

# Unlocking the Quandary: Towards Embedding Sustainable Development into the Sino Outbound FDIs

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## Abstract

Irrefutably, China has transformed into a key capital exporter especially to the developing African countries profoundly from the year 2000 and while her outbound investments are laudable for the positive impact they have had, qualm is also ubiquitous that they do not portend sustainable development. Perceptibly, the notion of sustainable development strives for an infallible balance between economic development, ecological protection and conservation as well as social development and in the contemporary world; it has wielded magical legislative and juridical support. Consequently, both the domestic and international policy instruments have largely courted its presence and moreover, the concept also permeated the foreign direct investments' turf. Ideally, foreign direct investments may only be sustainable if they are wholly reflective of what the notion propagates, that is, if they attain a balance between economic and social development while simultaneously protecting and conserving the environment. Contextually, this paper seeks to interrogate whether or not the notion of sustainable development is fully embedded into the Sino outbound investments and if not, offer suggestions on how the same may be ingrained. In a nutshell, the paper contends that China is generally in the right path towards full implantation of the notion in her outbound FDIs. Nevertheless, there still exists an avalanche of legal impediments that must be surmounted before the objective is fully achieved. The paper also opines that the developing capital importing countries also have a role to play in this course as the burden cannot be solely left to China to bear.

**Keywords:** Sustainable Development; Foreign Direct Investments; Chinese Outbound Investments; Bilateral Investment Treaties

## 1. Introduction

Although the precise contours of the concept of sustainable development have remained contested over the years,<sup>1</sup> it has however been generally agreed that the notion seeks to *inter alia* strike a balance between economic development, ecological protection and preservation as well as social development.<sup>2</sup> As such, the concept sets the yardstick for determining the aptness of any given development initiative in that it is obliged to ensure a better quality of life for everyone, now and for the generations to come.<sup>3</sup> Consequently, a development initiative must essentially meet four objectives at the same time; social progress which recognizes needs for everyone, effective protection of environment, prudent use of natural resources as well as maintenance of high and stable levels of economic growth and employment.<sup>4</sup> In addition, it should accommodate, reconcile and must seek the integration between growth, social justice, human rights [including labor standards<sup>5</sup>] and environmental protection objectives towards participatory improvement in collective quality of life for the benefit of both the present and future generations;<sup>6</sup> taking into account both the *intra* and intergenerational equity.<sup>7</sup> Grippingly, a myriad of domestic<sup>8</sup> and international instruments<sup>1</sup> have succinctly made provisions and alluded to the existence

<sup>1</sup> Remigijus Ciegis, Jolita Ramanauskiene, Bronislovas Martinkus, 'The Concept of Sustainable Development and its Use in for Sustainability Scenarios' (2009) 2 *Inzinerine Ekonomika- Engineering Economics* 28. See also, Edwin Zacoai, 'Sustainable Development: Characteristics and Interpretations' (1999) 54 *Geographica Helvetica* 73. The author opines that sustainable development is a broad topic with many different dimensions and approaches, persisting difficulties in operationalizing, measuring and evaluating.

<sup>2</sup> Marie Claire Cordonier Segger, 'The Role of International Forums in the Advancement of Sustainable Development' (2009) 10 *Journal of Sustainable Development Law and Policy* 1. See also, Andrea Ross, 'Modern Interpretations of Sustainable Development' (2009) 36 *Journal of Law and Society* 32.

<sup>3</sup> SDS Consulting, 'Sustainable Development: What is Sustainable Development?' May 7 2005 < <http://www.sustainable-development.net/information/PDF/050507sd-whatissd.pdf> > Accessed 11 August 2018. See further, Jennifer A. Elliot, *An Introduction to Sustainable Development* (3<sup>rd</sup> Edition, Routledge 2006) 14. The author postulates that sustainable development seeks to define a fair and just development and since the environment is the basis of all economic activity and of life itself, it is only right that the quality and the integrity of environment be maintained for future generations.

<sup>4</sup> SDS Consulting, *Ibid*.

<sup>5</sup> Rebecca Zahn and David Mangan, 'Labor Standards and Sustainable Development: Unpicking the Eu's Approach' (2015) 31 *Comparative Labour Law and Industrial Relations* 233.

<sup>6</sup> Luther Rangreji, "'The Future We Want" – Reflections on the "Sustainable Development" Paradigm' (2013) 43 *Environmental Policy and Law* 306. See also, A CISDL Concept Paper No 1 Montreal, 2005 <<http://cisdl.org/public/docs/What%20is%20Sustainable%20Development.pdf>> Accessed 11 August 2018.

<sup>7</sup> Dire Tladi, *Sustainable Development in International Law: An Analysis of Key Enviro- Economic Instruments* (Pretoria: University of Pretoria Press 2007) 40.

<sup>8</sup> For example, Government of Kenya, *Constitution of Kenya* (Nairobi: Government Printers 2010) Article 10.

of the concept, this being a harbinger that it has become central and consequently, its import and thrust in shaping the contemporary life's activities cannot be wished away.

Equally, the notion of sustainable development and its components have proved to be helpful especially when courts and other international tribunals have to interpret, apply or develop treaties or general international law.<sup>2</sup> Indeed, the notion represents a policy which can apparently influence the outcome of cases, the interpretation of treaties and practice of states and international organizations and may amount to momentous changes and developments in the existing law. In the case concerning the *Gabcikovo –Nagymoros Project (Hungary-Slovakia)*,<sup>3</sup> the ICJ gave a judicial interpretation to sustainable development as a concept whereby in his separate opinion, judge Weeramantry rightly postulated that the concept of sustainable development is the one that has received worldwide acceptance not only by the developing states but also by developed states,<sup>4</sup> as it reaffirms that there must be both development and environmental protection, and that neither of these rights can be neglected at the expense of the other, thus making it part of modern international law.<sup>5</sup>

The Judge therefore elaborated that the proper role of sustainable development as being the balancing of the competing demands of development and environmental protection by noting that 'the court must hold the balance even between the environmental considerations and developmental considerations raised by the respective parties' and further that 'it would not be wrong to state that the love of nature, the desire for its preservation, and the need for human activity to respect the requisites for its maintenance and continuance are among those pristine and universal values which command international recognition'.<sup>6</sup> Prominently, the judge considered sustainable development as a legal principle of customary international law with an erga omnes disposition.<sup>7</sup>

In the same vein, the ICJ in *the Pulp Mills on River Uruguay's Case [Argentina V Uruguay]*<sup>8</sup> alluded to the fact that economic development and ecological preservation are mutually reinforcing and as such, states should not frustrate each other from promoting sustainable development and where development may cause harm either to the environment or social development, it would require states to take steps to address a duty to prevent or mitigate such harm by ensuring that environmental and social measures are fully integrated into the project and its costs. The court further posited thus,<sup>9</sup>

....Present case highlights the importance of the need to ensure environmental protection of the shared natural resources while allowing for sustainable development...it is in particular necessary to bear in mind the reliance of the parties on the quality of the water of the River Uruguay for their livelihood and economic development...from this point of view account must be taken of the need to safeguard the continued conservation of the river environment and the rights of economic development of Riparian States...

Importantly, the ICJ also held *inter alia* that Environmental Impact Assessment- which is an essential tool in sustainable development- is a customary international law requirement.<sup>10</sup> Later on, the ICJ in *Whaling in the Antarctic [Australia V Japan: New Zealand Intervening]*<sup>11</sup> termed the Japanese continued whaling in the Antarctic as unsustainable and after scrutinizing and analyzing the scientific evidence presented by the parties, refused to countenance the Japanese assertion that the whaling was sound for the purposes of scientific research.<sup>12</sup> Additionally, the ICJ in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons Case* had recognized that 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn'.<sup>13</sup>

On its part, the Permanent Court of Arbitration in *the Arbitration Regarding the Iron Rhine Railway*

<sup>1</sup> For example, Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific (Antigua, Guatemala 18 February 2002) <[http://www.cep.unep.org/services/napregseas/Convention\\_English\\_NEP.do](http://www.cep.unep.org/services/napregseas/Convention_English_NEP.do)> Accessed 11 October 2017.

<sup>2</sup> Alan Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Allan Boyle and David Freestone (eds.), *International Law and Sustainable: Past Achievements and Future Challenges* (Oxford University Press 1999) 31.

<sup>3</sup> *Gabcikovo –Nagymoros Project (Hungary-Slovakia)* Merits, [1997] ICJ Rep 7.

<sup>4</sup> *Ibid*, Par. 29.

<sup>5</sup> *Ibid*, Par. 31-32.

<sup>6</sup> Karuiki Muigua and Francis Kariuki 'Sustainable Development and Equity in the Kenya Context' (2012) 3 <<http://kenyalaw.org/kl/index.php?id=1906>> Accessed 5 December 2017.

<sup>7</sup> D. B Magraw and L. D. Hawke, 'Sustainable Development' in Daniel Bodansky, Jutta Brunee and Ellen Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 625.

<sup>8</sup> *Case Concerning Pulp Mills on River Uruguay [Argentina v Uruguay]* [2006] ICJ Rep 113.

<sup>9</sup> Marie Claire Cordonier Segger (note 2) 16.

<sup>10</sup> Jessica L. Rutledge, 'Wait a Second- is That Rain or Herbicide? The ICJ's Potential Analysis in Aerial Herbicide Spraying and an Epic Choice Between Environment and Human Rights' (2011) 46 Wake Forest Law Review 1079.

<sup>11</sup> *Whaling in the Antarctic [Australia V Japan: New Zealand Intervening]* Judgment, [2014] ICJ Rep 26.

<sup>12</sup> Brendan Plant, 'Sovereignty, Science and Cataceans: The Whaling in the Antarctic Case' (2015) 74 Cambridge Law Journal 40. See also, Katie Sykes, 'The Appeal to Science and the Formation of Global Animal Law' (2016) 27 European Journal of International Law 497.

<sup>13</sup> Phillippe Sands, *Principles of International Environmental Law* (2<sup>nd</sup> Edition Cambridge University Press 2003) 257.

[*Belgium V Netherlands*]<sup>1</sup> balanced environmental preservation against socio- economic development thereby holding that the application of environmental measures could not amount to a denial of Belgium's transit rights, nor could these measures render the exercise of such a right unreasonably difficult. The tribunal further alluded to the concept of sustainable development thereby averring thus;<sup>2</sup>

...Environmental Law and the law of development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment. This is a duty, in the opinion of the tribunal, has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in the implementation of specific treaties between the parties.....

In *the Matter of Indus Waters Kishenganga Arbitration Between The Islamic Republic of Pakistan and The Republic of India*,<sup>3</sup> the Permanent Court of Arbitration reiterated the mutuality of development and ecological preservation. The court insisted that although India was entitled to divert water from Kishenganga for the purposes of power generation, the right was not unlimited since under the customary international law, it was *inter alia* obliged to maintain a minimum level of water flow to mitigate ecological harm.<sup>4</sup> Moreover, the court also restated the need to manage resources sustainably thereby insisting thus;<sup>5</sup>

...There is no doubt that states are required under the contemporary customary international law to take environmental protection into consideration when planning and developing projects that may cause injury to a bordering state. Since the time of *Trail Smelter*, a series of conventions, declarations, judicial and arbitral tribunals have addressed the need to manage resources in a sustainable manner. In particular, the International Court of Justice expounded upon the principle of 'sustainable development' in *Gabcikovo- Nagymaros* referring to the need to reconcile economic development with the protection of environment...

The concept of sustainable development has also permeated the WTOs' disputes adjudication but this is an anticipated position given that the 1994 Marrakesh Agreement Establishing the World Trade Organization recognizes sustainable development among its objectives.<sup>6</sup> Moreover, the 2001 Doha Declarations reaffirm the commitment to the objective of sustainable development as provided for in the preamble to the Marrakesh Agreement.<sup>7</sup> As such, the WTO Appellate Body in *the United States –Import Prohibition of Certain Shrimp and Shrimp Products*<sup>8</sup> did not mince its words in explaining the WTO's embrace of the concept while at the same time explaining its purport. The Body explicated that;<sup>9</sup>

....While Article XX was not modified in the Uruguay round, the preamble attached to the WTO Agreement shows that signatories to that agreement were in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national policy. The preamble of the agreement –which informs not only the GATT 1994, but also the other covered agreements explicitly, acknowledges 'the objectives of sustainable development'...this concept has generally been accepted as integrating economic and social development and environmental protection...<sup>10</sup>

<sup>1</sup> *In the Arbitration Regarding the Iron Rhine (" Uzeren Rijn") Railway Between The Kingdom of Belgium and the Kingdom of Netherlands*, Award of the Tribunal, The Hague 24 May 2005 <<https://pcacases.com/web/sendAttach/477> > Accessed 5 December 2017.

