

## **International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development**

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### *Abstract*

*Sustainable development agenda seeks to strike a balance among what are considered to be the three dimensions of sustainable development: the economic, social and environmental. Any efforts that concentrate on either of the three while neglecting the other aspects are undesirable. This paper looks at the environmental aspects of sustainable development and the related issues of human rights in the context of international investments law. While the issues as discussed are transnational in nature, and thus the scope of this paper is not limited to Kenya, there are references to the relevant regional and international legal instruments, where applicable.*

### **1. Introduction**

This paper critically discusses the sustainable development agenda and the related issues of human rights in the context of international investments law with a bias on Kenya. It explores the international investments law and policy in Africa and Kenya in particular, and how the same addresses the related environmental questions and human rights issues that arise.

### **2. International Investment Law and Policy in Africa: International Investments and National Development**

The main objective of investment laws is to promote (foreign) investment by regulating access to the domestic market; stipulating investor rights and guarantees; clarifying access to dispute settlement; setting up institutions, including investment promotion agencies and one-stop shops; and providing incentives schemes.<sup>1</sup> Development of international investment law, which pre-dates the development of investment treaties by several decades, is largely attributed to the customary international law theory that an affront to the rights of a foreign owned business in its host state is an affront to the sovereignty and interests of the investor's home state sovereign.<sup>2</sup> Scholars have observed that that in the immediate post-World-War II era, as international investment gained momentum, foreign investors who sought the protection of international investment law encountered an ephemeral structure consisting largely of scattered treaty provisions, a few contested customs, and some questionable general principles of law.<sup>3</sup> For investors, this international legal structure was seriously deficient in at least four respects: first, it was incomplete, for it failed to take account of contemporary investment practices and to address important issues of investor concern, such as their rights to make monetary transfers from the host country; second, the principles that did exist were often vague and subject to varying interpretations; third, the content of international investment law was contested, particularly between

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<sup>1</sup> United Nations Conference on Trade and Development, *World Investment Report 2018* UNCTAD/WIR/2018 (United Nations, 2018), p. 106. Available at [https://unctad.org/en/PublicationsLibrary/wir2018\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf) [Accessed on 1/10/2018].

<sup>2</sup> Mann, H., "Reconceptualizing international investment law: its role in sustainable development," *Lewis & Clark Law Rev.* 17 (2013): 521 at p.521.

<sup>3</sup> Salacuse, J.W., "The Treatification of International Investment Law," *Law and Business Review of the Americas* 13, no. 1 (2007): 155 at p. 155.

industrialized countries and newly decolonized developing nations that in the 1970s began to demand a new international economic order to take account of their particular needs; and finally, existing international law offered foreign investors no effective enforcement mechanism to pursue their claims against host countries that had injured or seized their investments or refused to respect their contractual obligations.<sup>4</sup>

To change the dynamics of this struggle and protect the interests of their companies and investors, industrialized countries began a process of negotiating international investment treaties that, to the extent possible, would be: 1) complete, 2) clear and specific, 3) uncontestable, and 4) enforceable. These treaty efforts took place at both the bilateral and multilateral levels, which, though separate, tended to inform and reinforce each other.<sup>5</sup> Notably, the focus of the initial period of growth of investment treaties was singular: the protection of investor rights in foreign states.<sup>6</sup> The protection of investors remained the sole objective of International Investment Agreements (IIAs) until the inclusion of investment liberalization provisions.<sup>7</sup>

United Nations Conference on Trade and Development (UNCTAD) observes that national investment laws operate within a complex web of domestic laws, regulations and policies that relate to investment (e.g. competition, labour, social, taxation, trade, finance, intellectual property, health, environmental, culture).<sup>8</sup> It is also observed that investment-related issues are typically also enshrined in countries' company laws, and-sometimes- in countries' constitutions. As such, to the extent a country has an investment law, this law must be assessed in the context of the country's larger policy framework.<sup>9</sup>

There has been identified challenges arising from the policymaking interaction between IIAs and the national legal framework for investment as follows: policymakers in charge of national and international investment policies might be operating in silos and create outcomes that are not mutually supportive or, worse, conflicting; incoherence (e.g. between a clearly defined Fair and Equitable Treatment (FET) clause in one or several IIAs and a broad FET clause in an investment law) may have the effect of rendering IIA reform ineffective; and incoherence between investment laws and IIAs may also create Investor-state dispute settlement (ISDS)-related risks when national laws include advance consent to international arbitration as the means for the settlement of investor-State disputes, which could result in parallel proceedings.<sup>10</sup>

The World Bank has rightly pointed out that different countries have different priorities in their development policies and, therefore, any attempt at comparison of their development levels, would require one to first decide what development really means to them, and what it is supposed to achieve.<sup>11</sup> However, regardless of their priorities, developing economies can draw on a range of external sources of finance, including Foreign Direct Investment (FDI), portfolio equity, long-term and short-term loans (private and public), Official development assistance (ODA), remittances and other official flows.<sup>12</sup> Foreign investments are considered important for a country as they have the potential to build and upgrade industries, connect countries to international markets and also drive essential innovation and competitiveness.<sup>13</sup> In addition, Investment Promotion Agencies (IPA) in developing economies expect most investment to come from agribusiness corporations, followed by information and communication Multinational Enterprises (MNEs). IPAs also expect to attract utilities and construction investors to fill infrastructure gaps. On the other hand, IPAs in developed economies expect most investments to come from information and communication companies and professional services, and from

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<sup>4</sup> Ibid, at p. 155.

