STRATHMORE LAW JOURNAL

VOLUME 2, NUMBER 1, AUGUST 2016

Strathmore University Press

Strathmore Law School
Madaraka Estate, Ole Sangale Road
P.O. Box 59857 00200
Nairobi - KENYA
Tel. +254-703-034601
editor.sup@strathmore.edu
www.press.strathmore.edu
www.law.strathmore.edu
Twitter: @strathmorelaw

Chinese foreign direct investment and human rights in Kenya: A mutually-affirming relationship?

*Rosemary Mwanza**

Abstract

Does the increase in Chinese foreign direct investment (FDI) inflows into Kenya portend doom for human rights in the country? The prominent narrative has been that FDI undermines human rights in host states, especially those in the developing world. This narrative is countered by claims that there exists a mutually affirming relationship between FDI and human rights. Proponents of this view posit that FDI facilitates the diffusion of human rights norms and correlates with the improved rule of law in host states. They also point to emerging human rights jurisprudence in international investment arbitration as evidence of a reciprocal relationship between FDI and human rights. In light of these arguments, this paper analyses the extent to which such a reciprocal relationship bears out between Chinese FDI and human rights in Kenya. It will be demonstrated that given the lack of a framework for human rights accountability for corporations at the international level, the restrictive treatment of human rights in international investment arbitration tribunals and weak institutional capacity in host states, a positive overlap between FDI and human rights is hardly a panacea for human rights protection in Kenya. Therefore, a synergy of legal measures and non-legal measures provide a pragmatic approach to insulate human rights from violations that may be associated with Chinese FDIs.

* LL.M. University of Southern California; Attorney at Law, NY, US; Lecturer, Catholic University of Eastern Africa Law School

Introduction

Chinese foreign direct investment (FDI) inflows into Kenya have grown at an exponential rate over the last few years.[1] The genesis of the present increase in Chinese FDI in Kenya can be traced to the long-standing history of diplomatic and trade relations between China and Africa.[2] In 2012, Chinese FDI inflows into Kenya stood at US$2.4 billion up from US$500 million in 2010.[3] In 2014, more than 50 Chinese companies were working on about 80 projects in Kenya with an estimated value of US$2 billion.[4] Investment in public infrastructure has been one of the main sources of Chinese FDI in Kenya. Three Chinese companies were responsible for the construction of the Thika Superhighway, a 50 kilometre eight-lane highway from Nairobi to Thika town. The Lamu Port-South Sudan-Ethiopia Transport Corridor Project (LAPSSET),[5] which is a composite construction project of a corridor from the town of Lamu on the Kenyan Coast, to Ethiopia and South Sudan is another example of Chinese involvement in massive infrastructure projects in the country.[6] In addition to setting up local manufacturing plants in order to edge into the local markets,[7] Chinese corporations have also invested in the mineral exploration and exploitation sector[8] and the energy sector.[9] Even though comprehensive information on Chinese investment

1 For an overview of Chinese investment in Kenya, see, Fiott D, 'The EU and China in Africa: The case of Kenya' 3 *Madariaga Paper*, 5 (2010). See also, Onjala J, 'A scoping study on China-Africa economic relations: The case of Kenya' The African Economic Research Consortium (AERC), Nairobi, 5 March 2008.

2 See generally, Kioko PM, 'A study on Chinese's economic relations with Africa: Case study Kenya' 2 *Prime Journal of Business Administration and Management*, 3 (2012) and, Konings P, 'China and Africa: Building a strategic partnership' 23 *Journal of Developing Societies*, 3 (2007), 343, 485-496.

3 International Monetary Fund, *Kenya: Fourth review under the three-year arrangement under the extended credit facility, request for waiver and modification of performance criteria-staff report; Press release on the Executive Board Discussions; and Statement by the Executive Director for Kenya*, Country Report No. 12/300, 2012, 6.

4 Africa Policy Institute, *China in Kenya: A tale of two dreams*, Africa Policy Brief, 2014.

5 Information regarding the LAPSSET project can be found at http://www.lapsset.go.ke/ on 11 August 2016.

6 'Judy Mwende: China firm wins port Lamu tender' *Construction Business Review*, 12 April 2013 http://www.constructionkenya.com/2899/china-communications-wins-lamu-port-tender/ on 11 August 2016.

7 'Victor Juma: Chinese manufacturers go local in battle for Kenya's consumers' *Business Daily,* 11 April 2011 http://www.businessdailyafrica.com/Corporate+News/Chinese+manufacturers+go+local+in+battle+for+Kenyas+consumers/-/539550/1142098/-/item/0/-/y3u2w2/-/index.html on 11 August 2016.

8 Some Chinese mining interests in Kenya include: Fenxi mining Company, a Chinese company was granted a mining concession for *mining* of *coal* in exploration blocks C and D within Mui basin in Kitui County in 2011; A consortium led by HCIG Energy Investment Company, a Chinese firm was granted a license to develop blocks A and within the Mui Basin in Kitui County.

9 'Catherine Riungu: Chinese power firm makes Kenya entry' *The East African Standard,* 30 November 2009 http://www.theeastafrican.co.ke/business/2560-814314-y3k0lb/index.html on 11 August 2016.

interests in Kenya is not readily available, what is clear from the examples cited is that Chinese FDI into Kenya is becoming increasingly an important component of its economy.

The exponential growth of Chinese FDI inflows into Kenya necessitates an assessment of its potential or real effects on human rights. This is due to concerns arising from evidence linking multinational corporations (MNCs), the main agents of FDI, to egregious human rights violations in host states, especially those in the developing world. Further, the increase in Chinese FDI in Africa as a whole has engendered much interests with some studies concluding that its impact on human rights in Africa is generally a negative one.[10] Some studies have found a link between FDI and poor civil liberties performance[11] and a race to the bottom in labour standards in several host states.[12] Similarly, FDI has been shown to correlate with the pollution haven phenomenon which occurs when a host state'…sets its environmental standards below the socially efficient level or fails to enforce its standards in order to attract foreign investment from countries with higher standards or countries that enforce their standards better.'[13]

Critics also argue that FDI undermines human rights because of the investor-centric nature of investment agreements. They point to stabilisation clauses, a common feature in investment contracts, which effectively create a regulatory chill on the power of host states to take measures pursuant to their tripartite duty to respect, protect, and fulfill.[14] Additionally, whether corporations as non-state actors are mere objects or subjects of international human rights law is still an open question.[15] To date, efforts to address this gap by establishing binding human rights obligations for corporate actors have borne no decisive outcome. Lack of a comprehensive treaty to hold foreign investors accountable for human

10 See for example, Adisu K, Sharkey T and Okoroafa S, 'The impact of Chinese investment in Africa' 5 *International Journal of Business and Management,* 9 (2010), 3.

