

Rethinking the Use of Bilateral Investment Treaties as Tools for Sustainable Development:

The Kenyan Experience



GENERAL OVERVIEW

1.0 Background to the Study

2.0 Conceptualizing Sustainable Development: meaning, pillars principles & indicators of incorporation of SD.

3.0 Bilateral Investment Treaties & SD In Kenya **Specific illustrations** how and to what extent Kenyan IIAs incorporate SD

4.0 Key Findings, Conclusion & Recommendations

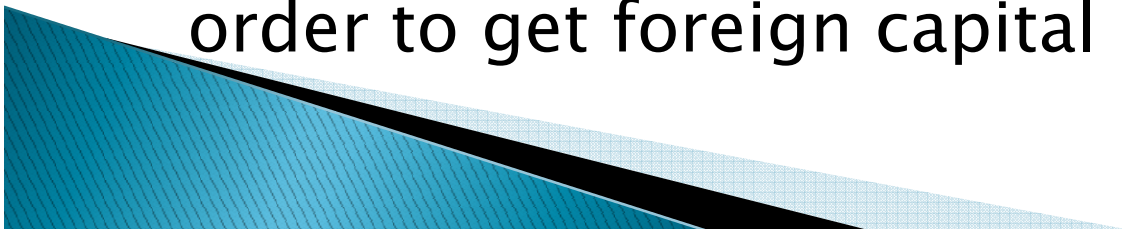


1.0 BACKGROUND

□ Debates , discussions and Commitments on SD :

- *Stockholm 1972,*
- *Rio 1992,*
- *Johannesburg Summit 2002*
- *New Delhi Conference 2002.*

- little attention to actual analysis of how and to what extent existing BITs have address SD.
- Focus has been on protecting investment in order to get foreign capital



Study Justification & Limitation

□ CHOICE OF COUNTRIES :

- Kenya– top five investment destination in sub-Saharan Africa
- Netherlands, Germany and the UK–top 10 investors in Kenya.

□ CHOICE OF STUDY:

- Global commitment to further the development of International Law on SD.
- Little attention on BITs and SD

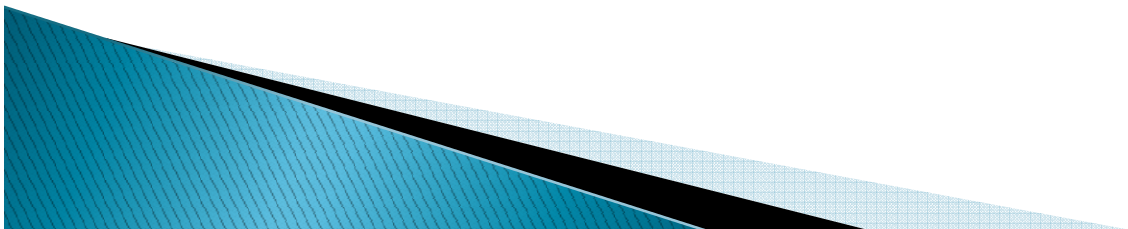
□ CHOICE OF BITs:

- To date more than 5,500 IIAs concluded
- Averages of three IIAs are concluded each week
- The only BITs that are currently in force in Kenya are between the Netherlands, Germany and United Kingdom