<sup>5</sup> Ibid, at p. 156.

<sup>6</sup> Mann, H., "Reconceptualizing international investment law: its role in sustainable development," *Lewis & Clark Law Rev.* 17 (2013): 521 at p.524.

<sup>7</sup> Ibid, at p.524.

<sup>8</sup> United Nations Conference on Trade and Development, *World Investment Report 2018* (United Nations, 2018), p. 106. Available at [https://unctad.org/en/PublicationsLibrary/wir2018\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf) [Accessed on 1/10/2018].

<sup>9</sup> Ibid, at p. 106.

<sup>10</sup> Ibid, at p. 107.

<sup>11</sup> The World Bank, 'What Is Development?' pp. 7-10 at p.10.

Available at [http://www.worldbank.org/depweb/beyond/beyondco/beg\\_01.pdf](http://www.worldbank.org/depweb/beyond/beyondco/beg_01.pdf) [Accessed on 1/10/2018].

<sup>12</sup> United Nations Conference on Trade and Development, *World Investment Report 2018*, at p. 12.

<sup>13</sup> United Nations Conference on Trade and Development, *World Investment Report 2018*.

specialised manufacturing industries: pharmaceuticals, automotive and machinery.<sup>14</sup> It is however noteworthy that there are some parallels within MNE expectations: IPAs from developing and transition economies all forecast investments from the food and beverages industry (light industry), matching corporation's plans of investments across the developing world. In addition, another promising industry for developing economies is information and communication (that includes both tech and telecom corporations) as the digital economy spreads to frontier markets.<sup>15</sup>

### **3. Investments, Human Rights, Environmental Damage and Sustainable Development: The (Dis) Connection**

Sustainable development has been defined as a combination of elements, such as environmental protection, economic development, and most importantly social issues.<sup>16</sup> Notably, the relationship between development and environment gave birth to the sustainable development concept, whose central idea is that global ecosystems and humanity itself can be threatened by neglecting the environment.<sup>17</sup> Economic, social, environmental and cultural aspects must be integrated in a harmonious manner to enhance the intergenerational well-being.<sup>18</sup>

Sustainable development contains both substantive and procedural elements, where substantive elements include the integration of environmental protection and economic development; the right to development; the sustainable utilisation of natural resources; the equitable allocation of resources both within the present generation and between present and future generations, while procedural elements include public participation in decision making; access to information; and environmental impact assessment.<sup>19</sup>

Human rights are inextricable from sustainable development, since human beings are at the centre of concerns for sustainable development.<sup>20</sup> Human rights depend upon having a liveable planet. The *Draft Principles on Human Rights and the Environment of 1994*,<sup>21</sup> (1994 Draft Principles) provide for the interdependence between human rights, peace, environment and development, and declares that human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.<sup>22</sup> This indivisibility has been affirmed by various judicial courts such as in the in the case of European union case of *Lopez Ostra v Spain*<sup>23</sup>, where the Court stated: “*Naturally, severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely....*”

The human rights-based approaches provide a powerful framework of analysis and basis for action to understand and guide development, as they draw attention to the common root causes of social and ecological injustice.<sup>24</sup> Human rights standards and principles then guide development to more sustainable outcomes by

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<sup>14</sup> Ibid, at p.18.

<sup>15</sup> Ibid, at pp.18-19.

<sup>16</sup> Fitzmaurice, M., ‘The Principle of Sustainable Development in International Development Law’ *International Sustainable Development Law*, Vol. 1 ISBN: 978-1-84826-314-7 (eBook).

<sup>17</sup> ‘Theories of Economic Development,’ p. 14. Available at [www.springer.com/cda/content/document/cda\\_downloadaddocument/9789812872470-c2.pdf?SGWID=0-0-45-1483317-p177033406](http://www.springer.com/cda/content/document/cda_downloadaddocument/9789812872470-c2.pdf?SGWID=0-0-45-1483317-p177033406) [Accessed on 02/10/2018].

<sup>18</sup> Ibid; See also generally, Chambers, R., *Sustainable Livelihoods, Environment and Development: Putting Poor Rural People First*, IDS Discussion Paper 240, Brighton: IDS, 1987. Available at <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/875/rc279.pdf?sequence=1&isAllowed=y> [Accessed on 02/10/2018].

<sup>19</sup> Birnie, P. et al, *International Law and the Environment*, (3rd Ed., Oxford University Press, New York, 2009), p. 116.

<sup>20</sup> 1992 Rio Declaration, Principle 1, which reads in full: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”

<sup>21</sup> Draft Principles On Human Rights And The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994).

<sup>22</sup> Draft Principles on Human Rights and the Environment, Principle 1.

<sup>23</sup> *López Ostra v. Spain*, 303 Eur. Ct. H.R. 41 (1994).

<sup>24</sup> Fisher, A.D., ‘A Human Rights Based Approach to the Environment and Climate Change’ *A GI-ESCR Practitioner’s Guide*, March 2014.

recognizing the links between ecological and social marginalization, stressing that all rights are embedded in complex ecological systems, and emphasizing provision for need over wealth accumulation.<sup>25</sup>

The *Universal Declaration of Human Rights of 1948*<sup>26</sup> (UDHR) places an obligation on all states to employ progressive measures to ensure recognition of human rights as guaranteed therein. Notably, the Declaration recognises the need for mobilization of resources by States so as to ensure realization of these rights. It provides that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.<sup>27</sup>

While the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* 1966<sup>28</sup> guarantees the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources, they must do so without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.<sup>29</sup> This is also captured under the *African Charter for Human and People's Rights (Banjul Charter)*<sup>30</sup>.