11 Adam A and Filippaios F, 'Foreign direct investment and civil liberties: A new perspective' 23 *European Journal of Political Economy*, 4 (2007), 1038.

12 See for example, Olney WW, 'A race to the bottom? Employment protection and foreign direct investment' 91 *Journal of International Economics*, 2 (2013), 191.

13 Neumayer E, 'Pollution havens: An analysis of policy options for dealing with an elusive phenomenon' 10 *Journal of Environment and Development*, 2 (2001), 148.

14 For example, in *Piero Foresti v South Africa* (ICSID Case No. ARB(AF)/07/1), South Africa was sued by European investors, who claimed that the Black Economic Empowerment (BEE) provisions of the Minerals and Petroleum Resources Development Act of 2002 (MPRDA), amounted to breach of investment treaties. In *Vattenfall v German (II*) (ICSID Case No. ARB/09/6), Germany's measure to wean itself of nuclear energy based on economic, health, environmental and safety considerations was challenged by investors as a breach of investment treaties.

15 Alvarez JE, 'Are corporations "subjects" of international law?' 9 *Santa Clara Journal of International Law*, 1 (2011), 1.

rights violations has undoubtedly been a major impediment to holding investors accountable for such violations.[16] Moreover, the fact that the Rome Statute of the International Criminal Court precludes the Court from exercising jurisdiction over corporations is evidence of a measure of reticence by the international community to subject corporations to direct accountability for human rights violations.[17]

Despite the criticism against FDI with regard to its deleterious effects on human rights, arguments that foreign investors' interests and human rights are mutually affirming provide a strong counter-narrative. A mutually-affirming relationship is said to exist where there is reciprocity between FDI and human rights. Reciprocity manifests itself where a host state's strong human rights performance serves as a positive location determinant for FDI, thus attracting more foreign investment. This in turn encourages host nations to improve their human rights performance in order to attract more FDI. Research examining the link between FDI and human rights indicates that different types of FDI encourage host states to promote the respect of human rights, thereby strengthening their human rights regimes.[18] In this regard, the narrative is usually that globalisation creates economic growth, which in turn facilitates the creation of an economic middle class. The members of the middle class are typically highly educated individuals who possess a heightened awareness of civil and political rights.[19] A rights-conscious middle class is able to demand from the state the fulfillment of its rights. Consequently, the overall effect is the improvement of both civil and political rights, and socio-economic rights.[20]

Proponents also argue that as more FDI flows into host states, investors import superior human rights standards through initiatives such as corporate social responsibility (CSR) programmes. Accordingly, under certain conditions, FDI can lead to a race to the top in environmental protection standards.[21] This position stands in opposition to a view that FDI automatically correlates with environmental degradation in host states. Further, it has been posited that interna-

16 Deva S, 'Human rights violations by multinational corporations and international law: Where from here?' 19 *Connecticut Journal of International Law*, 1 (2003), 1.

17 Article 25, *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90.

18 Hafner-Burton EM, 'Right or robust? The sensitive nature of repression to globalization' 42 *Journal for Peace Research,* 6 (2005), 695.

19 Apodaca C, 'Global economic patterns and personal integrity rights after the Cold War' 45 *International Studies Quarterly*, 4 (2001), 587.

20 Apodaca, 'Global economic patterns and personal integrity rights after the Cold War', 587.

21 Dong B, Gong J and Zhao X, 'FDI and environmental regulation: Pollution haven or a race to the top?' 41 *Journal of Regulatory Economics*, 2 (2012), 216.

tional investment arbitration tribunals contribute to the development of human rights jurisprudence by relying on human rights defenses to arrive at decisions. On the basis of this view, international human rights law and investment law are mutually-affirming components of a unified system of international law.[22]

Given the contrasting positions outlined above, the position that FDI has a negative impact on human rights is not a matter about which it is easy to be dogmatic. Predictably then, the relationship between the two has been described as an ambiguous one.[23] Against this background, this article analyses the extent to which a mutually affirming relationship between Chinese FDI and human rights in Kenya can or does exist. In order to set the discussion in context, part 2 analyses the real and potential impacts of Chinese FDI on human rights in Kenya. This is followed in part 3 by an examination of the extent to which a mutually affirming relationship bears out between human rights in Kenya and Chinese FDI in practice. Part 4 explores legal and non-legal measures that can be used to provide a cushion against human rights violations by Chinese corporate entities operating in Kenya.

Impact of Chinese FDI on human rights in Kenya

As Chinese FDI in the extractive industry continues to soar, concerns about its potential impact on the environment are not unfounded. Mining exploration and exploitation have been associated with some of the worst forms of environmental degradation. It has been noted that this kind of FDI can

> …fuel economic development at a scale and pace that overwhelms host country regulatory capacity, resulting in inefficient and irreversible environmental destruction and even potentially a decline in overall welfare.[24]

Concerns for environmental degradation are also fuelled by the environmental culture in China, exemplified by high levels of domestic pollution. For example, the high levels of pollution in China came under sharp focus shortly before and during the 2008 Olympics, raising questions about the suitability of

[22] Fry JD, 'International human rights law in investment arbitration: Evidence of international law's unity' 18 *Duke Journal of Comparative and International Law* (2007), 77.

[23] Letnes B, 'Foreign direct investment and human rights: An ambiguous relationship' 29 *Forum for Development Studies*, 1 (2014), 33.

[24] Mabey N and McNally R, 'Foreign direct investment and the environment: From pollution havens to sustainable development' *World Wide Fund for Nature Report* (1999).

Beijing as a host for the event.[25] Arguably, this phenomenon has been attributed to government policies that prioritise economic growth over environmental protection.

In an attempt to address pollution problems without negating economic growth, China has considered moving high-polluting industries to Africa.[26] Such a policy strategy can correctly be viewed as a constituent factor of the 'pollution haven' phenomenon. When such measures are coupled with weak enforcement of environmental protection laws, the possibility of a pollution haven phenomenon in Kenya is not far-fetched. In certain instances, public institutions have demonstrated little capacity or will for oversight. even in cases where investment projects carry a high potential for environmental degradation.[27] This combination of endogenous and exogenous factors places the environment in an increasingly precarious situation.

As with the pollution haven phenomenon, a race to the bottom in labour standards happens when host countries compete to deregulate the strong protection of labour rights in order to increase their competitive advantage relative to other countries. Investors respond to this by 'racing' to the countries with low labour standards because low labour standards imply low operating costs and better profits. For example, following the practice in a number of countries, export processing zones (EPZs) in Kenya were exempt from certain labour law obligations.[28] Certainly, investors in EPZs were incentivised by the favourable labour standards offered through outright legal exemptions. This only changed in 2003, following several industrial strikes by EPZ workers demanding better working conditions.[29] As a caveat, it is important to note that other factors such as tax incentives and exemption from tariffs and quota in export destinations also played a role in investors' locational choices.[30]

25 'Paul Kelso: Olympics: Pollution over Beijing? Don't worry, it's only mist, say officials' *The Guardian*, 6 August 2008 https://www.theguardian.com/sport/2008/aug/06/olympics2008.china on 12 August 2016.

