Bilateral Investment Treaties and Environmental, Social and Governance in Africa

Kariuki Muigua

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Abstract

The paper critically investigates the relationship between Environmental, Social and Governance (ESG) and Bilateral Investment Treaties (BITs) in Africa. It argues that Environmental, Social and Governance factors have become integral in the foreign investment sphere and are being widely embraced in BITs. The paper discusses the progress made towards embracing the concept of ESG in BITs in Africa. It further highlights ESG concerns under BITs in Africa. The paper also proposes reforms towards incorporating ESG concerns in BITs in Africa in order to foster Sustainable Development.

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1.0 Introduction

A Bilateral Investment Treaty (BIT) is an agreement between two countries regarding promotion and protection of investments made by investors from respective countries in each other's territory[1]. BITs have also been defined as agreements establishing the terms and conditions for private investment by nationals and companies of one country in the jurisdiction of another[2]. BITs are classified as part of International Investment Agreements (IAAs) alongside Treaties with Investment Provisions[3]. BITs are the primary legal mechanism for protecting Foreign Direct Investment (FDI) around the world[4]. BITs are thought to encourage FDI by establishing a broad set of investor's rights and by allowing investors to sue a host state in an international tribunal if these rights are violated[5]. It has been asserted that BITs focus on four substantive areas being FDI admission, FDI treatment, FDI expropriation, and the settlement of disputes[6]. It has been observed that BITs can create a stable investment environment to spur not only FDI but also international trade[7]. A BIT leads to an increase in trade flows between the home and foreign country[8]. BITs are thus integral components in the international investments realm.

BITs are very vital in Africa. It has been observed that Africa continues to face several challenges that make its share of global FDI to be negligible. These include the prevalence of fragmented investment policies, information asymmetry and high sovereign risk[9]. BITs

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[1] United Nations Conference on Trade and Development., 'Investment Policy Hub.' Available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/108/kenya (Accessed on 20/07/2023)
[2] Elkins. Z et al., 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000' University of Illinois Law Review, Volume 2008
[3] United Nations Conference on Trade and Development., 'Investment Policy Hub.' Op Cit
[4] Andrew. K., 'Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties.' *International Studies Quarterly*, Volume 53, Issue 1, 2009
[5] Ibid
[6] Elkins. Z et al., 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000' Op Cit
[7] Heid. B & Vozzo. I., 'The International Trade Effects of Bilateral Investment Treaties.' Available at https://media.adelaide.edu.au/economics/papers/doc/wp2020-08.pdf (Accessed on 20/07/2023)
[8] Ibid
[9] Beri. P & Nubong. G., 'Impact of Bilateral Investment Treaties on Foreign Direct Investment in Africa.' Available at https://onlinelibrary.wiley.com/doi/epdf/10.1111/1467-8268.12583 (Accessed on 20/07/2023)

can help overcome some of these concerns by signaling the host country's willingness to protect FDI[10]. It has been observed that there has been an influx of FDI into Africa in the recent past with many African countries taking measures towards to promoting and protecting such foreign investments[11]. Consequently, there has been proliferation of BITs, other treaties with investment provisions and foreign investment laws (FILs) in Africa, along with the parallel rise in numbers of claims brought by African investors and claims brought against African states under such instruments, thus demonstrating that investment protection is an important consideration in Africa[12]. African countries have implemented numerous reforms targeted at attracting foreign investors, including domestic reforms, regional integration initiatives, and signing bilateral investment BITs with potential FDI source countries[13]. BITs have the potential of spurring economic development in Africa through FDI.

Environmental, Social and Governance (ESG) is an approach to investing that seeks to achieve a sustainable, responsible and ethical investment environment by incorporating Environmental, Social and Governance concerns in decision making processes[14]. ESG is usually a standard and strategy used by investors to evaluate corporate behaviour and to determine the future financial performance of companies[15]. It covers a subset of non-financial performance indicators which include sustainable, ethical and corporate governance issues such as managing a company's carbon footprint and ensuring there are systems in place to ensure accountability[16]. ESG also involves monitoring and

[10] Ibid

[11] Wheal. R et al., 'Investment Treaty Protection: How to Safeguard Foreign Investments in Africa.' Available at https://www.whitecase.com/insight-our-thinking/africa-focus-winter-2022-investment-treaty-protection (Accessed on 20/07/2023)