*Agenda 21*<sup>31</sup> was adopted in 1992 with the aim of combating the problems of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which the human race depend for their well-being. Further, it sought to deal with the integration of environment and development concerns and greater attention to them which would lead to the fulfillment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future.<sup>32</sup> The aim was to achieve a global consensus and political commitment at the highest level on development and environment cooperation. *Agenda 21* basically seeks to enable all people to achieve sustainable livelihoods through integrating factors that allow policies to address issues of development, sustainable resource management and poverty eradication simultaneously.<sup>33</sup>

The *IISD Model International Agreement on Investment for Sustainable Development, 2005*<sup>34</sup> was formulated to promote foreign investment that supports sustainable development, in particular in developing and least-developed countries.<sup>35</sup>

Notably, the new generation of International Investment Agreements (IIAs) have sustainable development orientation, where, in contrast to the IIAs signed in 2000 and before, the 2017 IIAs include a larger number of provisions explicitly referring to sustainable development issues (including by preserving the right to regulate for sustainable development-oriented policy objectives).<sup>36</sup> For instance, UNCTAD observes that of the 13 agreements concluded in 2017, 12 have general exceptions – for example, for the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources.<sup>37</sup> In addition, all but one also explicitly recognize that the parties should not relax health, safety or environmental standards to attract

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<sup>25</sup> Ibid.

<sup>26</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [Accessed 10/08/2016].

<sup>27</sup> *Universal Declaration of Human Rights of 1948*, Art. 22.

<sup>28</sup> *International Covenant on Economic, Social and Cultural Rights*; adopted 16 Dec. 1966, 993 U.N.T.S. 3, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force 3 Jan. 1976).

<sup>29</sup> Ibid, Article 1.2.

<sup>30</sup> *African Charter for Human and People's Rights (Banjul Charter)*, adopted 27 June 1981, entered into force 21 October 1986), Article 21.

<sup>31</sup> (A/CONF.151/26, vol.II), United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

<sup>32</sup> Ibid, Preamble.

<sup>33</sup> Ibid, Clause 3.4.

<sup>34</sup> Howard Mann, et al., Int'l Inst. for Sustainable Dev., *IISD Model International Agreement on Investment for Sustainable Development: Negotiator's Handbook* (2d ed. 2006), available at [https://www.iisd.org/sites/default/files/publications/investment\\_model\\_int\\_handbook.pdf](https://www.iisd.org/sites/default/files/publications/investment_model_int_handbook.pdf) [Accessed on 1/10/2018].

<sup>35</sup> *Model International Agreement on Investment for Sustainable Development*, Article 1.

<sup>36</sup> United Nations Conference on Trade and Development, *World Investment Report 2018* (United Nations, 2018), op cit., at p. 96.

<sup>37</sup> Ibid, at p. 96.

investment; and 11 refer to the protection of health and safety, labour rights, the environment or sustainable development in their preambles.<sup>38</sup> A good example is the Morocco-Nigeria BIT of 2016.

The place of sustainable development agenda in investment law was also captured in the *United Nations 2030 Agenda for Sustainable Development*<sup>39</sup> which outlines the Sustainable Development Goals (SDGs) provides that one of the ways of reducing inequality within and among countries is ‘to encourage official development assistance and financial flows, including foreign direct investment, to States where the need is greatest, in particular least developed countries, African countries, small island developing States and landlocked developing countries, in accordance with their national plans and programmes’.<sup>40</sup> In addition, it provides that in order to strengthen the means of implementation and revitalize the global partnership for sustainable development, there is needed to adopt and implement investment promotion regimes for least developed countries.<sup>41</sup> Furthermore, one of the declarations is that ‘*private business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creation. The state parties also acknowledged the diversity of the private sector, ranging from micro-enterprises to cooperatives to multinationals. They called on all businesses to apply their creativity and innovation to solving sustainable development challenges. They affirmed to foster a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements and other on-going initiatives in this regard, such as the Guiding Principles on Business and Human Rights and the labour standards of ILO, the Convention on the Rights of the Child and key multilateral environmental agreements, for parties to those agreements*’.<sup>42</sup>

The SDGs ought to inform the efforts of member states in achieving sustainable development, poverty eradication, and environmental conservation and protection. They offer an integrated approach, which is environmentally conscious, to combating the various problems that affect the human society as well as the environmental resources. It is expected that states efforts will be informed by the SDGs in the economic, social, political and environmental decisions. The Goals also provide an elaborate standard for holding countries accountable in their development activities. This way, environmental health is not likely to be sacrificed at the altar of economic development but will be part of the development agenda. The *2030 Agenda* paints a picture of inextricable interdependence as far as international investment as a tool of development and the realisation of sustainable development agenda are concerned.

In addition to other reform-oriented elements, some of the IIAs concluded in 2017 contain innovative features that have rarely been encountered in earlier IIAs such as: conditioning treaty coverage on investors’ contribution to sustainable development. That is, inclusion of a requirement that a covered investment should contribute to the host state’s economy or sustainable development (Burundi-Turkey BIT, Mozambique-Turkey BIT, Turkey-Ukraine BIT).<sup>43</sup> Moreover, there is also need for fostering responsible investment which requires including a “best efforts” obligation for investors to respect the human rights of the people involved in investment activities and to promote the building of local capacity and the development of human capital.<sup>44</sup> For instance, the mining operations often exist in remote parts of developing countries, with the combined challenges in public services delivery and development assistance and mining sector players are always called upon to catalyze development in such areas.<sup>45</sup> Furthermore, an increase in the number of multinational corporations has led to a greater presence of private corporations amongst communities around the world, and

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<sup>38</sup> Ibid, at p. 96.