26 'Dexter Roberts: China's plan to export pollution' *Bloomberg Business*, 28 November 2014 http://www.bloomberg.com/news/articles/2014-11-27/chinas-pollution-solution-move-factories-abroad on 12 August 2016.

27 For instance, the LAPSSET project took off without an EIA despite the obvious implications to the environment. The same is reported to have happened in the Nicaraguan Canal Project which was started without a comprehensive EIA.

28 International Federation for Human Rights, *Economic development of human rights? Assessing the impact of Kenya's trade and investment policies and agreements on human rights,* 2008.

29 International Federation for Human Rights, *Economic development of human rights?*.

30 Chen C, *Foreign direct investment in China: Location determinants, investor differences and economic impacts*, Edward Elgar, Cheltenham, 2011, 69.

Even where host states have legal and institutional frameworks in place for the protection of labour rights, they may still compete for FDI by deliberately failing to enforce labour laws.[31] It is also true that most host states in the developing world lack the capacity to enforce labour standards.[32] Fortunately, a race to deregulate labour standards in Kenya is not apparent.[33] This notwithstanding, Chinese companies operating in the country have been implicated in conduct that would, if proved, amount to a breach of constitutionally protected labour rights.[34] This is not surprising given the fact that Chinese companies have had overall a poor record regarding labour practices in several African states.[35] Whether this state of affairs will persist or abate is uncertain. There is reason for optimism, however, stemming from the fact that several Chinese companies in Kenya have signed collective agreements with Kenya Building, Construction, Timber and Furniture Industries Employees Union.[36] Such agreements can be used potentially to ensure the protection of labour rights for workers employed by Chinese companies in Kenya.

Another disconcerting aspect of the presence of Chinese investors in Kenya is the danger posed by substandard Chinese products. Chinese consumer goods in the country originate both from direct importation from China and from Chinese companies that have set up manufacturing plants in the country. They include a wide range of food items, cosmetics, drugs, clothing and shoes. China's products have not always won praise for their safety. For instance, Chinese imports topped the European Union's list of most dangerous goods in 2015.[37] Threats to health and safety do not flow solely from consumption of substandard consumer goods. Substandard infrastructure end-products also pose serious risks to the safety, health and life of citizens.[38] Typically, construc-

[31] Davies RB and Vadlamannati KC, 'A race to the bottom in labour standards? An empirical investigation' 103 *Journal of Development Economics* (2013), 1, 2.

[32] Davies and Vadlamannati, 'A race to the bottom in labour standards? An empirical investigation', 1.

[33] See International Business Publications, *Kenya business law handbook: Strategic information and basic law*, vol 1, 2013, 56.

[34] 'Zhicong Deng: Chinese companies' labor dilemma in Kenya' *The China Africa Project*, 19 June 2014 http://www.chinaafricaproject.com/chinese-companies-labor-dilemma-kenya/ on 12 August 2016.

[35] For a discussion, see, Baah A and Jauch H (eds), *Chinese investments in Africa: A labour perspective*, African Labor Research Network, Windhoek, 2009. For a discussion about Chinese labour practices in Zambia's cooper mining industry, see, Human Rights Watch, *"You'll be fired if you refuse": Labour abuses in Zambia's Chinese state-owned copper mines*, 2011.

[36] Cottle E, 'Chinese construction companies in Africa: A challenge for trade unions' 14 *Global Labor Column*, 179 (2014).

[37] '"Made in China" tops the EU's most unsafe list' *China Daily Mail*, 1 April 2015 https://chinadailymail.com/2015/04/01/made-in-china-tops-the-eus-most-unsafe-list/ on 12 August 2016.

[38] See 'Sosthenes Mwita: Fake goods cause economic loses' *Daily News*, 22 October 2015

tion projects in Kenya are funded by Chinese loans and tied to the condition that the receiving country must spend the funds by contracting with Chinese companies.[39] This is done in order to secure investment opportunities for Chinese investors. In reality, this practice stifles competition and may lead to substandard work.[40] Other contemporary examples support this assertion. In several African countries, some infrastructure projects completed by Chinese firms deteriorated to unsafe degrees shortly after completion.[41] Obviously, Chinese firms are not solely to blame for the failed infrastructure projects. Governments have the primary responsibility to ensure that products and services available in the market meet legal safety standards. The situation is normally exacerbated by lack of accountability that persists in the wake of such failures.

In addition to the effects of FDI on the rights discussed above, the global movement of capital has an impact on property rights because it often necessitates displacement of people from their lands.[42] This is normally done through the exercise of the state's power of eminent domain. Generally, development-induced displacement has a direct impact on individual and community rights of access to land, food and other resources. Several Chinese FDI projects in Kenya have necessitated the involuntary displacement of people from their lands or some form of restriction on the use of land and other resources.[43] Although Article 40(b) of the Constitution mandates that those displaced through the State's exercise of eminent domain receive prompt and just compensation, instances of delayed compensation are not rare.[44] Prompt payment of compensation does

http://www.dailynews.co.tz/index.php/analysis/43450-fake-goods-cause-economic-losses on 12 August 2016.

39 'Dianna Games: Kenyan railway project putting China's business model on trial' Business Day Live 3 February 2014 http://www.bdlive.co.za/opinion/columnists/2014/02/03/kenyan-railway-project-putting-chinas-business-model-on-trial on 12 August 2016.

40 See for example, 'The Chinese in Africa: Trying to pull together' *The Economist*, 20 April 2011 http://www.economist.com/node/18586448 on 12 August.

41 'Nathan William Meyer: China's dangerous game: Resource investment and the future of Africa' *Foreign Policy Journal*, 12 October 2012 http://www.foreignpolicyjournal.com/2012/10/12/chinas-dangerous-game-resource-investment-and-the-future-of-africa/ on 12 August 2016.

42 Nunow AA, 'The displacement and dispossession of the Aweer (Boni) Community: The Kenya Government dilemma on the new Port of Lamu' International Conference on Global Land Grabbing II, New York, 17-19 October 2012, 5.

43 In 2015, the Government announced plans to acquire land worth US$ 45 million to facilitate the construction of the Mombasa-Nairobi standard gauge railway. See, 'Joseph Akwiri: Kenya announces plan to buy land for standard gauge railway' *Reuters*, 10 June 2015 http://www.reuters.com/article/kenya-railways-idUSL5N0YW3GB20150610 on 12 August 2016.

