International Investment in Oil, Environmental Degradation and the Developing World: A (Dis)connection

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

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November 2019

Word count: 12,820

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Acknowledgements

This dissertation would not have been possible without the insight and guidance from my supervisor, Ms. Purity Wangigi.

I am also thankful to my family and friends for their motivation and support during this study, and for helping with my personal and academic growth.

My sincere gratitude also goes to Ms. Emmah Wabuke and Abdullahi Ali for the assistance and encouragement while getting through some of the more difficult aspects of this study, which I remain grateful for.

Finally, I am indebted to my parents, David and Angela Kahumbu, for their immense support and sacrifice that lights my path. I am eternally grateful for the lessons and the laughter.

Declaration

I, JOANNA KATUNGE KAHUMBU do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....
Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....
Ms. Purity Wangigi

Abstract

The study undertaken in this dissertation seeks to assess the position of international investment in the developing world, analysed in the context of the right to a clean and healthy environment. The study highlights the notion that countries interested in attracting international investment often have weak or unenforceable environmental standards. As a result of this, the position of Kenya is analysed with regards to the oil and gas industry with the primary question being: what lessons can Kenya learn from other developing nations that have undertaken international investment in the extractives sector, without compromising on environmental standards? The major finding is resultantly that Kenya has in place the legislative framework necessary to combat the deleterious effects of investment in this pollution heavy industry, but the same framework is found wanting with regards to enforceability and compliance.

List of Abbreviations

1. ASEAN – Association of Southeast Asian Nations
2. BIT – Bilateral Investment Treaty
3. EGASPIN - Environmental Guidelines and Standards for the Petroleum Industry in Nigeria
4. EMCA – Environmental Management and Coordination Act
5. EPRA – Energy and Petroleum Regulatory Authority
6. ESIA – Environmental and Social Impact Assessment
7. FDI – Foreign Direct Investment
8. ICSID – International Centre for Settlement of Investment Disputes
9. IIA – International Investment Agreement
10. NEMA – National Environmental Management Authority
11. OECD – Organization for Economic Cooperation and Development
12. SPDC – Shell Petroleum Development Corporation
13. TNC – Transnational Corporation

List of Cases

1. *Cortec Mining Kenya, Cortec (Pty Limited and Stirling Capital Limited)* ICSID Case No. ARB/15/29 (2015).
2. *Glamis Gold, Ltd. v United States of America*, UNCITRAL, Award, (2009).
3. *Jonah Gbemre v SPDC* (2005) AHLR 151 (NgHC 2005).
4. *Kiobel v Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).
5. *Methanex v USA*, UNCITRAL, 44 ILM 1345, (2005).
6. *SERAC and CESR v Nigeria,* ACmHPR Comm. 156/96, (1996).

List of Legal Instruments

1. *Charter of Economic Rights and Duties of States,* 17 December 1984, A/RES/39/163.
2. *Constitution of Kenya*, (2010).
3. *Convention on Biological Diversity*, 29 December 1993, 1760 UNTS 79.
4. *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes)*, 14 October 1966, 575 UNTS 159.
5. *Declaration of the United Nations Conference on the Human Environment*, 16 June 1972, U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416.
6. *Environmental Management and Coordination Act* (1999).
7. *International Convention for the Prevention of Pollution of the Sea by Oil*, 12 May 1954, 327 UNTS 3.
8. *International Convention on Civil Liability for Oil Pollution Damage*, 29 November 1969, 973 UNTS 37.
9. *Petroleum (Exploration and Production) Act*, (2019).
10. *Rio Declaration on Environment and Development*, 13 June 1992, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874.
11. *Statute of the International Court of Justice*, 18th April 1946, 33 UNTS 993.
12. *The North American Free Trade Agreement*, (1994).

CHAPTER ONE: INTRODCTION

1.1 Background to the study

Transnational corporations are said to operate in some sort of a political and legal vacuum, which they attempt to mould by defining private environmental standards and at the same time taking advantage of this very lacuna at the expense of the environment.[1] Furthermore, a recent advisory opinion by the Inter-American Court of Human Rights recognised the right to a healthy environment as fundamental to the existence of humanity[2] and further explicated on the responsibility that States hold in protecting healthy environments and other environment-related rights. The Court considered the importance of the right to live in a healthy environment[3] although it is worth noting that the protocol where this right emanates from is not yet in force.