<sup>39</sup> United Nations, *transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

<sup>40</sup> Ibid, Goal 10(7) b.

<sup>41</sup> Ibid, Goal 17.5.

<sup>42</sup> Ibid, Para. 67.

<sup>43</sup> United Nations Conference on Trade and Development, *World Investment Report 2018* (United Nations, 2018), p. 98. Available at [https://unctad.org/en/PublicationsLibrary/wir2018\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf) [Accessed on 1/10/2018].

<sup>44</sup> Ibid, at p. 98.

<sup>45</sup> “World Bank, Mining Foundations, Trust and Funds: A Sourcebook. Washington, DC., 2010, p. 7, available at <https://openknowledge.worldbank.com/handle/10986/16965> [Accessed on 1/10/2018].

this, combined with a global decline in public sector development assistance has cast the private sector as an important player in social and economic development.<sup>46</sup> Under the requirement for corporate social responsibility, these corporations play an active role in betterment of the lives of locals in their countries' and specifically areas of operation. They, therefore, appear to be more useful in upgrading the lives of locals as compared to the often inefficient or absent government bodies.

This has been attributed to various factors including the existence of mining operations in environments where government institutions may be absent, weak, lack in capacity or corrupt, leaving gaps in essential public service provision. Further, the social and environmental footprint of mining operations often has impacts on local communities, requiring compensation and mitigation programmes and the remote locations of many operations accentuates the expectation for employment and economic development within host communities. The enclave nature of the mining industry can limit the "trickle down" of benefits unless specific social investment programmes are undertaken.<sup>47</sup> These are usually based on corporate social responsibility requirements that require these organisations to contribute positively to the lives of the communities.

The corporations involved in the extraction activities are not only supposed to focus on maximising profits, but also impact positively on the lives of the communities amongst whom they operate. Corporate Social Responsibility is, thus, an important tool that can be used by MNCs as a business tool to promote a positive image to business stakeholders, and as a way to improve the quality of life among citizens of the host countries.<sup>48</sup> However, the work of MNCs must go beyond CSR and be sustainable in the long run, as CSR in most cases is largely philanthropic and not anchored in law.<sup>49</sup> In carrying out their functions, the various MNCs should ensure that they operate in a manner that is sustainable. They are to ensure that their activities are socially sustainable, environmentally sustainable and economically sustainable.

These requirements should be backed by a legal and policy framework safeguarding the rights of communities as well as entrenching environmental obligations in investment laws. It has however been noted that these innovative features do not necessarily translate into reduced level of investment protection, as most of the IIAs signed in 2017 maintain substantive investment protection standards.<sup>50</sup>

It has been argued that states have a right, and indeed a duty, to seek to ensure that investments make a positive contribution to their sustainable development.<sup>51</sup> This, it is argued, requires a shift in focus from looking at the quantity of investment as the only issue, to the quality of that investment as the key issue.<sup>52</sup> From a sustainable development perspective, the link to investment is considered essential.<sup>53</sup> Scholars also argue that from a purely environmental perspective, foreign direct investment (FDI) provides a very valuable way to disseminate new technologies and processes, and thus to more rapidly advance the goal of sustainable development at the different levels of communities, states, and globally.<sup>54</sup>

In addition, from a broader sustainable development perspective however, and taking fully into account social and economic development factors as well as environmental, more subtle approaches are needed.<sup>55</sup> Those in support of this proposition also believe that poverty eradication and economic and social development must be equal factors, and the protection and promotion of human rights is both a necessary goal and a measure for the

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<sup>46</sup> The World Bank, 'Examining Foundations, Trusts and Funds (FTFs) in the Mining Sector,' Part 1, p.17. Available at [http://siteresources.worldbank.org/EXTOGMC/Resources/Sourcebook\\_Part1\\_Main\\_Findings.pdf](http://siteresources.worldbank.org/EXTOGMC/Resources/Sourcebook_Part1_Main_Findings.pdf) [Accessed on 1/10/2018].

<sup>47</sup> *Ibid.*

<sup>48</sup> Pimpa, N., 'Multinational Corporations: Corporate Social Responsibility and Poverty Alleviation in Thailand,' School of Management, RMIT University.

<sup>49</sup> See generally, Porter, M.E. & Kramer, M.R., 'Strategy and Society: The Link between Competitive Advantage and Corporate Social Responsibility,' *Harvard Business Review*, December, 2006.

<sup>50</sup> *Ibid.*, at p. 98.

<sup>51</sup> Mann, H., "Reconceptualizing international investment law: its role in sustainable development," *Lewis & Clark Law Rev.* 17 (2013): 521 at p.534.

<sup>52</sup> *Ibid.*, at p.534.

<sup>53</sup> *Ibid.*

<sup>54</sup> Mann, H., "Reconceptualizing international investment law: its role in sustainable development," *op cit.*, at p. 535.