<sup>2</sup> *Ibid*, Par. 59.

<sup>3</sup> *The Matter of Indus Waters Kishenganga Arbitration Between The Islamic Republic of Pakistan and The Republic of India*, Partial Award 18 February 2013 <[http://www.worldcourts.com/pca/eng/decisions/2013.02.18\\_Pakistan\\_v\\_India.pdf](http://www.worldcourts.com/pca/eng/decisions/2013.02.18_Pakistan_v_India.pdf) > Accessed 6 December 2017.

<sup>4</sup> Jasmine Moussa, 'Implications of Indus Waters Kishenganga Arbitration for the International Law of Watercourses and the Environment' (2015) 64 *International and Comparative Law Quarterly* 697.

<sup>5</sup> *The Matter of Indus Waters Kishenganga Arbitration Between The Islamic Republic of Pakistan and The Republic of India*, Partial Award Par. 449.

<sup>6</sup> Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 133 <<https://treaties.un.org/doc/publication/unts/volume%201867/volume-1867-i-31874-english.pdf> > Accessed 6 December 2017. The preamble postulates: 'Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development...'

<sup>7</sup> Doha Declarations, Ministerial Declaration Adopted on 14 November 2001 at the Ministerial Conference Fourth Session at Doha 9- 14 November 2001, Par. 6 <[https://www.wto.org/english/res\\_e/booksp\\_e/ddec\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/ddec_e.pdf) > Accessed 6 December 2017. It Provides '...We strongly reaffirm our commitment to the objective of sustainable development stated in the preamble of Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non discriminatory multilateral trading system, acting for the protection of environment and promotion of sustainable development can and should be mutually supportive..'

<sup>8</sup> *The United States –Import Prohibition of Certain Shrimp and Shrimp Products* AB-1998-4 WT DS58/ ABR 12 October 1998 <[https://www.wto.org/english/tratop\\_e/dispu\\_e/58abr.pdf](https://www.wto.org/english/tratop_e/dispu_e/58abr.pdf) > Accessed 6 December 2017.

<sup>9</sup> *Ibid* Par. 129.

<sup>10</sup> *Ibid*.

This position was subsequently but separately reinforced by the Body in the United States –Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia thereby restating thus;<sup>1</sup>

...In that framework, assessing first the object and purpose of WTO Agreement, we note that WTO preamble refers to the notion of ‘sustainable development’. This means that in interpreting the terms of the chapeau, we must keep in mind that sustainable development is one of the objectives of the WTO agreement. How this objective is to be appreciated can further be elaborated by reference to the Marrakesh Decision establishing the Committee on trade and Environment (CTE). The preamble of that decision provides inter alia that; there should not be nor be any policy contradiction between upholding and safeguarding an open, non discriminatory and equitable multilateral trading system on the one hand and acting for the protection and promotion of sustainable development on the other. These terms would seem to imply that recourse to trade related measures not based on international consensus is generally not the appropriate means of enforcing environmental measures since it leads to imposition of unwanted constraints in the multilateral trading system and may affect sustainable development....

Additionally, both the WTO Panel and the WTO Appellate body have drawn a link between trade, human health and sustainable development by ruling that a national measure designed to protect human health is justified under Article XX (b) GATT so as to restrict trade.<sup>2</sup> However, while the Appellate Body may readily acquiesce to a trade restriction by a party under the sustainable development banner –profoundly citing the environmental conservation-, such a party must however do so with clean hands as the Body will not countenance an unreasonable and unfair trade restriction imposed by a WTO’s Party member under the guise of environmental protection and sustainable development in general.<sup>3</sup>

Domestically, nations all over the world have, through enacting legislations and judicial pronouncements embraced the notion of sustainable development<sup>4</sup> and interestingly, most domestic courts have not fallen short in upholding principles that are associated with the concept. Fascinatingly, it has been recognized that common resources like air, forests and waterways are held by the state for the benefit and use by the current and future generations and as such, every state is a trustee and under a fiduciary duty<sup>5</sup> to use resources in the interests of the general public. In *Bulankulumana V Ministry of Industrial Development*<sup>6</sup>, the Sri Lankan Supreme Court reiterated that the government is a trustee of natural resources and the organs of the state are the guardians to whom the people have committed the care and preservation of resources of the people and where the government does not act properly as a trustee, it must be restrained from further acting. In the Philippines, the Supreme Court in the *Minors Oposa V Secretary of the Department of Environmental and Natural Resources*<sup>7</sup> routed for intergenerational equity and ruled *inter alia* that the future generations indeed hold enforceable environmental rights whose enforcement could appropriately be done by a guardian or representatives as a group. Davide L.J thus posited:<sup>8</sup>

....Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors’ assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come....

Similarly, the Supreme Court of India in *the State of Himachal Pradesh V Ganesh Wood Products*<sup>9</sup> [while upholding an injunction against the government of the state of Himichal Pradesh’s action permitting an

<sup>1</sup> *The United States –Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia* WT/DS58/RW 15 June 2001, paras. 5.5.4 and 5.5.5 <[https://www.wto.org/english/tratop\\_e/dispu\\_e/58rw\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/58rw_e.pdf)> Accessed 6 December 2017.

<sup>2</sup> *European Communities- Measures Affecting Asbestos and Asbestos Containing Products* AB 2000-11 WT /DS135/AB/R March 12 2001 <[https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009DP.aspx?language=E&CatalogueIdList=1236&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009DP.aspx?language=E&CatalogueIdList=1236&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True)> Accessed 6 December 2016.

<sup>3</sup> *China -Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, Reports of the WTO’s Appellate Body <[https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=126459&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=126459&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True)> Accessed 8 December 2017.

<sup>4</sup> For example see, *Waweru V Republic* [2007] AHRLR 149 [KeHC 2006] Paragraph 43. The High Court of Kenya Stated; ‘... The government through the relevant ministries is under the law under an obligation to approve sustainable development and nothing more, which is development that meets the needs of the present generation without compromising the ability of future generations to meet their needs....’

<sup>5</sup> *Ibid*, Par. 31.

<sup>6</sup> *Bulankulumana V Ministry of Industrial Development* Application No. 884/99, Supreme Court of Sri Lanka 243 [7 April 2000].

<sup>7</sup> *Minors Oposa V Secretary of the Department of Environmental and Natural Resources* 33 ILM 173 [1994].

<sup>8</sup> *Ibid*, 185.

<sup>9</sup> *State of Himachal Pradesh V Ganesh Wood Products* SC, AIR [1996] 149.

indiscriminate felling of Khair trees for the manufacture of Katha- resulting into deep and adverse effects on environment and ecology] held that the government's unsustainable actions were unacceptable. The Court further ruled that the actions were:-

....Contrary to public interest involved in preserving forest wealth, maintenance of environment and ecology and considerations of sustainable growth and inter-generational equity. After all, the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations...<sup>1</sup>

The polluter pays principle which admittedly propounds that whoever is responsible for the damage to the environment should bear the costs associated with it has also been embraced by states, profoundly in fixing the appropriate quantum of fine in sentencing offenders who have committed crimes. For example, an Australian court In *Environment Protection Authority v Waste Recycling and Processing Corporation*<sup>2</sup> took into account the polluter pays principle in the sentencing of an offender who had polluted waters contrary to Section 120(1) of the Protection of the Environment Operations Act 1997. The court posited thus;<sup>3</sup>

...Sustainable and economically efficient development of environmental resources requires internalizing the costs of preventing and controlling pollution as well as any environmental harm itself. This is the polluter pays principle. The polluter ought to pay for the costs of remedying any on-going environmental harm caused by the polluter's conduct. This can be done by the polluter cleaning up the pollution and restoring the environment as far as practicable to the condition it was before being polluted. The polluter ought also to make reparation for the irremediable harm caused by the polluter's conduct such as the death of biota and damage to ecosystem structure and functioning...

Moreover, states have appreciated the principle of integration as one of the cornerstones of modern environmental policy and sustainable development. For example, the integration of environmental concerns in other areas of policies has achieved the status of one of the basic principles of EU's environmental law and policy. To this end, Article 6 of the European Community treaty has provided that 'environmental protection requirements must be integrated into the definition and implementation of community policies and activities referred to in article 3, in particular with a view to promoting sustainable development'. This position has been endorsed by the European Court of Justice in *Greece V Council*<sup>4</sup> whereby the court ruled that 'it is a binding obligation that environment related requirements must be integrated into the policies although it is still far from clear what constitutes the exact substance of this principle.'

Additionally, the European Court of Justice has accorded the precaution principle preeminence and adopted a precautionary approach particularly in respect to environmental risks that pose dangers to humans. Therefore, the court in *United Kingdom V Commission of the European Community*<sup>5</sup> applauded the Commission and held that the Commission had not committed manifest error when it took precaution in banning the export of beef during the 'mad cow' crisis. The court said;

.....At the time when the contested decision was adopted, there was great uncertainty as to the risks posed by live animals, bovine meat and derived products. When there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait the reality and seriousness of those risks to become fully apparent.....

Similar sentiments have been echoed by the Supreme Court of Canada in *Canada Ltee (Spray Tech, Societe D' arrosage) V Hudson (Ville)*<sup>6</sup> whereby it was insisted thus;

....In order to achieve sustainable development, policies must be based on precautionary principle. Environmental measures must anticipate, prevent, and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation....

Elsewhere, states have also not faltered in embracing the principle of prevention and public participation as indispensable pillars towards achieving sustainable development. Towards this end, the High Court of Kenya has insisted that an Environmental Impact Assessment is a condition precedent to initiation of any development project that is anticipated to have an effect on the environment.<sup>7</sup> Moreover, those likely to be affected by the

<sup>1</sup> *Ibid*, 163-64.

<sup>2</sup> *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419.

<sup>3</sup> *Ibid*, Par. 230.

<sup>4</sup> *Greece V Council* C-62/88 [1990] ECR Par. 20.

<sup>5</sup> *United Kingdom V Commission* C-180/96 [1996] ECR I-3903 Paras. 98-99.

<sup>6</sup> *Canada Ltee (Spray Tech, Societe D' arrosage) V Hudson (Ville)* [2001] 2SCR 241 Paragraph 31.

<sup>7</sup> *Kasing'a V Daniel Kiplang'at Kirui & 5 Others* [2015] eKLR

intended project must participate in the assessment as a matter of a right. In this regard, the court has ruled thus:<sup>1</sup>

...69. Public participation for purposes of EIA ought to be real and actual. It has a critical role, for the persons to be most affected, may offer alternatives to the project or propose important mitigation measures. It is not a window dressing exercise, and neither should it be looked at as a mere formality, aimed only at ticking the boxes. I am surprised that NEMA could rubberstamp such a slapdash job, at least in so far as participation of the persons most affected by the project was concerned. It was the duty of NEMA to ensure that proper public participation was done. On seeing the project report, NEMA ought to have referred the proponents of the project back to the ground for proper public participation. This was not done and NEMA clearly slept on the job....

Notably, a similar position obtains in the United States whereby the courts have underscored the necessity of Environmental Impact Assessment prior to and during the progress of a development project.<sup>2</sup> Separately, the Brazilian Supreme Court has reiterated that environment 'is a constitutional public heritage, not because it belongs to the government but because its protection is in the best interest of the community on behalf of the present and future generations'.<sup>3</sup> Additionally, many countries in the world have also ratified provisions in their constitutions aimed at entrenching sustainable development in their jurisdictions but in different aspects.<sup>4</sup>

## 2. Sustainable Development and Foreign Direct Investments in Context

Indubitably, Foreign Direct Investment [FDI] is crucial especially to the developing countries as it provides the needed capital for investment. It brings with it employment, managerial skills and technology and therefore accelerated growth and development.<sup>5</sup> It also undoubtedly provides external capital needed to supplement domestic savings of the host states thus spurring investment and growth.<sup>6</sup> Potentially, FDI can also introduce cleaner technologies for facilitating technological leapfrogging that might contribute to sustainable development.<sup>7</sup> On the other hand, FDI may generate negative effects such as crowding out effects on domestic investment, unfair competition between foreign and domestic companies as well as 'the market stealing effect' as well as the former's capacity of absorption thereby leading to market inequalities or contributing to an outflow of foreign exchange.<sup>8</sup>

According to Asiedu,<sup>9</sup> FDI's could be market seeking, non - marketing seeking and even resource seeking but the crucial determinants on FDI inflows into a given host are return of investments, infrastructure development, openness of the host country as well as less political risk. Other crucial determinants include but not limited to:- large local markets, natural resources endowments, low inflation, and stable institutional and policy environment.<sup>10</sup> However, corruption and political instability tend to discourage investors and effectively keep investments at bay.<sup>11</sup>

<sup>1</sup> *Ibid*, Paragraph 69.

