.⁷⁰⁴ Besides these different sanctions, the law gives the judge the right to impose the suspension or termination of the installation materials on his/her own expenses.⁷⁰⁵

The law did not limit itself on the unlawful use of water only because it has gone far by including also the punishment of pollution of inland water. The act which is punished here is the

⁷⁰¹ Article 445

⁷⁰² Interview with Remy, the in charge of environment protection at REMA.

⁷⁰³ Chapter four of the Penal Code.

⁷⁰⁴ 25,000 to 100,000 if it is a receipt, 50,000 to 150,000 if it's the authorization, term imprisonment of 1 month to 3 months and a fine of 100,000 to 3,000,000.

⁷⁰⁵ Article 387 of the Penal Code.

pollution of inland water by dumping, spilling chemicals of any nature into water, that may cause or increase water pollution. The person guilty to this offence is punishable to a term of imprisonment of six (6) months to two (2) years and a fine of two million (2,000,000) to five million (5,000,000) Rwandan francs, or one of these penalties.⁷⁰⁶ The fact of spilling chemicals into water should also be punished using the provision on the 154 which punishes the act of administering a substance to a person which may cause illness or death. The law punishes the guilty offender who has intentionally administered a substance which may cause death, but without intention to cause death or a substance which is not likely to cause death can seriously impair health to a term of imprisonment of two years to five and a fine of one hundred thousand to five hundred thousand Rwandan francs.

The legislator has also provided for aggravating circumstances in case of environment pollution. The law says that if pollution results in incurable disease or permanent disability to any person, the penalty shall be a term of imprisonment of ten (10) years to fifteen (15) years and a fine of two million (2,000,000) to ten million (10,000,000) Rwandan francs. In the same vein, if pollution results in death of any person, the offender shall be liable to life imprisonment. In case of recidivism, the penalties are doubled. The offender may be ordered to rehabilitate the polluted area. In case of indifference, persistence in the refusal and conflict, relevant authorities may do so but the cost is paid by the person concerned.⁷⁰⁷

Another act polluting water which is punished by the Rwandan law is the throwing, pouring, flowing or dumping into water a substance likely to harm health or environment either on surface or underground, directly or indirectly. Whoever found guilty of one of acts mentioned here will be held liable to a term of imprisonment of one (1) month to three (3) months and a fine of five hundred thousand (500,000) to five million (5,000,000) Rwandan francs or one of these penalties.⁷⁰⁸

⁷⁰⁶ Article 103

⁷⁰⁷ Article 388 of the Penal Code

⁷⁰⁸ Article 389 of the Penal Code

4.6.4 Other activities degrading the environment punishable by the criminal code

The law punishes whoever has imported wastes and other hazardous products without authorization to an imprisonment of one year to five years and a fine of five million to fifty million Rwandan francs.⁷⁰⁹ The law adds that any person who buys, sells, imports, conveys in transit, stores immerses, burns or uses any other means that may lead to decomposition of toxic waste in a dump place and that may be harmful to human beings or environment or signs an agreement authorizing him or her to carry out such activities will be punished to an imprisonment of seven years to ten years and a fine of fifty million two hundred million Rwandan francs.⁷¹⁰

Another offence punished here is the pollution of public or private area. According to the article 427, shall be punished to a fine of ten thousand to one hundred thousand Rwandan francs any person who deposits, abandons or dumps waste materials ,or who pours domestic sewage in a public or private place except when that place has been designed by public authorities for that purpose. Besides being obliged to pay the fine, he/she may also be obliged to clean the place.

Non respect of the distance provided from the banks of rivers and shores of lakes and respect of reserved areas is also punished to an imprisonment of two months but less than six months and fine of hundred thousand to five million or one of these penalties. These sanctions provided by this article, shall be doubled in case of recidivism. The offender may be obliged also to rehabilitate the damaged area.⁷¹¹

It punishes also anyone who, in a manner that is not provided for by the law that governs it, burns, cuts trees or who causes others to do so or kills animals in protected forests and other protected areas and in national parks, is punished by an imprisonment of two (2) months to two (2) years and a fine ranging from three hundred thousand (300,000) to two million (2,000,000)

⁷⁰⁹ Article 424 of the Penal Code & the article 105 of the Law on protection of environment.

⁷¹⁰ Article 426 of the Penal Code

⁷¹¹ Articles 107 &108 of the penal Code.

Rwandan francs or one of the two penalties. Accomplices are also liable for the same penalties. Anyone who destroys a protected monument or damages a historical site is punished by a fine of one million (1,000,000) to five million (5,000,000) Rwandan francs and an imprisonment ranging from six (6) months to two (2) years or one of the two penalties.⁷¹² Anyone who has an establishment that obstructs the functioning of the agents responsible for inspecting protected buildings is punished by an imprisonment ranging from one (1) month to six (6) months and a fine ranging from one million (1,000,000) to five million (5,000,000) Rwandan francs or one of these two penalties. In case of recidivism, the building may be temporarily closed.⁷¹³ Anyone who persistently use an officially closed protected building, suspended or prohibited is punished by an imprisonment ranging from two (2) months to two (2) years and a fine ranging from five million (5,000,000) to ten million (10,000,000) Rwandan francs or one of these two penalties.⁷¹⁴

Providing tough sanctions against anyone who has violated rights to a safe and healthy environment is a good think but the implementation of these sanctions is another thing. If the law is not properly applied it may finally be desuetude. Persons from REMA, the Rwandan Public Prosecution Authority, the Rwanda National Police and other institutions involved in environment protection should seriously punish any person who has violated principles of environment. It is aberrant that cases of persons who have violated the environment are very few compared to a number of cases of persons who have been involved in the environment degradation.

4.7 Chapter Conclusion

The link between FDI and environment protection are two situations which have attracted the attention of various thinkers. Generally, it has been argued that the choice of foreign investors

⁷¹² Article 97

⁷¹³ Article 98

⁷¹⁴ Article 100

depend on the nature of the regulatory framework of the host country. In a country where the environment is not sufficiently regulated, that country will be the best choice of investors this is why countries in their policies of attracting investors and providing good climate to investors, they can sometimes engaged into the “race to the bottom”. This race to the bottom has always been found in developing countries where conditions and rules of environment protection have been weakened in order to attract many investors.

Rwanda like any other developing countries has put into place laws and regulations which seem to be more protective to the environment. In its law on protection of environment it has made the environment impact assessment obligatory for any business activity which intends to be opened in Rwanda. Beside this, the law has provided also for some sanctions in the organic law on protection of environment and in the organic law providing for the criminal code. The Rwandan government has also put into place some institutions having the mission of protecting the environment.

Even if the regulatory and institutional frameworks seem to be good, much need to be done. We have found that the EIA though imperative to all business activities, some investors do not comply with commitment they have made when submitting their EIA projects. Because of the reticence of public institutions in charge of verification of the implementation of the EIA, investors do violate rules relating to the environment protection. The role of public institutions in charge of protection of environment should revise their role in environment protection. Their actions should not only be based on suspension but also in imposing some other sanctions like imprisonment. After analysing various situations where the right to a safe and healthy environment have been violated, the researcher has start wondering if really the objective of boosting sustainable development which is often used by countries as a motive of attracting investors is reached. In the following chapter the focus has been made on the legal perspective of the issue which the “FDI and the right to development in Rwa

CHAPTER FIVE

FOREIGN DIRECT INVESTMENT AND SUSTAINBLE DEVELOPMENT

5.1. Introduction

Many developing countries, including Rwanda have been involved in the solicitation of foreign investment by offering tax and non-tax incentives. Through tax policies, countries have provided tax holidays, import duty exemptions and subsidies to foreign firms, as well as measures like market preferences, infrastructures and sometimes even monopoly rights, free trade zones, etc.⁷¹⁵ In that process of attracting FDI, policymakers of those countries bear in their minds that foreign investment can boost their economies.

⁷¹⁵ J. Bouoiyour, "Foreign Direct Investment in Morocco", *Agence Française de Développement*, Paris, Cedex 12, 2004, p. 1.

According to the OECD, the link between FDI and economic growth does not need demonstration. According to the organisation, MNCs contribute to management, capital, technological capacities and expertise, the integration of local industries into the global production and distribution network. It also permits the rapid upgrading of technology, highest quality control and greater penetration into external markets. They also lead to better human resource training and facilitate the transfer of skills and management capacity between enterprises⁷¹⁶

The UNCTAD also has added that:

Over the past two decades, most Governments have been actively promoting their countries as investment locations to attract scarce private capital and associated technology and managerial skills in order to help achieve their development goals. They have increasingly adopted measures to facilitate the entry of foreign direct investment (FDI).⁷¹⁷

The issue of development though appears not to be really a legal concept; it however, concerns human rights. The right to development has been confirmed by the UN declaration. According to its article 1, “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”⁷¹⁸ This chapter interrogates the effectiveness of this right in Rwanda basing on various laws, policies and programs. It has considered some indicators like the way FDI contributes to the balance of payment, how it transfers the technology and the corporate social responsibility. Before analysing these indicators, it starts by assessing the regime of incentives into place in Rwanda.

5.2 Incentives in the FDI in Rwanda

⁷¹⁶ OECD, *Foreign Direct Investment, Development and Corporate Responsibility*, Cedex, France, 2000, p.8.

⁷¹⁷ UNCTAD, *Tax Incentives and Foreign Direct Investment A Global Survey*, UNITED NATIONS New York, 2000, p.11, see also M. Sornarajah, *Op. cit.*, p. 143.

⁷¹⁸ Declaration on the Right to Development, adopted in 1986 by United Nations General Assembly (GA) in its resolution 41/128 in its article 1(1).

Tax incentives among others have been used by countries as a key tool to attract more MNCs.⁷¹⁹ Fiscal and non-fiscal incentives are generally given to investors who fall into specified categories or who fulfil some conditions set up by countries. The UNCTAD reports confirmed that a large number of countries offer this kind of stimulus to attract more investors.⁷²⁰ Incentives given to foreign companies by host states are of various types but most of them are provided to investors as soon as companies start to earn revenue while and after a given period, usually a relatively long time-span, they can change the rate bearing in mind that the whole period elapsed was for equipment that the benefit will start to be generated from that period.⁷²¹ Incentives and foreign direct investment can be targeted at many types of activities, such as export promotion, employment/skills training, and domestic value added and headquarters location.⁷²² Consenting incentives by countries are not bad in themselves, but the debate is on their usefulness in the process of foreign investment promotion.⁷²³

5.2.1 Incentives at the international level

Even if attracting foreign investors in a given country is purely an issue of countries which can be based on the idea of freedom of entry for the purpose of trade, it has been articulated through International Organisations like the WTO. Generally, incentives have been negotiated through various Bilateral and regional treaties which provide for the rights of entry and establishment of foreign direct investment in host countries.⁷²⁴ WTO and various regional agreements have

⁷¹⁹ A Cr. Nuță & Fl. M. Nută, “The effectiveness of the Tax Incentives on Foreign Direct Investments”, (2012) issue I, *Journal of Public Administration, Finance and Law*, p.2. available at <http://www.jopafl.com/uploads/THE-EFFECTIVENESS-OF-THE-TAX-INCENTIVES-ON-FOREIGN-DIRECT-INVESTMENTS.pdf> visited on 2nd July 2015.

⁷²⁰ UNCTAD, *Tax Incentives and Foreign Direct Investment, A global Survey*, 2000, p. 19, http://unctad.org/en/Docs/iteipcmisc3_en.pdf visited on 9th January 2015.

⁷²¹ A Cr. Nuță & Fl. M. Nută, *Op. cit.*, p. 2.

⁷²² UNCTAD, *Tax Incentives and Foreign Direct Investment A Global Survey*, United Nations New York, 2000 p.13.

⁷²³ M. Sornarajah, *Op. cit.*, p. 143.

⁷²⁴ *Idem*, p. 144.

contributed to the proliferation of FDI incentives. Countries have been obliged to change their laws and policies in order to provide investors with a climate which addresses their needs.⁷²⁵

Under international customary law, the role of international law is discussed under the sovereignty of countries in putting into place the national regulation on incentives. Though basing on sovereignty of states, countries are allowed to pre-establish conditions at their will. Notwithstanding, some international, regional and bilateral agreements have greatly contributed to the FDI environment. At the international level for example, WTO instruments such GATS have promoted the establishment of freedom of entry in the services sector. This instrument permits a commercial presence within the territories of member states.⁷²⁶

It is logical for countries to institute measures which can accept foreign investors or keep them out if their activities are considered harmful to its interests.⁷²⁷ Screening upon entry is generally performed by public agencies basing on criteria which have been put in various laws and policies. These public agencies undertake a feasibility of the proposed project of foreign investment with particular concern to how it shall contribute to the local economy.⁷²⁸ This process however, violates one of the core principles which are laid down by WTO instruments: the non-discrimination principle. This is a principle which is applicable after entry by providing that there will be no discrimination in the host country either based on the origin of investors or a racial background.⁷²⁹

5.2.2 Incentives to foreign investors in Rwanda

⁷²⁵ A. KOKK, "Globalization and FDI policies" (2003), in *the Development Dimension of FDI: Policy and Rule-Making Perspectives* Proceedings of the Expert Meeting held in Geneva from 6 to 8 November 2002, United Nations New York and Geneva, p. 30.

⁷²⁶ *Id.*, p. 119.

⁷²⁷ *Ibid.*

⁷²⁸ *Ibid.*

⁷²⁹ *Id.*, p. 147.

It has been noticed that host countries, especially developing ones, lose some revenues while attracting foreign direct investments. This phenomenon particularly affects those which start from very low FDI bases. Countries, when losing these revenues, think that the loss is short term and thereafter the revenues foregone will return in the long run through addition corporate income tax as investors will wean off tax incentives over time.⁷³⁰ Unlike other developing countries, Rwanda has been embarked into investment promotion. In doing so, it has provided for a number of incentives both fiscal and non-fiscal.⁷³¹ In these lines, we will peruse various laws and policies providing for those incentives. In this analysis we shall critically assess their usefulness.

5.2.2.1 Understanding tax incentives

Tax incentives can be defined as:

any incentives that reduce the tax burden of enterprises in order to induce them to invest in particular projects or sectors. They get exceptions to the general tax regime. Tax incentives would include, for example, reduced tax rates on profits, tax holidays, accounting rules that allow accelerated depreciation and loss carry forwards for tax purposes, and reduced tariffs on imported equipment, components, and raw materials, or increased tariffs to protect the domestic market for import substituting investment projects.⁷³²

Tax incentives are then defined as special exclusions, exemptions, deductions or credits that provide special credits, a preferential tax treatment or deferral of tax liability.⁷³³ Tax incentives in FDI are often structured through preferential subjection to income tax.

Host countries sometimes can "ease" the tax burden measures that can take different forms. Tax incentives can take one of the following forms: tax holidays; reductions in statutory tax rate of corporate profits; increased accelerated depreciation of capital expenditures; investment tax credits specific or general reduction in tax rates on dividends or interest.⁷³⁴ Rwandan law on

⁷³⁰D. Malunda, Corporate Tax Incentives and Double Taxation Agreements in Rwanda. *Is Rwanda getting a Fair Deal? A Cost Benefit Analysis, Report, IPAR, Kigali, 2014.*, p. 10.

⁷³¹ Law n° 26/2005 of 17/12/2005 Relating to Investment and Export Promotion and Facilitation has been promulgated and this law follows the Law n° 14/98 of 18/12/1998 establishing the Rwanda Investment Promotion Agency.

⁷³² UNCTAD, *Tax Incentives and Foreign Direct Investment A Global Survey, Op. cit, p. 12.*

⁷³³L. Nyirigira, *Fiscal Incentives towards Investment Promotion in Rwanda*, Dissertation, ULK, 2011, p. 28. Unpublished.

⁷³⁴ A. Cr. Nuță and Fl. M. Nută, "The Effectiveness of the Tax Incentives on Foreign Direct Investments", (2012), *Journal of Public Administration, Finance and Law*, p. 5.

investment promotion has not gone far from the perspective it has also provided for incentives in most of these domains.

The use of fiscal incentives has always led to a debate about their effectiveness. Some questions have been asked in this regard. Do tax incentives have the greatest impact on investment location choice of multinationals? What kind of investment seems to be most sensitive to changes in taxes? In choosing the appropriate fiscal instrument for attracting the investments, many countries consider these parameters.

5.2.2.2 Exemption from import duties and sales taxes

In Rwanda the issue of custom duties exemptions are generally found in national laws as well as in the EAC Act. With the integration to the EAC, these exemptions have been harmonized within the region this is why this subsection shall mainly be based on the EAC Customs Management Act. Under the EAC, a number of provisions to apply the Common External Tariff (CET) under customs union treaties have been passed, though not actually implemented by some EAC member states. Countries have committed them in gradually integrating the application of the policy.⁷³⁵ This Act exempts these items: Aircraft and their accessories, ships and other

⁷³⁵ In the spirit of gradually moving away from staying of applications of EAC CET and encouraging firms to be more efficient and competitive, Rwanda will apply official EAC CET on the following:

- Construction materials: CET of 25% instead of 0% for local investors with a minimum capital of US\$ 100,000 in hotels and 10% for projects worth US\$ 1.8 million and above;
- Importation of telecommunication equipment: CET of 25% instead of 0%; Other Revenue Administration Measures to increase the domestic tax base in 2013/14 include:
 - ✓ E-filing and E-payment: Under this system, tax forms are filled and taxes paid electronically. Its introduction and implementation will reduce compliance costs for both tax administration and taxpayers;
 - ✓ Electronic Single Window: This is a web page that links government clearing agencies and traders. It is intended to reduce the cost of doing business by facilitating international trade by speeding up and simplifying information flows between traders and government institutions, thus improving transparency and accountability in the goods clearing chain. It was launched and rolled out to different bonded warehouses. In addition, other agencies involved in import/export clearing were fully connected;
 - ✓ Electronic cargo tracking equipment: its introduction will help to ensure the protection of cargo from source to destination;
 - ✓ Introduction of mobile technology in payment and filing of taxes. This is a platform to file and pay taxes through mobile technology;
 - ✓ Introduction of Gold Card Scheme to facilitate compliant tax payers; the Gold Card Scheme is intended to help the Customs department balance its conflicting mandates of trade facilitation and enforcement. It allows the Department to facilitate low risk consignments and permit it to focus its enforcement efforts on the transactions representing higher or

vessels, museums, exhibits and equipment, hotel equipments, items imported for use in licensed hospitals and motor vehicles specially designed for refuse/garbage collection.⁷³⁶

The Government of Rwanda has taken a step forward in improving the investment code.⁷³⁷ The new Investment Code which was adopted in March 2015 has largely changed with relation to scrapping of various tax incentives. For example, construction materials will be subject to Common External Tariff (CET) rate of 25% up from 0% (for local investors) and 10% (for projects worth USD 1.8m). It is good that a reprieve from paying VAT for construction material that is not locally available has been granted.⁷³⁸

The annex of the law on investment promotion of 2005 which was repealed in March 2015 provided that “a foreign investor or an expatriate, who works for a registered investment enterprise, on individual basis, shall be exempted from duties on one personal car, his or her personal properties and on household properties in accordance with laws on customs.”⁷³⁹ The same incentives are given to an investor who imports machinery and raw materials which are exempted from import duties.⁷⁴⁰ For the import of raw materials, it is good that this provision has been repealed because its application should be limited to raw materials which are not available in Rwanda.

unknown risk without impeding the flow of goods. This scheme saves time for complaint tax payers, and allows expedited release of goods after clearance;

- ✓ Revision of investment code to adapt to the prevailing business environment; and
- ✓ Introduction of Electronic Billing Machines: The new VAT law requires registered taxpayers to use Electronic Billing Machines (EBM).