<sup>55</sup> *Ibid.*, p. 535.

achievement of sustainable development.<sup>56</sup> This is also affirmed in Principle 5 of the *Rio Declaration on Environment and Development 1992*<sup>57</sup> which provides that all States and all people should cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world. Poverty eradication is thus considered to be at the heart of achieving sustainable development in the world, and unless it is dealt with, then attaining sustainable development remains a mirage. Environmental goals cannot be achieved without development since poor people will circumvent environmental restrictions in their desperation for land, food, and sustenance.<sup>58</sup> The World Bank defines poverty as “the economic condition in which people lack sufficient income to obtain certain minimal levels of health services, food, housing, clothing and education generally recognized as necessary to ensure an adequate standard of living.”<sup>59</sup> Human rights are defined as universal, inalienable rights inherent to all human beings, which they are entitled to without discrimination.<sup>60</sup> Environmental protection is usually treated as a human rights issue because a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans, thereby serving to secure higher standards of environmental quality, based on the obligation of states to take measures to control pollution affecting health and private life.<sup>61</sup> Recognition of the relationship between abuse of human rights of various vulnerable communities and related damage to their environment is found in the concept of environmental justice. Environmental justice theory recognizes how discrimination and marginalization involves expropriating resources from vulnerable groups and exposing these communities to the ecological harms that result from use of those resources. Environmental justice is based on the human right to a healthy and safe environment, a fair share to natural resources, the right not to suffer disproportionately from environmental policies, regulations or laws, and reasonable access to environmental information, alongside fair opportunities to participate in environmental decision-making.<sup>62</sup> Despite the fact that the period between 1960s-70s saw many African countries attain independence from colonial domination, and the expectations that wealth would trickle down and create jobs for the people,<sup>63</sup> for most African countries, the expectations of a prosperous independent country have remained a mirage. Poverty remains rampant amongst many people across many African nations. Oil and mineral extraction, amongst other resources, in Africa is mostly carried out by multinational companies. These companies enter into agreements with African Governments for the extraction of resources. They have high bargaining power in the negotiations due to their influential position and backing from their governments. On the other hand, African governments have low bargaining power in these contracts or agreements because they are less influential. They are more flexible in negotiations than their foreign counterparts. In exchange, they end up giving what rightfully belongs to the people to foreigners.<sup>64</sup> Governments need to enforce environmental liability laws in their countries. To curb or avert violation of environmental rights or human rights, corporate entities involved in international investments could be exposed to criminal or tortious liability. A claim for toxic torts, in a civil suit, would be brought against a corporation for personal injury resulting from exposure to chemicals and other compounds brought about by activities of

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<sup>56</sup> Ibid, at p.534.

<sup>57</sup> United Nations, *Rio Declaration on Environment and Development 1992*, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992).

<sup>58</sup> Sachs, J.D. and Reid, W.V., “Investments toward sustainable development,” *Science (Washington)*, Vol.312, no. 5776 (2006): 1002.

<sup>59</sup>World Bank, *Handbook on Measuring Poverty*, Chapter 2. Available at [http://siteresources.worldbank.org/INTPA/Resources/4299661259774805724/Poverty\\_Inequality\\_Handbook\\_Ch02.pdf](http://siteresources.worldbank.org/INTPA/Resources/4299661259774805724/Poverty_Inequality_Handbook_Ch02.pdf) [Accessed on 3/10/2018].

<sup>60</sup> [www.ohchr.org/EN/Issues/pages/WhatareHumanRights.aspx](http://www.ohchr.org/EN/Issues/pages/WhatareHumanRights.aspx) [Accessed 3/10/2018].

<sup>61</sup> Boyle, A., ‘Human Rights and the Environment: Where Next?’ *The European Journal of International Law*, Vol.23, No. 3, 2012.

<sup>62</sup> Scottish Executive Social Research, *Sustainable Development: A Review of International Literature*, (Scottish Executive Social Research, 2006), p.8. Available at <http://www.gov.scot/resource/doc/123822/0029776.pdf> [Accessed on 3/10/2018].

<sup>63</sup> Pilger, J., “Apartheid Did Not Die” in “Freedom Next Time” (Edition, 2006); “Mandela’s Greatness may be assured, but not his Legacy” *New African*, Jan. 2014.

<sup>64</sup> Africa Development Bank, “Resource companies ripping-off Africa”-AFDB Chief.

Available at <http://uk.reuters.com/Art/2013/06/16/uk-africa-economy-idUKBRE95F0EH20130616> [Accessed on 3/10/2018].

the corporation. Claims in toxic torts could be brought by employees, and other ordinary citizens that might suffer personal injury from toxic outputs from the activities of a corporation. This would be in addition to claims for workers' compensation for occupational injury, where they occur. The liability could also arise from environmental harm affecting communities and their rights. For instance, *Wiwa v. Royal Dutch Petroleum*, *Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum Development Company* were three lawsuits filed by the Center for Constitutional Rights (CCR) and co-counsel from EarthRight International on behalf of relatives of murdered activists who were fighting for human rights and environmental justice in Nigeria.<sup>65</sup> Royal Dutch/Shell began using land in the Ogoni area of Nigeria for oil production in 1958. Pollution resulting from the oil production has contaminated the local water supply and agricultural land upon which the region's economy is based. Also, Royal Dutch/Shell for decades, is said to have worked with the Nigerian military regime to suppress any and all demonstrations that were carried out in opposition to the oil company's activities.<sup>66</sup> It has been alleged that Shell's aim for the lowest possible production cost including the practice of gas flaring, without regard for the resulting damage to the surrounding people and land, wreaked havoc on local communities and the environment.<sup>67</sup> In the early 1990s, the Ogoni, led by Ken Saro-Wiwa and the Movement for the Survival of the Ogoni People, began organized, non-violent protests against Shell's practices. Shell grew increasingly concerned with the heightened international prominence of the Ogoni movement and made payments to security forces that they knew to be engaging in human rights violations against the local communities. The military government violently repressed the demonstrations, arrested Ogoni activists, and falsely accused nine Ogoni activists of murder and bribed witnesses to give fake testimony.<sup>68</sup> From the foregoing, it is apparent that the Nigerian people, just like it has been the case in other select African countries, have not benefited much, if at all, from the extractive industry in their country but instead have suffered more tragedy as a result.