44 'Bernard Mwinzi: Petitioner stops Uhuru's railway project over unpaid Sh 1.4 billion' *Daily Nation,* 29 June 2016 http://www.nation.co.ke/news/Land-owners-derail-Uhuru-s-biggest-project/1056-3271824-nr8iw8/index.html on 12 August 2016.

not necessarily cushion those who are dispossessed of land and other resources against the negative consequences of disruption of livelihoods.[45]

FDI and human rights: Mutually affirming relationship?

In light of the impacts of Chinese FDI on human rights discussed above, this section analyses the extent to which a mutually affirming relationship between Chinese FDI and human rights in Kenya exists, or can exist. The analysis is presented under the following heads: the relationship between FDI and the diffusion of human rights norms; the extent to which FDI can or does promote rule of law; and the potential for emerging jurisprudence from international investment arbitration (IIA) tribunals to advance human rights in host states.

FDI and diffusion of human rights norms

As a facet of globalisation, FDI has been credited for improving human rights in host states either through the diffusion of human rights practices or practices that are supportive of human rights.[46] The diffusion of human rights norms occurs where foreign corporations 'export' superior human rights practices into host states. Corporations have facilitated the 'export' of norms primarily through CSR programmes which are premised on the idea that corporations have a responsibility to respect human rights. While the primary duty to protect human rights rests with the state, the widespread acceptance of the responsibility of corporations to respect human rights has become a mainstay of globalisation. This is a move away from the restrictive notion that corporations exist solely for the purpose profit making as conceived by Milton Freidman.[47] The paradigm shift is to a large extent attributable to the adoption and dissemination of the United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles) adopted in 2011.[48]

---

45 Robinson, WC, 'Risks and rights: The causes, consequences, and challenges of development-induced displacement' *An Occasional Paper* (2003).

46 Milner WT, 'Economic globalization and rights: An empirical analysis' in Brysk A (ed), *Globalization and human rights,* University of California Press, Berkeley, 2002, 77–97.

47 Milton F, 'The social responsibility of business is to increase its profits' *New York Times Magazine*, 13 September 1970.

48 United Nations High Commissioner for Refugees, *Guiding principles on business and human rights: Implementing the United Nations 'protect, respect and remedy' framework*, UN A/HRC/17/31, 21 March 2011.

Several factors are relevant to the question as to whether Chinese FDI will facilitate the diffusion of human rights norms in Kenya. Firstly, the effectiveness of CSR programs to facilitate norm diffusion depends partly on the human rights culture of FDI-exporting countries. The human rights culture in FDI exporting countries is shaped by political, social and economic factors unique to the FDI-exporting country. In China, the human rights culture is shaped by the 'socialist modernisation' model which prioritises economic development and views the role of human rights merely as facilitative of achieving the overarching goal of economic development marked by wealth maximisation.[49] In this sense, the Chinese approach to CSR is fueled by motives unlike those that inform the global CSR agenda, shaped as it is by Western conceptions of human rights as individual entitlements to be asserted against a particular duty holder. Western-inspired CSR is justified by the need to protect civil and political rights as claims that an individual can assert against a duty holder.[50] Accordingly, the global CSR agenda is conceived of as a constraint on corporate human rights abuses in line with a duty owed to the individual holder of human rights claims. Conversely, the perspective that human rights are individual entitlements that one can assert against the state or non-state actors does not shape Chinese legal framework to an appreciable degree.[51] It follows therefore that both at home and abroad, CSR by Chinese investors is essentially a philanthropic tool instrumental to the attainment of broader national social, political and economic policy goals.[52] For this reason, the motivations of Chinese CSR are often in variance with what is expected in a majority of host states, whose CSR paradigm is fashioned after Western conceptions of human rights and the role of the state.[53] Not surprisingly then, the performance of Chinese companies in CSR programmes has been shown to be poor.[54]

In addition to the human rights culture of FDI-exporting countries, realisation of the goal of CSR programs in FDI-receiving countries is advanced or impeded by legal, cultural and social realities in the host states.[55] Thus, even

49 Backer LC, 'China's corporate social responsibility with national characteristics: Coherence and dissonance with the global business and human rights project' in Martin J and Bravo KE (eds), *The business and human rights landscape: Moving forward, looking back,* Cambridge University Press, New York, 2015, 530.

50 See Backer, 'China's corporate social responsibility with national characteristics'.

51 See Backer, 'China's corporate social responsibility with national characteristics'.

52 Backer, 'China's corporate social responsibility with national characteristics', 530.

53 Backer, 'China's corporate social responsibility with national characteristics', 530.

54 Compagnon D and Alejandro A, 'China's external environmental policy: Understanding China's environmental impact in Africa and how it is addressed' 15 *Environmental Practice* (2013), 220.

55 Muthuri J and Gilbert V, 'An institutional analysis of corporate social responsibility in Kenya' 98

though Chinese companies are required to abide by local laws in their African operations, weak regulatory and institutional frameworks have been cited as a factor contributing to poor performance of CSR.[56]

Thirdly, whether corporations succeed as exporters of human rights norms depends on the type or motivations of FDI. For example, cross-border mergers and acquisitions in developing countries have been found to have a positive impact on human rights, including '…workers' rights and women's economic rights, along with both physical integrity and empowerment rights.'[57] According to a prevalent classification of FDI by John Dunning,[58] this type of FDI falls under the strategic asset/capabilities-seeking category. Chinese FDI in Kenya are composed of all the four categories in Dunning's typology. However, since most studies examining the impact of FDI on human rights have tended to lump together all types of FDI, it is difficult to determine the impact of specific types of Chinese FDI on human rights in Kenya. In order to harness the potential of CSR programmes as an avenue for norm diffusion, a thorough analysis of the impact of specific types of Chinese FDI on human rights in Kenya would be valuable.

FDI and rule of law

A comprehensive analysis of the meaning of rule of law is beyond the scope of this paper. For the purpose of the discussion in this section, therule of law indicators developed by the World Justice Project provide an understanding of the substantive meaning of the concept. The indicators include: constraints on government powers; absence of corruption; open government; fundamental rights; order and security; regulatory enforcement; civil justice; and criminal justice.[59] Accordingly, when FDI is said to relate negatively or positively with the rule of law, what is meant is that there is a reciprocal relationship between FDI and one or several of the indicators of rule of law stated. Certainly, this statement ought to be seen in light of the debate as to whether the strong rule of law in a host state is itself a prerequisite for increased FDI

Journal of Business Ethics, 3 (2011), 476.

56 Aklilu N, 'Greening Africa-China relations: African agents punching below their weight?' 2 *Journal of China and International Relations*, 1 (2014), 26.

57 Kim D-H and Trumbore PF, 'Transnational mergers and acquisitions: The impact of FDI on human rights, 1981–2006' 47 *Journal of Peace Research*, 6 (2010), 723, 732.

58 Dunning JH and Lundan SN, *Multinational Enterprises and the Global Economy*, Edward Elgar Publishing Limited, Cheltenham, 2008, 63-78.