⁷³⁶ EAC Customs Management customs management Act, Fifth Schedule B.

⁷³⁷ The law n° 26/2005 of 17/12/2005 relating to investment and export promotion and facilities.

⁷³⁸ See in the annex of investment code.

⁷³⁹ Annex I to the law n° 26/2005 of 17/12/2005 relating to investment and export promotion and facilities. In the annex of the draft of the investment code provides for a preferential tax rate of 15% to a registered investor in the transport and logistics sector whose business is operating a fleet of at least five trucks registered in his name (of at least 20 tons each) for transport of goods. A registered investor operating in mass transportation of passengers with a fleet of at least 10 buses (of at least 25 seats capacity each).

⁷⁴⁰ *Ibid*

Other commodities which are given exemptions are building and finishing materials. According to the same Code of investment, registered investors who fulfil requirements of Article 27 of the law relating to investment and export promotion and facilitation are allowed to import building and finishing materials are to pay an amount equivalent to five percent (5%) of their value while in Rwanda (CIF) to replace the duty that was supposed to be paid as import duty and excise duty. This kind of incentive is really illogical since some of building materials can be produced in Rwanda. There is a factory which produces cement in Rwanda⁷⁴¹ and another that produces tires in Umutara. Additionally, RURIBA Clays produces four product lines: Roof Tiles, Floor Tiles, Brick and a Structural Line.⁷⁴² The same incentives are given to investors for equipment aimed at being invested in tourism and hotel industry.⁷⁴³

The code adds that an investor who imports medical equipment, medicinal products, agricultural equipment, livestock, and fishing and inputs shall be exempted from import duty imposed on those goods. Still the concern remains the same. There is a need for precision on the nature of equipment which should benefit from that exemption. The specification should be that only products which cannot be produced locally should get the said exemption.

⁷⁴¹ CIMERWA is Rwanda is cement producer established 30 years ago, the firm is located in Bugarama, Rusizi district in South Western border of Rwanda. This is the only cement company in Rwanda that mines the raw materials, produces the clinker concentrate, packs and sells cement for general and civil construction. Some of its products are exported to the DRC and Burundi. <http://www.cimerwa.rw/>

⁷⁴² <http://www.ruliba.com/> accessed on 1st April 2015.

⁷⁴³ The law also exempts many other items from paying custom duties. These items are Switchboard; Water Spray; Safe and air conditioners, Bedroom fittings Carpet; Beds and their accessories; Television; Small fridge; Safe; Window fittings for sound, heat and light proofing; Room furniture (as part of the overall house design) and Air conditioners, Laundry and dry cleaning equipment : Washing machines; Driers; Laundry and dry cleaning equipment; d. Restaurant and bar : Chairs and tables (not made in plastic); Deep freezer and fridge; Dish washer; Air conditioners, Conference halls : Furniture and carpets (not made in plastic); Sound system and microphones; Overhead projector; LCD video projector; Air conditioner, Kitchen: Stoves; Ovens; Deep fryers; Grill; Dish warmer, Cold rooms, Refrigerator, Dish washing machine, Swimming pool : equipment for fitness centers, sauna, steam bath and massage.. Outdoor leisure: Children's play ground: swings, slide, carousel, and trampoline, Equipment for tennis courts & maintenance, nets, steamroller, training machine and lighting; Golf equipment. Lobby, public places and room corridors, Carpets; Furniture. Machines for house maintenance: Generator; Machinery for construction of cylinges, plumbing, electricity, air conditioning and refrigeration; Solar system for electricity or water production; Water treatment system; Liquid waste treatment plant; Lighting conductor; Chiller, air conditioning shaft; PABX: Radio communication system machine in hotels and bars; Broadcasting system for Television and music in rooms and public areas; Radio communication system; Fire alarm system, extinguishers and sprinklers; Ventilation and extraction of bad smell in technical rooms and basement. Gardens Integrated watering system in the gardens: Dancing hall and bar; Sound system equipment; Refrigerators ; Air conditioners for discotheques; Lights used in discotheques.

The Rwandan law on RIEPA⁷⁴⁴ in its annex gives incentives to investors who may intend to invest in Rwanda. According to the annex,

An investor intending to make new investment, rehabilitate, expand, renovate or restructure existing business enterprise and for that purpose import plant, machinery and equipment which is zero import tax rated under the Commodity Code (“Tarif de Douanes du Rwanda”), shall be exempted from sales tax otherwise payable on those goods. An investor who imports plant, machinery, equipment and raw materials for the operations of a registered business enterprise which are not zero import tax rated under the Commodity Code, shall pay a single flat fee of five (5%) percent of the CIF value of the imported items, in lieu of all taxes, including import duties, sales tax and others which would normally be imposed on such goods.⁷⁴⁵

Tariff protection has been quite a common form of investment incentive in many countries. They mainly offer tariff incentives of two kinds on export duties. Can reduce or eliminate tariffs on imported capital equipment and spare parts for qualifying investment projects with the intention of reducing the cost of those materials in local markets. In a bid to get back what they have been consented through these incentives, countries sometimes increase prices of final products.⁷⁴⁶

The Rwandan law on RIEPA provides also that a registered investor who imports specialized vehicles, that is to say: hotel shuttles, refrigerated vehicles, tourist vehicles, ambulances and fire-extinguishing vehicles, shall be exempted from payment of import and excise duty. An investor who imports airplanes for transportation of tourists is also exempted from payment of Taxes.⁷⁴⁷ Since Rwanda does not have factories producing vehicles and airplanes, the exemption is justifiable given that it does not occasion unfair competition to local companies. However, there should be no incentives with respect to products which can be produced in Rwanda.

⁷⁴⁴ RIEPA means Rwanda investment and Export promotion agency. This agency has been incorporated into the Rwanda Development Board and becomes one of its departments alongside with tourism, free trade zones, etc.

⁷⁴⁵ 7° of the Annex of the law n°26/2005 of 17/12/2005

⁷⁴⁶ UNCTAD, *Tax Incentives and Foreign Direct Investment A Global Survey*, *Op. cit.*, p. 22.

⁷⁴⁷ *Id.*, points 3 and 4.

It is good that Rwanda is now at the phase-out of incentives for some investors. This can be contrasted with the situation as existed before 2011 where incentives were granted for an open ended period with no definite time limit for new investors. Presently, investors have been given time limits. TIGO, for example, was given tax exemptions of zero duty on imports telecommunication equipment up to 2014. During the period in which it enjoyed tax exemption, the company made many investments in kind, including cars and various infrastructure projects.⁷⁴⁸

5.2.2.3 Tax holidays in Rwanda

Other forms of tax incentives which are used by countries when attracting foreign investors are tax holidays and free trade zones. Tax holiday consists of granting to foreign companies which intend to invest in the country a period of exemption from paying a number of taxes.⁷⁴⁹ Rwanda has also thought about these two forms of incentives in attracting foreign investors.

Rwanda, like many other countries, grants tax holidays to various companies when they invest in Rwanda. The Rwandan tax code on direct taxes on income provides many tax incentives to investors who invest in Rwanda.⁷⁵⁰ When dealing with the issue of tax holiday and determining the way it operates, some technical issues can be considered. Among these we have the year from which tax holiday will enter effect. Is it the year of establishment or the year when the entity starts getting profits? Another issue is the calculation of the depreciation period during the holiday period.

The investment code in its annex gives a tax holiday of seven years any registered investor who invests at least fifty million United States Dollars (USD 50,000,000) and contributing at least

⁷⁴⁸ Interview with the TIGO Rwanda finance controller made on 23rd April 2015.

⁷⁴⁹ Deloitte, Tax and Investment in India, 2015, Research, Relevancy and Reliability, p. 3. Available at <http://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/in-tax-india-guide-2015-noexp.pdf>, accessed on 20th April 2016.

⁷⁵⁰ Article 26 of the law n°16/2005 of 18/08/2005 on Tax on Direct Income.

thirty percent (30%) of this investment in form of equity in these specified areas: energy projects producing at least twenty five megawatts (25 MW). This incentive excludes an investor having an engineering procurement contract executed on behalf of the Government of Rwanda and fuel produced energy; manufacturing; tourism; health; Information and Communication Technology (ICT) Sector with an investment involving manufacturing, assembly and service. This incentive excludes communication, ICT retail and companies or enterprises and Telecommunications; export related investment projects; an investor registered in another priority economic sector as may be determined by an Order of the Minister in charge of finance.⁷⁵¹

It continues by giving a tax holiday of five years from the time of their approval, Microfinance institutions approved by competent authorities. The same law adds that this period can be renewed upon fulfilling conditions prescribed in the Order of the Minister in charge of finance. As earlier mentioned, that ministerial order is not yet there, we hope it shall consider the contribution to which that Microfinance has made to the Rwandan economic.

Some companies have then been granted tax holiday for a period of ten or five years. One of these companies is TIGO Rwanda, a foreign owned company whose registration is Luxembourg, where it is registered as MILLICOM. The company uses raw materials from foreign countries and mainly from Eriksson and Huawei. TIGO is part of a multinational group of companies that has expanded its operations into Rwanda. TIGO Rwanda started its operations in Rwanda in 2009 with tax holiday of five years to expire by 2014. It is good that now the tax holiday period has expired it has now started paying taxes.⁷⁵² Another company which has benefited from this advantage is Mineral Supply Africa which was given export tax incentives for exemption granted for a period of 5 years whereby only 4% of export is the tax paid. Some of motives from which tax incentives were offered, include buying from registered miners, job creation for locals,

⁷⁵¹ Annex of the Investment Code of 2015 in its part III.

⁷⁵² *Ibid.*

offering capacity building to locals as well as exemption on investment of capital of 5 million dollars.⁷⁵³

The same law in its transitional provisions gives an extension of twelve months to an investor who has benefiting from the incentives provided under Law n° 26/2005 of 17/12/2005 relating to investment and export promotion and facilitation, which are not provided for under the new law. It adds that Companies that carry out microfinance activities benefiting from the investment incentive of paying a profit tax equivalent to zero per cent (0%) during a five (5) years period will continue to benefit from this incentive until the end of that period.⁷⁵⁴ This law refuses however, a transitional period to companies which have been granted incentives based on the number of Rwandans employed, investor benefiting from additional time bound tax-related incentives for which the government of Rwanda has signed an undertaking before the publication of the new law.⁷⁵⁵

Even if the policy appears to be good and very clear on the link between tax exemption and sustainable development, this kind of incentive has been criticized in various ways. One of its critics is that it fits for companies which may invest for a period which largely exceeds the time for fiscal holidays. If that period expires companies may sometimes change their destinations.⁷⁵⁶ It has also been noticed that sometimes that entities abuse the commitment they have made by minimizing their tax liability wherever possible using both legal and illegal means.⁷⁵⁷

In doing so, companies change their destinations of exploitation by orienting their activities in countries with tax havens in order to shift profits to the lowest tax jurisdiction possible. Corporations structure in such a way so as to minimize tax liability in the producing and the consuming countries where the bulk of the economic activity takes place or by allocating profits

⁷⁵³ *Ibid.*

⁷⁵⁴ Article 22 of the investment code of 2015.

⁷⁵⁵ The same article

⁷⁵⁶ D. Holland and J. Vann R, *Income Tax Incentives for Investment*, IMF, 1998, V.2, Victor Thuronyi, chapter 23, p. 4.

⁷⁵⁷ D. Malunda, *Op. cit.*, p. 11.

through subsidiaries to offshore centres.⁷⁵⁸ Such aggressive tax planning practices are facilitated by tax havens like Mauritius, the Cayman Islands, Singapore, and Switzerland. Multinationals make use of low tax jurisdictions to avoid handing money over to tax collectors in the countries where their goods are produced, and in those where they are consumed.⁷⁵⁹

Another way for foreign investors to avoid tax while continuing to benefit from incentives is the use of mergers and acquisitions (M&A) or the changing of legal form especially the change of some domestic players into international entities with the aim of benefiting also from incentives as multinational corporation owner before proceeding to undertake a sale which is fictive.⁷⁶⁰ A merger occurs when two corporations combine their operations to form one business entity whereas an acquisition occurs when a bigger corporation acquires a small one through direct purchase.⁷⁶¹

Some examples of merger and tax avoidance can for instance the one occurred in Uganda with the telecommunication companies of Warid and Airtel. Airtel acquired Warid. It did not pay the capital gains tax on this acquisition, on the basis that Airtel was not based in Uganda during the time of acquisition. The Uganda Revenue Authority sued Airtel on the basis that Warid, when acquired, was based in Uganda.⁷⁶²

In Rwanda, we have also the case of BCR⁷⁶³ and its acquisition by a Kenyan Bank I&M.⁷⁶⁴ The Commercial Bank of Rwanda (BCR) has changed ownership three times over the last 10 years. The most recent purchaser is the Kenya based Bank I&M Bank, after which the former BCR has changed its name to I&M. The issue of non-payment of capital gains tax occurred on each of the subsequent ownership transfers. It is not known whether the company benefited from new tax

⁷⁵⁸ M. Henn, *Tax Havens and the Taxation of Transnational Corporations*, June 2013, p. 1. Available at www.library.fes.de/pdf-files/iez/global/10082.pdf. visited on July 4th 2015.

⁷⁵⁹ D. Malunda, *Op. cit.*, p. 11.

⁷⁶⁰ *Ibid.*

⁷⁶¹ B., A. Garner, *Black's Law Dictionary*, 4th Pocket edition, Thomson Reuters, 2011, p. 484.

⁷⁶² D. Malunda, *Op. cit.*, p. 11

⁷⁶³ Banque Commerciale du Rwanda Sa.

⁷⁶⁴ Investments & Mortgages Bank Limited

exemptions every time it changed hands?⁷⁶⁵ In interviews conducted with person the in charge of legal department at I&M bank he refused to answer to this question. My view would be that there must be clear guidelines on how the link between tax holiday and sustainable development works otherwise companies may abuse this obligation being hidden in loopholes in the policy or laws into place in the country.

5.2.2.4 Free economic zones

The Rwandan law on investment promotion has provided for the establishment of free economic zones. Article 22 of the law says that free economic zones are established in respect of the following: issuance of a certificate from authorities in charge of land granting; availability of land structure and environment assessment; presenting a study of the project; presence of a master plan; indication of how compensation of property and the activities of the expropriated persons are respected in accordance with law.⁷⁶⁶

The Rwandan free Trade Zone is regulated by the Law n°05/2011 of 21/03/2011 regulating Special Economic Zones in Rwanda.⁷⁶⁷ According to the law, it has been created with the aim of increasing the area of development by rehabilitating and increasing the infrastructure with the aim of fostering development of the country. It additionally has the objective of increasing the contribution of private sector in the development of the Country. It finally has the objective of promoting a high quality business climate with an emphasis on environmental protection in compliance with international laws and conventions.⁷⁶⁸

The Kigali Special Zone which was created by this law is a result of the merger between the former Kigali Special Economic Zone and the Kigali Industrial Park. The Kigali Special Economic Zone was developed in two phases. Phase I of KSEZ is on 98 Hectares of land with all

⁷⁶⁵ D. Malunda, *Op. cit.*, p. 11

⁷⁶⁶ Article 22 of the Rwandan Investment Code

⁷⁶⁷ This Law was Published in the Official Gazette n° special of 30 March 2011

⁷⁶⁸ Article 3 of the Law on Special economic Zone in Rwanda.

the plots (89 in total belonging to 61 investors) fully booked. Infrastructure development in phase II of the KSEZ is so far at more than 40% with the main works on access road construction, electricity roll out and water systems plots booked by 11 investors up to 60% of the available surface area for investment.⁷⁶⁹

The enactment of this law followed that of the policy on the special economic zones in 2010. According to that policy, SEZs are increasingly used as an economic policy tool worldwide which has great potential to promote private investment, industry and export growth by offering quality infrastructure, streamlined business regulations and incentives to investors and businesses.⁷⁷⁰ The policy adds that the types of zones allowed under the Investment Code are Export Processing Zones (EPZ), Free Trade Zones (FTZ), and Single Enterprise Export Processing Zone (SEEPZ). The authority in charge of the management of the special economic zone is “SEZAR”. This institution is responsible for coordinating activities, designing and providing direction of strategies, to ensure the operation and supervision of the zone.⁷⁷¹ It has the responsibility of organizing and managing free economic zones, but controlling the daily operations of such places may be carried out by companies or private individuals in accordance with specific conditions stipulated in an agreement.⁷⁷²

Where the Agency considers the application requesting for operating in a Free Economic Zone, it shall examine the capacity of the investment enterprise to accomplish the following goals or some of them:

creation of jobs that require specific and high quality technical knowhow; infusion of substantial new investments into productive activities; transfer of modern technology and

⁷⁶⁹ Interview with Mr Olivier the in charge of special economic zones in Rwanda.