Thus, in Africa, it is argued that unless investment law regime shifts its focus, it will begin to reverse its penetration and diminish in legitimacy as its focus on investor rights and freedom of investment proves to be of less and less value to developing countries.<sup>69</sup> Moreover, there is a growing international consensus that more is needed from investment treaties if they are to have a meaningful future, or any future at all, and this consensus is increasingly revolving around the sustainable development paradigm.<sup>70</sup>

#### **4. Sustainable International Investment Law and policies for National Development**

It has convincingly been argued that although countries' investment policy regimes typically have both a national and an international dimension, and which dimensions often diverge intentionally, they nevertheless should interact in a way that maximizes synergies, including from a sustainable development perspective.<sup>71</sup> As such it is suggested that shaping such interaction requires a solid understanding of the different objectives, functions and natures of the legal instruments involved. Strengthening cooperation between national and international investment policymakers, improving interaction and ensuring cross-fertilization between the two regimes (including by identifying lessons learned that can be transferred from one policy regime to the other) are crucial tasks for countries striving to create a mutually supporting, sustainable development-oriented investment policy regime.<sup>72</sup> For instance, as far as SDG-oriented evolution is concerned, IIAs are subject to global debate on sustainable development-oriented IIA reform and also exhibit reform approaches to IIAs by

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<sup>65</sup> Centre for Constitutional Rights, *Wiwa et al v. Royal Dutch Petroleum et al.*, available at <http://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al> [Accessed on 3/10/2018].

<sup>66</sup> *Ibid.*

<sup>67</sup> Centre for Constitutional Rights, *Settlement Reached in Human Rights Cases Against Royal Dutch/Shell*, New York, June 8, 2009. Available at <http://ccrjustice.org/home/press-center/press-releases/settlement-reached-human-rights-cases-against-royal-dutchshell> [Accessed on 29/05/2016].

<sup>68</sup> *Ibid.*

<sup>69</sup> Mann, H., "Reconceptualizing international investment law: its role in sustainable development," *op cit.*, at p.535.

<sup>70</sup> *Ibid.*, at p.536.

<sup>71</sup> United Nations Conference on Trade and Development, *World Investment Report 2018*, *op cit.*, at p. 106.

<sup>72</sup> *Ibid.*, at p. 106.



many states, based on UNCTAD Reform Package.<sup>73</sup> On the other hand, the national legal framework have some elements, such as environmental laws, at the core of SDG-oriented policy reform while other elements, such as national investment laws, are less exposed to the SDG discourse.<sup>74</sup> It is still a contentious issue as to whether states should be held internationally accountable for achieving sustainability, whether globally or nationally, and also the specific formula to be used in deciding the ‘acceptable standard of sustainable development.’<sup>75</sup>

The Rio+20 Declaration participating State Parties reaffirmed the need to achieve sustainable development by promoting sustained, inclusive and equitable economic growth, creating greater opportunities for all, reducing inequalities, raising basic standards of living, fostering equitable social development and inclusion, and promoting integrated and sustainable management of natural resources and ecosystems that supports, *inter alia*, economic, social and human development while facilitating ecosystem conservation, regeneration and restoration and resilience in the face of new and emerging challenges.<sup>76</sup> Thus, states retain substantial discretion in interpreting and giving effect to sustainable development.<sup>77</sup> It is however arguable that the national requirements to meet the needs of their people may be an incentive for such countries to uphold the principles of sustainable development and even set standards for the same.

This is well evidenced in the laws and the jurisprudence emanating from Kenyan courts. The Constitution stipulates that sustainable development is one of the national values and principles of governance that must bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.<sup>78</sup> Article 43 of the Constitution of Kenya 2010 provides for economic and social rights of all the Kenyan people and guarantees the right to an adequate standard of living for all and this encompasses right to adequate food, clothing, shelter, clean and safe water, education, health and social security. Any efforts geared towards achieving these rights should thus bear in mind the principles of sustainable development. This would thus include laws and policies on international investments in the country that would have any impact on these rights. For instance, one of the most applicable principles of sustainable development is the Polluter-Pays Principle which is seen not as a principle of equity; rather than to punish polluters, it is designed to introduce appropriate signals in the economic system so as to incorporate environmental costs in the decision-making process and, consequently, to arrive at sustainable, environment-friendly development.<sup>79</sup> The aim is to avoid wasting natural resources and to put an end to the cost-free use of the environment as a receptacle for pollution.<sup>80</sup> The precautionary principle is believed to provide guidance for governance and management in responding to uncertainty.<sup>81</sup> It also provides for action to avert risks of serious or irreversible harm to the environment or human health in the absence of scientific certainty about that harm and it is now widely and increasingly accepted in sustainable development and environmental policy at multilateral and national levels.<sup>82</sup> This is just a demonstration of how the various principles of sustainable development can be applied in decision-making processes related to international investments.