<sup>2</sup> *Calvert Cliffs' Coordinating Committee, Inc. V US Atomic Energy Commission* 49 F 2d 1109 [1971] USA.

<sup>3</sup> Nathalie J. Chalifour, *Land Use Law for Sustainable Development* (Cambridge University Press 2006) 480.

<sup>4</sup> For example, The Constitution of Ecuador, Articles 71-74, Article 41 of the Republic of Argentina Constitution, See also, Daniel A. Sabsay, 'Constitution and Environment in Relation to Sustainable Development' (2004) 21 *Pace Environmental Law Review* 155, Article 24 of the Constitution of the Republic of South Africa, The Constitution of India at Articles 14, 19(1) (g), 21, 26, 32, 47, 48-A, 226, 253, Seventh schedule and Eleventh Schedule, Article 43 of the Constitution of the Federal Republic of Ethiopia, Article 45 of the Constitution of the Kingdom of Spain, Article 115 of the 1922 Latvian Constitution, Article 43 of the 1991 Macedonian Constitution, Article 67 of the 2007 Thailand Constitution, Article 37 of the 1994 of the Republic of Moldova Constitution, Article 15 of the 1992 Mali's Constitution, Article 24 of the 2001 of the Greece Constitution, Article 20 of the 1999 Finland Constitution, Article 39 of the 2003 Chechen Constitution, Article 69 of the 2001 of the Croatian Constitution, Article 24 of the 1992 Angola Constitution, Articles 49 and 79 of the 1991 Constitution of Colombia, Article 46 of the 1992 Constitution of the Republic of Congo, Article 50 of the 1949 Constitution of Costa Rica, Article 21 of the 1983 Constitution of the Netherlands, Article 56 of the 1982 Constitution of the Republic of Turkey. The Constitution of the 1976 Constitution of the Portuguese at Article 66 provides that 'everyone has the right to a healthy and ecologically balanced human environment and duty to defend it. In order to guarantee the right to such an environment, within the context of sustainable development, it is the duty of the state acting through appropriate bodies and with involvement of citizens to prevent and control pollution and its effects and harmful forms of erosion'. On its part, Article 5 of the 1997 Constitution of the Republic of Poland says, '....The Republic of Poland shall safeguard independence and integrity of its territory and ensure the freedoms and rights of persons and citizens security, safeguard the national heritage and shall ensure the protection of the national environment pursuant to the principles of sustainable development....'

<sup>5</sup> Elizabeth Asiedu, 'On the Determinants of Foreign Direct Investment to Developing Countries' (2002) 30 *World Developments* 107.

<sup>6</sup> *Ibid*.

<sup>7</sup> UNCTAD and Sustainable Business Institute at the European Business School, *Making FDI Work for Sustainable Development* (UN: New York and Geneva 2004) 10. Investments by Transnational Corporations bring not only foreign currency but also employment growth, potential transfer of technologies and technological expertise and managerial skills.

<sup>8</sup> Mihaela Kardos, 'The Relevance of Foreign Direct Investment for Sustainable Development: Empirical Evidence From the European Union' (2014) 15 *Procedia Economics and Finance* 1349.

<sup>9</sup> Elizabeth Asiedu, (note 52) 110-15.

<sup>10</sup> Elizabeth Asiedu, 'FDI in Africa: The Role of Natural Resources, Market Size, Government Policy, Institutions and Political Instability' (United Nations University 2006) 63.

<sup>11</sup> *Ibid*, 74.

Questions are however bountiful on what the relationship between FDIs and sustainable development is and profoundly, what are the FDIs' effects on sustainable development. As already highlighted, sustainable development is the kind of development that 'considers ecological, social and economic dimensions, recognizing that all must be considered together to find lasting stability and prosperity'.<sup>1</sup> It may therefore be rightly inferred that an FDI may be sustainable only if its anchored on these three pillars and if it thrives on in advancing the course of attaining these objectives in its operations. Poignantly, in many host countries, the ecological and social aspects of FDI are given a wide berth although they play an important role in sustainable development. Indeed, regarding the ecological aspects, FDI may be either a favorable factor or a distorting one.

According to Mihaela,<sup>2</sup> two competing hypotheses regarding the effects of FDIs on sustainable development have been heralded. These are the pollution halo effect and the pollution haven effect hypotheses.<sup>3</sup> The former propounds the notion that FDI spreads best environmental management practices thus ultimately determining three types of 'greening effects' to wit: transfer of clean technologies that are more efficient and less polluting in comparison with domestic production, technology leapfrogging<sup>4</sup>- by transferring technologies to control pollution and spillovers to domestic firms- by transferring best practices in environmental management towards affiliates and domestic competitors and suppliers. In that way, FDI could be useful tool in creating an environment for ecologically sound, economic and social development. Closely associated to this hypothesis is an argument that since poverty is the main cause of environmental degradation, an increase in FDIs translates into an upsurge in economic wealth, diminished poverty, raised consumer expectations for more environmentally friendly products and ultimately, enhanced chances for sustainability.<sup>5</sup>

According to the pollution haven hypothesis, FDIs seek locations with weak regulations thus generating weaker environmental standards in host countries. Undeniably, 'regulatory chill' impels countries not to set stricter environmental standards for fear that they might lose points in the competition against other countries in attracting FDI and ultimately entrenching a 'race to the bottom'.<sup>6</sup> The hypothesis thrives on the proposition that environmental regulations raise costs whose upshot is an increase in price of the exports from countries with strict regulations relative to exports from countries with slipshod regulations.<sup>7</sup> This encourages FDIs shifts to avoid stringent regulations and maximize profits. Additionally, FDIs are also accused of propagating unfair labor practices and maintaining poor and health standards within the host countries.<sup>8</sup> Definitely, a race to the bottom and unfair practices in the aforementioned circumstances may only serve to exacerbate unsustainability.

In response thereto and having taken cognizance of the fact that FDIs are ordinarily channeled through and operated by Multinational Corporations [MNCs], the world community has over years been vigilant in formulating agreements, principles and even guidelines meant to at least influence the FDIs structure in enhancing 'sustainability mainstreaming'; taking into account the economical, social and ecological aspects of development. These efforts may chronologically be encapsulated as hereunder:

## 2.1 Voluntary Codes of Conduct for Transnational Corporations -1976

In 1976, the Organization for Economic Cooperation and Development [OECD] passed basic guidelines for multinational enterprises containing recommendations and codes of conduct for multinational enterprises aiming to bring business activities – particularly the FDIs in line with the government requirements of host countries.<sup>9</sup> On 27 June 2000, a new set of guidelines was adopted by the governments of 29 members of OECD and of Argentina, Brazil, Chile and Slovakia. The guidelines require enterprises inter *alia* to establish Environmental Management Systems [EMS] to minimize environmental, health and safety risks including collection and evaluation of adequate and timely information regarding health, environment and safety impacts of their activities, establishment of measurable objectives and where appropriate, targets for improved environmental performance, including periodically reviewing the continuing relevance of these objectives and regular monitoring and verification of progress towards environmental, health and safety impacts of activities of enterprises which should also engage in adequate and timely communication and consultation with communities

<sup>1</sup> McGill University, 'What is Sustainability' 1 <<https://www.mcgill.ca/sustainability/files/sustainability/what-is-sustainability.pdf>> Accessed 9 October 2017.

<sup>2</sup> Mihaela Kardos (note 55) 1350.

<sup>3</sup> Nadia Doytch, 'FDI Halo V Pollution Haven Hypothesis' (Volume 5 NYSEA Proceedings 65<sup>th</sup> Annual Meeting) 47-48 <[http://www.nysea.net/nysea/publications/proceed/2012/Proceed\\_2012\\_p047.pdf](http://www.nysea.net/nysea/publications/proceed/2012/Proceed_2012_p047.pdf)> Accessed 16 December 2017.

<sup>4</sup> UNCTAD (note 54) 10.

<sup>5</sup> *Ibid.*

<sup>6</sup> Nadia Doytch (note 61).

<sup>7</sup> Gene M. Grossman and Alan B. Krueger, 'Environmental Impacts of North American Free Trade Agreement' (Working Paper No. 3914 Cambridge: National Bureau of Economic Research 1991) 3-4.

<sup>8</sup> Human Rights Watch, "'You will Be Fired if You Refuse' Labour Issues in Zambia's Chinese State Owned Copper Mines' USA, November 2011 <<https://www.hrw.org/report/2011/11/04/youll-be-fired-if-you-refuse/labor-abuses-zambias-chinese-state-owned-copper-mines>> Accessed 17 July 2017.

<sup>9</sup> Seymour J Rubin, 'Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between International Legal Cooperation and Economic Development' (1995) 10 American University International Law Review 1275.

directly affected by environmental, health and safety policies of the enterprises and by their implementation.<sup>1</sup>

## 2.2 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises -1977

The Declaration provides direct guidance to enterprises on social policies and inclusive responsible and sustainable workplace practices.<sup>2</sup> It was amended in 2000, 2006 and revised in 2017.<sup>3</sup> Its principles are addressed to multinational enterprises, governments, employers and workers organizations and addresses areas such as employment,<sup>4</sup> training,<sup>5</sup> and conditions of work and life,<sup>6</sup> industrial relations<sup>7</sup> as well as general principles. Importantly, all its principles build on international labor standards, ILO conventions and recommendations. In particular, it elucidates on employment promotion, social security, elimination of forced or compulsory labor, child labor, equality of opportunities and treatment, security of employment, training, wages, benefits and conditions of work, safety and health, industrial relations, collective bargaining, access to remedy, examination of grievances and settlement of disputes.<sup>8</sup>

## 2.3 The Montreal Protocol – 1987

Manifestly, the agreement has an impact on the trade of goods, services and FDIs as it contains provisions that restrict the possibility of relocating abroad those production processes that contribute to the stratospheric ozone layer depletion.<sup>9</sup>

## 2.4 Business Charter for Sustainable Development- 1990

This Charter was drafted by the International Chamber of Commerce [ICC] in 1990<sup>10</sup> and contains principles in the field of environmental management. It represents companies' code of conduct that is in accordance with national and international guidelines. Although its observance is voluntary, signatories commit to applying home countries environmental requirements internationally, that is, in the host countries of the FDIs. Furthermore, all firms along the supply chain should be informed about or trained on safe use, transportation, storage and disposal of products. The environmental performance of the suppliers should be adapted to company's level by supporting improvements in the suppliers' environmental management through the application of the charters principles.

## 2.5 Basel Convention on Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal

The Convention<sup>11</sup> came into force in 1992 and under its dictates; MNCs and their affiliates are no longer allowed to transfer hazardous wastes to developing countries with less stringent standards and regulations.

## 2.6 The Rio Declaration on Environment and Development -1992

The declaration<sup>12</sup> though not legally binding has had a political appeal and has in some instances prevailed upon MNCs [through its principles] not to relocate abroad activities or materials that are detrimental to the environment or health. It recommends the negotiation of multilateral agreements<sup>13</sup> with the potential of reducing 'the tariff jumping FDI' and that help stop FDIs that attempt to circumvent high environmental standards in home country. The Declaration also underscores the necessity of international cooperation<sup>14</sup> to achieve sustainable Development and strengthen endogenous capacity building, highlights precautionary principle,<sup>15</sup> encourages polluter pays principle<sup>16</sup> and also supports effective awareness and access of information regarding

<sup>1</sup> See generally, OECD, Guidelines for Multinational Enterprises 2008 <<http://www.oecd.org/corporate/mne/1922428.pdf> > Accessed 18 December 2017.

<sup>2</sup> David Weissbrodt, 'Norms of the Responsibilities of Transnational corporations and Other Business Enterprises' (2003) 97 American Journal of International Law 901.

<sup>3</sup> International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (5<sup>th</sup> Edition Geneva Switzerland March 2017).

<sup>4</sup> *Ibid*, 6.

<sup>5</sup> *Ibid*, 10.

<sup>6</sup> *Ibid*, 11

<sup>7</sup> *Ibid*,13

<sup>8</sup> *Ibid*, 7-16.

<sup>9</sup> Montreal Protocol on Substances That Deplete Ozone Layer, 1987 <<https://treaties.un.org/doc/publication/unts/volume%201522/volume-1522-i-26369-english.pdf> > Accessed 18 December 2017.