⁷⁷⁰ Government of Rwanda, Special economic zone, May 2010, p. 3.

⁷⁷¹ Article 11 of the on Special economic Zone in Rwanda. The law adds that SEZAR has the following responsibilities: 1 ° to collabourate with relevant Government authorities to enable Zones to fulfill their responsibilities as provided by their governing laws; 2 ° to ensure that Zones comply with laws, develop them and facilitate their smooth operation; 3 ° to ensure that systems for the provision of administrative services to prospective developer, operator or user are available in a Zone; 4 ° to receive and follow up on applications filed by developers, operators and users of a Zone; 5 ° to keep operational records of each Zone; 6 ° to issue the certificate of origin for all goods that are shipped from a Zone; 7 ° to advise Government on matters relating to the establishment of Zones.

⁷⁷² Article 23.

other know-how; diversification and expansion of investment enterprises and exports; utilization of locally produced raw materials; creation of linkages within the economy; Establishment of a plan of action which does not degrade the environment.⁷⁷³

Companies which are considered as fulfilling conditions of being registered in the free trade zones are big or small manufacturing companies that export at least eighty percent (80%) of their production, merchandise trade enterprises that export at least eighty percent (80%) of their production, and professional, financial, and technical investment enterprises engaged in export of services.⁷⁷⁴

Another way of establishing special economic zones is the creation of export processing zones. Export processing zones in developing countries started to become popular during 1970s when they started turning away from imports. EPZs, which are founded on export promotion policies, have helped developing countries to open their economies.⁷⁷⁵ The World Bank (1992) has based its analysis on the premise that “An export processing zone is an industrial estate, usually a fenced-in area of 10 to 300 hectares, that specializes in manufacturing for export. It offers firms free trade conditions and a liberal regulatory environment.”⁷⁷⁶

Free trade zones are among a number of varieties of export processing zones (EPZs). These EPZs can have various names. Among these we have: customs-free zones, duty-free zones, free trade zones, or special economic zones,⁷⁷⁷ import tariff drawback arrangements, temporary

⁷⁷³ Article 24.

⁷⁷⁴ *Ibid*

⁷⁷⁵ A. Derosa, Dean and V. O. Ronigen, *Rwanda as a Free Trade Zone*, ADR International Ltd, USA, 2003, P.5

⁷⁷⁶ The World Bank considers the Shannon Free Zone in Ireland, set up in 1959, as one of the first EPZs, 1992, p.7. The Rwandan policy on Free Economic Zone has also proposed these advantages of the EPZs: The main potential economic benefits from zones are:

1. Increase foreign and domestic private sector investment
2. Employment and Income Generation both direct (within the zone) and indirect through backwards and forwards linkages with businesses outside the zone.
3. Export growth and diversification and increase in foreign exchange fiscal incentives are used to counteract the anti export bias of other trade policies
4. Development of industry and other sector requiring serviced, specialized infrastructure.
5. Skills upgrade and technological transfer—from increased foreign direct investment.
6. Demonstration effects for new policies and reform zones can act as experimental laboratories for application of new economic policies and approaches.
7. Improve effective tax rates through enhanced tax collection within the zone (net new) tax revenues collected from expanded tax base and improved tax collection procedures will serve to offset perceived foregone taxes from fiscal incentives.

⁷⁷⁷ D. Holland and R. J. Vann, *Op. cit*, p. 19.

admissions and export subsidies.⁷⁷⁸ The EPZ distinguishing feature with other zones is that they have right to import machinery equipment and raw materials free of custom duties and other taxes for assembling, processing, or manufacturing, with the intention of exporting their finished products. Article 41 of the law on direct income incorporation taxes provides that a registered business operating in a free economic Zone and foreign companies which have their headquarters in Rwanda that fulfil all requirements of the Rwanda investment code are to pay corporate income tax at the rate of 0% and the tax free repatriation of profits. The Rwandan FTZ proposal was to establish Rwanda as an economy which follows the example of Hong Kong or Singapore.⁷⁷⁹

Even though there is no consensus on the goals to be achieved in an export processing zone, the following have been retained as the most popular: Provide foreign exchange earnings by promoting non-traditional exports; provide jobs to alleviate unemployment or under-employment problems in the host country; assist in income creation; attract foreign direct investment (FDI) to the host country. In the case of a successful EPZ, foreign direct investment would be accompanied by technological transfer, knowledge spill-over and demonstration effects that would act as catalysts for domestic entrepreneurs to engage in production of non-traditional products.⁷⁸⁰

Countries promote EPZs with the aim of reducing external pressures for trade policy reform, especially pressures from MNCs and donors. This was among policies which have been proposed by the World Bank to developing countries- to create EPZs as a means of promoting exports. This was done through fund supports made by the World Bank to some developing countries including even Africa in order for them to create EPZs.⁷⁸¹

⁷⁷⁸ M. Dorsati, *A Review of the Role and Impact of Export Processing Zones*, 1999, World Bank, 1999, p. 15.

⁷⁷⁹ A. Erosa, Dean and V. O Ronigen, *Op. cit.*, p4.

⁷⁸⁰ *Idem*, p.16.

⁷⁸¹ *Idem*, p.7.

The purpose for countries to initiate EPZ is to increase exportation. If products from EPZ are sold locally, they will be considered as products imported and consequently will pay custom duties.⁷⁸² But this principle is not absolute because some countries have adopted a flexible system whereby the EPZ production can be sold up to a given percentage in the domestic market. This is for example the case of Dominican Republic which accepts up to 20% of the EPZ products into its domestic market, while Mexico lets 20-40%.⁷⁸³

Some companies which are registered in the Rwanda free trade zones are the Rwanda Trading Company processes coffee for export purposes. RTC does not sell its products locally in Rwanda. RTC sells about 50,000 bags of coffee each year – 15,000 of which are fully washed, proudly making us the largest exporter of Rwandan specialty coffee. Rwanda Trading Company is an affiliate of US- based Westrock Coffee and Tembo Coffee Company located in the southern highlands of Mbeya, Tanzania. RTC, Westrock and Tembo are owned and capitalized by Westrock Capital Partners, a private equity firm in the U.S. Coffee is bought from about 57,000 farmers from different part of Rwanda and from other coffee plants, like RWACOF, who are coffee specialists, processors (washed and fully washed Arabic) and exporters since 1996. It also offers its processing facilities to small scale farmers and exporters.⁷⁸⁴

Even if the main goal of the EPZ is to provide the country with foreign exchange earnings through exportations, this objective can sometimes not be properly achieved by developing countries because those companies import raw materials sometimes unnecessary out of the country and this, impacts on the foreign exchange of the host country. It has, for example, been noticed in Asia that hosts of EPZs net export growth performance have not been so impressive

⁷⁸² D. Holland and J. Vann R, *Op. cit*, p.19.

⁷⁸³ M. Dorsati, *Op. cit*, p. 25.

⁷⁸⁴ D. Malunda, *Op. cit*, p. 42.

because studies shown that Indonesia, South Korea and Taiwan only managed to get a high ratio of net to gross export whereas others like Malaysia, Philippines and Sri Lanka did not.⁷⁸⁵

Some countries have failed in the implementation of their free trade zones. Some examples show failures in the monitoring of these zones in Africa. Examples retained in Africa are DRC, Senegal, Namibia, Liberia and Cote D'Ivoire.⁷⁸⁶ This is why Rwanda, in establishing its Free Economic Zones should consider the experience from these free economic zones which have failed. Sometimes, the way of defining the policy may also cause some problems. Reliance on tax holidays and other fiscal incentives not based on performance reduce government revenues with little benefits.⁷⁸⁷ All these parameters should be considered.

The increase export by EPZ has also been criticized in this way. The contribution to the export remains insignificant because the export made should be compared to import they have made. The non-performance in their activities is mainly due to the fact that they import a large number of portion of their raw materials a factor which considerably increases importation in the host country.⁷⁸⁸ The consequence being then the scarcity of foreign currency and will have adverse effects on balance of payments.

In the interview we had with people from SEZAR and MINICOM in its directorate in charge of industrial development, they told us that EPZ is not yet clearly operational because their focus for this was on the creation of a mixed zone composed of local companies which were in the Industrial Park situated in Gikondo⁷⁸⁹ and the establishment of the free economic zone.⁷⁹⁰ The Rwandan policymaker should consider the experience of countries which have succeeded in the

⁷⁸⁵ M. Dorsati, *Op. cit*, p. 23.

⁷⁸⁶ Rwandan policy on SEZ, p. 12.

⁷⁸⁷ *Ibid*.

⁷⁸⁸ *Id.*, p. 24.

⁷⁸⁹ All companies which were in that Industrial Park have been obliged to move to the Special economic zone because the place was judged not suitable for environment protection as it is in marchland.

⁷⁹⁰ Interview held with Olivier ,and Claude

establishment of free trade zones while avoiding errors which have been committed by other countries.

5.2.2.5 Incentives on direct incomes

Other kinds of incentives which are granted by the government of Rwanda to foreign investors are incentives on direct income. The law on income taxes says that income which benefits from incentives is income derived from investment, any payments in cash or in kind by an individual in the form of interest, dividend, royalty, or rent which has not been taxed as business income.⁷⁹¹

If payment of interest, dividend distribution or royalty payment was subject to reduction of withholding tax as stipulated in article 51 of law n° 16/2005, the taxpayer does not pay tax on investment income.⁷⁹² Income accruing to registered collective investment schemes and employees' shares scheme are also exempted from income tax.⁷⁹³ These incentives concern exemptions on interest income, dividend income, royalty income and rental income.

a. Incentives on export

If a taxpayer exports commodities or services that bring to the country between three million (3.000.000) US dollars and five million (5.000.000) US dollars in a tax period, he or she shall be entitled to a tax discount of three per cent (3%); If he or she exports commodities or services that bring to the country more than five million (5.000.000) US dollars in a tax period, he or she shall be entitled to a tax discount of five per cent (5%). Companies that carry out micro finance activities approved by competent authorities shall pay corporate income tax at the rate of zero

⁷⁹¹ Art. 32 of law n° 16/2005 of 18/08/2005 on direct taxes on income

⁷⁹² Arts 33 (paragraph 2), 34 (paragraph 2) and 35 (paragraph 2) of law n° 16/2005

⁷⁹³ Art. 16 bis of law n° 16/2005

per cent (0%) for a period of five (5) years from the time of their approval. However, this period may be renewed by the order of the Minister.⁷⁹⁴

b. Exemption on interest income

Interest income is subject to a flat tax of 15%. Interest income includes income from loans, deposits, guarantees, and current accounts. It also includes income from government securities, income from bonds, and negotiable securities issued by public and private companies' income from cash bonds.⁷⁹⁵ This shows clearly that they benefit from an exemption of 50% as per article 11 which says that a company which gets more than 1,200,001 pays 30% whereas here the rate is 15%.⁷⁹⁶

c. Dividend income

Dividend income is subject to a flat tax of 15%. Dividend income includes income from shares and similar income distributed by companies and other entities⁷⁹⁷. Dividends also benefit for the exemption at the same rate as we have said above.

d. Royalty Income

Royalty income' includes all payments of any kind received as a prize for the use of, or the right to use, any copyright of literary, craftsmanship or scientific work including cinematograph films, films, or tapes used for radio or television broadcasting. The term also includes any payment received from using a trademark, design or model, computer application and plan secret formula or process. It also includes the price of using, or of the right to use industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific or

⁷⁹⁴ Ibid.

⁷⁹⁵ Art. 33 of the law n° 16/2005

⁷⁹⁶ Art. 11 of the law n° 16/2005

⁷⁹⁷ Art. 34 of law n° 16/2005

experience. Royalty income includes also natural resource payments⁷⁹⁸. Royalty income is subject to a flat tax of 15%.

e. Rental income

All revenues derived from rent of machinery and other equipment and land including livestock in Rwanda⁷⁹⁹, are included in taxable income, reduced by 10% of gross revenue as deemed expense; interest paid on loans and depreciation expenses. Income derived from the rent of buildings or houses incorporated as assets mentioned in article 38 of law n° 16/2005, is subject to corporate income tax, and exempted from rental income tax.

5.2.2.6 Tax foregone in the FDI attraction

The Action Aid, through its report, has tried to compute and make a report on revenue losses and gains as a ratio of total revenues collected in Rwanda over time. According to the report, tax exemptions and incentives accruing from the provisions of the customs law account for 64%, which is the highest proportion of taxes foregone over the last 10 years. Custom exemptions on investment account for an average of 31% of the total taxes foregone over the last 10 years in Rwanda. Taxes foregone associated with industrial inputs imported into Rwanda account for an average of only 5% of the incentives given to manufacturers over the last 10 years in Rwanda.⁸⁰⁰

The principle is that the ratio of taxes foregone to total revenues is always higher than the ratio of corporate tax to revenues over time. This was mainly seen from 2006 onwards, where there is a steady increase in the proportion of both taxes foregone and corporation tax. The period which was most concerning was the period from 2006 to 2010 when the global financial crisis was at its

⁷⁹⁸ Art. 35 of law n° 16/2005

⁷⁹⁹ Art. 36 of law n° 16/2005

⁸⁰⁰ D. Malunda, *Op. cit.*, p. 26.

peak. The Global crunch led to reduced economic activity and subsequent sharp decline in both corporate tax and incentives as a proportion of total revenues.⁸⁰¹

The World Bank studies also revealed the considerable extent to which tax holidays and other fiscal incentives are very costly to low-income countries and essentially lead to effective subsidies to MNCs. This is mainly noticed when their results lead to unbalanced proportion between advantages expected by host countries or fails to achieve substantial employment gains.⁸⁰²

When incentives are granted to newly incorporate foreign companies, after 5 years of operation in the country, they should stop benefiting from these incentives and starts paying taxes. However, this is not case in Rwanda, a country in which tax incentives are not helping to generate more corporate tax revenues because companies continue to ask for incentives even over the time. This has been explained by the fact that some companies have been involved in asking for grace period or lobbying at RDB by the companies in order to get more tax incentives after their period has elapsed.⁸⁰³

Another factor which leads to the non-payment of taxes after the period of tax holiday is the low predictability and low profitability among corporations. This limits re-investment and expansion of the companies' operations thus limiting the growth of corporate taxes as a proportion of total revenues over time. Lastly, another plausible cause would be the tax avoidance whereby companies report lower profits than what they have actually made and thus remitting most of the profits back to shareholders.⁸⁰⁴ Another issue is the slow rate of industrialization which does not

⁸⁰¹ Ibid

⁸⁰² A. Derosa, Dean and V. O Ronigen, *Rwanda as a Free Trade Zone*, ADR International Ltd, USA, 2003, p. 12.

⁸⁰³ D. Malunda, *Op. cit.*, p. 26

⁸⁰⁴ Ibid

reach the expected results at the time of establishment. This is an issue of concern for the manufacturing sector in Rwanda.⁸⁰⁵

5.2.2.7 Double tax agreements

Another tool which is used by countries to attract foreign investors is the use of double tax agreements (DTAs) which are usually signed by countries. When signing DTAs they generally follow two pertinent model text treaties these are the OECD and UN models. The OECD model was originally designed to allocate taxing rights and obligations between OECD countries or between OECD members and non-members.⁸⁰⁶

The OECD model⁸⁰⁷ relies on the residence principle when determining the country which is entitled to get taxes.⁸⁰⁸ According to this principle, the income is taxed where the taxpayer has his/her residence.⁸⁰⁹ For the UN model,⁸¹⁰ the principle which is applicable is the source

⁸⁰⁵ *Ibid.*

⁸⁰⁶ OECD, Manual on effective mutual agreement procedure (MEMAP), Center for tax policy and administration, February 2007, p.5., available at www.oecd.org/ctp/38061910.pdf, accessed on 25th April 2016.

⁸⁰⁷ Model tax convention (condensed version) © OECD 2014 available at <http://www.oecd.org/ctp/treaties/2014-model-tax-convention-articles.pdf>

⁸⁰⁸ The OECD model has tried to define the resident as:

1. For the purposes of this Convention, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authorities thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);

b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;

c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;

d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated.

⁸⁰⁹ Articles from 6 and the following of the OECD Model.

⁸¹⁰ United model double taxation convention between developed and developing countries, Department of economic and social affairs, New York 2011, http://www.un.org/esa/ffd/documents/UN_Model_2011_Update.pdf, accessed on 11th April 2015.

model.⁸¹¹ According to the principle, taxing rights belong to the country where the production is carried out or where the profit is accrued.⁸¹²

When countries sign DTAs they can choose either of these models. The UN model is a result of a committee with a mandate “to have regard to the special needs of developing countries”. This model would then allow developing countries to retain more taxing rights or income generated by foreign investments in the host country.⁸¹³ Negotiating and signing double tax agreements (DTA) is also another issue in investment and sustainable development. This is why it also attracted attention. So far, Rwanda has signed a number of DTAs.⁸¹⁴

One of countries Rwanda has signed with DTAs is Mauritius. Unlike other African countries, Mauritius has achieved a relatively high level of development and governance. It is one of the African countries which has negotiated and signed many DTAs both with developed and developing countries.⁸¹⁵ So far, Mauritius has signed 38 DTAs from which 13 are with African countries. It has also a network of 36 Investment Promotion protection Agreements (IPPA) under which it offers full protection of foreign investors.⁸¹⁶

The presence of Mauritius has been manifestly remarked in some African countries with a considerable trend. In Uganda For Example, Records from the Uganda Investment Authority (UIA) shows that the top FDI sources to Uganda for the period 1990-2010 were United Kingdom

⁸¹¹ Articles from 6 and following of the UN model.

⁸¹² Action Aid and SEATINI-Uganda, Double taxation treaties in Uganda: Impact and policy implications, July 2014, p.11. Available at http://www.ms.dk/sites/default/files/udgivelser/double_taxation_treaties_in_uganda.pdf, accessed on 10th April 2014.