[12] Ibid

[13] United Nations Economic Commission for Africa., 'Investment Policies and Bilateral Investment Treaties in Africa Implications for Regional Integration.' Available at https://archive.uneca.org/sites/default/files/PublicationFiles/eng_investment_landscaping_study.pdf (Accessed on 20/07/2023)

[14] Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR Research in Corporate Finance.' *Journal of Corporate Finance* 66 (2021): 101889

[15] Li. T.T et al., 'ESG: Research Progress and Future Prospects.' *Sustainability*, No. 13 of 2021.

[16] Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR Research in Corporate Finance.' Op Cit

reporting environmental concerns such as carbon emissions, water consumption and waste generation; social concerns such as employee, product and customer related data and governance concerns such as political lobbying, anticorruption initiatives and board diversity[17]. The goal of ESG is to integrate Environmental, Social and Governance factors in corporate activities in order to enhance the sustainability and social impact of business activities[18]. It has been pointed out that the concept of ESG is very vital since Environmental, Social and Governance concerns have become a societal focal point in light of the Sustainable Development agenda[19].

The paper critically examines the relationship between ESG and BITs in Africa. It argues that Environmental, Social and Governance factors have become integral in the foreign investment sphere and are being widely embraced in BITs. The paper discusses the progress made towards embracing the concept of ESG in BITs in Africa. It further highlights ESG concerns under BITs in Africa. The paper also proposes reforms towards incorporating ESG in BITs in Africa in order to foster Sustainable Development.

2.0 The Nexus between ESG and BITs

The importance of mitigating climate change, upholding good social policies and good governance have led to the rise and use of Environmental, Social and Governance (ESG) factors in the world of finance and investment[20]. Banks, funds and other financial institutions have increasingly sought to measure whether the investments they make promote ESG[21]. It has been pointed out that ESG has the ability of shaping the behavior of Multinational Corporations under BITs by fostering socially responsible, sustainable

[17] Ibid

[18] Li. T.T et al., 'ESG: Research Progress and Future Prospects.' Op Cit

[19] Sriyani. C. & Heenetigala. K., 'Integrating Environmental, Social and Governance (ESG) Disclosure for a Sustainable Development: An Australian Study.' *Business Strategy and the Environment*, No. 26 of 2017.

[20] Goh. N., 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' *The Journal of World Energy Law & Business*., Volume 15, Issue 6, 2022

[21] Ibid

and ethical investments[22]. ESG is thus an essential part of the international investment law regime which can foster Sustainable Development through the investment sphere by promoting responsible business conduct[23].

The United Nations 2030 Agenda for Sustainable Development recognizes the role of international trade and investments in promoting inclusive economic growth and poverty reduction whilst contributing to the promotion of Sustainable Development[24]. Towards this end, the Sustainable Development goals advocate for investment in areas such as industry, infrastructure and innovation for economic growth and development[25]. Further, towards reducing inequalities between developed and developed nations, the Sustainable Development goals encourage development assistance and FDI to underdeveloped regions of the world[26]. It can thus be argued that investments through BITs are critical in the attainment of the Sustainable Development goals through FDI in areas such as infrastructure, industry, energy, and innovation in developing countries. However, such investments are required to be guided by the principle of Sustainable Development in accordance with the 2030 Agenda for Sustainable Development[27]. ESG concerns are at the heart of the Sustainable Development agenda[28]. The Sustainable Development Goals seek to achieve global development within the ESG framework by addressing social challenges such as poverty, hunger, health, education, gender equality, access to clean water and employment through investments in areas such as energy,

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[22] Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR Research in Corporate Finance.' Op Cit

[23] Organisation for Economic Co-operation and Development., 'The Future of Investment Treaties.' Available at https://www.oecd.org/daf/inv/investment-policy/Note-on-possible-directions-for-the-future-of-investment-treaties.pdf (Accessed on 20/07/2023)

[24] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development' Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf (Accessed on 20/07/2023)

[25] Sustainable Development Goal 9., 'Industry, Innovation and Infrastructure' available at https://www.undp.org/sustainable-development-goals#industry-innovation-and-infrastructure (Accessed on 20/07/2023)

[26] Ibid, Goal 10

[27] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development' Op Cit

[28] Sriyani. C. & Heenetigala. K., 'Integrating Environmental, Social and Governance (ESG) Disclosure for a Sustainable Development: An Australian Study.' Op Cit

industry, innovation and infrastructure while mitigating the effects of climate change and promoting good governance[29]. ESG considerations are thus important in BITs.