<sup>10</sup> International Chamber of Commerce, Business Charter for Sustainable Development, 1990 <[https://www.iisd.org/business/tools/principles\\_icc.aspx](https://www.iisd.org/business/tools/principles_icc.aspx) > Accessed 19 December 2017.

<sup>11</sup> Basel Convention on Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal, 1989 <<http://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf> > Accessed 19 December 2017.

<sup>12</sup> The Rio Declaration on Environment and Development, 1992. <[http://www.unesco.org/education/pdf/RIO\\_E.PDF](http://www.unesco.org/education/pdf/RIO_E.PDF) > Accessed 19 December 2017.

<sup>13</sup> *Ibid*, Preamble.

<sup>14</sup> *Ibid*, Principle 9.

<sup>15</sup> *Ibid*, Principle 15

<sup>16</sup> *Ibid*, Principle 16.



environment, hazardous materials and activities in communities.

## 2.7 United Nations Conference on Environment and Development: Agenda 21- 1992

Agenda 21<sup>1</sup> is also not binding but demands that environmental aspects be considered in FDIs and that traditional barriers to trade that can be ascribed to environmental protection be based on an international consent. The Agenda also provides for transfer of both know how and technology from the industrialized to developing countries.<sup>2</sup> It also rightly insists that FDI can accelerate technology transfer infrastructural projects, training of experts and conveying of environmental management practices.<sup>3</sup> Agenda 21 also calls for the consideration of environmental, safety and health aspects at all levels of corporate planning and decision making.<sup>4</sup>

## 2.8 Convention on Biological Diversity – 1992

The Convention aims at protecting species and connection with FDIs is based on the intended cooperation in terms of financial and technological connectivity. Visibly, positive effects on environment can be achieved by technological transfer, easier access to patents and licenses this being the noble course championed by the Convention.<sup>5</sup>

## 2.9 Global Environment Facility -1992

The facility is attributed to the Franco- German initiative and was created to finance poor countries efforts to contribute to global environmental protection.<sup>6</sup> Its core aim is to avoid the application of old polluting technologies and as such, the idea of the fund is to bear additional costs incurred for installing environmental friendly technologies.

## 2.10 Environmental Management and Audit Scheme [EMAS] – 1993

The EMAS was passed by the European Union [EU] in 1993 with an objective of promoting continuous improvement of environmental performance of corporate through the introduction of efficient and transparent environmental management processes.<sup>7</sup> Apart from compliance with all environmental regulations, corporates are enjoined to incessantly improve their performance and results thereof are externally audited at least every three years. Incontrovertibly, this arrangement promotes environmental transparency since corporates' environmental policies have to be published and made publically available. Later in 1996, the International Standard Organization [ISO] passed ISO 14001 with an objective of continuous improvement of corporates' EMAS and mitigation of environmental harm.<sup>8</sup> Accordingly, EMAS are certified according to ISO 14001 every three years in order to maintain ongoing verification that they are being implemented properly.

## 2.11 Social Accountability 8000 Standard – 1997

The Standard was developed by the Council on Economic Accreditation Agency in 1997<sup>9</sup> and is a voluntary standard for auditing workplace conditions and a system for independently verifying factories compliance with the standard. It covered issues such as child labor, forced labor, health and safety, freedom of Association and the right of collective bargaining.<sup>10</sup>

## 2.12 Global Reporting Initiative -1997

The initiative was established in 1997 by the Coalition for Environmentally Responsible Economics [CERES] with an aim of designing globally applicable guidelines for preparing enterprise- level sustainability reports covering economic, environmental and social issues.<sup>11</sup> The core objective was to design and promote standardized reporting, core measurements applicable to all enterprises and customized sector specific

<sup>1</sup> United Nations, *United Nations Conference on Environment and Development Rio de Janeiro, Brazil 3 to 14 June 1992: Agenda 21* <<https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>> Accessed 20 December 2017.

<sup>2</sup> *Ibid*, see generally, Chapter 30, 'Strengthening the Role of Business and Industry'.

<sup>3</sup> *Ibid*.

<sup>4</sup> *Ibid*, par. 30.26.

<sup>5</sup> United Nations, *Convention on Biological Diversity 1992* <<https://www.cbd.int/doc/legal/cbd-en.pdf>> Accessed 20 December 2017.

<sup>6</sup> Stanley W. Burgiel and Sheldon Cohen, *The Global Environment Facility: From Rio to New Delhi, A Guide for NGOs* (Washington DC, IUCN Publications 1997) 7.

<sup>7</sup> Fabio Iraldo, Francesco Testa and Marco Frey, 'Is an Environmental Management System Able to Influence Environment and Competitive Performance? The Case of the Eco- Management and Audit Scheme [EMAS] in the European Union' (2009) 17 *Journal of Cleaner Production*, 1444.

<sup>8</sup> Patrick Yarnell, 'Implementing an ISO 14001 Environmental Management System: A Case Study of Environmental Training and Awareness at Vancouver International Airport' <[http://rem-main.rem.sfu.ca/theses/YarnellPatrick\\_1999\\_MRM230.pdf](http://rem-main.rem.sfu.ca/theses/YarnellPatrick_1999_MRM230.pdf)> Accessed 20 December 2017.

<sup>9</sup> Angelica Hagman, *Social Accountability International and the SA 8000*, 2007 <[https://gps.ucsd.edu/\\_files/faculty/gourevitch/gourevitch\\_cs\\_hagman.pdf](https://gps.ucsd.edu/_files/faculty/gourevitch/gourevitch_cs_hagman.pdf)> Accessed 20 December 2017.

<sup>10</sup> *Ibid*, 4-5.

<sup>11</sup> Carl –Johan Hedberg and Fredrik Von Malmborg, 'The Global Reporting Initiatives and Corporate Sustainability Reporting in Swedish Companies' (2003) 10 *Corporate Social Corporate Responsibility and Environmental Management* 153.

measurements ; all reflecting the environmental , economic and social dimensions of sustainability.<sup>1</sup>

## 2.13 UNCTAD World Report on Foreign Direct Investment and the Challenge of Development – 1999

The report<sup>2</sup> reiterated the Transnational Corporations [TNCs] provisions of Agenda 21 thereby requiring them – along with other industrial actors- to encourage worldwide policies on sustainable development. It also noted that TNCs have special role and interest in promoting cooperation in technology transfer and in building a trained pool and infrastructure in the host countries.<sup>3</sup> The report also enjoined the TNCs to imbue and share their environmental management experiences with local authorities, national governments and international organizations and also report annually on their environmental record as well as on their use of energy and natural resources.<sup>4</sup> Moreover, the report urged the TNCs to arrange for environmentally sound technologies to be available to the affiliates in developing countries. TNCs are also required to provide data for substances that are needed specifically for the assessment of potential risks to human health and environment. Additionally, they are required to adopt on voluntary basis, community right to know programmes based on international guidelines, including sharing information on causes of accidental releases or potential releases and means to prevent them.<sup>5</sup>

## 2.14 United Nations Global Compact – 2000

This is a clarion call to business enterprises everywhere to align their operations and strategies with ten universally accepted principles of human rights, labor, environment and anticorruption and to take action in support of UN goals and issues embodied in sustainable development goals.<sup>6</sup> It is also a leadership platform for development, implementation and disclosure of responsible corporate practices and serves as the largest corporate sustainability initiative in the world.<sup>7</sup> In a nutshell, businesses are called to support and respect the protection of internationally proclaimed rights<sup>8</sup> and must ensure that they are not complicit to human rights abuses. They should uphold the freedom of association, recognize the right to collective bargaining and eliminate all forms of forced and compulsory labor,<sup>9</sup> abolish child labor and eliminate discrimination in respect of employment and occupation.<sup>10</sup> Additionally, businesses should support precautionary approach to environmental challenges and must undertake initiatives to promote greater environmental responsibility.<sup>11</sup> Moreover, they should also encourage development and diffusion of environmentally friendly technologies.<sup>12</sup> In addition, they should work against corruption in all its forms, including extortion and bribing.<sup>13</sup>

## 2.15 UN Convention Against Corruption [2003] and OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions [1997]

The world community has long appreciated that global corruption is far reaching and deeply damaging as it undermines efforts against poverty and diseases, facilitates serious crimes, harms investments and economic growth. As such, the first binding global instrument aimed at combating corruption as well facilitating international cooperation and asset recovery was put in place in 2003.<sup>14</sup> In 1997, however, party members had toiled to promulgate the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions thereby terming as criminal, bribing of foreign officials in international business.<sup>15</sup> It requires parties to criminalize bribery of foreign public officials in international business transactions,<sup>16</sup> set a definition of a foreign public official, and impose effective, proportionate and dissuasive sanctions for natural and legal persons,<sup>17</sup> establish territorial and nationality over the offence according to parties jurisdiction,<sup>18</sup>

<sup>1</sup> *Ibid.*

<sup>2</sup> United Nations Conference on Trade and Development, *World Report on Foreign Direct Investment and The Challenge of Development* 1999, 460-461 <[http://unctad.org/en/Docs/wir1999\\_en.pdf](http://unctad.org/en/Docs/wir1999_en.pdf)> Accessed 20 December 2017.

<sup>3</sup> *Ibid.*, 460.

<sup>4</sup> *Ibid.*, 460- 461.

<sup>5</sup> *Ibid.*, 460.

<sup>6</sup> UN Global Compact, *Corporate Sustainability in the World Economy*, 2000 [http://psm.du.edu/media/documents/international\\_regulation/united\\_nations/other/un\\_global\\_compact.pdf](http://psm.du.edu/media/documents/international_regulation/united_nations/other/un_global_compact.pdf)> Accessed 21 December 2017.

<sup>7</sup> *Ibid.*, 2.

<sup>8</sup> *Ibid.*, Principles 1 and 2.

<sup>9</sup> *Ibid.*, Principles 3 and 4.

<sup>10</sup> *Ibid.*, Principles 5 and 6.

<sup>11</sup> *Ibid.*, Principles 7 and 8.

<sup>12</sup> *Ibid.*, Principle 9

<sup>13</sup> *Ibid.*, Principle 10.

<sup>14</sup> United Nations, *United Nations Convention Against Corruption* (UN New York 2004) <[https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf)> Accessed 21 December 2017.

<sup>15</sup> OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD Publications 1997) <[https://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)> Accessed 21 December 2017.

<sup>16</sup> *Ibid.*, Article 1.

<sup>17</sup> *Ibid.*, Article 8.

<sup>18</sup> *Ibid.*, Article 4.

establish the bribery of foreign public officials as a predicate offence to money laundering, disallow economic and political considerations in investigating and prosecuting offence<sup>1</sup> and facilitate mutual legal assistance and extradition.<sup>2</sup>

#### 2.16 UN Principles for Responsible Investment – 2006-2016

The Principles were founded in April 2006 on the initiative of the former UN Secretary General, Kofi Annan. He invited institutional investors and asset managers in the world to work together with the UN to develop Principles for Responsible Investment.<sup>3</sup> The investors undertook to *inter alia* incorporate environmental, social and governance [ESG] issues into the investments analysis and decision making process and investment policies.<sup>4</sup> They further agreed to seek appropriate disclosure on ESG issues by the entities in which they invest.<sup>5</sup> Moreover, they promised to promote acceptance and implementation of the principles within the financial sector,<sup>6</sup> cooperate in enhancing effectiveness in implementing the principles<sup>7</sup> and also keep on reporting activities and progress in implementing the principles.<sup>8</sup>

#### 2.17 Principles for Responsible Management Education -2007

In 2007, the UN Global Compact<sup>9</sup> in conjunction with institutions of higher learning upon recognition that business leaders would need to play a critical role in tackling sustainability challenges partnered and undertook to develop capabilities of students to be future generators of sustainable value for business and society at large. They also agreed to work for an inclusive and sustainable global economy<sup>10</sup> by incorporating in the academic activities and curriculum the values of global social responsibility<sup>11</sup> and engage in research to understand roles, dynamics and impacts of corporations in creation of sustainable social, environmental and economic value.<sup>12</sup> They also avowed to facilitate and support dialogue and debate among students, business consumers, media, civil society organizations and other interested groups and stakeholders of critical issues related to the global social responsibility and sustainability.<sup>13</sup>

#### 2.18 International Standard Organization 26000- Guidance on Social Responsibility – 2010

In appreciation of the fact that the objective of social responsibility is to contribute to sustainable development, the International Standard Organization [ISO] in November 2010 released its guidance on social responsibility, ISO 26000, which consists voluntary guidelines intended for use by organizations of all types, in both the public and private sectors.<sup>14</sup> It covers labor, human rights, the environment, corruption, consumer concerns and other issues pertinent to social responsibility.<sup>15</sup> In a nutshell, it recognized that organizations have responsibility to respect human rights regardless of whether states are unwilling or unable to fulfill their duties to protect. They should not infringe human rights but should have due diligence in safeguarding and fulfilling all rights.<sup>16</sup> With regard to environment, ISO 26000 calls upon organizations to respect and promote environmental principles such as environmental responsibility, precautionary approach, environmental risk management and the polluter pays principle.<sup>17</sup> Additionally, it urges organizations to improve environmental performance by preventing pollution including emissions to air, discharges to water, water management, use and disposal of toxic and hazardous chemicals and other forms of pollution.<sup>18</sup> The standard further recognizes that organizations that provide products and services to consumers as well as other customers have responsibilities to consumers and customers including providing education and accurate information using fair, transparent and helpful marketing information and contractual processes, promoting sustainable consumption and designing products and services

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<sup>1</sup> *Ibid*, Article 5.