2.0 Conceptualizing SD

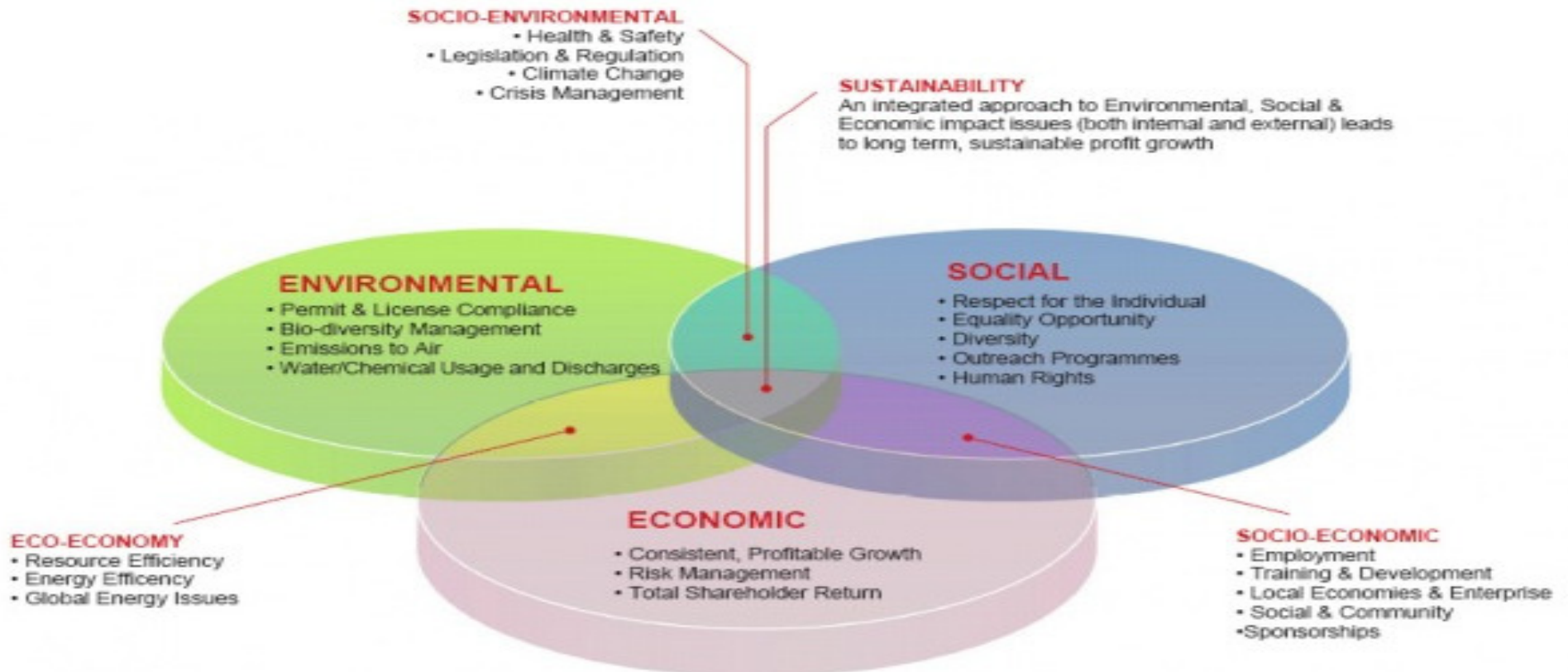
➤ **Five main conceptual precursors to Sustainable Development:**

- *theory of population ,*
- *environmental limits*
- *appropriate technology,*
- *social needs*
- *Living in harmony with nature*



Meaning of SD.

A comprehensive and *integrated approach* to economic, social and political processes [aimed] at ...the protection of the environment [for] social and economic development ...to realize the right of human beings with due regard to the needs and interests of future generations...



PILLARS SD contd:

➤ Pillars :


❑ Economic, Social(human rights) & environment protection

- balanced and promoted concurrently
- Contain international law principles of SD



International Law Principles on SD

- Articulated by Rio and New Delhi Declaration

 - List of the Principles:
 1. Integration and inter-relationship-backbone of SD, most operationally significant
 2. Common but differentiated responsibilities
 3. Precautionary principle
 4. Good governance
 5. Public participation
 6. Equity and poverty eradication;
 7. Duty of states to ensure sustainable use of natural resources
- 

Principle of integration

[T]he **inter-dependence** of the socio-economic, environmental and human rights **aspects** of the principles of sustainable development....7.1 ILA Declaration

□ Meaning: Each principle of SD has interconnected **aspects** of social (human rights), environmental or economic development

□ Function of the Legal Aspects:

- determine the **pillar** a given SD principle may fall
- determine the extent to which SD has been incorporated or integrated into BITs (**indicators of incorporating SD**)
- Allocate SD responsibilities & objectives