59 World Justice Project, *Rule of law index*, 2015, 23-31.

inflows, or whether FDI and attendant economic development is what contributes to strong rule of law.[60]

All else being equal, the rule of law plays an important role as a determinant factor of a country's ability to attract FDI.[61] This is due to the fact that corporations are confident about doing business where contractual and property rights are secured through clear, predictable laws.[62] On the other hand, poor rule of law performance in host states is linked to a higher likelihood of political instability, corruption, and weak institutions of governance, which undermine the sustainability and profitability of investment. Based on the premise that foreign investors' location decisions are influenced by the performance of rule of law in host states, governments of host states are incentivised to strengthen the rule of law as a 'basic asset' for attracting and retaining FDI.

This is not to say that foreign investors always view weak institutions of governance in host states as a hindrance to investing in those states. Quite the contrary, firms that consider lack of accountability and transparency as a location advantage consider poor rule of law performance as a positive location determinant. For such firms, weak institutions of governance create numerous opportunities to collude with government officials in order to 'buy' investment opportunities.[63] Such firms may also consider corruption as a necessary cost of doing business in so far as it helps to circumvent regulatory requirements that are deemed onerous.[64] When this is the case, states will have no incentive to strengthen rule of law as a condition for attracting FDI.[65]

---

60 For example, the exponential growth of FDI inflows into China, despite it weak rule of law performance, challenges dogmatic adherence to the notion that rule of law is an absolute prerequisite for FDI inflows.

61 Blanton L and Blanton R, 'What attracts foreign investors? An examination of human rights and foreign direct investment'69 *The Journal of Politics*, 1 (2007), 143. See also, Anyanwu JC, 'Why does foreign direct investment go where it goes? New evidence from African countries' 13 *Annals of Economic and Finance*, 2 (2012), 425.

62 Haggard S, MacIntyre A and Tiede L, 'The rule of law and economic development' 11 *Annual Review of Political Science*, 1(2008), 205.

63 In *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No. ARB/00/7, award of 25 September 2006. Evidence was adduced that an investor bribed the then President, Daniel arap Moi by paying Kenya Shillings 2 million as a 'personal donation' to the President. This case is illustrative of the way corruption serves as a way to buy regulatory compliance as long as money is given to the right people.

64 Leff N, 'Economic development through bureaucratic corruption', 82 *American Behavioral Scientist* (1964), 33.

65 Hafner-Burton, 'Right or robust?', 696.

Human rights jurisprudence in international investment arbitration

Human rights feature in IIA tribunals mostly in cases where states rely on them as defences to investor claims arising under bilateral investment treaties (BITs).[66] Critics have argued that the restrictive approach with which IIA tribunals treat human rights results in the fragmentation of international law, the inevitable result of which is the weakening of human rights.[67] Further, the restrictive treatment of human rights within the IIA framework sends a signal to governments that adopting policies to improve human rights protection at home exposes them potentially to liability. As a result, some states may opt not to take the measures that are necessary to protect human rights where doing so will offend the provisions of a BIT or other investment agreements. Viewed this way, the overall impact of the investment law framework is to subordinate human rights to the interests of foreign investors.

A contra narrative to this position is that, far from undermining human rights, emerging jurisprudence in IIA supports human rights by borrowing from human rights jurisprudence to arrive at decisions.[68] For example, it is argued that the application of the proportionality test has served as an access point for bringing human rights considerations to bear more on tribunal decisions.[69] However, proportionality has been adjudged as an inappropriate transplant into the international adjudication context because it invites arbitrators who lack independence and neutrality to pass value judgments on host policy measures.[70] This raises questions on the strength and suitability of the proportionality test as an avenue for bringing human rights considerations to bear on arbitration proceedings.

66 United Nations Conference on Trade and Development, *Selected Recent Developments in IIA Arbitration and Human Rights*, 2009 UNCTAD/WEB/DIAE/IA/2009/7.

67 See generally, van Aaken A, 'Fragmentation of international law: The case of international investment protection' 17 *Finnish Yearbook of International Law*, 1 (2008), 91.

68 Fry JD, 'International human rights law in investment arbitration', 77. Fry argues that IIAs have on numerous occasions relied on human rights jurisprudence. For example, in *Mondev International Limited v United States*, ICSID Case No. ARB (AF)/99/2, award of October 11 2002, the tribunal borrowed heavily on jurisprudence relating to the right to fair trial/retroactivity of the law.

69 See for example, Kingsbury B and Schill S, 'Public law concepts to balance investors' rights with state regulatory actions in the public interest – the concept of proportionality' in Schill S (ed), *International investment law and comparative public law*, Oxford University Press, Oxford, 2010, 78.

70 An illustrative argument is that international arbitration tribunals should rely on the language of the relevant BIT and apply the 'necessity test' as a standard of review to avoid the risks attendant to the proportionality test approach. See, Ranjan P, 'Using the public law concept of proportionality to balance investment protection with regulation in international investment law: A critical appraisal' 3 *Cambridge Journal of International and Comparative Law*, 3(2014), 853.

Notably, the application of the proportionality test has not produced consistent results in regard to the place of human rights in the international investment landscape. An apt illustration of the limits of the proportionality test is provided by several cases brought against Argentina on the basis of measures taken by the Argentine Government in response to the financial crisis of 2001-2003. The cases alleged that the said measures were contrary to the 1991 US-Argentina BIT. In *Continental Casualty Company v Argentina,*[71] Argentina prevailed on the basis that the measures taken were necessary to protect basic rights and liberties. However, similar human rights defences did not provide reprieve for Argentina in the other cases despite the fact that they had arisen from circumstances that were factually similar to those relating to the *Continental Casualty Company* case.[72]

As a consequence of the uncertainty relating to the status of human rights in IIA tribunals, human rights play a peripheral role in shaping adjudicative outcomes.[73] A case in point is *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania.*[74] Here, the respondent had cancelled a concession previously given to the claimant, on grounds that the claimant's performance did not conform to the requirements set forth in the concession. The Tribunal allowed *amici* submissions which, in part, advanced the argument that the respondents actions were necessary to protect the human right to clean and safe drinking water and should not be punished therefore as they were taken in good faith. Even though the Tribunal found that the *amici* submission was 'useful,'[75] the gravamen of the decision was not the human rights considerations but rather the lack of a causal link between Tanzania's actions and the harm on the claimant.[76]

Perhaps the clearest illustration of the negative impact of FDI on human rights is the fact that the international arbitration system can be used to directly stifle states' authority to take measures for the protection of human rights. The *Lago Agrio* case[77] which arose out of allegations of environmental degradation

71 ICSID Case No. ARB/03/9, award of September 5, 2008.

72 In *Sempra Energy International v Argentine Republic* ICSID (*Case* No. ARB/02/16), award of 28 Sep 2007 the Tribunal rejected the necessity defense on grounds that Argentina had herself contributed to the financial crisis that it sought to remedy by measures that were in breach of the relevant BIT. In *Compañiá de Aguasdel Aconquija SA and Vivendi Universal SAv Argentine Republic* ICSID Case No. ARB/03/19 award of 9 April 2015. The Tribunal balanced the legitimate expectations of the investor against the state's need to regulate in order to protect the human right to water.