<sup>2</sup> *Ibid*, Article 9.

<sup>3</sup> UNEP Finance Initiative and The Global Compact ‘The Principles for Responsible Investment’ <[https://www.unglobalcompact.org/docs/issues\\_doc/Financial\\_markets/PRI\\_Brochure\\_electronic\\_version.pdf](https://www.unglobalcompact.org/docs/issues_doc/Financial_markets/PRI_Brochure_electronic_version.pdf)> Accessed 18 August 2018.

<sup>4</sup> *Ibid*, Principles 1 and 2.

<sup>5</sup> *Ibid*, Principle 3

<sup>6</sup> *Ibid*, Principle 4

<sup>7</sup> *Ibid*, Principle 5

<sup>8</sup> *Ibid*, Principle 6

<sup>9</sup> United Nations Global Compact, Principles For Responsible Management, 2007 <[https://www.unglobalcompact.org/docs/issues\\_doc/PRME/PRME-Info\\_2012.pdf](https://www.unglobalcompact.org/docs/issues_doc/PRME/PRME-Info_2012.pdf)> Accessed 22 December 2017.

<sup>10</sup> *Ibid*, Principle 1.

<sup>11</sup> *Ibid*, Principle 2.

<sup>12</sup> *Ibid*, Principle 4.

<sup>13</sup> *Ibid*, Principle 6.

<sup>14</sup> Sarah A. Altschuller, Army K. Lehr and Andrew J. Orsmond, ‘Corporate Social Responsibility’ (2011) 45 *International Lawyer* 179.

<sup>15</sup> *Ibid*.

<sup>16</sup> International Standards Organization, ISO 26000: Guidance on Social Responsibility (1<sup>st</sup> Edition Switzerland 2010) 24.

<sup>17</sup> *Ibid*, 41.

<sup>18</sup> *Ibid*, 43.

that provide access to all and cater where appropriate, for the vulnerable and disadvantaged.<sup>1</sup> Equally, organizations should, in their operations prioritize community involvement and developments as both are integral parts of sustainable development.<sup>2</sup>

## 2.19UN Guiding Principles on Business and Human Rights – 2011

These guiding principles are organized by three pillars of ‘protect, respect and remedy’ framework.<sup>3</sup> On one hand, states have a duty to protect human rights<sup>4</sup> abuses by third parties including business enterprises through appropriate policies, regulations and adjudication. On the other hand, corporates and business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse effects with which they are involved.<sup>5</sup> Moreover the guidelines underscore the need for a greater access to both the judicial and non judicial remedies by victims of corporate related abuses.<sup>6</sup>

## 2.20OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Context in a Global Context – 2011

This a comprehensive, non binding code of conduct that OECD members and others have agreed to promote among the business sector.<sup>7</sup> The guidelines establish that firms should respect human rights in every country in which they operate.<sup>8</sup> Further, they should also respect the environmental<sup>9</sup> and labor standards<sup>10</sup> and have due diligence processes in place to ensure that this happens. Firms should also pay decent wages, combat bribe solicitation and extortion and must promote sustainable consumption.<sup>11</sup>

## 2.21Children Rights and Business Principles- 2012

Launched by the UNICEF and the UN Global Compact in 2012, the principles provide a means for businesses to better understand, appreciate and address the ways in which they touch children’s lives.<sup>12</sup> They clarify businesses’ responsibility to respect children’s rights and call on them to make commitments to support children rights.<sup>13</sup> Specifically, businesses should monitor, enforce and advance rights by contributing to the elimination of child labor in all business activities and relationships.<sup>14</sup> They should also provide decent work for young workers, parents and caregivers<sup>15</sup> and should as well ensure the protection and safety of children in all business activities and facilities.<sup>16</sup> Moreover, they should ensure that products and services are safe and supportive of children rights.<sup>17</sup> Equally, firms must use advertising that respect and supportive children rights<sup>18</sup> while not also forgetting to advance children rights in security arrangements,<sup>19</sup> environment and land use and acquisition.<sup>20</sup> Above all, businesses should protect children affected by emergencies<sup>21</sup> and supplement government efforts to protect and fulfill children rights.<sup>22</sup>

## 2.22Paris Agreement on Climate Change – 2015

This Agreement was negotiated by the world community aiming to stabilize green house gases emissions to acceptable levels. It *inter alia* imposed on the party members obligations to report on their National Determined Contributions [NDCs] and called for measures meant to assure developing countries of financial and

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<sup>1</sup> *Ibid* , 51.

<sup>2</sup> *Ibid* , 60.

<sup>3</sup> United Nations Human Rights Office of the High Commissioner, ‘Guiding Principles on Business and Human Rights: Implementing the UN Protect, Respect and Remedy Framework’ 2011 <[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)> Accessed 22 December 2017.

<sup>4</sup> *Ibid* , Principle 1.

<sup>5</sup> *Ibid* , Principle 11.

<sup>6</sup> *Ibid* , Principle 25.

<sup>7</sup> OECD, OECD Guidelines for Multinational Enterprises, (OECD Publishing 2011) <<https://www.oecd.org/corporate/mne/48004323.pdf> > Accessed 23 December 2017.

<sup>8</sup> *Ibid* , 31.

<sup>9</sup> *Ibid* , 42.

<sup>10</sup> *Ibid* , 35.

<sup>11</sup> *Ibid* , 47.

<sup>12</sup> UNICEF, Children Rights and Business Principles, 2012 <[https://www.unicef.org/corporate\\_partners/index\\_25078.html](https://www.unicef.org/corporate_partners/index_25078.html) > Accessed 24 December 2017.

<sup>13</sup> *Ibid* , Principle 1.

<sup>14</sup> *Ibid* , Principle 2.

<sup>15</sup> *Ibid* , Principle 3.

<sup>16</sup> *Ibid* , Principle 4.

<sup>17</sup> *Ibid* , Principle 5.

<sup>18</sup> *Ibid* , Principle 6.

<sup>19</sup> *Ibid* , Principle 8.

<sup>20</sup> *Ibid* , Principle 7.

<sup>21</sup> *Ibid* , Principle 9.

<sup>22</sup> *Ibid* , Principle 10.

technological support to address climate change issues. Undoubtedly, implementing the ambitious goals of Paris Agreement depends on the contribution of both states and non state actors and most notably, the MNCs.<sup>1</sup> Imperatively, in the absence of relevant legally imposed regulations, states might incentivize MNCs to engage in voluntary cooperation to cut their emissions.<sup>2</sup>

In addition to the foregoing, it is also worth noting that most relationships<sup>3</sup> between foreign investors and host states are governed by Bilateral Investment Treaties [BITs].<sup>4</sup> Currently, there exists more than 3000 BITs worldwide<sup>5</sup> whose main purpose is to offer as much protection as possible to foreign investors to attract and protect foreign investment.<sup>6</sup> These treaties make provisions profoundly dealing with mechanisms for protecting foreign investments in terms of expropriation, compensation, standard of compensation, qualified investors and investments, treatment of investments as well as investor –state dispute settlement.<sup>7</sup> However, majority of these BITs do not accord preeminence to sustainable development given that issues to do with observance of human rights, environment, fight against graft, social and labor standards are hardly mentioned.

Nevertheless, this ignominious trend appears to be changing as evinced in the contemporary BITs. For example, Norway's 2007 model BIT expressly mentions sustainability goals and the need to incorporate principles of corporate social responsibility as interpretative guide to its text.<sup>8</sup> Related efforts are discernible under the provisions of the BIT concluded between Belgium-Luxemburg Economic Union and Tajikistan<sup>9</sup> while the 2004 US model BIT and the 2006 Canada- Peru BIT are further examples of BITs pursuing this trend.

Moreover, the jurisprudence of international investment tribunals is also lending support to such an approach. For example, in *Methanex Corporation V United States of America*<sup>10</sup> the tribunal examined *inter alia* the compatibility of regulatory powers of the states in favor of environment with the minimum standards of protection guaranteed to foreign investors under NAFTA and dismissed the claimant's claim that the regulatory measures amounted to expropriation and thus compensable. The tribunal stated thus;<sup>11</sup>

....As a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process, and which affects, *inter alia*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by regulating government to then putative investor contemplating investment that the government would refrain such regulation....

In *Chemtura Corporation V Government of Canada*,<sup>12</sup> the arbitral tribunal held that step taken by the Canadian government to ban the use of lindane- a possible carcinogen, an environment contaminant and a cause of various negative health consequences in human and animals including death- was not expropriatory as it was meant to *inter alia*, protect public health. Equally, arbitral tribunals have already demonstrated a leaning towards declining jurisdiction on disputes emanating from investments and investors' activities thriving on corrupt deals. In *World Duty Free Company V Republic of Kenya*<sup>13</sup> for example, the ICSID tribunal held that a payment by the company to the president of the respondent, Daniel Arap Moi to obtain a contract was a bribe and in the circumstances, the tribunal would not enforce it as doing so would be contrary to international public policy. By the same token, an ICSID tribunal in *Inceysa Vallisoletana V El Salvador*<sup>14</sup> refused jurisdiction over a fraudulently or illegally made investment.

<sup>1</sup> Behnam Taebi and Azar Safari, 'On Effectiveness and Legitimacy of Shaming as a Strategy for Combating Climate Change' (2017) 23 Science and Engineering Ethics 1289.

<sup>2</sup> *Ibid*, 1301.

<sup>3</sup> Noting that there are also other types of agreements that are currently defining relationships between hosts states and foreign investors, for example, Free Trade Agreements, Energy Charter Treaty, NAFTA, ACIA, TPP, TTIP and ECOWAS.

<sup>4</sup> David Collins, *An Introduction to International Investment Law* (1<sup>st</sup> Edition, Cambridge University Press 2017) 33. The author insists that BITs remain the chief treaty based means of regulating foreign investments under international law.

<sup>5</sup> Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2<sup>nd</sup> Edition, Oxford University Press 2012) 13.

<sup>6</sup> Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (3<sup>rd</sup> Edition, Hart Publishing 2016)2.

<sup>7</sup> Guiguo Wang, 'China's Practice in International Investment Law: From Participation To Leadership in the World Economy' (2009) 34 Yale Journal of International Law 575.

<sup>8</sup> David Collins (note 156) 39.

<sup>9</sup> Article 5(3) providing that: '....The Contracting Parties reaffirm their commitments under the international environmental agreements, which they have accepted. They shall strive to ensure that such commitments are fully recognized and implemented in their domestic legislation....'

<sup>10</sup> *Methanex Corporation V United States of America*, final award on jurisdiction and merits, 3 August 2005 < <https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf> > Accessed 20 December 2017.

<sup>11</sup> *Ibid*, Part IV Chapter D Par. 7.

<sup>12</sup> *Chemtura Corporation V Government of Canada*, *Ad hoc-* UNCITRAL Arbitration Rules, Award, 2 August 2010, Par. 254 < [https://www.italaw.com/sites/default/files/case-documents/ita0149\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf) > Accessed 11 July 2018.

<sup>13</sup> *World Duty Free Company V Republic of Kenya*, ICSID Case No. ARB/00/7, Award 2 August 2006, Par.176.

<sup>14</sup> *Inceysa Vallisoletana V El Salvador*, ICSID Case No. ARB /03/26, Award 2 August 2006, Par. 252.