⁸¹³ Action Aid and SEATINI-Uganda, *Op. cit.*, p. 12.

⁸¹⁴ Rwanda signed double taxation agreements with Belgium, Mauritius and South Africa.

⁸¹⁵ Appleby Guide, Guide to Double Taxation Agreements in Mauritius, Port Louis, Mauritius September 2014 <http://www.applebyglobal.com/publication-pdf-versions/guides/guide-to-double-taxation-agreement>, accessed on 11th April 2015.

⁸¹⁶ *Ibid*

(US\$ 1,018 million), India (US\$ 947 million), Kenya (US\$ 858 million), and China (US\$506 million). In 2011, Mauritius appears on the list, bringing in FDI amounting to slightly below US\$ 20 million (with 8 projects). It was 7th on the list of investing countries, which was headed by Kenya (US\$87 million), Norway (US\$78 million), India (US\$50 million) and China (US\$ 42 million). United Kingdom had dropped to 8th on the list (UIA, 2011).⁸¹⁷

Rwanda and Mauritius signed a DTA in 2001 which was renegotiated and re-signed in November 2013 after realizing that Mauritius was benefiting disproportionately from it. However, in signing DTA agreement with Mauritius, the Rwandan policymaker did not take into account the fact that his country is more experienced in negotiating and concluding DTAs. In the old agreement, all the taxation rights belonged to Mauritius because it was considered to be too generous to Mauritius People. In response to these changes, some companies have opted to register their companies in Mauritius before going commencing operations in Rwanda.

Among investors which have continued operating after the change of the DTA with Mauritius is SIFINTRA. This demonstrates that the renegotiation of DTAs by adopting agreements which mostly favours Rwanda is not a deterrent to FDI. *SAFINTRA* Roofing and Steel, started its operations in Rwanda in 2008 and has been operating at Kicukiro Sonatubes. *SAFINTRA* is part of a multinational group of companies – *SAFAL* group⁸¹⁸ and operates in Kenya and recently Burundi.⁸¹⁹ The firm has 120 permanent workers, ten of whom are foreigners.⁸²⁰ Questions can be raised as to whether a single company is allowed to employ such a number of foreigners without prior authorization from Rwanda Development Board.

⁸¹⁷ *Ibid.*

⁸¹⁸ The *SAFAL* group is one of the biggest steel manufacturers in East and Southern Africa. The company is involved in manufacturing and trading of painted and non-painted iron sheets. They are also involved in trading steel tubes and there are plans to trade in new items such that they offer complete roofing solutions to their clients. *SAFINTRA* is a fully foreign-owned company. The company says that no change in ownership has taken place since 2008 when *SAFINTRA* started operations in Rwanda. *SAFINTRA* imports 90% of its raw materials from Kenya. The remaining 10% come mostly from Uganda and on rare occasions India. . Almost all their products are sold locally and less than 1% is exported to DRC and Burundi.

⁸¹⁹ D. Malunda, *Op. cit.*, p.44.

⁸²⁰ *Id.*, p.45.

The most important issue with DTAs is that their negotiation is sometimes made in a very short period of time, without consulting all involved stakeholders for possible remarks and inputs. Generally, these agreements are made by government officials with minimal or no participation by non-state actors.⁸²¹ Another challenge is on the implementation process- especially in putting in place the appropriate institutional framework and putting into place persons who will deal day to day with their implementation. The result is that most of time this shyness leads to the absence of follow up by the concerned persons.⁸²²

One of advantages for countries when attracting foreign investors is the increase of their tax revenue. This is why every country needs a clear debate between various stakeholders in order to know with certitude what it shall gain from that agreement. It is then illogical that this stage is rarely respected and the result will be that developing countries lose their ability to negotiate and the aim of raising their incomes is rarely achieved.⁸²³

Ignoring the role of the Private Sector Federation in negotiation is really illogical since they are among organs which are directly concerned by those negotiations. It must be informed during the negotiations process and upon signature of such agreements. The same applies to the involvement of civil society organisations in the negotiation process. It is aberrant that they are not even aware of such agreements except few of them which intervene on economic development which may clearly know their changes or even make a kind of a follow up.⁸²⁴

Being under the same consideration of why countries conclude DTAs, it is good that Rwanda has renegotiated its DTA agreement with Mauritius after realizing what it stands to gain. Provisions of double tax agreements can sometimes be used as tools to avoid taxes. This is why it is very crucial for countries when concluding their DTAs, to reconsider how the interests of its citizens

⁸²¹ Agency for cooperation and research in Development, *Promoting Win-win Bilateral Free Trade Agreements, Perspective from Rwanda*, Kigali, Rwanda, February 2012, p.6.

⁸²² *Ibid.*

⁸²³ Action Aid and SEATINI-Uganda, *Op. cit.*, p. 12.

⁸²⁴ Agency for cooperation and research in Development, *Op. cit.*, p. 6.

will be protected. Countries must also make efforts to protect their domestic tax bases from misuse basing on the improper use of tax treaties.

This objective can be achieved by adopting specific and general anti-avoidance techniques as well as their interpretations.⁸²⁵ The negotiation must be guided by this guiding principle which says:

the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions.⁸²⁶

The UN and OECD models contain some provisions which may be considered as specific anti-avoidance. Some cases may for example be retained here. The beneficial-owner concept in articles 10, 11 and 12; the special-relationship rules in Articles 11 (6) and 12 (6); the taxation of capital gains on shares of land-rich companies in Article 13 (4); and Article 17 (2) dealing with the diversion of income to so-called star companies.⁸²⁷

Another way of avoiding abuses in the application of DTAs is to provide measures in their domestic laws. The use of domestic anti-avoidance rules which prevent abuses based on DTAs can be used as one of the solution if such rules are effective and if their application to tax abuses is not prohibited by the general principle that tax treaties prevail over domestic laws.⁸²⁸ In Rwanda for example, the Constitution in its article 190 proclaims the supremacy of international treaties and conventions over other laws except the constitution. It says “Upon their publication in the official gazette, international treaties and agreements which have been conclusively adopted in accordance with the provisions of law shall be more binding than organic laws and

⁸²⁵A. Trepelkov, H. Tonino and D. Halka, *Administration of Double Tax Treaties for Developing Countries*, United Nations Handbook, New York, 2013, p. 46. Available at http://www.un.org/esa/ffd/documents/UN_Handbook_DTT_Admin.pdf, accessed on 11th April 2015.

⁸²⁶ Idem, p.47

⁸²⁷ Idem, p. 46.

⁸²⁸ A. Trepelkov, H.Tonino and D. Halka, *Op. cit.*, p. 47.

ordinary laws except in the case of noncompliance by one of parties.”⁸²⁹ The only way of avoiding such conflict between domestic laws and international conventions in countries, is to include in these treaties’ provisions expressly allowing the application of domestic anti-avoidance rules.⁸³⁰ It is also prudent for countries to draft treaties in clear terms, to avoid any ambiguity in their interpretations. Host countries should make all possible efforts in avoiding conflict which may occur between their laws and treaties they may about to sign.⁸³¹

5.2.3 Non fiscal incentives

The Rwandan government also provides for non-fiscal incentives to foreign investors who invest in Rwanda. Among these, we include special protection which accepts to them, the grant of visa and work permits. All these forms of incentives are detailed in the following lines.

5.2.3.1 Protection of investors and their properties

The law says that the Government has the responsibility of protecting the capital invested. It says

it shall not acquire the rights of an investor on a registered investment enterprise over any activity that is included in the activities of the investment enterprise, except as relates to public interest according to periods and procedures provided by law and in consideration of; prior payment of adequate compensation, foreign convertible currency, a period not exceeding twelve (12) months from the date of acquisition, and such amount is freely repatriated to a country of the investor’s choice without being subject to any form of tax whatsoever.⁸³² Investment enterprises shall not be separated on issues relating to law or internal regulations that govern business enterprises and industries.⁸³³

The certificate of registration of an investor may indicate the procedure which will be used in arbitration case negotiations fail. And that act must respect consent of all parties involved in the case and their commitment to respect the terms and the decisions taken by the forum setting of

⁸²⁹ Article 190 Of the Constitution of 4 June 2003 as amended to date.

⁸³⁰ C. Elliffe, *International Tax Avoidance-the Tension Between Protecting the Tax base and Certainty of Law*, July 2015, available at http://www.researchgate.net/publication/228129901_International_Tax_Avoidance_-_The_Tension_between_Protecting_the_Tax_Base_and_Certainty_of_Law

⁸³¹ A. Trepelkov, H.Tonino and D. Halka, *Op. cit.*, p. 46.

⁸³² Article 30.

⁸³³ *Ibid*

disputes.⁸³⁴ In case of disagreement by both the parties on the mode or forum for arbitration, the aggrieved party, may sue in a competent Rwandan court for the decision to be rendered.⁸³⁵

In all cases, the principle of amicable settlement of dispute is privileged in all disputes between the government of Rwanda and investment. The judicial procedure may only be considered if it is shown that the negotiation between parties has failed.⁸³⁶ Disputes that arise between a foreign investor and the Agency or the Government of Rwanda in respect of a registered business enterprise that are not settled through negotiations shall be submitted to an international arbitration committee after both parties have mutually agreed upon it.⁸³⁷

5.2.3.2 Granting of visa to investors

The Rwandan law of the investment code says that

a foreign investor and his or her expatriate(s) are entitled to a free initial work permit and a free residence visa valid for a period of one (1) year. Renewal of such a visa shall be done after payment of an amount in place at that time. An investor who deposits an amount equivalent to five hundred thousand United States American Dollars (USD 500,000) on an account in one of the commercial banks in Rwanda for a period of not less than six (6) months shall be entitled to the right of acquiring permanent residence status in the country.⁸³⁸

5.3 FDI and balance of payments and job creation

⁸³⁴ Article 33

⁸³⁵ Article 34

⁸³⁶ Article 31

⁸³⁷ The law provides for this procedure to be followed: 1° in consultation with the centre responsible for settling disputes between investors; 2° in accordance with bilateral or multilateral agreements on protection of investment activities, of which the Government of Rwanda and the country from which the investor originates signed; 3° in accordance with any other international procedure of settling investment disputes, particularly the Convention of 18 March, 1965, concerning the Settlement of Disputes in matters of investment arising between States and foreigners on investing in a country concluded under the aegis of the International Bank for Reconstruction and Development and ratified by the Republic of Rwanda under the Decree-Law of 16, July 1979 approved by law n° 01/ 82 of 26 January 1982 approved decree-laws.

⁸³⁸ Article 20 of the Rwandan Investment Code.

One of the important needs for developing countries seeking to attract investors is the improvement of their balance of payments and the creation of jobs. Being used by countries as a tool for the economic development, we have asked ourselves on the extent to which it contributes to the balance of payment and jobs it creates.

5.3.1 Contribution of FDI in the balance of payments in Rwanda

The Balance of payments shows countries transactions with the rest of the world. It notes inflows and outflows of money and categorizes them into different sections.⁸³⁹ The link between export and balance of payment can easily be shown using this example. When a given amount of FDI (say \$100 million) first flows into a country, the normal assumption is that an equivalent amount of foreign exchange has come into the country.⁸⁴⁰

Even if countries consider that the role of FDI in the host countries is creation of jobs, technology transfer, human capital development and related functions, the focus is also oriented to the improvement of balance of payments of host countries directly through inflows by increasing exports.⁸⁴¹ FDI which invests in export oriented industries that produce goods which are not locally produced like agricultural products, minerals, and other products of the first necessity contributes in reducing a country's trade balance.⁸⁴²

Exporting companies' contribution to trade balance can be contrasted against that of companies which operate in the local markets only.⁸⁴³ If this objective is not observed, FDI loses its meaning because the contribution to the balance of payments is one of the cornerstones through

⁸³⁹Definition available at <http://www.economicshelp.org/blog/glossary/balance-payments/> , accessed on 2nd April 2015.

⁸⁴⁰ D. Malunda, *Op. cit.*, p. 17.

⁸⁴¹ A. Razmi, "The Effects of Export Oriented, FDI-Friendly Policies on the Balance of Payment in Developing Economies: A General Equilibrium Investigation", *University of Massachusetts*, Economics Department Working Paper Series, 2006, p.4.

⁸⁴² *Ibid.*

⁸⁴³ D. Malunda, *Op. cit.*, p. 12.

which countries attract investors. Some authors have contested this position arguing that the consequences of FDI inflows in the contribution to the reduction of the imbalance of payments is ambiguous and is also negative.⁸⁴⁴ It has been argued that investments directed at the domestic market have a lower impact on the balance of payments.⁸⁴⁵ If the economy of a country is well built, where by business persons may come from outside to buy commodities in the country, it may contribute towards improving the balance of payments in the countries. Developing countries like Rwanda manifest the deficit in their payments. The FDI oriented in the domestic market whether in service, factory, it rather generate a net negative external balance impact in the long run.⁸⁴⁶ In analyzing the role of FDI in the balance of payments a distinction is made between exports oriented industries located in EPZs⁸⁴⁷ and other export oriented industries. EPZ oriented FDI has been criticized that it plays a detrimental role in that it creates unfair competition to local industrial exporters. Additionally, EPZs benefit from tax incentives while generating low quality jobs.⁸⁴⁸

On the contrary, export oriented FDIs which are located in some zones in rural areas working in agriculture contribute significantly in improving the lives of local citizens by employing surplus labour from agriculture and promoting out grower schemes that boost farmer incomes in rural areas. The effects of such action would for example be envisaged when they build good infrastructure at the place of their establishment.⁸⁴⁹ When FDI is oriented primarily towards the export market and uses locally produced agricultural products, it has the potential to generate significant gains in external balance gains though some of these might be offset if the import content of exports is high.⁸⁵⁰

Coming back to Rwanda, it is aberrant that most of the FDIs which come to invest in Rwanda have only been orienting their activities in service industries and less towards export oriented manufacturing or sectors which may reduce the trend in acquiring foreign currencies by

⁸⁴⁴ A. Razmi, *Op. cit*, p. 5.

⁸⁴⁵ D. Malunda, *Op. cit*, p.12.

⁸⁴⁶ BNR, Monthly reports 2014, available at <http://www.bnr.rw/index.php?id=212> visited on 2nd April 2015.

⁸⁴⁷ EPZ means Economic Processing Zone

⁸⁴⁸ D. Malunda, *Op. cit*, p. 12.

⁸⁴⁹ *Ibid*.

⁸⁵⁰ *Ibid*

producing commodities which are highly needed by local consumers like foods processed, cloths, energy, etc. Most of investors we have in Rwanda are engaged in regional banking services⁸⁵¹, supermarket chains⁸⁵², construction and other sectors which operate in Rwanda with no prospects of improving the demand in foreign currencies. My view is the domains which would more interest Rwanda Development Board when attracting investors should be the agro processing factories, energy and water industries rather than giving incentives to foreign countries which do not bring innovations to the local market.

Another problem with FDI and balance of payments is the use of resources. The relationship between investors and their home countries impact significantly on the scarcity of foreign currencies in the host country. This occurs also when acquiring all materials or when they use labour force from their home country. An example which needs a particular attention is the relationship between some countries and the Chinese investment. Although developing countries benefit from infrastructure projects in the long run, they benefit much less than what they would have benefited from such FDI if had used labour and machinery procured locally on such projects.⁸⁵³ A country which then needs to increase its balance of payments through FDI should know how to balance between rights investors and the role they play in the development of the host country.

5.3.2 FDI and job creation

The relationship between FDI and development constitute the basis of FDI on two issues. FDI is expected to strongly contribute to the Job creation and raising public revenues generated in the form of taxes which are paid by companies incorporated in the host country. These revenues created by FDI will then be used for expenditures related to education, health and other public services and construction of other basic infrastructures. Whenever companies' subsidiaries are planted in other countries through FDI it is seen as a potential to the generation of new

⁸⁵¹ These banks are for example: Kenya Commercial Bank, Equity Bank, ECOBANK, Guarantee Trust Bank, etc.

⁸⁵² SIMBA supermarket, NAKUMATT, etc.

⁸⁵³ D. Malunda, *Op. cit.*, p. 18.

employment through hiring of people. In doing so, it improves on the employment in the country by creating new types of jobs created, regional distribution of new employment, wage levels, income distribution and skill transfer.⁸⁵⁴

The role played by FDI in job creation can be both negative and positive. It can be negatively perceived when for example it deteriorates working conditions instead of contributing to its improvement. Even if people think that FDI leads to improvements in employment levels in the host country especially for less developed countries, some other authors have pointed out that if trade and FDI are expected to positively affect employment creation, it cannot be automatically assured, as the employment expected can be diverse in different areas.⁸⁵⁵

Studies have, shown that the contribution of FDI in developing countries is very low and leads to decreasing tax footprint.⁸⁵⁶ When talking about job creations, one cannot ignore other factors inherent to employment such as: age, level of education, labour laws, minimum wage levels, and changes in interest rates, productivity, terms of trade, and the openness of the economy.⁸⁵⁷

Other scholars have said that the attraction of foreign investors may lead to the employment crowding-out where the inflow of FDI makes the competition more intense and then, domestic enterprises will reduce employment to improve their competitiveness. Furthermore, instead of creating new jobs, there may sometimes be an employment shift taking place in transfer of workers to new enterprises.⁸⁵⁸ Finally, there may also be employment loss for not suitable and workers for new corporate environment.⁸⁵⁹

⁸⁵⁴ Ibid.

⁸⁵⁵ Z. Brincikova, and L. Darmono, *Op. cit.*, p. 247.

available at <http://eujournal.org/index.php/esj/article/viewFile/2830/2661>

⁸⁵⁶ Redefine, Foreign Direct investment- A critical perspective. A re-define working paper, available at <http://redefine.org/sites/default/files/ForeignDirectInvestment-Acriticalper.pdf>, accessed on 1st April 2015.

⁸⁵⁷ Z. Brincikova and L. DARMO, "Impact of FDI Inflow on Employment in V4 Countries", (February 2014) V1, in *European Scientific journal*, p. 245.

⁸⁵⁸ Ibid.