Indicators of integration or incorporating SD

PILLAR	PRINCIPLE	Indicators of incorporating SD
Environmental Protection	Common but differentiated Responsibility	<ul style="list-style-type: none"> • Polluter pay • Capacity-building- access to and use of environmentally sound technology
	Precautionary Principle	<ul style="list-style-type: none"> • Avoid harm to natural resources • Environmental Impact Assessment
	State responsibility for sustainable use of natural resources	<ul style="list-style-type: none"> • host state rights and responsibilities pursuant to environmental and developmental policies • Demonstrable or implied sensitivity to the environment within and beyond borders
Economic Development	Poverty Eradication	<ul style="list-style-type: none"> • Poverty Eradication
	Equity	<ul style="list-style-type: none"> • Inter- and intra- generational equity - fair access to natural resources
Social Development	Public Participation	<ul style="list-style-type: none"> • Right to access judicial organs and business information, public participation
	Good governance	<ul style="list-style-type: none"> • Anti-corruption • CSR & socially responsive investments

BILATERAL INVESTMENT TREATIES AND SD

❑ Nature and Scope of BITs:

- Changing economic and political realities necessitate BITs for SD

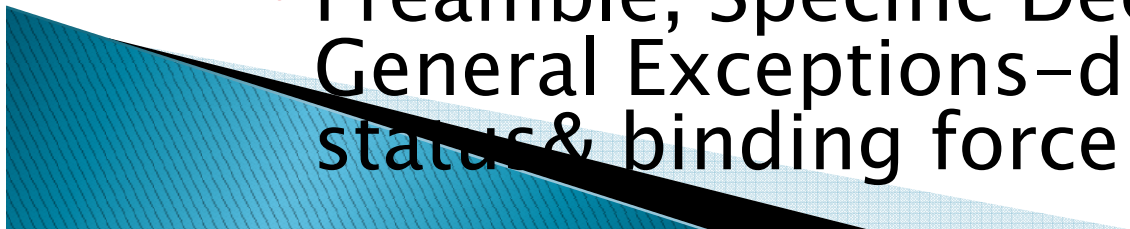
❑ Underlying assumptions on usage of BITs as tools for SD:

- Protect and Promote FDI through BITs to realize SD

❑ How BITs incorporate SD:

❑ Structure of IIAs and SD-

- Preamble, Specific Declarations and General Exceptions—different legal status & binding force

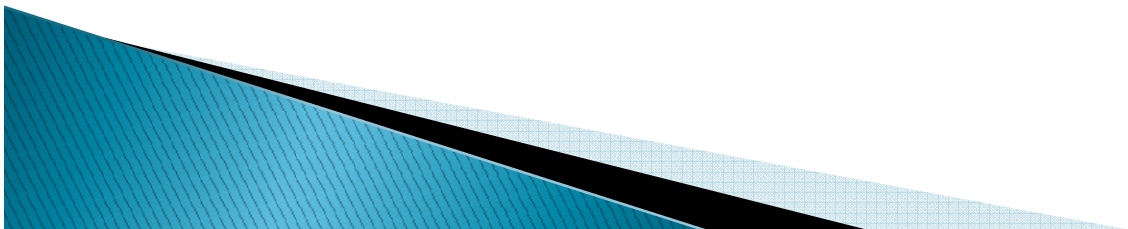


4.0 Assessment of Kenyan BITs and Extent of Incorporation of SD


IIA	IIA Structure	Principle of Sustainable Development						
		Environmental protection			Economic development		Social development	
		Common but Differentiated Responsibilities	Precautionary Approach to natural resources, human health or ecosystems	State responsibility for sustainable use of natural resources	Poverty Eradication	Equity	Public Participation	Good Governance
Netherlands-Kenya BIT	Preamble	X	X	X	✓	✓	X	X
	Specific declarations	X	X	X	X	X	X	X
	General exceptions	X	X	X	X	X	✓	X
German-Kenya BIT	Preamble	X	X	X	✓	✓	X	X
	Specific declarations	X	X	X	X	X	X	X
	General exceptions	X	X	X	X	X	✓	X
UK-Kenya BIT	Preamble	X	X	X	✓	✓	X	X
	Specific declarations	X	X	X	X	X	X	X
	General exceptions	X	X	X	X	X	✓	X