73 Meshel T, 'Human rights in investor-state arbitration: The human right to water and beyond' 6 *Journal of International Dispute Settlement*, 2 (2015), 277.

74 ICSID Case No. ARB/05/22, award of 24 July 2008.

75 ICSID Case No. ARB/05/22, para 355.

76 ICSID Case No. ARB/05/22, para 779-808.

77 *Maria Aguinda and others v Chevron Texaco Corporation*, Proceeding No. 002-2003, Sup. Ct. of Justice, Nueva Loja, Ecuador.

by Chevron in Ecuador is illustrative of this point. Following a judgment by the Ecuadorian Supreme Court against Chevron for claims arising out of oil spills caused by Chevron's operations in Lago Agrio, Chevron mounted a series of challenges in US courts and in the Permanent Court of Arbitration (PCA) in a bid to prevent the enforcement of the judgment against Chevron's assets in the US. The claim before the PCA case was based on the 1997 US-Ecuador bilateral agreement. On 16 February 2012, the PCA issued an interim award (the second of its kind) ordering Ecuador to '…take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of the judgments.'[78] The intended effect of the PCA directive was to force Ecuador to take positive measures to prevent its citizens from enforcing the judgment through all available channels.

There is some truth to the claim that investor-state arbitration tribunals can potentially play a role in strengthening human rights protection. However, based on the analysis above, any such advantage to the human rights regime is purely incidental. The manner with which human rights-based defenses have been dealt by IIA tribunals demonstrates that the international investment landscape is generally not accommodative of human rights. Further, the Chevron-Ecuador case exemplifies how the international arbitration system can be used to subordinate human rights to investors' interests.

Safeguarding human rights

The foregoing analysis demonstrates the need for pragmatic measures to shield human rights from the deleterious effects of FDI. The measures discussed in the following segment are pragmatic in the sense that they can cushion human rights from violations by corporate actors in a manner that creates a balance between the interests of investors and human rights.

Including human rights provisions in investment agreements

Kenya's BIT with China, signed in 2001, contains no substantive provisions on human rights.[79] Like BITs, other types of agreements entered into by states and investors are usually silent on the human rights obligations of investors.[80]

78 *Chevron v Texaco*, Second Interim Award, 16 February 2012, para 3.

79 Ofodile UE, 'Africa-China bilateral investment treaties: A critique' 35 *Michigan Journal of International Law,* 1 (2013), 138.

80 Ofodile, 'Africa-China bilateral investment treaties', 199.

Thus, the absence of human rights provisions in the Kenya-China BIT reflects the common practice globally. It has been argued that many BITs which China has signed with other African countries '…do not take into account the fact that most countries in Africa are at their early stages of development and that Africa's least developed countries are least likely to benefit from such agreements.'[81] This is so despite the critical development needs in African countries, one of which is the promotion and respect of human rights.[82] The increase in Chinese FDI inflows in Kenya necessitates rethinking of the place of human rights in investment agreements.

In addition to the lack of human rights language in investment agreements, the use of stabilisation clauses limits the authority of host-states to adopt legislative and other measures for the protection of human rights. Even though stabilisation clauses are justified as a commercial tool for risk management, one study found that stabilisation clauses in investment agreements between investors and developing countries tend to contain sweeping language that critically curtails the freedom of those states to legislate or take policy measures for the protection of human rights.[83]

As of July 2016, the Kenya-China BIT is yet to come into force. As such, an opportunity still exists for Kenya to negotiate the inclusion of human rights clauses in the BIT.[84] In order to secure optimal protection for human rights, the human rights clause should contain language that expressly preserves the State's authority to take legislative and policy measures for the protection of human rights. This is in line with United Nations High Commission for Refugees recommendations relating to the responsibility of a state in safeguarding human rights in an era of increased globalisation and attendant human rights abuses.[85] Even though the same recommendation is applicable to investment agreements between Kenya and its other trading partners, the exponential growth of Chinese FDI is a strong justification for such a measure.

---

81 Ofodile, 'Africa-China bilateral investment treaties', 131.

82 See for example, Shelton D, 'Protecting human rights in a globalized world' 25 *British Columbia International and Comparative Law Review*, 7 (2002), 273, and Clapham A, 'Human rights obligations of non-state actors' 88 *International Review of the Red Cross*, 863 (2006), 491.

83 Shemberg A, 'Stabilization clauses and human rights' 27 May 2009 http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES on 3 July 2015.

84 Information relating to the status of BITs is available at http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/990 on 12 August 2016.

85 United Nations High Commissioner for Refugees, *Guiding principles on business and human rights*.

Further, to lessen the drastic effect of stabilisation clauses on the ability of a state to protect human rights, Kenya should negotiate the inclusion of a human rights undertaking in all investment agreements signed with China. The idea of the inclusion of human rights clauses to safeguard the state's duty to respect, protect and fulfill human rights is not uncharted waters. The BTC Human Rights Undertaking relating to The Baku-Tbilisi-Ceyhan Pipeline Project (BTC Pipeline Project)[86] offers a good illustration of how to tailor safeguards for human rights. The undertaking was adopted following criticism by Amnesty International that the Host Government Agreements involving BP put human rights at risk of being abused while at the same time curtailing the authority of states to take measures for their protection.[87] In effect, the undertaking preserved the authority of host governments to regulate for the protection of human rights, health, safety and the environment without incurring the risk of liability for breach of the Host Government Agreement. In this sense, the impact of relevant stabilisation clauses was lessened.

The fact that the Human Rights Undertaking has yet to be subjected to judicial interpretation makes it difficult to fully assess its effectiveness as a measure for enhancing the protection of human rights. The inclusion of human rights clauses in investment contracts is also linked to the ongoing broader discourse on whether including human rights clauses in commercial contracts is compatible with the protection of investors' interests. Nonetheless, exempting specific measures taken by states from the application of stabilisation clauses would legitimise human rights defenses in IIA tribunals.[88] One approach suggested is the use of broad human rights language in BITs (preferable over-restrictive language) in order to create reasonable leverage for IIA tribunals to entertain human rights defenses without going beyond their jurisdictional limits.[89]

Another advantage offered by the inclusion of human rights undertakings in investment agreements is that of setting the stage for a change of attitude about the place of human rights in the foreign investment context. A change of

86 A copy of the human rights undertaking can be viewed at http://subsites.bp.com/caspian/Human%20Rights%20Undertaking.pdf on 12 August 2016.