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<sup>73</sup> United Nations Conference on Trade and Development, *World Investment Report 2018*, op cit., at p. 105.

<sup>74</sup> *Ibid*, at p. 105.

<sup>75</sup> Birnie, P. et al, *International Law & the Environment*, op cit, pp. 125-126.

<sup>76</sup> Art. 1.4, *Rio+20 Declaration*.

<sup>77</sup> *Ibid*, p. 126.

<sup>78</sup> Constitution of Kenya, Art. 10(2) (d).

<sup>79</sup> *Ibid*, p. 67; See also Nicoleta, D.D., ‘The Polluter-Pays Principle- -Expression Of Tort Liability For Environmental Protection,’ *Analele Universității din Oradea, Fascicula Protecția Mediului* Vol. XVIII, 2012, pp. 295-302 at p. 301. Available at [http://protmed.uoradea.ro/facultate/anale/protectia\\_mediului/2012A/im/11.%20Dascalu%20Diana.pdf](http://protmed.uoradea.ro/facultate/anale/protectia_mediului/2012A/im/11.%20Dascalu%20Diana.pdf) [Accessed on 3/01/2018].

<sup>80</sup> *Ibid*, p. 67.

<sup>81</sup> Cooney, R., *The Precautionary Principle in Biodiversity Conservation and Natural Resource Management: An issues paper for policy-makers, researchers and practitioners*, (IUCN, Gland, Switzerland and Cambridge, 2004), UK. xi + 51pp at p. 1. Available at <http://www.sehn.org/pdf/PrecautionaryPrincipleissuespaper.pdf> [Accessed on 3/10/2018].

<sup>82</sup> *Ibid*, p.1.

The emergence of the precautionary principle marked a shift from post-damage control (civil liability as a curative tool) to the level of a pre-damage control (anticipatory measures) of risks.<sup>83</sup> It originated in environmental risk management to provide regulatory authority to stop specific environmental contaminations without waiting for conclusive evidence of harm to the environment (i.e., while there was still “uncertainty” about the evidence).<sup>84</sup> It has been suggested that the precautionary principle might be described both in terms of the level of uncertainty that triggers a regulatory response and in terms of the tool that will be chosen in the face of uncertainty (as in the case of technological requirements or prohibitions).<sup>85</sup>

Maximising sustainable development benefits requires maximising synergies between IIAs and the national legal framework for investment.<sup>86</sup> Strengthening cooperation between the authorities in charge of the various dimensions of a country’s investment policy framework is crucial for ensuring a coherent approach that reflects the country’s overall strategy on investment for development.<sup>87</sup> It is suggested that one option for doing so is the establishment of special agencies or interministerial task forces with a specific mandate to coordinate investment policy-related work (including the negotiation of IIAs) of different ministries and other government units. In addition, stakeholder consultations can help maximise synergies.<sup>88</sup>

In addition, well-managed legal interaction between different investment policy instruments, based on a clear understanding of the different functions and objectives of the two regimes and the way they relate to each other, can help minimize challenges arising from diverging or conflicting clauses.<sup>89</sup> Policymakers are encouraged to strive for a more synergetic approach to the formulation of IIAs and the national legal framework for investment in order to produce an investment regime that is in line with a country’s broader national development strategy and with sustainable development imperatives.<sup>90</sup> This is because an investment policy regime does not exist in a vacuum; it interacts with other areas of economic law and policy, as well as with other areas of law and policy that are considered “non-economic”, such as culture, environment, health, labour, social or gender-related issues; land rights; national security issues, among others.<sup>91</sup> In order to foster sustainable development-oriented policy coherence, it has been suggested that IIA reform must take into account the interaction between IIAs and other bodies of international law. This is because addressing this relationship in IIA reform can help avoid conflicts and provide arbitral tribunals with guidance on how to interpret such interaction.<sup>92</sup>

Globalization has simply been described as increasing and intensified flows between countries of goods, services, capital, ideas, information and people, all of which produce cross border integration of a number of economic, social and cultural activities.<sup>93</sup> There are said to be four main driving forces behind increased interdependence namely: trade and investment liberalization; technological innovation and the reduction of communication costs; entrepreneurship; and global social networks.<sup>94</sup> There are remarkable benefits that come with globalization. For instance, there has been introduction of new technologies, access to new markets and

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<sup>83</sup> World Commission on the Ethics of Scientific Knowledge and Technology (COMEST), *The Precautionary Principle*, (United Nations Educational, Scientific and Cultural Organization, Paris, 2005), p.7. Available at <http://www.eubios.info/UNESCO/precprin.pdf> [Accessed on 3/10/2018]

<sup>84</sup> Hathcock, J.N., ‘The Precautionary Principle—An Impossible Burden Of Proof for New Products,’ *AgBioForum*, Vol. 3, No. 4, 2000, pp. 255-258, p.255.

<sup>85</sup> Sunstein, C.R., ‘Beyond the Precautionary Principle,’ University of Chicago Public Law and Legal Theory Working Paper No. 38, January 2003, p.11. Available at [http://www.law.uchicago.edu/files/files/38.crs\\_.precautionary.pl-lt.pdf](http://www.law.uchicago.edu/files/files/38.crs_.precautionary.pl-lt.pdf) [Accessed on 3/10/2018].

<sup>86</sup> United Nations Conference on Trade and Development, *World Investment Report 2018*, op cit., p. 108.