KENYAN BITs AND ENVIRONMENTAL PROTECTION

- ▶ **Indicator**: Poverty eradication ; inter and intra-generational equity for prosperity and posterity
- ▶ **Status Of Incorporation**:
 - **Preamble**- none
 - **Specific Declarations**: only Article 3 Netherlands -Kenya BITs
 - **General exception clauses**-none

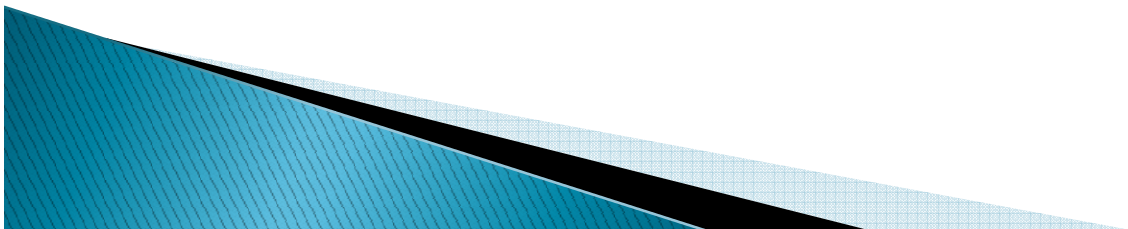


KENYAN BITs AND ECONOMIC DEVELOPMENT

- ▶ **Indicator**: Poverty eradication ; inter and intra-generational equity for prosperity and posterity
 - ▶ **Status Of Incorporation**:
 - **Preamble**- impliedly incorporated to a certain extent
 - **Specific Declarations**: only Article 3 Netherlands -Kenya BITs
 - **General exception clauses**-none
- 

KENYAN BITs AND SOCIAL DEVELOPMENT

- ▶ **Indicator:** access to judicial organs , public participation & good governance
- ▶ **Status**–not incorporated in the preamble and specific declarations or exception clauses
- ▶ **Settlement of disputes by arbitration** : state–state mechanism or investor–state mechanisms



SUMMARY OF FINDINGS ON KENYAN BITs & SD.

❑ **Preamble:** assume that protecting FDI is the gateway to attracting and reaping SD benefits