87 Amnesty International, *Human rights on the line: The Baku-Tbilisi pipeline project*, 2003.

88 Cernic JL, 'Corporate human rights obligations under stabilization clauses' 11 *German Law Journal*, 2 (2010), 210.

89 Dumberry P and Dumas-Aubin G, 'When and how allegations of human rights violations can be raised in investor-state arbitration' 13 *The Journal of World Investment and Trade*, 3 (2012), 349. Including broadly crafted human rights language in BITs would empower arbitration tribunals to entertain and adjudicate human rights defenses as long as the investor conduct in question is related to the interest/activity protected by the BIT.

attitude would be instrumental to creating a human rights culture so that human rights are not viewed as the unwelcome interloper in an otherwise comprehensive investment law framework. Infusing a human rights culture in state-investor relationships can pave the way potentially for the development of a binding international treaty to facilitate direct accountability for human rights violations by foreign investors.

Utilising domestic law

The spike in the number of foreign direct liability claims against MNCs in Western states has received much attention and commentary mainly because the cases were seen as an opportunity for access to justice for victims of human rights violations by corporations, especially those from developing countries. However, with only a few of such cases resulting in substantive judgments favourable to the claimants,[90] there is the sobering realisation that, contrary to expectations, home-state courts are hardly the optimal forums for litigating human rights cases based on corporate behaviour in host states. In light of this reality, the importance of exploiting the potential of the legal framework in host-states to ensure accountability for human rights violations by corporate actors cannot be overemphasised.

Experience from Nigerian courts is illustrative of the potency of host-states' domestic institutions and laws to respond to human rights violations by foreign corporate actors.[91] The 1994 case of *Shell v Farah* set the precedent for holding foreign investors accountable for human rights violations.[92] Following an oil spill, representatives of a village successfully sued Shell for pollution of a river that was the source of their drinking water. In 2005, the Court in *Gbemre v Shell* invalidated the law that permitted continued the flaring of gas in Nigeria on grounds that it was inconsistent with the applicant's right to life and/or dignity of human person enshrined in Section 1(3) of the Constitution of Nigerian and provisions of the African Charter on Human and Peoples' Rights.[93] In *Shell v*

[90] Enneking L, 'The future of foreign direct liability? Exploring the international relevance of the *Dutch Shell Nigeria* case' 10 *Utrecht Law Review*, 1 (2014), 44.

[91] For an overview of cases litigated in the Nigerian courts in 1972-1997, see, Frynas G, 'Social and environmental litigation against firms in Africa' 42 *The Journal of Modern African* Studies, 3 (2004), 363.

[92] *Shell Petroleum Development Company v Farah*(1995) 3 NWLR (Part 382).

[93] FHC/B/CS/153/2005. *Gbemre v Shell* was the first judicial authority in Nigeria to declare that gas flaring is illegal, unconstitutional and a breach of the fundamental human rights. The Court found that section 3(2) (a) and (b) of *Associated Gas Reinjection Act* (Chapter A 25 Volume 1, Laws of the

Meburu, the Court ruled in favour of the respondent who sought, *inter alia*, a declaration that the entry of the defendant/appellant (Shell) into claimant's parcels of land in Abacheke since 1958 without payment of lease, rent, acquisition or any form of compensation money was unlawful.[94]

The *Lago Agrio* case alluded to earlier is a further example of how human rights litigation in host-state courts can enhance accountability for human rights violations of foreign corporations. The suit culminated in a US$8 billion judgment by the Ecuadorian Supreme Court on 14 February 2011. In response, Chevron instituted several cases both in US courts[95] and in the PCA[96] to prevent the execution of the judgment from the Ecuadorian Supreme Court on grounds that the judgment had been obtained fraudulently.[97] Even though these maneuvers have stalled the enforcement of the judgment against Chevron's assets in the US, Chevron has so far been unable to curtail efforts by the plaintiffs to enforce the Ecuadorian judgment in other jurisdictions where Chevron's assets are located.[98] The scale of Chevron's efforts to prevent enforcement of the judgment is a testament that host-state courts are indeed an effective avenue for human rights litigation against corporate violators.

Legal reforms introduced through the Constitution of Kenya (2010) offer an avenue for holding non-state actors accountable for human rights violations. Two developments are significant in this regard. One, Article 22 of the Constitution eliminated the stringent requirement of *locus standi* for litigants wishing to file a petition based on a claim of human rights violation. Under the previous legal regime, some judges only entertained human rights petitions where the petitioner demonstrated direct harm.[99] In effect, the requirement of *locus standi* prevented third-party litigation (public interest litigation) with the result that numerous instances of human rights violations went unaddressed. Second, the development of jurisprudence on the horizontal application of human rights has provided an avenue for direct accountability for human rights violations for

Federation of Nigeria 2004) and Section 1, *Associated Gas Reinjection (continued flaring of gas) Regulations* (Section 1.43 of 1984) were unconstitutional.

94 (2013) LPELR-21889 (CA).

95 *Chevron Corporation v Donziger*, No. 11 Civ. 0691 (S.D.N.Y., 03/04/2014).

96 *Chevron Corporation v Republic of Ecuador*, PCA Case No. 2009-23.

97 See *Chevron Corporation v Donziger*, No. 11 Civ. 0691 (S.D.N.Y., 03/04/2014).

98 The Supreme Court of Canada in *Chevron Corporation v Yaiguaje* [2015] 3 SCR 69 held that the Ecuadorian plaintiffs could enforce the judgement emanating from the Supreme Court of Ecuador in Canada, against Chevron assets in Canada. Efforts to enforce against Chevron assets in Colombia, Brazil and Argentina are ongoing.

99 A classic example is the case of *Maathai v Kenya Times Media Trust Ltd* [1989] eKLR.

corporate actors. For instance, the High Court stated in *Jemimah Wambui Ikere v Standard Group Limited & another* that,

> …there are instances where the non-state actors can be and have been held liable for breach of fundamental rights and freedoms. The rigid position that fundamental rights and freedoms only applies vertically has been overtaken by the emerging trend in the development of human rights law and litigation.[100]

Harnessing the power of the 'spotlight effect' through targeted advocacy

Voluntary codes of conduct are vaunted as an effective avenue for ensuring accountability for human rights violations. However, a major weakness stems from the fact that corporations are normally not legally mandated to abide by them and can therefore opt out of them when necessary to protect their bottom line. Due to lack of a compliance-monitoring system, it is quite easy for corporations to opt out of the codes in practice while at the same time retaining their commitment to them in theory.[101] Moreover, under the UN Guiding Principles, corporations only have a moral responsibility under international law to protect human rights.[102] Further, corporations enjoy internationally recognised privileges but bear little of the obligations stemming from international human rights law. In Europe, for example, corporations can approach the European Court of Human Rights for violations of their human rights under the concept of 'corporate humanity.'[103] In other words, corporate humanity affords corporations the right to invoke claims that have traditionally been reserved exclusively for human beings.[104] Superimposed over the state-centric paradigm for protection of human rights that argues that states are primarily responsible for protecting human

100 [2013] eKLR. Other examples of recognition of horizontal application of human rights are: *Law Society of Kenya v Betty Sungura Nyabuto*[2012] eKLR and *D.A.O & Another v The Standard Group Ltd* [2013] eKLR.