⁸⁵⁹ This was a case some years ago with Kenya Commercial Bank. This bank picked workers from its competitors(Banque Populaire du Rwanda Ltd, Bank of Kigali, etc.

UNCTAD has reported in 1994 that transnational corporations are estimated to employ some 73 million persons at home and abroad. Although this represents only around 3 per cent of the world's labour force, employment in MNCs accounts for nearly 10 per cent of paid employment in non-agricultural activities worldwide, and close to 20 per cent in developed countries considered alone.

In addition, the indirect employment effects of MNCs, activity are at least equal to the direct effects and probably much larger. Backward linkages, such as the purchasing of raw materials, parts and components from subcontractors and external suppliers, are among the principal channels whereby MNCs can indirectly contribute to employment generation. The importance of these effects has grown in recent years, as firms have progressively focused on smaller but higher value segments of the production process, relying increasingly on national and international outsourcing for technological, cost or flexibility reason.”⁸⁶⁰

Coming back to Rwanda, some jobs have been created by foreign companies which come to invest in the local market. TIGO Rwanda is one of foreign investors which have benefitted from tax exemptions of zero duty on imports of telecommunication equipment for a period of five years. The number of jobs created by TIGO Rwanda within this period of tax exemption is 203 full time employees and 49 part-time employees as per October 2013. Among these, 18 employees are experts from foreign countries, 10 hold top managerial positions while 8 are middle managers.⁸⁶¹ This policy of recruiting employees contradict provisions of the annex of the Rwandan investment code in its point IX which says that any investment enterprise that invests at least two hundred fifty thousand United States Dollars (250,000) shall have rights to recruit three employees without necessarily demonstrating that their skills are lacking or insufficient on the labour market in Rwanda.⁸⁶² We believe that the requirement of expatriates which was in the article 20 of the former investment code,⁸⁶³ can only apply in case where the

⁸⁶⁰ D. Malunda, Op. cit, p. 10.

⁸⁶¹ Idem, p. 43.

⁸⁶² Annex of the law n°6/2015 Of 28/3/2015 on investment promotion and facilitation, in the *OGRR*, Special n° of 27 May 2015.

⁸⁶³ Article 20 para 1 of the Rwandan investment code of 2005.

company wants to recruit more than three employees. The fact that TIGO has around twenty foreigners in its personal is a violation to the aforementioned article. It is important to mention that the law accepts derogations but upon request to the Rwanda Development Board which may grant or reject it depending on specific reasons given.⁸⁶⁴

Another company which has attracted our attention is Mineral Supply Africa, a subsidiary of Cronimet Central Africa, a company based in Switzerland which is its biggest shareholder. Mineral Supply Africa was registered and started its operations in Rwanda in 2008. From the period of its registration in Rwanda, Mineral Supply Africa has been engaged in mining.⁸⁶⁵ The investment made by this company is a number of trucks, machines, job creation, capacity building to workers as well as supporting local miners with advance amount of money for their mines.⁸⁶⁶ As far as the issue of job creation is concerned, officials from the same company have said that their company has created 41 jobs in varied categories: machine operators, mineral processers, and mineral cleaners among others. In the 41 jobs created by the company only one position is occupied by a foreigner from DRC who holds a managerial position the remaining 40 positions are occupied by local. Besides this, the company provides capacity building to locals in providing skills in machine operating, mineral cleaning and processing.⁸⁶⁷

Another foreign company operating in Rwanda is AZAM, a grain milling company which operates in Rwanda, Uganda, Malawi, Burundi and Mozambique. AZAM⁸⁶⁸ was incorporated on 9th January 2009 in Rwanda but it started production in 2011. At the time of its establishment in Rwanda, it had the objective of manufacturing quality wheat products to cater of the local demand in Rwanda and export to Eastern DRC.⁸⁶⁹ AZAM started with an initial investment of

⁸⁶⁴ Article 20 para 2 of the same investment code of 2005.

⁸⁶⁵ D. Malunda, *Op. cit.*, p. 44.

⁸⁶⁶ *Ibid.*

⁸⁶⁷ *Ibid.*

⁸⁶⁸ Bakhresa Grain Mill Rwanda Ltd

⁸⁶⁹ D. Malunda, *Op. cit.*, p. 44.

\$25M, funds obtained on loan from the International Finance Corporation and over the years has re-invested \$5M by expanding the business, manufacturing products like juices.⁸⁷⁰

AZAM has created 270 employments in Rwanda among which 205 are full employed workers and 50 employees on contract basis. It also employs 15 foreigners and these occupy top management position. According to the Financial Controller K.P. Rao, the top management positions are mainly occupied by foreigners.⁸⁷¹ As we have said, the fact for AZAM to employ 15 workers infringes the ancient Rwandan Investment Code which said that the number of foreigners in foreign companies must not exceed 3 unless the company has received an authorization from the Rwanda Development Board.⁸⁷² It is worth noting that, since AZAM is a Tanzanian company, partner state of the East African Community, principles of free movement of goods and services are applied here.⁸⁷³

Another example that is noteworthy is the Rwanda Trading Company, a coffee exporter in Kigali, Rwanda. This company started its operations in 2009. Rwanda Trading Company works directly with Rwanda's coffee producers to procure, process, and market these coveted coffees throughout the U.S., Europe and Asia.⁸⁷⁴ Although it has been stated that the company started to operate in Rwanda in 2009, this is because it changed its ownership. Rwanda Trading Company was formerly called Rwandex. Its major shareholder is Scott Ford, a company which has been declared insolvent by the court and liquidated since.⁸⁷⁵

5.4 FDI and transfer of technology in Rwanda

The transfer of technology is one of tools used by countries to boost their economies using the foreign direct investment. OECD said in its report that:

⁸⁷⁰ *Ibid.*

⁸⁷¹ *Ibid.*

⁸⁷² Article 20 of the Rwandan investment code of 2005 which was repealed by that 28 March 2015

⁸⁷³ Article 7 of the EAC Protocol on the Establishment of the EAC common market of 2009

⁸⁷⁴ <http://westrockcoffee.com/origins/factory-spotlights/rwanda-trading-company>, accessed on 25th March 2015.

⁸⁷⁵ See RWANDATEL Ltd case in Judgement n° Rcom 0175/011/TC/NYGE Of 18th July 2011.

Economic literature identifies technology transfers as perhaps the produce positive externalities in the host developing economy. MNEs are the developed world's most important source of corporate research and development (R&D) activity, and they generally possess a higher level of technology than is available in developing countries, so they have the potential to generate considerable technological transfer. However, whether and to what extent MNEs facilitate such transfer varies according to context and sectors.⁸⁷⁶

Technology transfer is generally often done through interrelated channels: vertical and horizontal. The vertical channels link suppliers or purchasers in the host countries whereas the horizontal channels links competing or complementary companies in the same industry; migration of skilled labour; and the internationalization of research and development.⁸⁷⁷ The technology transfer requires a number of measures to be taken by countries. After explaining what transfer of technology means, the research will assess how effective is in Rwanda.

5.4.1 Meaning and origin of technology transfer

There are many definitions of technology transfer basing on where emphasis is put. A technology may be defined as the information necessary to achieve a certain production outcome from a particular means of combining or processing selected inputs.⁸⁷⁸ On the other side, technology transfer is

The process by which one party gains access to the knowledge of another party and becomes able to adapt successfully the knowledge in the production processes. Technology transfer may take place through market based and non-market based mechanism. Market based channels include trade in goods and services, foreign direct investment (FDI), licensing, joint ventures and cross border movement of personnel whereas major channels in the non-market based system are imitation, departure of employees (who later join in other firms/institutions or begin their own business) and data in patent applications and test data.⁸⁷⁹

⁸⁷⁶ OECD, *Foreign direct investment for Development MAXIMISING BENEFITS, MINIMISING COSTS, Overview, 2002, p.12.*

⁸⁷⁷ *Ibid*

⁸⁷⁸ J.Biswajit dhar and Reji, *Foreign Direct Investment, Intellectual Property Rights and Technology Transfer the north-south and the south-south dimension*, UNCTAD, background paper , n°. 6, 2012, p. 5. available at http://unctad.org/en/PublicationsLibrary/ecidc2012_bp6.pdf, Accessed on on 22nd February 2015.

⁸⁷⁹ *Ibid.*

According to WIPO⁸⁸⁰, technology transfer is the process by which a technology, expertise, knowhow or facilities developed by one individual, enterprise or organisation is transferred to another individual, enterprise organisation.⁸⁸¹ Others have defined technology transfer as the process of deliberate and systematic acquisition/provision/sharing/licensing of equipment and machinery, technology, skills, knowledge, intellectual property rights, business and organisational processes, designs and facilities, for the manufacture of a product, for the application of a process or for the rendering of a service.⁸⁸²

Technology transfer can be used through various channels. Among these we have licensing techniques, joint ventures or provision from which technology will be clearly transferred.⁸⁸³ Many MNEs assist local suppliers in purchasing raw materials and intermediate goods and in modernizing or upgrading production facilities. This aim is reached through a technical assistance, training and other information to raise the quality of the suppliers' products.⁸⁸⁴ For some authors technology transfer is among essential elements of bargaining between parties whereby host countries and investors decide to commercialize technology through foreign investment. This is the point of view of authors BISWAJIT DHAR and REJI Joseph when they say

although most of the studies have described this process as transfer of technology, the reality of the technology acquisition was aptly described by Constantine Vaitzos as one of "technology commercialization" or technology trade, which brought into focus the nature of the market through which technology is "transferred" to the developing country.⁸⁸⁵

⁸⁸⁰ WIPO means World Intellectual property Organisation.

⁸⁸¹ http://www.wipo.int/export/sites/www/sme/en/documents/pdf/technology_transfer.pdf, accessed on 22nd February 2015.

⁸⁸² United Nations Economic council Economic commission for Africa, Innovation and technology transfer for enhanced productivity and competitiveness in Africa, background paper, Abuja, 2014, p1., available at <http://www.uneca.org/sites/default/files/uploaded-documents/COM/com2014/com2014-innovation>, on 22nd February 2015.

⁸⁸³ Technology transfer can have various forms. Among these we have: Overseas factories founded through direct investment by suppliers, Businesses established by migrants from the supplier country, Joint ventures, Management contracts with suppliers, Turnkey contracts, where suppliers guarantee the transfer of technology when they construct a factory, The employment of engineers and skilled workers provided by the suppliers or by businesses owned by the receivers, Purchase contracts for machinery and know-how, Technology transfer as an integral part of the machinery imported by the recipient, Patent licence agreements, Production of imitations and In-house development of a technology.

⁸⁸⁴ *Ibid*

⁸⁸⁵ J.Biswajit dhar and Reji, *Op. cit.*, p. 3.

Technology transfer started just after the Second World War. Multinational Corporations, especially in the United States of America (USA), gained a monopoly over certain types of technology. Due to that monopoly they were able to dictate the rest of the world the way that technology can be used.⁸⁸⁶ Developing countries on the other side claimed that the new technology which was being used by Multinationals constitute their boons as it is protected by various conventions aimed at protecting intellectual property rights through patent rights.⁸⁸⁷

New technologies to build steam engines, coke-fired blast furnaces, spinning machines, railways and steam ships were steadily being developed and applied.⁸⁸⁸ The industrial revolution in Continental Europe and in the US has been made possible through the transfer of these technologies. The transfer of technology from Britain to Germany, France and the US is a topic of major significance within the study of modern Western economic history, as it enabled the spread of industrial know-how and industrialisation.⁸⁸⁹ When MNCs import products like chemicals and other technological appliances to be installed in developing countries using local employees, they also acquire knowledge which allows them to use that technology in the absence of those MNCs.⁸⁹⁰

5.4.2 Features and controversies of technology transfer in FDI

Supporters of the technology transfer through FDI have argued that local firms or industries benefit from foreign investors when the technology transfer is the aim of MNCs.⁸⁹¹ The expectation of attaining FDI spillovers has motivated governments in many transition economies to adopt policies aimed at attracting investors. They do envisage the foreign direct investment

⁸⁸⁶ TW. Bennett and J. Strug, *Op. cit.*, p. 231.

⁸⁸⁷ Paris convention for the protection of industrial property available at <http://fordhamipconference.com/wp-content/uploads/2010/08/MichelleMarsh4.pdf>, on 22nd February 2015.

⁸⁸⁸ Hoshimi Uchida, "Technology Transfer", in *The Era of Industrialisation*, Eds. Shunsaku Nishikawa and Takeji Abe, A History of the Japanese Economy, Vol. 4, Iwanami Shoten, 199, p. 4.

⁸⁸⁹ *Ibid.*

⁸⁹⁰ http://www.wipo.int/export/sites/www/sme/en/documents/pdf/technology_transfer.pdf, accessed on 22nd February 2015.

⁸⁹¹ These externalities are commonly known as spillovers because foreign investors cannot appropriate them fully.

with the aim of the modernization of their industrial structure and the upgrade of their infrastructure by acquiring new capabilities.⁸⁹²

Some authors have considered that the transfer of technology needs a certain level of skill and capacity exercised by the host country so as to allow them make the most of it.⁸⁹³ For technology transfer to generate externalities at the level of the MNC it needs to be relevant to the host-country business sector in general, and not only to be limited to the company that receives them first.⁸⁹⁴ The level of technology of the host country's business sector is of great importance because FDI to have a more positive impact than domestic investment on productivity, the "technology gap" between domestic enterprises and foreign investors must be restricted.⁸⁹⁵ Local companies in the host country must be at the level which is able to absorb technology from MNCs which are in the country.

However, this view was not unanimously accepted. Some scholars have argued that it would appear that the larger the technological gap, the greater the spillover, up to a certain point.⁸⁹⁶ It may be possible to an extent but if the company brings a very sophisticated technology, my view is that the host country may find itself under a situation in which it cannot absorb that technology.

Even if the rationale of attracting FDI is to upgrade local industries, sometimes, domestic firms may also suffer negative externalities, like the loss of skilled employees to MNC affiliates.⁸⁹⁷ In

⁸⁹² E. Sinani and E. Klaus Meyer, *Spillovers of Technology Transfer from FDI: The Case of Estonia*, *Journal of Comparative Economics*, Center for East European Studies, Copenhagen Business School, Howitzvej 60, 2000 Frederiksberg, Denmark 2004, p. 3.

⁸⁹³ WTO, *A Taxonomy on Country Experiences on International Technology Transfers*, Working Group on Trade and Transfer of Technology, 11 November 2002, p.4. Available at <https://www.cbd.int/doc/case-studies/ttc/ttc-00043-en.doc>, visited on 3rd July 2015.

⁸⁹⁴ OECD, *Op. cit.*, p. 13.

⁸⁹⁵ *Ibid.*

⁸⁹⁶ J. Bouoiyour, *Op. cit.*, p. 1.

⁸⁹⁷ In Rwanda the same experience occurred. New companies which want to start their activities in Rwanda do always recruit employees from their sister companies with skills instead of recruiting fresh employees. This was experienced by various banks following the coming of Kenya Commercial Bank, Equity and so on.

doing so, local companies may suffer a high competition from their sister companies because they employ their former employees who know their trade secrets.⁸⁹⁸

Another controversial issue in the relationship between foreign investors and host countries resides also in the way intellectual property rights are protected. The technology transfer puts together two contradicting situations: the promotion of technology in host countries and the protection of intellectual rights. The controversies on technology transfer in FDI are mainly based on the fact that intellectual property rights of investors need a strong protection whereas the countries need that technology.⁸⁹⁹ The following lines discuss the way intellectual rights of investors can be compulsory licensed.

5.4.3 Technology transfer through compulsory licensing in Rwanda

Among techniques which may also help in technology transfer is the grant of licenses to local companies which may engage in the same sector. A compulsory license is an authorization given by a national authority to a person, without or against the consent of the title-holder, for the exploitation of a subject matter protected by laws.⁹⁰⁰ Compulsory licensing is an exception to the main principle of patent law, namely that the patent holder enjoys the exclusive right to authorize the use of its patented invention.⁹⁰¹

Licensing is defined as a

⁸⁹⁸ The issue of secrete is very important to corporations is very crucial. The insider trading has been envisaged as illegal sometimes when revealing secretes of the company. The so called "Insider trading" in business is a term that most investors have heard and usually associate with illegal conduct. But the term actually includes both legal and illegal conduct. The legal version is when corporate insider's officers, directors, and employees buy and sell stock in their own companies.

Illegal insider trading refers generally to buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, while in possession of material, nonpublic information about the security. Insider trading violations may also include "tipping" such information, securities trading by the person "tipped," and securities trading by those who misappropriate such information.

⁸⁹⁹ TW. Bennett and J. Strug, *Introduction to International Law*, Juta, Cape Town, 2003, p. 231.

⁹⁰⁰ C. M. Correa, *Intellectual Property Rights and the use of Compulsory Licenses: Option for Developing Countries*, Trade Related Agenda, development and Equity Working Papers, south center, October 1999, p.3., available at http://www.iatp.org/files/Intellectual_Property_Rights_and_the_Use_of_Co.pdf

⁹⁰¹ X, EU contribution on legal issues related to compulsory licensing under the TRIPS agreements available at http://trade.ec.europa.eu/doclib/docs/2006/may/tradoc_122031.pdf

written contract under which the owner of a copyright, know how, patent, service mark, trademark, or other intellectual property, allows a licensee to use, make, or sell copies of the original. Such agreements usually limit the scope or field of the licensee, and specify whether the license is exclusive or non-exclusive, and whether the licensee will pay royalties or some other consideration in exchange. While licensing agreements are mainly used in commercialization of a technology, they are also used by franchisers to promote sales of goods and services.⁹⁰²

The technology transfer agreements differ from other types of agreements. This agreement entitles the undertaking of transfer of technical information to be used in a special technical process in return for a financial consideration to produce or to develop a certain product, install or operate machines or devices or provide services.⁹⁰³ Licensing can here involve the purchase of production and distribution rights and the know-how required to enable the exercise of production and distribution rights. This technique provides local companies in improving their technologies by lawfully imitating style of production of MNCs through licensing.⁹⁰⁴

In licensing, MNCs provide to their local subsidiary companies superior knowledge based assets whereas local firms provide local advantages like distribution networks, brand recognition.⁹⁰⁵ Even if the transfer of technology is a vertical relationship, this does not prevent the recipient from improving that technology, even in a better way than the original inventor. For instance, China invented gunpowder, but the Europeans used and developed it for world conquest.⁹⁰⁶

Compulsory licensing is one of channels from which countries can benefit technology spillover. In USA for example, on 6 July 1994, the US Federal Trade Commission (FTC) required Dow Chemical to license to a potential entrant intangible dicyclomine assets, including “all formulations, patents, trade secrets, technology, know-how, specifications, designs, drawings,

⁹⁰² <http://www.businessdictionary.com/definition/licensing-agreement.html> , accessed on 17th March 2015.