### 3. Chinese Outbound Investments and Sustainable development in Perspective

Unquestionably, Chinese investments abroad have had a steady proliferation especially after the launch of the 'Go Global' initiative in early 2000.<sup>1</sup> For example, Chinese FDI inflows into Africa surged from US \$ 75 million in the year 2000 to US \$ 3.2 billion in the year 2014<sup>2</sup> and expected to rise to over US \$ 100 billion by 2020<sup>3</sup> while in 2012, China accounted for \$4 billion inbound FDIs in the USA.<sup>4</sup> The trend persists in Europe whereby the Chinese investments went up from US \$ 6 billion in 2010 to US \$ 55 billion in 2014<sup>5</sup> and similarly in other parts of Asia<sup>6</sup> and South America.<sup>7</sup>

Whether or not these outbound investments are sustainable development sociable and are fully reflective of principles highlighted in the foregoing part is still nebulous. Moreover, questions abound as to what steps China has taken in order to make her outbound investments sustainable development genial, whether the steps are sufficient and if not, whether options exist, to embed sustainable development therein.

Markedly, disquiet is rife in the developing world- especially in Africa- that the FDIs are not sustainable development amiable. For example, criticism has been leveled against the Chinese investors that they 'import' Chinese labor to take jobs created by the Chinese investors and as such, local communities do not benefit from the job opportunities.<sup>8</sup> It is also asserted that they provide poor working conditions coupled with a wanton violation of minimum wages regulations whenever they engage the local population.<sup>9</sup> Additionally, Chinese investments are allegedly characterized by a derisory transfer of technology as the associated projects hardly depend on local [African] companies but instead prefer Chinese companies to perform tasks.<sup>10</sup>

Moreover, it has been contended that Chinese investment profoundly in the extractive sector, unlike the western, is lax in demanding that host [African] countries to execute any kind of anti corruption measures, does not evaluate whether there is prudent use of the monies or whether it vanishes into the sacks of dishonest hosts' leaders thereby having the potential of entrenching the resource curse.<sup>11</sup> In addition, many projects undertaken by Chinese investors are caught up in serious infringement of environmental and social rights given that many important aspects of these projects are never put into consideration especially during the Environmental Impact Assessment [EIA].<sup>12</sup> Additionally, it has been charged that Chinese companies are by and large not subject to stringently enforced anti-bribery legislation thereby giving them a competitive benefit over [US] companies in the global market place by allowing them to 'curry favor with local officials in the ways the [US] companies cannot'.<sup>13</sup>

Perceptibly, such a position is by no means a harbinger of sustainable development. Fair enough though, China may not bear a blanket condemnation in view of her concerted efforts [in line with the global trend] to entrench the notion of sustainable development in her outbound foreign direct investments.

<sup>1</sup> Guiguo Wang, *International Investment Law: A Chinese Perspective* (London: Routledge, 2015) 5-6. The author states thus; "...According to the statistics released by the Chinese Ministry of Commerce, China outflow of capital was very close to the total amount of the inflow of capital in 2013...." See further, Axel Bergel, 'China's New Bilateral Investment Treaty Programme: Substance, Rationality and Implications for International Investment Law Making' (Bonn, Germany 2008) 5. See also, Lutz Christian Wolff, 'Chinese Investments Overseas: Onshore Rules and Offshore Risks' (2011) 45 *The International Lawyer* 1029.

<sup>2</sup> Yu Zheng, 'China's Aid and Investment in Africa: A Viable Solution to International Development?' (Fudan University 2016) 2.

<sup>3</sup> Tais Ludwig, 'Recommendations for Addressing Environmental Impacts of African Development Projects Funded by Chinese Banks' (2015) 15 *Sustainable Development Law and Policy* 11. See also, Tang Xiaoyang and Irene Yuan Sun, 'Social Responsibility or Development Responsibility? What is The Environmental Impact of Chinese Investments in Africa: What are the Drivers and what are the Possibilities for Action?' (2016) 49 *Cornell International Law Journal* 69. The author postulates that from January 2010 to January 2015, 2161 firms had registered their outward investments to Africa. That is to say that the number of Chinese investments in Africa within the past 5 years more than doubled the total number of investments from the previous twenty years.

<sup>4</sup> Daniel C. K. Chow 'Why China Wants a Bilateral Investment Treaty With the United States' (2015) 33 *Boston University Law Journal* 421.

<sup>5</sup> Phillippe Le Corre and Alain Sepulchre, 'Why China is Investing Heavily in Europe' (South China Morning Post, 15 May 2016) < <http://www.scmp.com/comment/insight-opinion/article/1944491/why-china-investing-heavily-europe> > Accessed 7 July 2017.

<sup>6</sup> Alicia Garcia Herrero 'China Outward Foreign Direct Investment' (The Blog Post, 28 June 2015) < <http://bruegel.org/2015/06/chinas-outward-foreign-direct-investment/> > Accessed 7 July 2017. The author posits that according to MOFCOM (2013), the Chinese FDIs into other Asian Countries stood at US \$ 76 Billion while FDIs into South America stood at US \$ 14.4 Billion.

<sup>7</sup> *Ibid.*

<sup>8</sup> Jim Anyango, 'Deals with China Will Hurt Kenya, Warn Researchers' (Business Daily, 3 November 2009). The author indicating thus; '...There have been complaints to the effect that the Chinese investors do not usually offer job opportunities to local professionals...'

<sup>9</sup> Dan Hangland, 'In it for the Long Term? Governance and Learning among Chinese Investors in Zambia Copper Sector' (2009) 199 *China Quarterly* 629.

<sup>10</sup> Apurva Sanghi and Dylan Johnson, 'Deal or No Deal: Strictly Business for Kenya' (World Bank Group, Policy Research Paper 7614 March 2016) Abstract. The authors have opined that '...The Standard Gauge Railway and Thika Superhighway experiences suggest that Chinese firms offer relatively few technology transfer or supplier opportunities for local firms and academia...'

<sup>11</sup> Jeremy Kelley, 'China in Africa: Curing the Resource Curse with Infrastructure and Modernization' (2011) 12 *Sustainable Development Law and Policy* 35. See also, James Thuo Gathii, 'Beyond China's Human Rights Exceptionalism in Africa: Leveraging, Science, Technology and Engineering for Long Term Growth' (2013) 51 *Columbia Journal of Transnational Law* 678-679.

<sup>12</sup> Xiuli Han, 'Environmental Regulation of Chinese Overseas Investment from the Perspective of China' (2010) 11 *Journal of World Investment and Trade* 382.

<sup>13</sup> Michael B. Runnels and Adam M. Burton, 'The Foreign Corrupt Practices Act and New Governance: Incentivizing Ethical FDI in China and Other Emerging Economies' (2012) 34 *Cardozo Law Review* 298.

### 3.1 Guidelines on Environmental and Social Impact Assessment of Loan Projects

Formulated by the China's EXIM Bank in 2004, the guidelines<sup>1</sup> are meant to *inter alia* help in the 'implementation of the national strategies for sustainable development, promote economic, social and environmental development, and effectively control credit risks'.<sup>2</sup> In a nutshell, the EXIM Bank would give consideration to environmental and social impact during the loan endorsement process- to Chinese companies investing abroad- requiring EIA prior and after project and habitual appraisal of implementation of the project.<sup>3</sup> Inimitably, violations would lead in the EXIM stopping its lending or claiming an early reimbursement.<sup>4</sup>

### 3.2 Guidelines to the State Owned Enterprises under Central Government on Fulfilling Corporate Social Responsibility

In 2007, the State Owned Assets Supervision and Administrative Commission [SASAC] issued a directive entitled 'Guidelines to the State Owned Enterprises under Central Government on Fulfilling Corporate Social Responsibility' thereby encouraging SOEs to adopt sound CSR practices and issue efficient CSR reports.<sup>5</sup> The guidelines have defined CSR to include product safety, resource conservation, technological innovation, employees' rights and public welfare<sup>6</sup> and emphasized on the need of the SOEs to adopt measures propitious for improving ability to make sustainable profits.<sup>7</sup>

### 3.3 Guide on Sustainable Overseas Forests Management and Utilization by Chinese Enterprises and Guidelines for Outbound Investment and Cooperation

In March 2009, the Ministry of Commerce and the State Forestry Administration jointly promulgated 'Guide on Sustainable Overseas Forests Management and Utilization by Chinese Enterprises'<sup>8</sup> aiming to *inter alia* promote the legitimate, sustainable management and utilization of global forest resources and related trade activities.<sup>9</sup> The commerce ministry, also, in 2013 and in conjunction with the Ministry of Environmental Protection published 'Guidelines for Outbound Investment and Cooperation'. These two set of guidelines encouraged Chinese enterprises to respect environmental laws of host countries and integrate environmental protection and due diligence measures.<sup>10</sup> They also enjoined enterprises to conduct EIAs, create environmental management plan and participate in green procurement, recycling and local community activities.<sup>11</sup>

### 3.4 Guidelines for Social Responsibility in Outbound Mining Investments

In 2010, Chinese academics, planners and economists had published 'Environmental Policies on China's Investments Overseas' directly urged china to issue guidelines regarding FDIs, aid and loans in other countries.<sup>12</sup> Additionally, the Government Associated China Chamber of Commerce for Minerals, Metals and Chemicals Importers and Exporters published guidelines to standardize foreign mining investments and operations in 2014<sup>13</sup> thereby encouraging the outbound investors to pay attention to labor, environmental protection, supply chain due diligence and human rights concerns.<sup>14</sup>

<sup>1</sup> China Export and Import Bank, 'Guidelines for Environmental and Social Impact Assessments of the China Export and Import Bank's Loan Projects' <<https://www.globalwitness.org/sites/default/files/library/Chinese%20guidelines%20EN.pdf>> Accessed 29 August 2018.

<sup>2</sup> *Ibid*, Article 1.

<sup>3</sup> Kevin P Gallagher, Katherine Koleski and Amos Irwin, 'Chinese Finance in Latin America: Brown or Green?' (TEMTI Series of Economic Perspectives on Global Sustainability, EP 03-2013, TEMTI -CEESP / IUCN) 9-10 <[http://www.iucn.org/about/union/commissions/ceesp/what\\_we\\_do/wg/temti.cfm](http://www.iucn.org/about/union/commissions/ceesp/what_we_do/wg/temti.cfm)> Accessed 13 April 2018.

<sup>4</sup> *Ibid*.

<sup>5</sup> Jingchen Zhao, *Corporate Social Responsibility in Contemporary China: Corporations, Globalization and the Law* (Cheltenham UK and Northampton USA: Edward Elgar 2014) 195.

<sup>6</sup> State Owned Assets Supervision and Administrative Commission [SASAC] the People's Republic of China, 'Guidelines to the State Owned Enterprises under Central Government on Fulfilling Corporate Social Responsibility' (2007) Par.11-14 <[http://en.sasac.gov.cn/2011/12/06/c\\_313.htm](http://en.sasac.gov.cn/2011/12/06/c_313.htm)> Accessed 29 August 2018.

<sup>7</sup> *Ibid*, Par.9.

<sup>8</sup> Ministry of Commerce and the State Forestry Administration, 'A Guide on Sustainable Overseas Forest Management and Utilization by Chinese Enterprises' <<https://www.forestry.gov.gy/wp-content/uploads/2016/05/AGuideonSustainableOverseasForestManagementandUtilizationbyChineseEnterprises.pdf>> Accessed 13 April 2018.

<sup>9</sup> *Ibid*, see, Par. 1 on objectives.

<sup>10</sup> Pichamon Yeophantong and Cristelle Maurin, 'China and the Regulation of Outbound Investment: Towards a Responsible Investment Policy Framework' in Andrea K. Bjorkland (ed.), *Yearbook on International Investment Law and Policy 2014-2015* (New York: Oxford University Press 2016) 349.

<sup>11</sup> Tang Xiaoyang and Irene Yuan Sun (note 169) 83.

<sup>12</sup> David H. Shinn, 'The Environmental Impact of China's Investment in Africa' (2016) 49 Cornell International Law Journal 25.

<sup>13</sup> China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters, 'Guidelines for Social Responsibility in Outbound Mining Investments' 2014 <[https://www.globalwitness.org/sites/default/files/library/CCCMC%20Guidelines%20for%20Social%20Responsibility%20in%20Outbound%20Mining%20Investments%20Oct%202014%20CH-EN\\_1.pdf](https://www.globalwitness.org/sites/default/files/library/CCCMC%20Guidelines%20for%20Social%20Responsibility%20in%20Outbound%20Mining%20Investments%20Oct%202014%20CH-EN_1.pdf)> Accessed 13 April 2018.

<sup>14</sup> Pichamon Yeophantong and Cristelle Maurin (note 189) 359.