101 Liubicic RJ 'Corporate codes of conduct and product labeling schemes: The limits and possibilities of promoting international labor rights standards through private initiatives' 30 *Law and Policy in International Business*, 1 (1998), 111. See also, Engle E, 'Corporate social responsibility (CSR): Market-based remedies for international human rights violations?' 40 *Willamette Law Review*, 103 (2004). Engle argues that soft law approaches are generally ineffective unless supplemented by other measures taken by the state.

102 United Nations High Commissioner for Refugees, *Guiding principles on business and human rights.*

103 For a broader discussion on the evolution of the concept and specific rights vested on corporations, see, van den Muijsenbergh WHAM and Rezai S, 'Corporations and the Europe and Convention on Human Rights' 25 *Pacific McGeorge Global Business and Development Law Journal*, 1 (2012), 43.

104 For a discussion supporting the view that corporations should enjoy certain human rights, see, Dhooge LJ, 'Human rights for transnational corporations' 16 *Journal of Transnational Law and Policy*, 2 (2007), 197. For a contra opinion, see, Grear A, 'Challenging corporate 'humanity': Legal disembodiment, embodiment and human rights' 7 *Human Rights Law Review*, 3 (2007), 511.

rights, the totality of these factors contribute to weak accountability for human rights violations of corporate actors.[105]

In this context, the role of non-governmental organisations (NGOs) as agents and transmitters of the norm of accountability is a significant one. An approach that has been applied with positive results is the so-called 'spotlight effect'. The spotlight effect is a term used to describe a phenomenon where one believes that their conduct is subject to public scrutiny more than it actually is and as a result changes his/her behaviour in a bid to avoid embarrassment and social stigma.[106] Anecdotal studies show that corporations do change their behaviour to avoid being shamed for behaviour that amounts to human rights violations. Normally, corporations do so out of fear that public shaming will lead to consumer boycotts thus undermining profitability.[107] Of the spotlight effect, Spur observes that, '…what often drives corporations toward higher standards is pressure from public voices and concerned shareholders.'[108]

On the other hand, it has been argued that the spotlight effect has a chilling effect on new FDI inflows because it discourages MNCs from investing in countries where there is a heightened likelihood of being exposed to public condemnation.[109] While these findings may force a rethinking on the methods and the extent to which pressure is brought to bear on corporate actors to induce changes in behaviour, Chinese FDI in Kenya is not limited only to new inflows of FDI on which the spotlight effect has been shown to have the strongest impact. Chinese investors already form a considerable presence in African countries. Given the centrality of human rights in Kenya's political democracy, the priority should be to identify ways through which agents of the spotlight effect can bring about and sustain a change of corporate behaviour in favour of human rights.

Globally, NGOs have played a crucial role as entrepreneurs and transmitters of the norm of accountability.[110] A good example is the case of the advocacy

105 See discussion in, Jochnick C, 'Confronting the impunity of non-state actors: New fields for the promotion of human rights' 21 *Human Rights Quarterly*, 1 (1999), 25.

106 For an exposition on the meaning of the spotlight effect, see, Gilovich T, Savitsky K and Medvec VH, 'The spotlight effect in social judgment: An egocentric bias in estimates of the salience of one's own actions and appearance' 78 *Journal of Personality and Social Psychology*, 2 (2000), 211.

107 Spar DL, 'The spotlight and the bottom line: How multinationals export human rights' 77 *Foreign Affairs*, 2 (1998), 7.

108 Spar D and Yoffie D, 'Multinational enterprises and the prospects for justice' 52 *Journal of International Affairs*, 2 (1999), 557.

109 Barry CM, Clay CK and Flynn ME, 'Avoiding the spotlight: Human rights shaming and foreign direct investment' 57 *International Studies Quarterly*, 3 (2013), 532.

110 Finnemore M and Sikkink K, 'International norm dynamics and political change' 52 *International Organization*, 4 (1998), 887.

efforts of Amnesty International regarding the Chad-Cameroon Oil and Pipeline Project.[111] NGOs have also played a pivotal role in pushing for their accountability, exposing human rights abuses of Royal Dutch Shell, a multinational oil company operating in the Niger Delta.[112] Notwithstanding the less than favorable outcomes in many of the legal cases brought against Royal Dutch Shell in Western courts, the cases brought to light the conduct of the MNC and forced the company to adopt several internal policies for addressing the effect of their operations on human rights.[113] Similar anecdotes are legion.[114] These anecdotes provide useful lessons for NGOs involved in human rights advocacy on the gains that can be had when foreign investors are placed under the spotlight.

Conclusion

A positive link between Chinese FDI and human rights in Kenya is a tenuous one. As the discussion in this paper has shown, while the positive relationship between FDI and human rights gives credence to an assertion that a mutually affirming relationship exists between human rights and FDI, the said correlation is not a panacea to human rights protection. Chinese FDI presents multiple challenges to the human rights regime in Kenya. Thus, protecting human rights depends on the ability to harness the synergetic power of legal and non-legal measures including; human rights litigation in domestic courts; inclusion of human rights language in the Kenya-Chinese BIT and other investment contracts; and targeted advocacy.

111 Amnesty International, *Contracting out of human rights: The Chad-Cameroon pipeline project*, 2005.

112 The involvement of the Center for Constitutional Rights (CCR) and EarthRights International (ERI) in litigation against the Royal Dutch Petroleum Company and its affiliates demonstrate the impact of NGOs in promoting accountability for human rights.

113 See some of the measures taken by the Royal Dutch Company in, Manby B, 'Shell in Nigeria: Corporate social responsibility and the Ogoni crisis' *Carnegie Council on Ethics and International Affairs* (2000).

114 For example, GAP Inc, one of the largest retailers in the world, was placed under the spotlight after a scandal that broke in 2003 regarding labour practices in its factories Asia. Following the exposure GAP adopted a clear vendor code of conduct to monitor compliance with labour standards. In 2004, GAP became a member of the Business Leaders Initiative of Human Rights (BLIHR). BLIHR was a group of 14 corporations created to find ways of incorporating the principles expressed in the Universal Declaration of Human Rights into business practices. It ceased operations in 2009. Similarly, Nike Inc., Wal-Mart and Reebok and other retail corporation came under the spotlight for selling apparel produced under sweat-shop conditions. Subsequently, they adopted the Apparel Industry Partnership, a voluntary code of conduct aimed at improving labour practices of workers in countries where the sweatshops were located.