⁹⁰³ Arab Countries, Guide for Licensing technology transfer agreements, Licensing executives society, 2007, p.4. available at <http://www.tag-publication.com/UploadFiles/khaled/LES-AC/Les%20Eng2.pdf>

⁹⁰⁴ Ibid

⁹⁰⁵ http://www.wipo.int/export/sites/www/sme/en/documents/pdf/technology_transfer.pdf, accessed on 22nd February 2015.

⁹⁰⁶ R. Li-Hua, *From Technology Transfer to Knowledge Transfer-a study of International Joint Venture Projects in china* available at <http://hadjarian.org/esterategic/tarjomeh/li-hua.pdf>, visited on 23rd February 2015.

processes, quality control data, research materials, technical information, management information systems, software and all information relating to the United States Food and Drug Administration Approvals” that are not part of the acquired company’s physical facilities or other tangible assets.⁹⁰⁷ If these information are compulsory licensed, it is very clear that countries will gain easily that technology.

The same principle has been also applied in the case of *FTC v. Xerox Corporation* a Consent Decree was issued in the United States according to which the patent and know-how barriers to competition developed by Xerox were eliminated by requiring Xerox to license some of its patents free of royalty, and the rest at low royalties, and to offer all of its office copier know-how royalty-free to US patent licensees.⁹⁰⁸

Compulsory licensing even if accepted, extends to some activities only, it has been indirectly recognized by the Paris Convention on the Protection of Industrial Property. Under its article 5A it allows countries to put into place protectionist measures by granting compulsory licenses in order to prevent abuse by using excessive rights conferred to patent holders.⁹⁰⁹

Transfer of technology can be made through movement of skilled personnel. The transfer of technology requires the transfer of complementary services of engineers and technicians to do in-site jobs. They can better equipped personnel in subsidiaries in the host countries. This way of transferring technology to subsidiaries can easily work than transferring skilled personnel to unrelated companies.⁹¹⁰ The Paris Convention has, however, provided for barriers to compulsory licensing. The convention says that a compulsory licence may not be applied on grounds of failure to work or insufficient work before the expiration of a period of four years from the date of filing the patent application or three years from the date of the grant of the patent, whichever

⁹⁰⁷ C. M. Correa, *Op. cit.*, p. 6.

⁹⁰⁸ *Ibid*

⁹⁰⁹ S. M. Reis., *Commentary on the Paris Convention for the Protection of Industrial Property*, Honolulu, Hawaii, USA, available at <http://www.lex-ip.com/Paris.pdf>, visited on 6th May 2015.

⁹¹⁰ MASKUS (2004) suggests that the bulk of the international technology transfer takes place through market based mechanisms or within multinational firms quoted by J.Biswajit Dhar and Reji, *Op. cit.*, p.6.

period expires last; such licence must be refused if the patentee justifies his inaction with legitimate reasons. It must be non-exclusive; non-transferable, even in the form of the grant of a sub-licence, except with that part of the enterprise or goodwill which exploits such licence.⁹¹¹

In compulsory licensing, the license is granted without the consent of the patentee in certain conditions. To grant this right, some conditions must be observed. Some of these conditions include: the person or company applying for a license must start negotiating a voluntary license with the patent holder basing on usual commercial conditions. If this condition fails, it is from that a compulsory license can be issued.⁹¹² Though a compulsory license can be issued, the patent owner is entitled to compensation. The TRIPS Agreement states “the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization”.⁹¹³ The problem here would be that of knowing the real meaning of adequate remuneration. It is up to the courts to determine the extent of this concept.

The Rwandan law, like other countries provides; for the compulsory licensing in two different cases only. Compulsory licensing is accepted either when the owner of the license has failed to use it, for instance, in the case where the owner of the patent manifests the absence or insufficient nature of industrial or commercial use of a patented invention in the Republic of Rwanda, or when the owner is abusively exercising his exclusive rights or neglecting to take measures aiming at using it in a proper way.⁹¹⁴ Such decision is taken in a cabinet meeting and the patent is given to another company which has manifested the willingness and the capacity of using it⁹¹⁵

Another case where the license can be compulsory granted, is what the legislator has called the *ex officio* compulsory licensing. According to the law, the Government of Rwanda may decide that even without the agreement of the patent owner a government the department or a third party

⁹¹¹ Paris convention for the protection of industrial property. Available at <http://fordhamipconference.com/wp-content/uploads/2010/08/MichelleMarsh4.pdf>.

⁹¹² X, *TRIPS Agreement: an Overview, IP Services, India*, 2008, p. 10, available at <http://www.ipproinc.com/admin/files/upload/5638424eba1ffe6d201d715e91034b8b.pdf>. visited on 6th May 2015.

⁹¹³ Article 31 (h) of the TRIPs

⁹¹⁴ Articles from 47 to 50 of the law on protection of intellectual property rights.

⁹¹⁵ Article 47.

appointed may, with appropriate remuneration, use the invention for the sake of public interest, in particular for national security; public health and environment protection. The same measure may also be used following the court decision if it has been noticed that the patent owner or his licensee uses the invention is anti-competitive.⁹¹⁶

The issue of transfer of technology is very controversial. Looking at the provisions of the law, we may conclude that the transfer of technology through compulsory licensing may not be possible since its application is clearly limited to some cases which have been exhaustively enumerated by the law. It must also follow a tuff procedure as it is stated in the law.

In contrast, in some countries, the compulsory licensing has been used as a unique way of accessing the technology of international companies. In China and India for example, information technology transfer through compulsory licensing offers a unique opportunity to exploit advantages of international trade. The compulsory licensing makes the green technology available to developing countries at an affordable price.⁹¹⁷ Rwanda and other developing countries should also consider this opportunity in order to make the transfer of technology possible without infringing rights of inventors. Another channel from which technology is transferred is the joint venture between local companies and MNCs.

5.4.4 Technology transfer through joint venture

This is a kind of arrangement between two or more firms, where each one provides some advantage that result in reduced cost of operation.⁹¹⁸ Local companies which generally are presumed to be of lower level of technology benefit from MNCs which are presumed to have high level of technology. A joint venture is a contractual business undertaking between two or more parties. Joint venture is:

⁹¹⁶ Article 51 of the Rwandan law of intellectual protection.

⁹¹⁷ R. Rish.Gupta, "Indian comparative advantage in the Manufacture and exportation of Green Technology", (2008), *Sustainable Development Law and Policy*, V.12., Issue 3 Rio+20, p. 54.

⁹¹⁸ UNCTAD, 6.

Similar to a business partnership, with one key difference: a partnership generally involves an ongoing, long-term business relationship, whereas a joint venture is based on a single business transaction. Individuals or companies choose to enter joint ventures in order to share strengths, minimize risks, and increase competitive advantages in the marketplace.⁹¹⁹

The Glossary of OECD⁹²⁰ defines a joint venture as

a contractual agreement between two or more parties for the purpose of executing a business undertaking in which the parties agree to share in the profits and losses of the enterprise as well as the capital formation and contribution of operating inputs or costs. It is similar to a partnership, but typically differs in that there is generally no intention of a continuing relationship beyond the original purpose.⁹²¹

In these two definitions there is no provision for technology transfer but working together and sharing resources as well as losses could be seen that whoever is advanced in technology, will allow the other to learn from him/her. In relation to their investors, host countries sign agreements for joint ventures and it offers benefits to all parties. This can be done when providing location-specific knowledge regarding the host country's markets, local tastes, local business practices, local labour, local suppliers, and local business-government relations.⁹²²

In joint ventures, the technology shared between nations is dominated by transfers among multinational and their corporate affiliates. The joint venture relationship offers great benefits to host countries. Some US and European parent firms shun joint venture arrangements where international sourcing, quality control, rapid technological change, product differentiation, and integration with external markets rather than purely domestic sales dictate corporate strategy.⁹²³

⁹¹⁹ <http://legal-dictionary.thefreedictionary.com/Joint+Venture> accessed on 1 March 2015.

⁹²⁰ OECD, *Glossary of Foreign Direct Investment Terms and Definitions*, available at <http://www.oecd.org/daf/inv/investment-policy/2487495.pdf> visited on 2nd May 2015.

⁹²¹ The same glossary adds that A joint venture may not involve the creation of a new legal entity. Whether a quasi-corporation is identified for the joint venture depends on the arrangements of the parties and legal requirements. The joint venture is a quasi-corporation if it meets the requirements for an institutional unit, particularly by having its own records. Otherwise, if each of the operations is effectively undertaken by the partners individually, then the joint venture is not an institutional unit and the operations would be seen as being undertaken by the individual partners to the joint venture. Because of the ambiguous status of joint ventures, there is a risk that they could be omitted or double-counted, so particular attention needs to be paid to them.

⁹²² Institute for International Economic, FDI and joint venture requirements, p. 199, Available at http://www.piie.com/publications/chapters_preview/53/7iie258x.pdf accessed on 16/03/2015.

⁹²³ OECD, *Foreign direct investment, development and corporate responsibility*, Cedex, France, 2000, p. 47.

Many host countries justify joint venture requirements with arguments that joint ventures achieve great technology transfer, expands access to external markets, and more robust backward linkages to domestic economy than wholly owned subsidiaries.⁹²⁴ One example of a joint venture agreement was one signed by the government of Rwanda and KT Corporation (NYSE: KT), South Korea's largest telecommunications for a period of 25 years with the aim of providing a high-speed (4G LTE) broadband network. Through this agreement, KT was expected to bring expertise and make staged cash injection of around \$140 million, while the Government's equity investment in the JV includes assignment of its extensive (over 3,000 km) national fibre optic network assets, spectrum and a wholesale-only operator license.⁹²⁵

Though foreign investors may consider joint ventures as a mechanism which only disadvantages them there are also some advantages, it can however, provide them with advantages they would not ordinarily get if they worked alone. The Rwandan land law grants freehold title to land to only Rwandan companies. The same law adds that companies or a group of individuals co-owning land, an organisation or association with legal personality can have freehold title only if at least 51% of its stake is owned by Rwandan citizens except in economic zones.⁹²⁶ These are one of the barriers which have been put into place by the Rwandan legislature which would encourage joint ventures for companies desiring to acquire lands in Rwanda.

As was said previously, there is no clear policy which can help in in-seminating technology through joint venture vehicles. This loophole leads to the absence of a clear implementation of the policy of technology transfer in Rwanda. The government of Rwanda through Rwanda Development Board and Ministry of Commerce should urgently work together in order to put into place a legal policy which will help technology acquisition through joint venture and compulsory licensing.

⁹²⁴ Ibid.

⁹²⁵ [http://www.gov.rw/newsdetails2/?tx_ttnews\[tt_news\]=168&cHash=0f1a01e22362fd833296c274225bef0](http://www.gov.rw/newsdetails2/?tx_ttnews[tt_news]=168&cHash=0f1a01e22362fd833296c274225bef0) visited on 2nd May 2015.

⁹²⁶ Article 6 of the law n° 43/2013 of 16/06/2013 Governing Land in Rwanda, in *OGRR*, no Special of 16/06/2013.

5.5 FDI and Corporate Social Responsibility

The relationship between companies and host countries can sometimes go far from the mere mutual respects of reciprocal obligations between them. MNCs may sometimes be obliged to act out of the sphere of their domain of activities in order to improve socio-economic lives of inhabitants of the host country. In this section we shall see the extent to which MNCs in Rwanda consider also this obligation.

5.5.1 Definition and scope of CSR

The concept of corporate social liability (CSR) is an issue which is somehow vague. This concept is used to describe the way in which corporations may positively affect the society in which they operate.⁹²⁷ The World Bank and the World Business Council on Sustainable Development (WBCSD) defines CSR as “the commitment of business to contribute to sustainable economic development working with employees, their families, the local community and society at large to improve their quality of life, in ways that are both good for business and good for development.”⁹²⁸

Even if as we said the concept seems to be vague, some examples of CSR have been retained: ensuring that the private sector does not contribute to violations of human rights and promotes the respect of these rights; the respect of core labour standards, ensuring that local communities benefit from large companies’ operations in developing countries, responsible management of environmental impacts of a company’s operations, including emissions, waste and use of sustainable resources, avoidance of corruption and the increase in transparency in business practice, incorporation of social and environmental criteria in procurement decisions.⁹²⁹

⁹²⁷ CH. Uden, *Multinational Corporations and Spillovers in Vietnam*, Institution of Economics, LUNDI University, Master’s Thesis in Economics, 2007, p. 11.

⁹²⁸ <https://sweden.se/wp-content/uploads/2013/11/CSR-high-resolution1.pdf>

⁹²⁹ CH. Uden, *Op. cit.*, p. 12.

During the past years, the relationship between business and society through CSR has become important and attracted many thinkers. This was a response to pressure from consumers, civil society, large enterprises and governments in forcing companies to become more environmentally and socially responsible due to environmental pollution, human rights abuses, etc.⁹³⁰

The Chinese government has made clear its position on the issue of CSR in these words “While pursuing economic profits, corporations are held responsible by shareholders, employees, consumers, suppliers, communities, and other stakeholders. Moreover, corporations have responsibilities to protect the environment.”⁹³¹ On the other hand, the UK government has also defined it as “as how companies address the social, environmental and economic impacts of their operations and so help to meet our sustainable development goals. Specifically, we see CSR as the voluntary actions that business can take, beyond compliance with minimum legal requirements, to address both its own competitive interests and the interests of wider society.”⁹³² Lastly, the World Bank has also said that “The commitment of business to contribute to sustainable economic development, working with employees, their families, the local community, and society at large to improve their quality of life, in ways that are both good for business and good for development.”⁹³³

CSR is a situation which has been claimed by NGOs, trade unions, consumers and shareholders because companies should not only be seen in the sphere of violating human rights like polluting environment, employing children, but also in a positive development such as helping to

⁹³⁰ *Ibid.*

⁹³¹ F. Maya, *et. alii*, *Corporate responsibility in African Development : Insights from an Emerging Dialogue*, October 2010, 11 on http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_60.pdf

⁹³² UK Government

⁹³³ The World Bank

eradicate poverty.⁹³⁴ As this responsibility resulted from the pressure from various organisations as we have said, this is why it has been perceived negatively.⁹³⁵ The fight was then oriented to principles not using child labour or violate human rights rather than considering positive development such construction of hospitals, schools, eradication of poverty in general.⁹³⁶

This principle from which companies contribute in the CSR is left to the thanks of companies themselves. This obligation has been left to various organisations with development orientation like World Bank, UN and some national development cooperation agencies such as DFID in the UK and the Canadian International Development Agency (CIDA).⁹³⁷

Although CSR is seen as a burden, it has concrete foundation. For the UN, the CSR falls under its program of the Millennium Development Goals (MDGs); a program with the only focus of eradicating poverty and hunger, achieving universal primary education, promoting gender equality, reducing mortality and improving health, and ensuring environmental sustainability. Its main objective is to reduce poverty for persons living on less than 1 USD a day by half between 1990 and 2015.⁹³⁸ Another cause justifying why FDI must intervene in development in the host country is the fact that states have been obliged to reduce their roles in developing economies by giving these tasks to private corporations.⁹³⁹

Among organisations which fought to promote CSR in a development context DFID can be considered as a pioneer when in 1997 it created a Socially Responsible Business Unit following the publication of the first White Paper on International Development which clearly imposes corporations to respect core labour standards and protection of human rights in general. Its

⁹³⁴ R. Jenkins, *Globalization, Corporate Social Responsibility and pPoverty*, Article presented at two workshops, at the Copenhagen Business School in August 2004 and at Chatham House in January 200, .p.527.

⁹³⁵ *Ibid.*

⁹³⁶ *Ibid.*

⁹³⁷ *Ibid.*

⁹³⁸ *Ibid.*

⁹³⁹ *Ibid.*

second paper emphasized on the CSR in poverty reduction.⁹⁴⁰ Other development agencies have also recently emphasized the role of CSR in promoting development. These include CIDA, the Swedish International Development Agency (SIDA), the German Federal Ministry for Economic Cooperation and Development (BMZ) and the Dutch Ministry of Development Cooperation (MBZ).⁹⁴¹

5.5.2 ILO tripartite declaration of principles concerning multinational enterprises and social policy

The issue of positive social intervention of MNCs has not been ignored in the international sphere. The Tripartite Declaration of Principles concerning Multinational Enterprises and social policy was adopted by the Governing Body of the International Labour Organisation in its 204th Session in November 1977 and be amended in its 279th held in November 2000.⁹⁴² The declaration has emphasized on several issues from which countries, companies, employees and employers would observe when promoting social- economic lives of inhabitants of the host countries.

The declaration stresses on the role Multinational enterprises in the economies of countries; because of this, through FDI can bring considerable benefits to host countries by improving the social welfare by playing an important role to the improvement of living standards and the satisfaction of basic needs; and to the enjoyment of basic human rights but basing on the framework policies of governments.⁹⁴³ Countries should then take the first step by putting into place, legal and institutional measures which ensure their commitment to the contribution to the welfare of its citizens by Multinationals through corporate social responsibility.