Consequently, many IAAs including BITs are incorporating ESG matters including specific provisions on the protection of the environment, climate action and Sustainable Development[30]. The Organisation for Economic Co-operation and Development (OECD) notes that many recent BITs capture ESG concerns such environmental protection, labour laws, and transparency requirements as part of the overall Sustainable Development agenda[31]. For example, the *Canadian Model Agreement for the Promotion and Protection of Investments* recognizes the role of investments in promoting Sustainable Development as part of responsible business conduct[32]. Further, the *United States of America Model Bilateral Investment Treaty* recognises the nexus between BITs and ESG matters such as the environment and human rights including labour rights[33]. It stipulates that investments shall be conducted in a manner that respects environmental laws and policies of the host state, and multilateral environmental agreements[34]. In terms of environmental protection, the USA Model Bilateral Investment Treaty further provides that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws[35]. In addition, it also sets out that investments shall be carried out in a manner that complies with domestic labour standards and international labour standards set out under the International Labour Organization (ILO) Declaration on

[29] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development' Op Cit
[30] United Nations Conference on Trade and Development., 'The International Investment Treaty Regime and Climate Action.' Available at https://unctad.org/system/files/officialdocument/diaepcbinf2022d6_en.pdf (Accessed on 20/07/2023)
[31] Organisation for Economic Co-operation and Development (OECD)., 'Novel Features in Recent OECD Bilateral Investment Treaties.' *International Investments Perspectives,* 2006
[32] Government of Canada, 'Model Agreement for the Promotion and Protection of Investments, 2021' available at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng (Accessed on 20/07/2023)
[33] United States of America Model Bilateral Investment Treaty, 2012, Available at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (Accessed on 20/07/2023)
[34] Ibid, Article 12
[35] Ibid,

Fundamental Principles and Rights at Work and its Follow-Up[36]. The USA Model Bilateral Investment Treaty further contains pertinent provisions on transparency and disclosure of information which are vital components of the Governance 'G' pillar of ESG.

At the regional level, it has been observed that many investment agreements are capturing ESG concerns such as protection of human rights and the environment, compliance with domestic law, measures against corruption and the promotion of Sustainable Development[37]. For example, the *Agreement Establishing the African Continental Free Trade Area* seeks to achieve among other things the promotion and attainment of Sustainable Development among state parties through investments[38]. Further, the *Southern Africa Development Community (SADC) Model Bilateral Investment Treaty Template* encapsulates ESG concerns including human rights, environment and labour[39]. It states that investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located[40]. It further provides that investors and their investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work and that further investors and their investments shall not establish, manage or operate investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the host state or the home state, whichever obligations are higher[41].

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[36] Ibid, Article 13

[37] Shaw. J., 'The Advent of Investor Obligations in an African Model for International Investment Law Reform.' Available at https://afaa.ngo/page18097/10399642#:~:text=Incorporating%20investor%20obligations%20in%20international,gained%20considerable%20traction%20in%20Africa. (Accessed on 20/07/2023)

[38] Agreement Establishing the African Continental Free Trade Area, available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (Accessed on 20/07/2023)

[39] Southern Africa Development Community (SADC) Model Bilateral Investment Treaty Template., Available at https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf (Accessed on 20/07/2023)

[40] Ibid, Article 15

[41] Ibid

It is thus evident that ESG matters have become part and parcel of the international investment law regime. ESG factors are being incorporated in BITs. However, there are several ESG concerns under BITs in Africa.