<sup>87</sup> *Ibid*, at p. 109; See also Organisation For Economic Co-Operation And Development, *Policy Framework For Investment*, (OECD, 2006). Available at <https://www.oecd.org/daf/inv/investment-policy/36671400.pdf> [Accessed on 3/10/2018].

<sup>88</sup> *Ibid*, at p. 109.

<sup>89</sup> *Ibid*, at p. 109.

<sup>90</sup> *Ibid*, at p. 111.

<sup>91</sup> United Nations Conference on Trade and Development, *World Investment Report 2018*, op cit., at p. 111.

<sup>92</sup> *Ibid*, p. 114.

<sup>93</sup> Bertucci, G., & Alberti, A., ‘Globalization and the Role of the State: Challenges and Perspectives’ p. 1. Available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan006225.pdf> [Accessed on 3/10/2018].

<sup>94</sup> *Ibid*.

the creation of new industries. Foreign aid remains crucial to developing countries. However, the practical situation in the global market is that there are unfair rules that are disadvantageous to developing countries due to their reduced bargaining powers as against many of the developed world countries.<sup>95</sup>

Advocates of globalisation have contended that it affords the poor countries and their citizenry the chance to develop economically and raise their standards of living.<sup>96</sup> Opponents of globalisation on the other hand, have argued that the creation of an unregulated international free market works for the benefit of multinational corporations in the Western world at the expense of local enterprises, local cultures, and common people.<sup>97</sup> They disagree with those who support globalisation in that it is concerned with the welfare of the rich and the developed world while denying the poor countries and their citizenry the chance to develop economically and raise their standards of living. The more developed countries with high bargaining power enjoy the biggest share of the benefits of globalisation. The rich industrialized countries formulate policies to make developing countries liberalize domestic markets for easier access but the same is not reciprocated in the domestic markets of industrialized countries. This makes Africa vulnerable since it can be extensively exploited yet it cannot readily access the national markets of developed countries.<sup>98</sup> As a result, African domestic industries have collapsed while foreign investments continue thriving. It has been argued that international policies on globalisation are deliberately calculated to ensure continued economic domination by the industrialized countries.<sup>99</sup> This only serves to impoverish the people in the developing states especially in Africa. Globalisation has also been associated with a decline in the power of national governments to direct and influence their economies especially with regard to macroeconomic management.<sup>100</sup>

It is thus argued that the need to understand investment law as part of a broader part of international law relating to globalization suggests the need for a better method of integrating human rights, environmental, and other areas of law in a more transparent and conflict-free dispute settlement environment.<sup>101</sup> The World Commission on Environment and Development recommended that in order to achieve sustainable development, changes are required in the attitudes and procedures of both public and private-sector enterprises. Moreover, environmental regulation must move beyond the usual menu of safety regulations, zoning laws, and pollution control enactments; environmental objectives must be built into taxation, prior approval procedures for investment and technology choice, foreign trade incentives, and all components of development policy.<sup>102</sup>

Cross-fertilization between domestic investment rules and IIAs can also ensure that lessons learned in one realm of policymaking benefit the other. Facilitating cross-fertilization not only requires intensified cooperation between policymakers, but also the careful identification of potentially transferable lessons learned.<sup>103</sup>

As far as sustainable development orientation of domestic laws on investments is concerned, it has been observed that only a small number of national investment laws refer- in their preamble or another dedicated clause on the objectives of the law- to sustainable development (or environmental or human health protection).

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<sup>95</sup> World Bank World Economy Report, 'Sustainable Development Challenges' *World Economic and Social Survey* 2013 E/2013/50/Rev. 1ST/ESA/344.

<sup>96</sup> Globalization 101, 'What Is Globalization?' *The Levin Institute* - The State University of New York, Available at <http://www.globalization101.org/what-is-globalization/> [Accessed on 3/10/2018].

<sup>97</sup> Ibid

<sup>98</sup> For example, under North American Free Trade Agreement, USA has entered into agreement opening its market only to its neighbours, that is, Canada and Mexico. Developing countries are excluded yet NAFTA members can under WTO's GATT agreement access the markets of developing countries.

<sup>99</sup> Stiglitz, J., *Globalization and its Discontents* (Penguin Books, UK, 2002).

<sup>100</sup> Smith, M. K. & Doyle M. 'Globalization' *the encyclopedia of informal education* (2002), Available at [www.infed.org/biblio/globalization.htm](http://www.infed.org/biblio/globalization.htm)[Accessed on 2/10/2018].

<sup>101</sup> Mann, H., "Reconceptualizing international investment law: its role in sustainable development," op cit., at p.544.

<sup>102</sup> World Commission on Environment and Development, *Our Common Future*, United Nations 1987, "Report of the World Commission on Environment and Development," General Assembly Resolution 42/187, 11 December 1987. A/42/427, chapter 2, para. 79.

<sup>103</sup> United Nations Conference on Trade and Development, *World Investment Report 2018*, op cit., at p. 109.

This is however not to say that sustainable development- related concepts are entirely missing from other national laws and policies, as exemplified above in the case of Kenya.<sup>104</sup>

## **5. Conclusion**

An effective investment law and policy regime should be geared towards promoting sustainable development. It should also ensure minimal or no environmental damage. In addition, human rights must at all times be upheld. This paper argues that for long lasting and sustainable investment policies that positively impact on the lives of communities, there is a need to ensure that the same are in line with the principles of sustainable development especially those that seek to safeguard human rights as well as sound environmental management and governance.

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<sup>104</sup> Ibid, at p. 111.

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