⁹⁴⁰ *Ibid.*

⁹⁴¹ *Ibid.*

⁹⁴² <http://www.ilo.org/public/english/standards/relm/gb/docs/gb295/pdf/mne-1-3.pdf>

⁹⁴³ ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, point number one.

http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/documents/publication/wcms_101234.pdf

The main aim of the declaration is to encourage the positive contribution which can be made by Multinationals in improving economic and social progress of inhabitants of the host countries through corporate social responsibility. The CSR is also used in reducing the adverse impact which may arise as a result of various operations of MNCs.⁹⁴⁴

The declaration serves as a global instrument designed to provide guidance to government and Multinationals in implementing principles of CSR.⁹⁴⁵ In doing so, the declaration has recommended that countries put in place laws and policies, measures and appropriate actions in order to provide all stakeholders with sufficient with sufficient framework which defines clearly the role to be played in the CSR.⁹⁴⁶ Furthermore, the employers and workers of Multinationals must also take similar actions by adopting social policies and their clear action of plan for their intervention in CSR.⁹⁴⁷

5.5.3 Scoping and perception of Corporate Social responsibility in FDI

The link between FDI and CSR is not clearly expressed but it results from other factors from which it is supposed to intervene. Its role in poverty reduction shows clearly how FDI plays a major role in CSR. If countries mainly developing ones do refer to FDI to boost their economies, it is very normal if we attach FDI to poverty reduction especially through CSR.

In some African countries, like Kenya, Mozambique, Ghana and Malawi, the surveys have shown that CSR among business in Africa have found in philanthropic support like on Education, health and environment protection.⁹⁴⁸ In Kenya, for example, the interventions have been found in health and medical provision, and donations are also directed towards education and training, HIV/AIDS, agriculture and food security, and underprivileged children. In Zambia,

⁹⁴⁴OECD, *Guidelines for Multinational Enterprises*, *Op. cit*, p. 43

⁹⁴⁵ OECD, *Overview of Selected Initiatives and Instruments Relevant to Corporate Social responsibility*, 2008, p.248. available at <http://www.oecd.org/corporate/mne/40889288.pdf>

⁹⁴⁶ Point 3 of the Declaration.

⁹⁴⁷ Point 4 of the Declaration.

⁹⁴⁸ F. MAYA., *et. alii*, *op. cit*, p. 15

the focus was rather on supporting orphanages, supporting events like cultural ceremonies, education and health provision and donation to religious based organisations.⁹⁴⁹

Scholarship is not unanimous on the role FDI play in poverty reduction. Some authors support the positive role which is played by FDI in poverty reduction other emphasize on the issue that the role of FDI in poverty reduction depends critically on local capabilities to absorb FDI and on the local policy framework.⁹⁵⁰ If then, FDI respect their role, this will lift some people out of poverty. Whereas, the practice of CSR is focused on both sides the financial and social performance of companies and the state's role in CSR is policy formulation.⁹⁵¹ The problem here would be that countries do not clearly define the role of FDI in participating in socio- economic rights of their inhabitants. This reticence leads to the fact MNCs instead of positively contributing to poverty reduction in the host countries, they sometimes have negative impacts. Their negative impact can for example be seen when companies do not monitor the social impact of their activities.⁹⁵²

When MNCs pursue only their monetary profits to the exclusion of other goals can have adverse impacts in the main long goal from which they are the most actors in poverty reduction. Socially irresponsible businesses will find their profits diminished by growing economic and social insecurity, shrinking markets and the depletion of available raw materials because the CSR benefits indirectly to MNCs.⁹⁵³ Companies have an indirect interest in contributing to the improvement of lives of myriad people living in the host countries. The logic being simple, we all know that no single company would wish to operate in a country where there is no manpower. The means to have them contribute to their own lives by participating in programs fighting HIV/AID, or by building more hospitals, etc.

⁹⁴⁹ Id., p. 16.

⁹⁵⁰ R. Jenkins, *Op. cit.*, p. 531.

⁹⁵¹ E. Taliouris, *Is CSR a Policy Tool for Sustainable Development in South Europe? Case Study in Greece*, available at <http://www.lse.ac.uk/europeanInstitute/research/hellenicObservatory/CMS%20pdf/Events/2011-5th%20PhD%20Symposium/Revised/TALIOURIS-updated.pdf>

⁹⁵² Id., p.535.

⁹⁵³ DFID, *Socially Responsible Business Team strategy*, p. 2.

CSR can be realised when MNCs provide anti-retroviral drugs to workers who are HIV positive. Workers suffering from HIV/AIDS who do not receive treatment are unlikely to be able to continue working and have low life expectancy such a policy can make a significant in preventing their households from living into poverty.⁹⁵⁴ The situation shall be better when the benefit is extended to family members and to workers after they have leave employment.⁹⁵⁵

Similarly, the non respect of core rights can lead to poor performance of companies. It has been shown for example, that in Pakistan that the shift to concentrate production in factories, in response to concerns about child labour, led to many women home workers losing out. The same has been shown when there is concentration on a small group of people. It can have an adverse impact on the society. The eloquent example would be in South Africa when wine industries tend to widen inequality in agriculture and further concentrate power in the hands of wealthy white famers.⁹⁵⁶

5.5.4 CSR in Rwanda

The situation in Rwanda does not seem to be very far from that of other countries which are under the same development context. Some of features of the Rwandan CSR are the lack of a framework on its implementation. In an interview held with people from MINICOM⁹⁵⁷ on 14th and 15th May 2015 they told me that there is no legal framework on CSR but they have just started few days ago to think about it.⁹⁵⁸

Even if there are no legal and institutional frameworks on CSR in Rwanda, there are some individual companies that take initiatives. AZAM one of foreign companies operating in Rwanda, in addition to the jobs it has created for the people of Rwanda and providing quality wheat products has undertaken a pilot project in cooperation with Ministry in recognition of its social responsibility. The company has also donated various sums to Gasabo district for

⁹⁵⁴ R. Jenkins, p. 537.

⁹⁵⁵ Ibid.

⁹⁵⁶ Ibid.

⁹⁵⁷ MINICOM is an acronym standing for Ministry of commerce

⁹⁵⁸ Interview with legal department at MINICOM

construction of class rooms in the local school. To promote the sports, it has sponsored one Football match between AZAM Football Club and Rayon sports Football Club in Kigali. It also contributed to the Agriculture for assessing the potential to grow wheat in Rwanda. It has already completed one harvest in Northern part of Rwanda, Musanze and Western part of Rwanda (Kayonza) and the results are being assessed.⁹⁵⁹

Another example is that of The Bank of Kigali. Through its partnership with IMBUTO Foundation, it has for the past three years provided scholarships to 200 students from needy backgrounds.⁹⁶⁰ This Bank also supports the Operation Smile, the International children's medical charity to carry out cleft palate surgery on Rwandan children born with cleft lips and cleft palates. Bank of Kigali committed USD 30,000 to be utilized for the surgical procedure. Since the establishment of Operation Smile in Rwanda in 2009, over 1000 patients have had successful cleft surgeries.⁹⁶¹

Furthermore, MTN Rwanda also participated in numerous activities in Rwanda⁹⁶², MTN Rwanda equipped Rusumo High School a fully connected lab with 36 computers. The project was designated to enable teachers and pupils in secondary schools gain practical skills on the usage and understanding of ICT and how it can add value to their lives. This support was made under the company's corporate social responsibility program. The support was not only given to Rusumo High school, MTN supported also other schools in different provinces and these include Essa High School in Musanze, Sainte Bernadette in Huye, Kabarondo High School, Kanombe High School, ESG Rubavu and Gihundwe high School. In overall, MTN Rwanda has donated

⁹⁵⁹ D. Malunda, *Op. cit.*, p.23.

⁹⁶⁰ <http://bk.rw/index.php/about-us/corporate-social-responsibility/ongoing-projects/partnership-with-imbuto-foundation>

⁹⁶¹ <http://bk.rw/index.php/about-us/corporate-social-responsibility/ongoing-projects/partnership-with-operation-smile>

⁹⁶² It worth to mention that the staff in charge of social responsibility told us that we should wait until July because she was in a campaign in the rural area that she will be available in that month then we contented ourselves on date available in their website. In various websites we have found that MTN Foundation-Department of CSR MTN has been involved in the below projects: Education: Scholarships, 21 Days of Y'ello Care. Community & Health: Operation smile, Genocide commemoration, Blood donation. Disaster and emergency support , Supporting government initiatives of Nyakatsi (Avega members), Mutuelle de sante (Health insurance) , Tree planting Environmental friendly generators & Antennas, Me to U. Poverty reduction: Supporting vulnerable families with Cows, Supporting cooperatives and Distribution channel

more than 250 computers in these schools, across the country to be benefited by more than 5,500 students and 300 teachers.⁹⁶³ MTN also in partnership with IMBUTO Foundation funded 100 underprivileged students in a project worth 90 Million covering students from throughout their secondary education. It contributed also to the simile operation of 1680 Rwandese benefited from free cleft lip surgery, 89 Health care professionals trained and this project worth more than Rwf 33 million.⁹⁶⁴

Bralirwa is also a company which participates in the CSR. According to *Sven Piederiet*, the managing director of Bralirwa, it has also been involved in different activities, including helping local development, Hospital, light and protecting the earth. For the local community, Bralirwa started the company to develop maize growing with local entrepreneurs for raw materials to be used by it instead of importing them overseas. Secondly, it also supports the Rwandan Genocide Memorial, tree planting initiatives, health initiatives as well as offering support to local schools.⁹⁶⁵ From these few examples, we can see that these initiatives though not sufficient are good since they are organic without being obliged by any governmental policy. The government of Rwanda should take this opportunity in order for it to improve lives of its citizens.

5.6 Chapter Conclusion

Countries when attracting investors their main objective is to boost their economies by improving the balance of payments through increase of imports transfer of technology, the corporate social responsibility, etc. In assessing the feasibility of these goals on whether they can be achieved if they are achievable we have analysed laws and policies into place in Rwanda. Besides this, we have also conducted interviews with various persons involved in the process.

⁹⁶³ http://www.mtn.co.rw/Content/Pages/138/MTN_Rwanda_inaugurates_%E2%80%98ICT_School_Project%E2%80%99_in_Ru%20sumo

⁹⁶⁴ www.igihe.com/business/in-the-past-3-three-years-mtn-rwanda-spent-half-a.html

⁹⁶⁵ Statement of *Sven Piederiet* available at <http://www.africareport.com/stories/bralirwa-brewery-the-inspiring-model-of-csr> , accessed on 18th May 2015.

After 1994 government of Rwanda has been engaged into the doing business policy since the establishment of the Rwanda Investment and Export Promotion Agency (RIEPA). This law was followed by the adaptation and modification of a number of other laws with the aim of providing a good climate to eventual foreign investors. The very important laws adopted include the Rwanda investment code adopted in 2005 which was repealed in 2015 and the law on direct income tax adopted in 2006. These two laws provide for incentives to foreign investors of two natures: fiscal and non-fiscal.

In assessing the whether the government of Rwanda has benefited from FDI, we have found that the situation was less satisfactory due to the fact that the investment policy in general did not provide a basis from which the country can benefit from FDI. Some of gaps identified include the absence of a policy on technology transfer, the fact that the government has left the issue of corporate social responsibility to the mere appreciation of companies, the lack of a clear policy defining obligations of companies intended to work in Free Economic Zones especially the Rwanda Export and Processing zones.

Another issue identified in this analysis is the lack a clear regulatory framework on negotiation of bilateral investment agreements and double tax agreements. We have found that some double tax agreements have failed simply because parties to the agreement were not getting similar or mutual advantages and benefits. It is good that some of them have been reviewed but the exercise should concern all BITs and DATs has signed in order to see by clearly considering advantages the country will get from these agreements.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

The relationship between FDI and human rights is a situation which combines two concepts which are not related at all: The promotion of foreign direct investment in the country and the protection of citizens of the host country against adverse effects of activities of investors. Countries believe that FDI helps in boosting their economies, because they create jobs, they transfer technology and develop the industrial sector. This belief has directed decisions of policymakers in various countries and they have put into place measures which are not heavy to investors.

As the number of investors remains low compared to the countries which are involved in FDI promotion, countries have been engaged into a competition which has led sometimes to the “race to the bottom”. This race leads to the situation whereby countries have lessened their standards regarding human rights protection. This said, it becomes obvious that investors have been

accused of being involved in human rights violations in various countries, either by acting directly or indirectly while using authorities of host countries in order to help them implement their unethical plans. MNCs have been causing environmental degradation, forced labour, child labour and violation of other human rights. Among the different rights which are mostly violated we have labour rights, right to a safe and clean environment and the right to development.

Rwanda like other countries has been engaged into the policy of providing a business environment that would attract more investors. By doing so, some laws have been adopted while others needed being modified. In 1998, the first investment agency has been created with the aim of promoting investment and export. In 2005, the Rwandan legislator has adopted the investment code and export promotion. Apart from the adoption of these specific laws on investment, some other laws have also been repealed in 2009 and others were, of course, adopted. Among the laws which have been modified, we have the Company Act, the Labour Code, the law on security interests, and the law on negotiable instruments, the law on the establishment of commercial courts, the law on insolvency and also the law governing contracts which was repealed in 2011.

It has also been noted that beside the adoption of new laws, the Rwandan policymaker has also implemented some programs that mostly aim at boosting the economy through FDI. In this vein, the Vision 2020 development, the Poverty Reduction Strategy Paper (PRSP) and the National Investment Strategy have been adopted. It is also important to mention that, apart from being a member of the Multilateral Investment Guarantee Agency (MIGA), Rwanda has signed bilateral investment treaties with Belgium, Germany, and recently in 2006 with the US, referred to as Trade and Investment Framework Agreement (TIFA), Mauritius and South Korea. All these strategies do recognize that the Private Sector will have to lead the process of economic development and wealth creation.

This long process has the only objective of adopting a business climate that is more favourable to investors. Rwanda has been ranked among the best countries which facilitate investors in the

SU-Region, even Worldwide. Having noted that the Rwandan regulatory and institutional frameworks promotes the investment inflow, the question that has often come to mind is to know whether the process cannot have its foundation in lessening standard rights, especially those concerning labour rights, rights to a clean and safe environment and the right to development. In this research, some sectors where investors are mostly found in Rwanda in order to see if they respect principles of human rights have been scrutinised. The sectors which have been considered in this research are labour rights, environmental rights and right to development.

Violation of human rights by corporations has always been associated with the impunity, which often characterized this domain due to various theories. In various countries, it was a principle that corporations cannot be held criminally liable. The argument that propounds this theory was the absence of *mens rea* and *actus reus*. Besides this, many criminal lawyers have also thought that sanctions in criminal law, like imprisonment cannot be applied to corporations. Another polemic in the criminalization of activities was the use of legal personality by corporations as a shield which protects them from being responsible for acts committed by their subsidiaries. Lastly, the issue which concerned the criminal liability of corporations was the use of immunities in case the investment was made by a State owned company.

The Rwandan law has, however, espoused another approach which accepts the criminal liability of corporations. The criminal code, as well as the law on the protection of the environment, have provided for criminal sanctions for any company which may be found responsible for crimes against the environment. This has been found as a step which needs to be commended, although this still needs additional improvements. This research has found that offences punished by these two laws do not cover all possible crimes which may be committed by corporations.

This research has also analysed the way labour rights are respected in Rwanda. The International Labour Organisation (ILO), through various conventions has provided for core labour standards

which are regarded as minimum rights that must be respected by all employers. Among the different standards which have been retained, we can mention the freedom of association and collective bargain, the respect of leaves, holidays and rests, prohibition of child and forced labours and health and security at work.

Rwanda is among many countries that are parties to most of these conventions, but the issue remains on their implementation. Freedom of association and collective bargain is guaranteed by both the Constitution of Rwanda and the Rwandan Labour Code. When reading through the paragraphs of legal instruments, we can easily conclude that this right is properly respected. However, the main issue remains on its implementation. This research has found that these rights are not properly enjoyed by employees. Furthermore, it has been found that trade unions are quasi inexistent in Rwanda and even the few that exist do not work properly. Most of the workers in Rwanda do not belong to any trade union or a trade confederation. The fact of not belonging to any trade union does not infer that they do not know their existence, but rather because they fear that membership might be negatively received by their employers. Labour representatives who follow day to day the relationship between employers and employees are absent in all institutions. It has also been realised that the right to strike in Rwanda is very rare. Employees believe that if they dare enter into strikes, they might lose their jobs and once lost, to find another job may not be possible to them given the unemployment situation which prevails in Rwanda.

Regarding working conditions, the Rwandan labour code allows employees to work 45 hours a week, and this is strictly observed on the whole territory. In the case an employee has exceeded these hours, they have the right to be compensated either by being given compensation leave or being paid for those extra hours. This study has found that the compensation of supplementary hours has never been respected. Workers do claim for their rights only when their contracts have been terminated. For circumstantial leaves, as well as public holidays and rests, the study found that the trend is good compared to other labour rights.

Child and forced labours are also among core labour standards contained in various ILO conventions. The Rwandan law has also embodied these rights into its laws. Even if they are clearly regulated in Rwanda, this study has found that forced labour remains quasi in-existent in Rwanda. Child labour, however, is common in various institutions in Rwanda. Being a category of workers whose labour is significantly cheap; investors choose to employ them in their business instead of employing qualified personal. In most of the times, it has been noticed that children are employed in the domains of mining, construction industries and in agro-industries.

Another labour right which has been analysed is the health and the security of employees at workplace. The Rwandan legislator has provided for a number of measures which guarantee health and security in working environments. Though these measures are contained in various Ministerial Orders, their implementations remain absent and consequently they have fallen into desuetude. Accordingly, this study has found that no single employer has complied with the requirements of these Ministerial Orders.

Other rights which have been also analysed in this work are the rights to a safe and clean environment. The Rwandan Government has created an institution in charge of the monitoring of environment protection by various persons, including business enterprises. Besides, an organic law on the protection and conservation of the environment has been also adopted. The Rwandan penal code, on the other hand, contains also some provisions which punish any person who may be responsible for environmental degradation and pollution.

Among the merits of the Organic Law on environment protection, there is the obligatory submission to the environment impact assessment imposed on any business activity which is to be undertaken in Rwanda. Its article 67 stipulates that every development project shall undergo

environment impact assessment prior to its establishment in the country. It also contains some provisions which punish human activities that pollute the environment. In its penal part, it punishes any persons who may be responsible for environment pollution or who may not comply with the requirements contained in it. This law punishes, by suspending any person and closing any association that does not carry out environmental impact assessment prior to launching any project that may have harmful effects on the environment. However, in this research, it has been found that various business activities do not respect EIA principles. They only respect the submission of the project to the EIA test, but we explore the fact that regular audit on the conformity of activities with the environment is not properly done.