3.0 ESG Concerns under BITs in Africa

Several ESG related concerns have emanated from BITs in Africa. It has been observed that host states are increasingly asserting claims against foreign investors for alleged breaches of their environmental obligations[42]. In addition, there have been allegations of foreign investors' breach of human rights, for example, access to water, or the lack of public consultation of local communities in relation to development projects[43]. Indeed, the activities of certain Multinational Corporations have resulted in environmental concerns including the extinction of biodiversity, contamination and destruction of soil and air pollution as a result of oil spillages[44]. Further, Multinational corporations operating in most developing countries especially in Africa have been accused of gross human rights violations, such as killings, bad labour practices and land injustices[45]. Such practices have had an impact on economic activities, social-cultural life and human health of the affected people thus hindering the attainment of Sustainable Development within the ESG framework[46]. Consequently, there has been rise of investment treaty arbitration between foreign investors and host states under Bilateral and Multilateral Investment

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[42] Allen. N., 'Investment Treaty Disputes Role in Sustainability.' Available at https://www.addleshawgoddard.com/globalassets/specialisms/litigation/esg-risk-reputation-compliance--disputes/investment-treaty-disputes-role-in-sustainability.pdf (Accessed on 21/07/2023)

[43] Ibid

[44] Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' *African Research Review Vol. 3 (1), 2009. Pp. 111-124*

[45] Makwana, R., 'Multinational Corporations (MNCs): Beyond the Profit Motive,' Share the World Resources, 3rd October 2006, available at http://www.stwr.org/multinationalcorporations/multinational-corporations-mncs-beyond-the-profitmotive.html#legalrights (Accessed on 21/07/2023)

[46] Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' Op Cit

Treaties where ESG concerns such environmental matters and human rights are being considered[47].

It has been observed that as sustainability obligations become increasingly stringent in light of concerns about climate change, disputes related to environmental matters will inevitably rise in years to come[48]. Further, it has been noted that investment treaty arbitration can foster ESG requirements under BITs such as respect for human rights and sound environmental governance[49]. The importance of ESG factors such as respect for human rights and environmental protection is so fundamental that some decisions in investment treaty arbitration have observed that where a foreign investor violates national laws on matters such as environmental conservation and human rights, then such a situation may warrant the proportionate response of a denial of treaty protection under the BIT and the International Centre for Settlement of Investment Disputes (ICSID) Convention[50]. ESG matters such as human rights and environmental protection are thus vital concerns under BITs in Africa.

Another fundamental ESG issue under BITs in Africa is the aspect of repatriation of profits and other benefits given to foreign investors such as tax incentives. BITs contain provisions guaranteeing transfers and repatriation of profits[51]. Such provisions establish a host country's obligation to permit the payment, conversion and repatriation of amounts relating to an investment, ensuring that, at the end of the day, a foreign investor will be able to enjoy the financial benefits of a successful investment[52]. However, it has

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[47] Goh. N., 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' Op Cit

[48] Allen. N., 'Investment Treaty Disputes Role in Sustainability.' Op Cit

[49] Peterson. L & Gray. K., 'International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration.' Available at https://docs.escrnet.org/usr_doc/Luke_Peterson___IHR_in_bilateral.pdf (Accessed on 21/07/2023)

[50] International Centre for Settlement of Investment Disputes, Arbitration between Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited and Republic of Kenya, ICSID Case No. ARB/15/29

[51] Peterson. L & Gray. K., 'International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration.' Op Cit

[52] United Nations Conference on Trade and Development., 'Transfer of Funds.' Available at https://unctad.org/system/files/official-document/psiteiitd20.en.pdf (Accessed on 21/07/2023)

been observed that where poor profits sharing models are adopted, the host country may end up with little benefits since most of the profits will be repatriated to the investor's home country[53]. Further, tax incentives for foreign investors create a disadvantage for domestic firms since they face the same conditions to sell and produce[54]. This could result in economic and social effects in host countries such as underdevelopment and collapse of local firms and industries[55]. This can hinder the attainment of Sustainable Development in host countries.

Finally, it has been observed that some foreign investors under BITs have engaged in bad governance practices thus affecting the attainment of the 'G' pillar of the ESG agenda[56]. Such practices include corruption, lack of diversity and failure to embrace Corporate Social Responsibility (CSR)[57]. It is thus imperative for investors to adopt good governance practices in order to enhance the role of ESG in BITs.

The foregoing discussion has addressed some of the ESG concerns in BITs. These include instances of human rights violation, failure to embrace sound environmental governance practices, lack of proper framework on repatriation of profits which results in economic and social concerns in host countries and bad governance by some investors. There is need to address these matters in order to foster ESG requirements in BITs.