### 3.5 Extra Efforts In Entrenching Sustainable Development in the Sino Outbound FDIs

Additional efforts to inculcate sustainable development related practices into the Chinese outbound investments have also been propagated by Chinese Business Association of various sectors.<sup>1</sup> For example, China International Contractors Association has already made public a guide on social responsibility for Chinese international contractors aimed at establishing a yardstick for social responsibility for construction firms and to encourage them operate foreign contracting projects in a more accountable way.<sup>2</sup> The guide also provides for instructions on environmental management, resource saving, waste and emission reduction and ecological protection. Moreover, certification by international standards has been helpful in improving environmental practices. Indeed, over 100,000 Chinese enterprises have acquired ISO 14001 Standard denoting that these enterprises have created environmental management system<sup>3</sup> and are fulfilling international best practices even while operating overseas.<sup>4</sup> Additionally, Chinese private businesses, SOEs, NGOs and business associations are increasingly signing up and pledging to implement the UN Global Compact,<sup>5</sup> which is a voluntary corporate responsibility initiative that commends enterprises to line up their activities and policies with the ten generally accepted principles in the fields of human rights, labor, environment and anticorruption. Essentially, some companies like Huawei Technologies Co. Ltd and Petro China Co. Ltd which have invested intensely in Africa are devoted to tendering their yearly reports.<sup>6</sup>

Moreover, the Chinese Government is also keen in stepping up war on overseas corruption as signified by the 8th Amendment to Article 164 of the Chinese Criminal law in the year 2011. The amendment is meant to deal with ‘crimes of offering bribes to official of foreign countries and international organizations’ -thereby proscribing bribes given to officials of foreign countries and international organizations to secure illegitimate commercial benefits.<sup>7</sup> This is obviously a step in the right direction in view of the fact that corruption leads to negligence in EIA and social impact assessment processes as well as low quality of construction products<sup>8</sup> and for China, bribery hurts it as it escalates costs of doing business and makes firms vulnerable to further blackmail.<sup>9</sup> Unquestionably, corruption thwarts efforts towards mainstreaming sustainable development especially with regard to Sino outbound FDIs.

## 4. Unshackling The Quagmire : Options for Entrenching Sustainable Development Into the Sino Outbound FDIs

Despite the foregoing resolute efforts to fully ingrain sustainable development into the Sino outbound investments, there remains an avalanche of legal obstacles that impede the full realization of this goal. Notably the obliteration of these impediments is of particular importance as it goes along with fortifying China’s emergence as a global force as it prepares to be the world’s largest economy by the year 2025.<sup>10</sup>

Notably, the Chinese companies carrying on business abroad [especially in Africa] are only subject to the foregoing voluntary guidelines which lack a binding force of the law and unless China transforms these guidelines into law and attach penalties to violations the guidelines will not revolutionize the conduct of many overseas Chinese companies.<sup>11</sup> Indeed, the guidelines are arbitrary, vague and their voluntary and moral nature makes them virtually impossible to faithfully fulfill.<sup>12</sup>

Moreover, whereas China has domestically taken major legislative steps to guarantee sustainability of her inbound investments, these steps are not replicated with regard to the outbound investments. For example, in 2014, China carried out drastic amendments to the 1989’s Environmental law as reflected in the 2014’s Environment Protection Law<sup>13</sup> which entered into force on 1 January 2015. Admittedly, the law introduced a numerous changes the most significant including elevated consequences for defying China’s environmental law,

<sup>1</sup> Tang Xiaoyang and Irene Yuan Sun (note 169) 83.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, 86.

<sup>4</sup> *Ibid.*

<sup>5</sup> UN Global Compact, *Corporate Sustainability in the World Economy*, 2000 <[http://psm.du.edu/media/documents/international\\_regulation/united\\_nations/other/un\\_global\\_compact.pdf](http://psm.du.edu/media/documents/international_regulation/united_nations/other/un_global_compact.pdf)> Accessed 21 December 2017.

<sup>6</sup> David H. Shinn (note 191) 33.

<sup>7</sup> Daniel Chow, ‘The Interplay Between China’s Anti- Bribery Laws and the Foreign Corrupt Practices Act’ (2012) 73 Ohio State Law Journal 1034.

<sup>8</sup> Benjamin Barcewski, ‘How Well Do Environmental Regulations Work in Kenya? A Case Study of Thika Highway Improvement Project’ (Columbia University Centre for Sustainable Urban Development Working Paper 2013) 7-9.

<sup>9</sup> Tang Xiaoyang and Irene Yuan Sun (note 169) 98.

<sup>10</sup> Xiuli Han (note 178).

<sup>11</sup> David H. Shinn, ‘The Environmental Impact of China’s Investment in Africa’ (2016) 49 Cornell International Law Journal 25.

<sup>12</sup> Xiuli Han (note 178) 388. See also, Tang Xiaoyang and Irene Yuan Sun (note 169) 84. The author avers that the guidelines ‘operate more as suggestions and lack binding force of law. They rarely imply imperative ‘shall’ and instead use ‘encourage’ for environmental and social protection actions’.

<sup>13</sup> The amended law was adopted at the Eighth Meeting of Standing Committee of Twelfth National Party Congress of the Peoples Republic of China on 24 April 2014 <<https://www.chinadialogue.net/Environmental-Protection-Law-2014-eversion.pdf>> Accessed 12 April 2018.



expansion of the scope of projects to be subjected to EIA and an expanded *locus standi* to take legal action against polluters on behalf of public interest.<sup>1</sup> For example, where a polluter does not rectify as ordered by a government authority, the authority wields power to impose a fine on daily basis commencing from the day after the order of correction was made based on the original fine made.<sup>2</sup> This is a stark departure from the 1989 law which imposed a onetime penalty only on each illegal activity.<sup>3</sup> The law also prescribes strict measures against officials guilty of improperly granting permits and approving EIAs documents, covering up violations and failing to issue orders to suspend operations of polluters.<sup>4</sup> Additionally, the law calls for an appraisal of officials at or above county level on their environmental and economic performance and the evaluation should be made public.<sup>5</sup>

Notably, China has in addition to the foregoing, promulgated the Environmental Protection Tax Law<sup>6</sup> aiming to protect and improve environment, reduce discharge of pollutants and promote ecological process.<sup>7</sup> The law applies to enterprises, public institutions and other production operations that may directly discharge taxable pollutants- which include atmospheric, water, solid wastes and sound pollutants<sup>8</sup> - into the environment. The taxable pollutants are classified in diverse categories and sub categories with tax rates per measurable unit. The rates vary depending on where production takes places with areas with higher pollution such as Beijing, Hebei and Tianjin having higher tax rates compared to other less polluted areas.<sup>9</sup>

In 2007, China promulgated a new Labor Contract Law which arguably made a myriad of changes profoundly by requiring all employers to enter into written contracts with all their workers.<sup>10</sup> The chief objective was to ideally enlarge the protection of employees by affording them an employee friendly employment that would also be extended to all foreign invested domestic enterprises as well as SOEs and public organizations. In a nutshell, the law obligates an employer to consult the labor union, employee or the employee's representative in the drafting or revision of work rules and regulations<sup>11</sup> and further enjoins them to execute a written labor contract with an employee within one month of hiring or face penalties.<sup>12</sup> The law also protects workers during probation by stipulating that wages during such period cannot be paid at a level below the minimum enterprise wage, at less than 80 % of formal wage in labor contract or below the minimum age of the local standard.<sup>13</sup> Moreover, the law makes it hard to terminate an employee for any reasons.<sup>14</sup> The 2007 law also gave workers and trade unions more power to act and more access to the local administration and courts to seek redress for grievances.<sup>15</sup> On the other hand, employers are enjoined to comply with all aspects of the law, protect workers' rights and responsibilities in the factory.<sup>16</sup> Moreover, changes in the wages, working hours, holidays, welfare, insurance, training, rules and processes must be discussed with the workers and indeed, the labor union has a right to seek for protection of the rights.<sup>17</sup> Equally, layoffs must be discussed with trade unions and employees and the local department must be informed and be involved.<sup>18</sup> The trade unions are by law authorized to contest employer's action violating labor law practices and the labor contracts.<sup>19</sup> Additionally, the law also makes room

<sup>1</sup> Robert L. Falk and Jasmine Wee, China: China's New Environmental Protection Law- Implications for Overseas Investors, Joint Ventures and Trading Partners (Mondaq, 11 October 2014). <<http://www.mondaq.com/china/x/345932/Environmental+Law/Chinas+New+Environmental+Protection+Law> > Accessed 12 April 2018.

<sup>2</sup> Environmental Protection Law of the People's Republic of China, 24 April 2014, Article 59 <<https://www.chinadialogue.net/Environmental-Protection-Law-2014-eversion.pdf> > Accessed 12 April 2018.

<sup>3</sup> Environmental Protection Law of the People's Republic of China (1989) Article 39 <<https://www.ecolex.org/details/legislation/environmental-protection-law-of-the-peoples-republic-of-china-lex-faoc003551/> > Accessed 12 April 2018. See also, Laney Zhang, 'China: Environmental Law Revised' (Global Legal Monitor 6 June 2004).

<sup>4</sup> Environmental Protection Law of the People's Republic of China (note 208) Article 68.

<sup>5</sup> *Ibid*, Article 26

<sup>6</sup> Environmental Protection Tax Law of China (Passed By the 25<sup>th</sup> Session of Standing Committee of Twelfth National Party's Congress on 25 December 2016). The law took effect on 1 January 2018. <<https://chinaenergyportal.org/en/environmental-protection-tax-law/> > Accessed 12 April 2018.

<sup>7</sup> *Ibid*, Article 1.

<sup>8</sup> Environmental Protection Tax Law of China (note 212) Article 3.

<sup>9</sup> Richard Hoffman, 'China Introduces New Environment Protection Tax Law' (Ecovis Beijing, 10 January 2018).

<sup>10</sup> Labor Contract Law of the People's Republic of China (Approved by the 28<sup>th</sup> Conference of 10<sup>th</sup> Session of National People's Congress Standing Committee on 29 June 2007) Article 10. The law requires that when one is working without a contract, one has to be created within one month of starting work. <<http://www.12333sh.gov.cn/200912333/2009english/laws/200911/P020091105359417211156.pdf> > Accessed 24 April 2018.

<sup>11</sup> *Ibid*, Article 4.

<sup>12</sup> *Ibid*, Article 82 explicates that if the employer violates the law and fails to make a contract with employee, the employer must double the wage of the employee since the time when permanent contract should have been made.

<sup>13</sup> *Ibid*, Article 20.

<sup>14</sup> *Ibid*, Article 21.

<sup>15</sup> Lin Yang, 'Guidelines on China's New Employment Contracts Law' (Association Corporate Counsel, 28 March 2013) 3.

<sup>16</sup> Labor Contract Law of the People's Republic of China (note 216) Article 4.

<sup>17</sup> *Ibid*, Article 6.

<sup>18</sup> *Ibid*, Article 41.

<sup>19</sup> *Ibid*, Article 43.

for collective bargaining agreements.<sup>1</sup>

Apart from the industrial relations law, Chinese law obliges foreign investors –especially those engaged in joint ventures- to comply with all laws and administrative rules and regulations, observe social morals and business ethics, conduct business in good faith, subject themselves to government’s and public bodies supervision and fulfill social responsibilities.<sup>2</sup> Imperatively, Joint Ventures should be able to promote the development of China’s economy and raising of scientific and technological levels for the benefit of socialist modernization.<sup>3</sup> Moreover, Joint Ventures are mandatorily required to transfer technology to the Chinese labor and economy in general as a condition precedent to their operation’s authorization.<sup>4</sup> Superlatively, Chinese investment laws require foreign investments to be mutually beneficial to China.<sup>5</sup> Conversely however, this mutual benefit that exists in Chinese domestic law does not apply to Chinese investments overseas –profoundly in Africa –as there exists no evidence that China and [African ]countries are negotiating Joint ventures in infrastructure and other rigorous projects carried out by Chinese companies in Africa aiming at enhancing human capacity development through technological transfer and training.<sup>6</sup>

Ludwig<sup>7</sup> rates that Chinese [environmental] regulations are rarely enforced abroad but this is to be anticipated given that laws of a state are generally not expected to have an operation or effect beyond its geographical or territorial limits.<sup>8</sup> Apart from the extraterritorial inapplicability of Chinese laws and the unbinding voluntary guidelines, the non observance of the best labor and environmental practices by the Chinese enterprises in [Africa] is also exacerbated by the insistence by the Chinese authorities that the overseas investors should instead observe the local laws and regulations of the countries in which they operate.<sup>9</sup> While this is legally tenable, a danger lurks in that majority of [African] countries’ [environmental] regulations are not constantly well established and given this precarious position, some investors have the penchant of using the legal loopholes and the administration to lower environmental standards thereby rendering redundant, ‘the principle of abiding by local laws and regulations’.<sup>10</sup>

Additionally, many developing [African] countries attach limited eminence to environmental protection; have understaffed bureaucracies, poor records for countering corruption and indeed, copious African officials are averse to summoning Chinese companies that engage in ‘uncouth’ environmental practices.<sup>11</sup> This does not axiomatically gladden Chinese companies that are increasingly focused on making takings to partake in responsible but more costly environmental practices, especially when there exists a lot of African officials and Chinese entrepreneurs who are ready to agree to the lower standards.<sup>12</sup>

In view of this, it would be imperative that the Chinese investors should, while being urged to respect and abide by the laws of the host country, also be subjected to Chinese laws and international standards where they exist.<sup>13</sup> Further, Xiaoyang<sup>14</sup> contends that Chinese firms do not wield adequate knowledge of local laws and are ‘not used to looking into laws to find their standard behavior’ but instead believe ‘that money is the lubricant which can get everything done’. Therefore the investors are indubitably impeded by an entrepreneurial custom that accords priority to wealth instead of laws and eventually pushing them away from vigilantly learning and complying with the local laws and regulations.<sup>15</sup>

Further, cooperation between China and Africa for the purposes of transnational enforcement of laws and judgments, settlement of commercial disputes and even punishing transnational crimes affecting investors and host countries’ relations are also hampered by laxity on part of the developing African countries to accede to relevant treaties. For example, whereas China is already a party to the 1965 Hague Convention on the Service Abroad of Judicial or Extra Judicial documents in Civil or Commercial Matters only Egypt, Botswana, Malawi and Seychelles from Africa are parties to the same.<sup>16</sup>

Equally, out of more than fifty African Countries, only South Africa and Seychelles are Parties to the 1971

<sup>1</sup> *Ibid*, Articles 51-5.