Furthermore, the research discovered the existence of many cases where fishing activities have polluted water using elementary fishing methods. Fishers use nets with very small meshes. This means that such nets are harmful to the conservation of fish resources and other aquatic animals. The use of toxic products to catch more fish is sometimes used by fishers in Rwanda and this pollutes also the environment. The rudimentary fishing way which is also used by Rwandan fishers also endangers many aquatic animals, though this seems not to be done willingly.

Another mode of activity which pollutes the environment is the use of industrial fertilizers pesticides to improve the yield productivity. In order to increase soil fertility, Rwandan farmers use fertilizers, pesticides and herbicides and these chemical products strongly affect the environment. These pesticides are very harmful to the environment, particularly for groundwater and surface waters.

Lastly, the research has analysed the right to development. The link between FDI and development appears to be the cornerstone of attracting foreign investors. When countries attract foreign investors, they bear in their mind that foreign investment can boost their economy. This consideration has its basis on the fact that FDI contributes to management, capital, technological

capacities, and job creation. This said, it also facilitates the integration of local industries into the global production and distribution network, and facilitates the transfer of skills and management capacity between enterprises.

Many developing countries have been involved in the solicitation of foreign investment by offering tax and non-tax incentives. Through tax policies, countries have provided tax holidays, import duty exemptions and subsidies to foreign firms, as well as measures like market preferences, infrastructures and sometimes even monopoly rights, free trade zones, et cetera. Even if the positive role played by FDI is crucial and cannot be ignored, it however requires clear legal and institutional frameworks to make this dream possible.

Rwanda, like other many countries, believes that it can improve its production using foreign investment. Through its investment code, Rwanda has started attracting a number of foreign investors. For this reason, it has adopted an open regime to all investors, subject to their compliance with the investment code and other important laws. In assessing if Rwanda has reached the goals of development using FDI, this research has come up with indicators. The latter include, among others; firstly the analysis of incentives consented by investors in order to get the real image of the extent of sacrifice the country has consented. After analysing these incentives, the research has then analysed some indicators which may help to assess the impact of FDI on the country, and these include technology transfer, job creation, corporate social responsibility and the role it plays on the balance of payments.

Unlike other developing countries, the Government of Rwanda has conceded to MNCs a number of incentives, both fiscal and non-fiscal. Among the fiscal incentives that have been consented to investors, there are exemption from import duties and sales taxes. According to the investment code, an investor intending to make new investment, rehabilitate, expand, renovate or restructure existing business enterprise who imports plant, machinery and equipment is exempted from paying custom duties. It adds that an investor who imports plant, machinery, equipment and raw materials for the operations of a registered business enterprise which are not zero import tax

rated, shall pay a single flat fee of five percent (5%) of the CIF value of the imported items, in lieu of all taxes, including import duties, sales tax and others which would normally be imposed on such goods.

Another form of incentive conceded to investors in Rwanda is tax holiday. The law gives a tax holiday to business assets held at the establishment for at least three (3) tax periods from the period tax in which the investment allowance was given. The law adds that an investment allowance of forty per cent (40%) of the invested amount in new or used assets may be depreciated- excluding motor vehicles that carry less than eight (8) persons, except those exclusively used in a tourist business which can be accepted to deduct from a registered investor in the first tax period of purchase or of use of such an asset if the amount of business assets invested is equal to at least thirty million (30,000,000) Rwandan francs.

Thirdly, Rwanda has created free economic zones. According to the law, these free economic zones have the aim of increasing the area of development in order to rehabilitate and increase the infrastructure with the aim of fostering development of the country. It also has the objective of increasing the contribution of private sector in the development of the Country. The Kigali special zone, which was created by this law, is a result of the merger between the former Kigali special economic Zone and the Kigali industrial park. To these incentives we can also add double tax agreements, incentives on direct income, etc. Beside fiscal incentives, Rwanda has also consented non-fiscal incentives. The Rwandan Government also provides for non-fiscal incentives to foreign investors who invest in Rwanda. Among these, we have special protection which grants them visas and work permits.

All these incentives show clearly that Rwanda has made considerable sacrifices in order to get another income in return to fill the gap which has been created by these incentives. This is why in this work, we have also analysed the extent to which Rwanda gets profit through foreign

investment. As it has been mentioned earlier, among the indicators we have analysed include transfer of technology, corporate social responsibility, job creation and contribution to the balance of payments.

The transfer of technology is another tool host countries use in order to trigger foreign direct investment to boost their economic growth. As a matter of fact, technology transfer remains a good process by which technology, expertise, knowhow or facilities developed by an individual, an enterprise or an organisation is transferred to another individual, enterprise, or organisation. Technology transfer in foreign direct investment is one of controversial issues because it puts together two contradicting situations. This implies that the promotion of technology in host countries in one hand, and the protection of intellectual rights on other hand. The different controversies on technology transfer in FDI are mainly based on the fact that intellectual property rights of investors need a strong protection whereas host countries need that technology.

In Rwanda, one of the different ways from which technology is transferred is the compulsory licensing. However, it has been found that this compulsory licensing does not aim at transferring technology, but using it when the patent owner has failed to use their patent properly or for security and health purposes. The Rwandan law provides for the compulsory licensing in two different cases; either when the owner of the license has failed to use it, for instance, in the case where the patent's owner manifests the absence or insufficient nature of industrial or commercial use of a patented invention in the Republic of Rwanda. The other case is when the patent owner is abusively exercising their exclusive rights or neglecting taking measures that can easily prevent his licensee from abusively exercising the licensed exclusive rights. Another case where the license can compulsorily be granted is the case of *ex officio* compulsory licensing. In this context, the Government of Rwanda may decide that a government department or a third party uses an invention in the case of public interest, in particular for national security, public health or; environmental protection. The same measure may also apply following a court decision if it

has been noticed that the patent owner or his licensee uses the invention which is anti-competitive.

Joint ventures can also be used as a tool to inseminate technology through FDI. Joint venture is a contractual business that is undertaken between two or more parties to formulate a single business transaction. To this effect, individuals or companies choose to enter joint ventures in order to share strengths, minimize risks, and increase competitive advantages in the market place. In the case of Rwanda, joint ventures are not regulated consequently. As a matter of fact, their contribution to technology transfer remains also questionable. In this research, it has been found that there is no clear policy which can help the insemination of technology through joint ventures. This loophole leads to the absence of a clear implementation of the policy of technology transfer in Rwanda

The relationship between companies and host countries can sometimes go beyond the mere mutual respect of reciprocal obligations between them. It is in this perspective that MNCs may sometimes be obliged to act out of the sphere of their domain of activities in order to improve the socio-economic lives of inhabitants of the host country. This is made through Corporate Social Responsibility (CSR). The situation in Rwanda seems not to be different from that of other countries that are under the same development context. Some of the features of the Rwandan CSR include the lack of a framework on its implementation. Though there are some individual cases where companies have been involved in corporate social responsibility, it has been shown that there is no clear policy which may compel them to do so.

Other very important rationales behind the attraction of FDI are the export promotions and job creation. Export promotion contributes a lot to the balance of payments. The latter truly shows countries' transactions with the rest of the world. In addition, it notes inflows and outflows of money and categorizes them into different sections. FDI invests in export oriented industries that

produce goods which are not locally produced like agricultural products and minerals, and other products of the first necessity that do contribute in reducing a country's trade balance. The results of this research clearly show that most investors in Rwanda are engaged in regional banking services, supermarket chains, construction and other sectors which operate in Rwanda, with no prospects of improving the demand in foreign currencies. Their contribution to the export promotion is very little since their products are consumed locally.

In many countries, investors are attracted as they are allowed to create employment and enhance the nation's purchasing power through higher wages. When MNCs plant new branches in other countries, through FDI, this becomes a real potential to the generation of new employment through giving people new jobs. In doing so, there is now seen a clear improvement on employment in the country since new jobs are created, there is also regional distribution of new employment, wage levels, income distribution and skill transfer. Even if people may think that FDI leads to improvements in employment levels in the host country, especially for less developed countries, some authors have pointed out that it cannot be automatically assured, as the employments that have been created are generally judged of bad quality, and where labour standards are not respected.

Secondly, FDI may lead to the employment crowding-out where the inflow of FDI makes competition more intense and then, domestic enterprises will reduce employment to improve their competitiveness. All in all, instead of creating new jobs, there may sometimes be an employment shift taking place in transfer of workers to new enterprises. Finally, there may also be employment loss for none suitable workers because the new corporate environment will lose their jobs. It is in this similitude that, in Rwanda, this research has found that jobs created are very few compared to concessions.

6.2 Recommendations

After highlighting a number of issues which need to be addressed in the Rwandan investment promotion vis-à-vis the rights of individuals, we have also proposed some recommendations which are based on the three domains we have chosen: labour rights, Environmental rights and the right to development.

6.2.1 Labour standards

1. The Ministry of Public Service and Labour Promotion should strengthen the role of trade unions, as well as that of labour representatives. The outcomes of the research have shown that trade unions are not equipped enough in order to strongly protect and promote rights of workers. Furthermore, the role of labour representatives should also be clearly defined. As it is mandatory to every institution to have labour representatives, labour inspectors who are located at the district level should work hand in hand with all institutions in order to make sure that representatives of workers carry out their daily activities without fear and intimidation. In case of some companies that have never elected their labour representatives, serious sanctions should apply. In fact, not having workers representatives remains an infringement to the provisions of the labour code.

2. The article 45 of the labour code which stipulates that in all companies, the legal employment's working load is forty five hours per week should be amended and weekly hours be reduced to forty as it was in the law which was repealed. Given the fact that the labour law has a progressive character, it is unbelievable to enact a law which worsens labour conditions. Thus, it is illogical to move from forty working hours to forty five. The same measures should also apply to article 66 of the same code which provides for maternity leave. That article states that a mother who is on maternity leave shall only receive the totality of her salary during only six weeks. In case she opts to resume her work after only six weeks of her maternity leave, she will get her full salary package and benefits from two hours of breastfeeding period every day. If however, she opts to remain in the maternity leave after six weeks, she will have rights to only 20% of her salary package. This article also violates the principle of acquired rights. In the previous law, this period was of twelve consecutive months. We then deplore the fact that it decreased from twelve to six weeks.

3. The Ministry of public service and labour should inflict sanctions to all companies which do not guarantee health and safety at work. As the outcomes of this study have found that norms regulating health and safety at work are not respected. The same data have implied that provisions of the Ministerial order n° 1 of 15/05/2012 determining modalities of establishing and functioning of occupational health and safety committees are totally ignored by all institutions. Equipment which are listed in that Ministerial Order for which every institution must have to emergently help workers in the case of accident and other equipments which prevent occupational diseases and accidents are totally absent in all institutions.

4. The Ministry of public service and labour should inflict sanctions to all companies which employ children. As it has been found in the results, some companies employ children because they think they [children] constitute a category of workers who are cheap, as they are never employed based on their qualification since they do not

5. have any. Using labour inspectors in all districts, a regular inspection should be made and whenever they find a case of child labour, they can inflict sanctions to that company.

6. Lastly, the issue of minimum wage should also be settled out in order to avoid any workers' exploitation by employers. As the research findings show, the law which regulates the minimum wage is now forty two years old. It is illogical to think that 100 Frws in 1974 remain the same 100 Frws in 2016. The legislator should put into place a system whereby the adjustment of the minimum wage can be easily made.

6.2.2 Environmental rights

1. This research has shown that the only step for the EIA which is respected is the submission of the project for the EIA test. After this stage, REMA and RDB do not continue assessing the compliance with the protection of the environment. Their role should then be extended to all the activities conducted by the company throughout its life. The protection of environment by investors is not about having good projects and plans of environment protection, but also the respect of environmental principles in all the company's activities. This is why there is need to very much emphasize on the audit regarding compliance with recommendations made during the submission of the EIA project.

2. The sanctions to the environment violations contained in the organic law on protection of environment and criminal code should be strongly applied in order to deter anyone who may intend to violate rules of protecting the environment. Since 2005, the date of enactment of the organic law on protection of the environment in Rwanda, it has been noted that no single company has been inflicted sanctions, and yet there are plenty of cases regarding environment violation. As a matter of fact, the Public Prosecution together with the National Police should not focus on classical crimes only but also deal with other new crimes which have been incorporated in the criminal code and other laws.

3. The list of offences on the environment should be extended. Crimes which are included in the criminal law and environmental law do not cover all aspects of the issue. The use of rudimentary equipment for fishing; poisoning of water, for example should be considered as crimes if a prior authorization was not given to all the users who use such fishing methods. The same should apply with those who use pesticides and fertilizers. In fact, these products help improve the production in farming, but the way farmers use them might be harmful to the environment, as they can pollute it. Ultimately, there should be guidelines on how to address the issue in an effective way.

6.2.3 Right to development

1. The policy of incentives should be reviewed. Granting incentives to every investor without prioritizing sectors can lead to huge loss. Incentives should be given to investors who show that their intervention is based in sectors which do not have local investors or which contribute directly to the economic growth of the area. To illustrate this, these mostly concern investments in energy, water and sanitation and farming companies. On the other hand, banks and financial institutions, construction companies, hotels, supermarkets, et cetera, should only benefit from incentives after clearly assessing the individual role the company will play in the economic growth. After granting those incentives, there should be an evaluation mechanism which could help to assess, after a given period of time, the role the company has played, if found not convincing incentives should cease.

2. There should be a clear policy on the transfer of technology. The Rwandan government should adopt a regulatory framework on how technology transfer will be made in the frame of foreign direct investment. Being one of the goals for attracting investors, the way this will be implemented should be made clear in order to avoid any ambiguity. This obligation should clearly appear on the agenda of companies by specifying how it will be achieved. The law as well as the policy should define its scope; inferring how it operates vis-à-vis the intellectual rights of investors, etc.

3. The corporate social responsibility should not be regarded as a favour made by investors to the inhabitants of the host country. This should rather be made obligatory and well defined. The Government of Rwanda should then adopt a law and a policy on how companies will comply with this requirement. By doing so, the Government should define clearly the role which every actor will play in this context. Companies should bear in mind that complying with corporate social responsibility is not a favour, but rather an obligation which they have to fulfil naturally.

4. Before signing any bilateral investment agreement, as well as a bilateral tax agreement, the government of Rwanda should clearly check various advantages it will get from the agreements. All stakeholders, including members of the Civil Society, should be involved in the negotiation process in order to clearly assess the outcome of that agreement in a fruitful way.

5. The Rwandan Regulatory and institutional frameworks on free trade zones should be based on an empirical experience by considering the way they have worked in other countries, their success stories, as well as their failures. For EPZs, there must be a clear understanding of the extent to which it will contribute to the improvement of the balance of payments by increasing export. The importation of the materials to use should be restricted to any items that cannot be found in the country.

As we have not exhausted all angles of the relationship between FDI and human rights, this is why we recommend that other researchers think about other angles which also need special attention. These are, for example, the issue of how FDI contributes to the establishment of the rule of law in the country, and FDI and good governance. Given the role they can play in a country, it becomes easier for them to impose these principles before they start operating in that country. Given the fact that most countries seem eager to attract more investors in their countries, they will not hesitate to cope with their requirements.

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ANNEX

QUESTIONNAIRES

QUESTIONNAIRE 1.

ADDRESSED TO THE STAFF OF THE RWANDA DEVELOPMENT BOARD

1. How do you evaluate the Rwandan policy on investment vis à vis the rights of individuals against adverse effects which may be caused by investors?
2. How do you appreciate the conduct of the process of environment impact assessment?
3. What do you think would be modified in order to improve the Rwandan frameworks on EIA?
4. How do you match the investment attraction, and promotion and protection of individuals by investors in Rwanda?
5. What issues do you think are issues which would be settled out by the Rwandan framework on investment to make it working properly?

QUESTIONNAIRE 2.

ADDRESSED TO THE STAFF OF THE WANDA ENVIRONMENT MANAGEMENT AND PROTECTION AUTHORITY

1. What should be modified for the environment promotion and protection policy in order to bring investors complying with principles of environment protection?
2. What are the main challenges linked to FDI for which the Rwandan environment is facing ?
3. How effective is the process of EIA by RDB ?
4. Have you had some cases where investors have not complied with commitment they have made in their EIA tests?
5. What is the impression of REMA on the Rwandan policy on environment protection vis à vis the general policy of investment promotion?
6. What else do think should be modified?

QUESTIONNAIRE N°3

ADDRESSED TO MINICOM STAFF AND RRA STAFF

1. How do you appreciate the issue of incentives in Rwanda?
2. What category of companies do you think should not benefit from incentives?
3. Is there any policy which obliges investors to comply with principles of corporate social responsibility?

4. To what extent do you think Rwanda free trade zones shall contribute to the balance of payments?
5. What should be done to make the investment policy more effective?
6. How do you appreciate the role of SEZAR in the export promotion?
7. What do you think would be modified in laws and policies of the Rwanda Free Economic zones?
8. Is there any policy on how technology is transferred by investors to individuals in Rwanda?
9. What should be done to make the policy of technology transfer more effective and efficient?

QUESTIONNAIRE N°4

ADDRESSED TO THE STAFF OF THE MINISTRY OF PUBLIC SERVICE AND LABOUR, LABOUR INSPECTORS, LAWYERS OF TRADE UNIONS CONFEDERATIONS

1. What do you know about labour standards?
2. Do you know ILO conventions containing those labour standards?
3. Which of them have been ratified by Rwanda?
4. To what extent are they respected by investors in Rwanda?
5. How do you appreciate the role of labour delegate in the protection and promotion of rights of workers?
6. How do you appreciate the role of labour inspectors in the protection and promotion of rights of workers?
7. To what extent are labour conditions respected in Rwanda?
8. What do you think would be a good way of to bring investors cope with all labour standards?
9. What should be the best way of protecting workers against adverse conduct of investors?

10. Do you have any suggestion on what should be modified on the Rwandan legal and institutional frameworks?