❑ **Specific declaratory clauses :**

➤ largely seek to protect the interests and rights of the investors

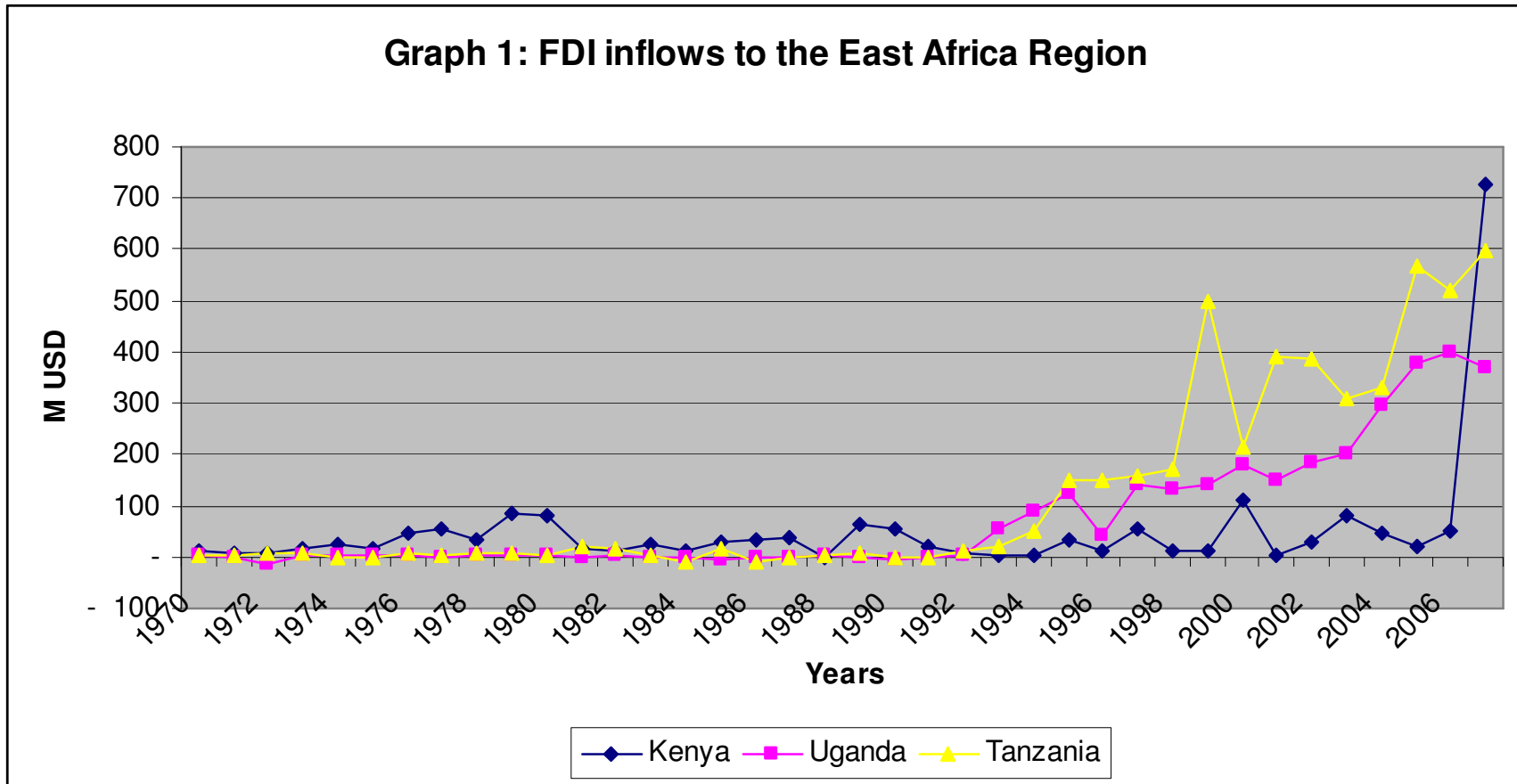
➤ do not create rights and obligations for SD.

❑ **Statistics on provisions:**

IIA	NUMBER OF ARTICLES	DISTRIBUTION OF PROVISIONS
German-Kenya BIT	thirteen (13)	Protecting Investors-(8) Procedural matters-(5) Provision implying SD-(0)
UK-Kenya BIT	fourteen (14)	Protecting Investors-(5) Procedural matters-(8) Provision implying SD-(0)
Netherlands-Kenya BIT	eighteen (18)	Protecting Investors-(9) Procedural matters-(7) Provision implying SD-(2)



BITS as tools for SD in Kenya?



BITS as tools for SD in Kenya?

World Investment Report 2013: Global Value Chains: Investment and Trade for Development

Annex table 1. FDI flows, by region and economy, 2007-2012 (continued)
(Millions of dollars)