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[53] Lebrand. M., 'Profit Shifting and FDI Restrictions.' Available at https://thedocs.worldbank.org/en/doc/212101480958609594-0050022016/original/4Lebrandpaper.pdf (Accessed on 21/07/2023)

[54] Ibid

[55] Lere. A., 'Multinational Corporations' (MNCs) Engagement in Africa: Messiahs or Hypocrites?' *Journal of African Foreign Affairs*, Volume 5, Issue 1, 2018

[56] Filatotchev, I. & Stahl, G. K., 'Towards Transnational CSR. Corporate Social Responsibility Approaches and Governance Solutions for Multinational Corporations. ' *Organizational Dynamics*, Volume 44, No.2, 2015, pp. 121-129

[57] Ibid

4.0 Way Forward

Several measures can be undertaken towards embracing ESG as a vital component of BITs. To begin with, there is need to integrate ESG clauses in BITs. It has been observed that there has been rise of ESG investing which has brought about a paradigm shift in the world of finance as investors are increasingly looking beyond financial returns and considering the impact of their investments on the environment, society, and corporate governance[58]. Progress has been made towards integrating ESG clauses in BITs. It has been noted that many IAAs including BITs are incorporating ESG matters including specific provisions on the protection of the environment, climate action and Sustainable Development[59]. Further, in Africa, it has been observed that recent BITs such as the 2016 Morocco–Nigeria BIT are embracing innovative human rights approaches to the protection and promotion of FDI[60]. States should thus integrate ESG clauses in BITs in order to make investments more aligned with ESG concerns such climate action, environmental governance, respect for human rights as well as other public policy imperatives[61]. In order to achieve this goal, African Countries should ensure that they negotiate appropriately with foreign countries in order to capture ESG clauses in BITs.

In addition, there is need for investors to promote sustainable, ethical and socially responsible investments[62]. Such investments promote matters such as social justice, environmental sustainability, alternative energy and clean technology efforts[63]. Socially responsible investing allows market participants to conduct positive and negative screens to invest in companies that they believe are engaging in sustainable practices such as

[58] Sood. Y., 'Review Paper: 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' by Nelson Goh.' Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4466733 (Accessed on 21/07/2023)

[59] United Nations Conference on Trade and Development., 'The International Investment Treaty Regime and Climate Action.' Op Cit

[60] Zugliani. N., 'Human Rights in International Investment Law: The 2016 Morocco–Nigeria Bilateral Investment Treaty.' *International & Comparative Law Quarterly*, Volume 68, Issue 3, 2019

[61] United Nations Conference on Trade and Development., 'The International Investment Treaty Regime and Climate Action.' Op Cit

[62] Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR Research in Corporate Finance.' Op Cit

[63] Oehmke. M & Opp. M., 'A Theory of Socially Responsible Investment.' Available at https://www.runi.ac.il/media/rzcpiq4a/a-theory-of-s.pdf (Accessed on 21/07/2023)

environmental stewardship, consumer protection, human rights, and racial and gender diversity[64]. By engaging in socially responsible investing, foreign investors can promote ESG factors including environmental stewardship and human rights protection[65].

Further, it is imperative that investors comply with national laws under BITs. One of the key challenges highlighted in the investment sphere in Africa is the violation of national laws by Multinational Corporations especially those related to environmental conservation in favour of commercial interests[66]. As a result, many BITs have set out obligations concerning respect for national laws such as environmental laws and human rights[67]. Investors should thus comply with such laws by ensuring that they respect human rights and foster environmental conservation. This will promote ESG matters in the BITs framework.