<sup>2</sup> Chris Carr, Lotus Sun and Minter Ellison, ‘Joint Ventures in China: Overview’ Law as at 1 October 2007.

<sup>3</sup> Law of the People’s Republic of China on Joint Ventures Using Chinese and Foreign Investment, clause 3 <<http://www.china.org.cn/english/government/207001.htm>. >

<sup>4</sup> *Ibid*, Articles 40-43.

<sup>5</sup> James Thuo Gathii (note 177) 686.

<sup>6</sup> *Ibid*, 683.

<sup>7</sup> Tais Ludwig (note 169) 11.

<sup>8</sup> *Buchanan V Rucker* 9 East. 192 KB (1808). See also, Supreme Court of New Hampshire in *Adrian E. Hardy V Martin O. Betz, Chief of Police* 105 NH 169 (1963).

<sup>9</sup> Tang Xiaoyang and Irene Yuan Sun (note 169) 84.

<sup>10</sup> *Ibid*.

<sup>11</sup> David H. Shinn (note 204) 67.

<sup>12</sup> *Ibid*.

<sup>13</sup> Xiuli Han (note 178) 400.

<sup>14</sup> Tang Xiaoyang and Irene Yuan Sun (note 169)84.

<sup>15</sup> *Ibid*.

<sup>16</sup> Weidong Zhu, Creating a Favorable Legal Environment for Sustainable Development of China- Africa Business Relations’ (2014) 2 Journal of South African Law 306.

Hague Convention on Taking of Evidence Abroad in Civil or Commercial matters compared to China which acceded to in 1997.<sup>1</sup> Besides, only Morocco, Tunisia, Egypt and Algeria that have entered into bilateral treaties on judicial assistance with China and movingly, many African countries are not parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Tribunals' Awards.<sup>2</sup> In those circumstances, it indubitably becomes intricate to pursue proceedings against unscrupulous investors who may seek haven in China after flouting investment related laws in the developing African countries.

Moreover, it is also worth appreciating that whereas China has concluded BITs with some of the developing [African] countries, majority of these BITs are antiquated and do not reflect the definite situation that the Chinese investors encounter abroad, for example, the issues of environmental protection and treatment of laborers.<sup>3</sup> Accordingly, as Chinese investors maintain the investment trajectory abroad, there is need for a mutual renegotiation of the BITs between china and these states so as to address sustainable development related issues such as labour rights, environment and corporate social responsibility premised on the most modern development of the international investment law world over.<sup>4</sup> Besides, the renegotiated BITs should also address fight against corruption which undeniably serves as a major stumbling block towards sustainable development.<sup>5</sup>

Additionally, in order to jolt the war against the overseas turpitude to a better level, China should also seriously consider taking a horde of measures including signing and ratifying the Convention on Combating Bribery of Foreign Officials<sup>6</sup> and also fully embrace global norms such as the Extractive Industries Transparency Initiatives [EITI]. It also ought to be recalled that on 25 February 2011<sup>7</sup>, the 8<sup>th</sup> amendment was introduced to Article 164 of the Criminal Law of China to deal with -'crimes of offering bribes to official of foreign countries and international organizations' -thereby proscribing bribes given to officials of foreign countries and international organizations to secure illegitimate commercial benefits.<sup>8</sup> The law however is flawed as it does not address the question whether it applies to foreign nationals who may make payments and since its promulgation, no single person has been charged in court under it.<sup>9</sup> Outstandingly, the law is also fundamentally defective for want of specificity as it leaves several words undefined including 'foreign public official', 'property' and 'illegitimate commercial benefit'.<sup>10</sup> Besides, no judicial interpretation or implementing rules have been issued regarding the definition of 'foreign public official' or 'international public organization official'.<sup>11</sup> Notably, the non specificity flouts the 'principle of legality' a cardinal criminal law principle which demands *inter alia* that rules governing criminal liability must be written with a high level of precision and clarity than rules governing civil liability.<sup>12</sup> This ambiguity entrenches a great deal of prosecutorial discretion, justifying cynicism that bribery of foreign officials will be prosecuted vigorously and fairly.<sup>13</sup> A need therefore exists for China to carry out amendments to its Criminal law to fill the foregoing gaps and take war against overseas corruption to a higher level.

Developing African nations also have a role to play in this course. For example, they should be vigilant in acceding to and ratifying relevant treaties such as the 1965 Hague Convention on the Service Abroad of Judicial or Extra Judicial documents in Civil or Commercial Matters, the 1971 Hague Convention on Taking of Evidence Abroad in Civil or Commercial matters, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Tribunals' Awards and also consider negotiating bilateral treaties with China on judicial assistance to make it possible to pursue errant Chinese investors who may relocate back to China after engaging in acts considered sustainable development averse in the host states. Additionally, they should also strive to develop better domestic legal and policy conditions to guarantee sustainable development and particularly emphasize on enhancing investment climate to boost competitiveness by putting into place first-rate

<sup>1</sup> *Ibid*, 307.

<sup>2</sup> New York Convention on the Enforcement of Foreign Arbitral Tribunals Awards (1958) <<http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>> Accessed 15 April 2018.

<sup>3</sup> Weidong Zhu (note 241) 310.

<sup>4</sup> *Ibid*.

<sup>5</sup> Critical lesson is discernible from the wording of Article 13 of the IISD Model International Agreement on Investment for Sustainable Development. For an exposition please see, Howard Mann, Konrad Von Moltke, Luke Eric Peterson and Aaron Cosbey, *IISD Model International Agreement on Investment for Sustainable Development* (Manitoba: International Institute for Sustainable Development, 2005).

<sup>6</sup> Convention on Combating Bribery of Foreign Officials in International Business Transactions, 1997 <[http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)> Accessed 18 August 2018.

<sup>7</sup> Jennifer Whitman, 'Fighting the Natural Resource Curse in Sub-Saharan Africa with Supply -Side Anti-Bribery Laws: the Role of China' (2014) *Manchester Journal of International Economic Law* 121.

<sup>8</sup> Daniel Chow (note 200).

<sup>9</sup> *Ibid*, 1035.

<sup>10</sup> Jennifer Whitman (note 248)138.

<sup>11</sup> Nathan G Bush, 'China' in Homer E Moyer, JR Miller and Chevalier (eds.), *Anti Corruption Regulation 2017* (London: Law Business Research Ltd 2017) 48.

<sup>12</sup> William Musyoka, *Criminal Law* (Nairobi: Law Africa Publishing Ltd 2013) 8. See also, Antonio Cassese, *International Criminal Law* (Oxford University Press, 2<sup>nd</sup> Edition 2008) 36-41.

<sup>13</sup> Michael B. Runnels and Adam M. Burton, 'The Foreign Corrupt Practices Act and New Governance: Incentivizing Ethical FDI in China and Other Emerging Economies' (2012) 34 *Cardozo Law Review* 298.

macroeconomic policies, stable macroeconomic environment, and stable political institutions, peace, security, openness and high level of education.<sup>1</sup> Similarly, they should also push for the adoption of a common position on Afro-Sino BITs in order to *inter alia* depress unhealthy competition between states and avert a race to the bottom by investors and fortify the negotiation position of African countries in the future Sino- Afro engagements.

## 5. Conclusion

Over years, the notion of sustainable development- which seeks to strike a balance between economic development, ecological protection and preservation as well as social development - has become a universally acknowledged concept. As such, courts of law both at the international and domestic realm have not vacillated in making pronouncements that are sustainable development affable and insisted that 'there must be both development and environmental protection, and that neither of these rights can be neglected at the expense of the other, thus making it part of modern international law.'<sup>2</sup> The notion has also permeated the WTO's Appellate Body which insists that

the 'concept has generally been accepted as integrating economic and social development and environmental protection...'<sup>3</sup> Moreover, investments tribunals are increasingly demonstrating the penchant for making awards that lend support to the notion in relation to foreign direct investments. Correspondingly, the international community has also, over years, been vigilant in originating agreements, principles and even guidelines meant to at least influence the FDI's structure in entrenching sustainable development taking into account the economical, social and ecological aspects of development. Consequently, capital exporting nations should imitate this trend to ensure that outbound FDI's bring forth an exquisite cocktail of the economic, ecological and social development.

As one of the key contemporary capital exporting states- especially to the developing African countries-, China has increasingly taken cognizance of the necessity of embedding the notion into its outbound FDI's. Essentially, this move appears to be a reaction to the denigration that Chinese investments are at times sustainable development frigid; they disregard environmental conservation and protection, flout best labor practices and are at times, enshrouded in corruption. China has therefore increasingly promulgated a host of guidelines meant to ensure that its outbound FDI's are sustainable. Nevertheless, these guidelines are voluntary and lack a binding force of the law and for a meaningful transformation of the conduct of the overseas Chinese companies, China should convert these guidelines into law and attach for violations. Moreover, whereas China has of late seriously embarked on initiating domestic legislative reforms meant to embed sustainable development into the inbound FDI's, such efforts are not replicated with regard to the outbound FDI's. China has instead insisted that Chinese companies operating overseas should abide by the local laws and regulations and while this is legally tenable, many developing [African] countries attach limited eminence to environmental protection; have understaffed bureaucracies, poor records for countering corruption and as such, it would be imperative that the Chinese investors should, while being urged to respect and abide by the laws of the host country, also be subjected to Chinese laws and international standards where they exist. Additionally, there should be a mutual renegotiation of the BITs between China and the developing states so as to address issues concerning labour, environment, corruption and corporate social responsibility premised on the most modern development of the international investment law world over.

To step up the war against the overseas turpitude, China should seriously consider taking measures including signing and ratifying the Convention on Combating Bribery of Foreign Officials, fully embrace global norms such as the Extractive Industries Transparency Initiatives [EITI] and amend Article 164 of its Criminal Law to be able to competently stem crimes of offering bribes to officials of foreign countries and international organizations. The developing African countries should on their part accede to, ratify relevant treaties and negotiate bilateral treaties with China on judicial assistance to make it possible to pursue errant Chinese investors who may relocate back to China after engaging in acts considered sustainable development averse in the host states. Moreover, they should put in place better domestic legal and policy conditions to guarantee sustainable development and emphasize on enhancing investment climate to boost competitiveness by putting into place first-rate macroeconomic policies, stable macroeconomic environment, and stable political institutions, peace, security, openness and high level of education.<sup>4</sup> Likewise, they should also push for the adoption of a common position on Afro-Sino BITs in order to *inter alia* depress unhealthy competition between states and avert a race to the bottom by investors and fortify the negotiation position of the developing African countries in the future Sino- Afro engagements.

<sup>1</sup> Uche Uwelukwa Ofodile, 'Africa- China BITs: A Critique' (2013-2014) 35 Michigan Journal of International Law 200.

<sup>2</sup> *Gabcikovo -Nagymoros Project (Hungary-Slovakia)* Merits, [1997] ICJ Rep 7 Par. 31-32

<sup>3</sup> *Ibid.*

<sup>4</sup> Uche Uwelukwa Ofodile (note 255).

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