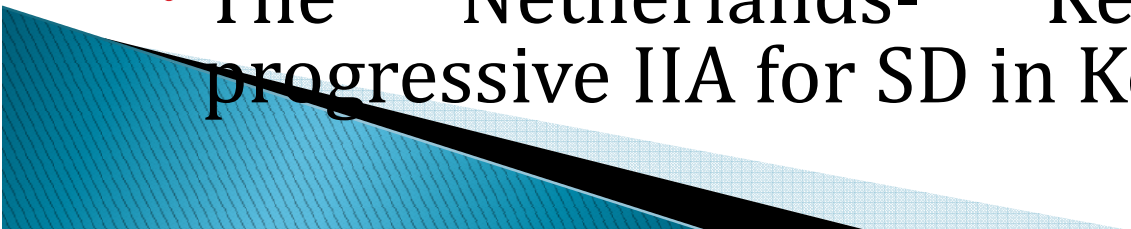
Region/economy	FDI inflows						FDI outflows					
	2007	2008	2009	2010	2011	2012	2007	2008	2009	2010	2011	2012
Saint Helena	0	-	-	-	-	-	-	-	-	-	-	-
Senegal	297	398	320	266	338	338	25	126	77	2	47	47
Sierra Leone	95	53	110	238	715	740 ^a	- 1	- 5	- 0	- 0	-	-
Togo	49	24	49	86	171	166	- 1	- 16	37	37	106	103
Central Africa	5 639	5 022	6 028	9 389	8 120	9 999	81	149	53	590	323	699
Burundi	1	4	0	1	3	- 1	0	1	-	-	-	-
Cameroon	189	21	740	538	243 ^a	507 ^a	- 8	- 2	- 69	503	144 ^a	193
Central African Republic	57	117	42	62	37	71	-	-	-	-	-	-
Chad	- 322 ^a	466 ^a	376 ^a	313 ^a	282 ^a	323 ^a	-	-	-	-	-	-
Congo	2 275	2 526 ^a	1 862 ^a	2 211 ^a	3 056 ^a	2 758 ^a	-	-	-	-	-	-
Congo, Democratic Republic of	1 808	1 727	664	2 939	1 687	3 312	14	54	35	7	91	421
Equatorial Guinea	1 243	- 794	1 636	2 734 ^a	1 975 ^a	2 115 ^a	-	-	-	-	-	-
Gabon	269	773 ^a	573 ^a	499 ^a	696 ^a	702 ^a	59 ^a	96 ^a	87 ^a	81 ^a	88 ^a	85
Rwanda	82	103	119	42	106	160	13	-	-	-	-	-
São Tomé and Príncipe	36	79	16	51	35	50 ^a	3	0	0	0	0	1
East Africa	4 027	4 358	3 875	4 460	4 555	6 324	112	109	89	132	106	109
Comoros	8	5	14	8	23	17 ^a	-	-	-	-	-	-
Djibouti	195	229	100	27	78	100	-	-	-	-	-	-
Eritrea	7 ^a	39 ^a	91 ^a	91 ^a	39 ^a	74 ^a	-	-	-	-	-	-
Ethiopia	222	109	221	288	627	970 ^a	-	-	-	-	-	-
Kenya	729	96	115	178	335	259	36	34	46	2	9	16
Madagascar	773	1 169	1 066	808	810	895 ^a	-	-	-	-	-	-
Mauritius	339	383	248	430	273	361	58	52	37	129	89	89

OVERALL FINDINGS


▶ **BITs & SD:**

- IIAs create *interpartes* rights and obligations between the host and home state *viz* the investors but none for SD
- Changing economic and political realities- SD needed

▶ **BITs & SD in Kenya**

- To a large extent the Kenyan BITs do not address SD either explicitly or implicitly.
 - The Netherlands- Kenya BITs -most progressive IIA for SD in Kenya.
- 

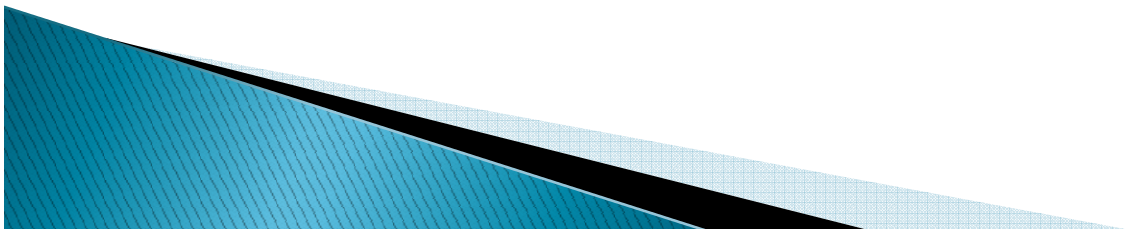
CONCLUSION

- ▶ **SD in Kenya remains a mirage.**–the lack of incorporation of SD.
 - ▶ **SD is a reality that is here to stay**–Global commitment
 - ▶ **Embrace SD as a core objective in BIT Structure.**
 - ▶ **Balance** between protecting investment *viz* addressing SD.
- 

RECOMMENDATIONS

□ Incorporating:

- **SD Objectives:** draft specific clauses or respective standards of protection
 - **Host state :** right to regulate investment for development
 - **Home State** rights and obligations for SD
- ▶ **Further studies :** ‘Why ’ incorporating SD into BITs remains a mirage in Kenya



QUESTIONS??