It also important for investors to foster good governance. It has been asserted that Multinational corporations play a significant role in shaping the global economy and politics[68]. Their governance practices thus have a significant impact on host countries[69]. It is thus vital for these entities to embrace good governance practices such as enhancing diversity, promoting good labour practices and embracing Corporate Social

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[64] Ibid

[65] Gerard. B., 'ESG and Socially Responsible Investment: A Critical Review.' Available at https://web.archive.org/web/20200305104050id_/https://biopen.bi.no/bixmlui/bitstream/handle/11250/2602369/Gerard.Beta.2019.pdf?sequence=4 (Accessed on 21/07/2023)

[66] Muigua.K., 'Multinational Corporations, Investment and Natural Resource Management in Kenya' available at http://kmco.co.ke/wp-content/uploads/2018/11/Multinational-Corporations-Investment-and-Natural-Resource-Management-in-Kenya-Kariuki-Muigua-November-2018.pdf (Accessed on 21/07/2023)

[67] See for example the United States of America Model Bilateral Investment Treaty and the Southern Africa Development Community (SADC) Model Bilateral Investment Treaty Template

[68] Kim. S & Milner. H., 'Multinational Corporations and their Influence through Lobbying on Foreign Policy.' Available at https://www.brookings.edu/wpcontent/uploads/2019/12/Kim_Milner_manuscript.pdf (Accessed on 21/07/2023)

[69] Ibid

Responsibility[70]. Good governance by investors is integral in attaining the Governance 'G' pillar of ESG.

Finally, there is need for investors to promote Sustainable Development. The United Nations 2030 Agenda for Sustainable Development recognizes the role of international trade and investments in promoting inclusive economic growth and poverty reduction whilst contributing to the promotion of Sustainable Development[71]. Towards this end, the Sustainable Development goals advocate for investment in areas such health, energy, education, food security, industry, infrastructure and innovation for economic growth and development[72]. Further, towards reducing inequalities between developed and developed nations, the Sustainable Development goals encourage development assistance and FDI to underdeveloped regions of the world[73]. Foreign investments are thus key in fostering Sustainable Development. Sustainable Development entails fostering environmental protection, economic development and social concerns[74]. Thus, while undertaking investment activities under BITs, foreign investors should ensure that they adhere to the Sustainable Development agenda by promoting environmental protection, fostering economic development and ensuring that their investments are socially conscious[75].

Through these among other measures, ESG concerns in Africa will be realized through BITs.

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[70] Filatotchev, I. & Stahl, G. K., 'Towards Transnational CSR. Corporate Social Responsibility Approaches and Governance Solutions for Multinational Corporations. ' Op Cit

[71] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development' Op Cit

[72] Ibid

[73] Ibid, Goal 10

[74] Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1

[75] Ajibo. C., 'Sustainable Development Agendas in African Investment Treaties: Reconciling Principle with Practice.' *Australasian Review of African Studies*, Volume 40, No. 2 of 2019, p 55-70

5.0 Conclusion

BITs have the potential of spurring economic development in Africa through FDI[76]. The importance of mitigating climate change, upholding good social policies and good governance have led to the rise and use of Environmental, Social and Governance (ESG) factors in the world of finance and investment[77]. Consequently, many IAAs including BITs are incorporating ESG matters including specific provisions on the protection of the environment, climate action and Sustainable Development[78]. However, several ESG concerns are evident in the BITs framework in Africa. These include instances of human rights violation, failure to embrace sound environmental governance practices, lack of proper framework on repatriation of profits which results in economic and social concerns in host countries and bad governance by some investors[79]. There is need to embrace ESG tenets in the BITs framework in Africa. This can be achieved through integrating ESG clauses in BITs, promoting sustainable, ethical and socially responsible investments, compliance with national laws under BITs, fostering good governance and promoting Sustainable Development[80]. Embracing ESG principles in Africa can thus be realized.

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[76] United Nations Economic Commission for Africa., 'Investment Policies and Bilateral Investment Treaties in Africa Implications for Regional Integration.' Op Cit

[77] Goh. N., 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' Op Cit

[78] United Nations Conference on Trade and Development., 'The International Investment Treaty Regime and Climate Action.' Op Cit

[79] Peterson. L & Gray. K., 'International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration.' Op Cit

[80] Gerard. B., 'ESG and Socially Responsible Investment: A Critical Review.' Op Cit

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Beri. P & Nubong. G., 'Impact of Bilateral Investment Treaties on Foreign Direct Investment in Africa.' Available at https://onlinelibrary.wiley.com/doi/epdf/10.1111/1467-8268.12583

Elkins. Z et al., 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000' University of Illinois Law Review, Volume 2008

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Heid. B & Vozzo. I., 'The International Trade Effects of Bilateral Investment Treaties.' Available at https://media.adelaide.edu.au/economics/papers/doc/wp2020-08.pdf

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