From this exposition, the author ponders on the notion of the corporate responsibility of companies operating in international investments, seeing as they have proven to hold just as much, if not more, power as States in their ability to violate human rights.[4] The study has been informed by multiple instances of this exercise of power in the developing world and particularly in the pollution heavy industry of oil and gas. This was exemplified in the *SERAC v Nigeria* case where the Shell Petroleum Development Corporation (SPDC) exploited oil reserves in Ogoniland without regard for environment through their violation of applicable international environmental norms.[5] In this case, the immense power of the corporation, and the potential economic prosperity of the country as a result of venturing into the exploitation of their oil reserves, led the government to renege on its duties towards its citizens and even engage in quelling a non-violent campaign by the Movement of the Survival of the Ogoni People through military action.[6] The applicant approached the African Commission for Human

[1] Finger M and Svarin D, 'Transnational Corporations, the Environment and Global Perspectives' Theory vs. Policy? Connecting Scholars and Practitioners, New Orleans, 17 February 2010, 1.
[2] *Advisory Opinion for the Republic of Columbia* IACtHR 15 November 2017.
[3] The right also obligates States to promote the protection, preservation, and improvement of the environment. Article 11, *Additional Protocol to the American Convention on Human Rights on the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador'* (not yet in force).
[4] The case of *SERAC v Nigeria* clearly elucidates on this power where the Nigerian National Petroleum Company in a consortium with Shell Petroleum Development Corporation were able, through their operations, to cause environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People. The Nigerian Government condoned and facilitated their activities by placing the legal and military powers of the State at the disposal of the oil companies as a result of the economic pressure for these investments to succeed and bring wealth to the State.
[5] *SERAC and CESR v Nigeria*, ACmHPR Comm. 156/96, (1996).
[6] This violent overreaction to the peaceful resistance was the subject of the *Kiobel v Royal Dutch Petroleum* case before the US Supreme Court decided in 2013. See also Becker P, 'The Alien Tort Statute of 1789 and

and People's Rights for relief regarding the human rights violations that had been committed, notably leaving out the primary perpetrator of the violations (SPDC) and the environmental violations that led to these abuses in the first place.[7] It thus becomes evident that international agreements and principles have resoundingly failed to restrain corporations from violating the rights of people within their countries of operation.[8]

The recent history of transnational corporations (TNCs) contains multiple examples of environmental violations taking place because of their operations,[9] which they are able to commit by taking advantage of loose regulatory frameworks in developing countries, corruption, or 'a lack of accountability resulting from legal rules shielding corporate interests'.[10] The approach to remedying this state of affairs has been a proliferation of non-binding soft law as a response to the inadequate legal framework.[11] These instruments result in very few legal obligations being created to bind corporations, and thus the reluctance to enforce binding rules against TNCs becomes evident.

One of the many challenges associated with these soft law guidelines is their practical implementation where theoretical emphasis is placed on the protective duty of the state while the practical perspective points to the fact that these efforts need to be supplemented by private actors.[12]

Kenya is currently involved in oil exploitation by TNCs thus making the study of how this would affect the environment even more pertinent. Following from this exposition, the study seeks to investigate the position Kenya may find itself in owing to the fact that oil exploitation in the country is a commercially viable venture with interest from multiple international

International Human Rights Violations: Kiobel v. Royal Dutch Petroleum Co.' 17(1) *New England Journal of Entrepreneurship*, 2014, 29.

[7] See Mazeedah H, 'The Right to a Clean Environment in Nigeria: Case study of Jonah Gbemre vs. SPDC' 3 *Journal of the Mooting Society University of Lagos*, 2017, 15, where the author discusses the fact that the SPDC oil consortium exploited the oil reserves and disposed toxic wastes into the environment and local waterways which violated applicable international standards casting them as primary perpetrators whose acts the government then condoned and facilitated.

[8] Examples include the 'Guiding Principles on Business and Human Rights' and the proposed UN Binding Treaty for Transnational Corporations on Human Rights'.

[9] Noteworthy examples are the Bhopal disaster involving leakage of deadly MIC gas from one of Union Carbide's industrial plants,

[10] Zamfir I, 'Towards a binding international treaty on business and human rights', *European Parliament Research Service*, 1, 2018.

[11] Nolan J, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights' 30(78) *Utrecht Journal of International and European Law*, 2014, 12.

[12] Nolan J, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights', 14.

companies.[13] What can Kenya glean from the disastrous examples scattered across the developing world?

1.2 Statement of the problem

The complicity of states that are interested in attracting international investment has encouraged TNCs to cover themselves with the protection of free trade and investment treaties, while violations of rights inheres in their existence. The current framework of international environmental law governing environmental violations by TNCs has been found wanting with regards to providing redress for victims in the developing world[14] as illustrated in the *SERAC* case above: international investment law appears antithetical to environmental norms and standards. This dissertation explores how the legal framework governing the environment in Kenya does not cater for the multiple problems that international investment in oil will undoubtedly give rise to. Countries in the developing world such as Nigeria failed to take cognizance of this at the onset and this dissertation aims to provide key examples of these failures and how Kenya as a country currently exploiting oil through Bilateral Investment Treaties (BITs) can learn from them. This study hopes to provide an outline of the situation countries in the developing world have found themselves in, while serving as a prospective means through which Kenya can move forward with the exploitation of oil reserves while simultaneously ensuring environmental standards are not compromised.

1.3 Purpose of the study

This study's purpose is to contribute to the existing body of research in a two-fold manner. First by looking into how environmental standards are applied against TNCs as foreign investors. The second objective is to investigate how international investment in oil impacts the environment of a country and how this can be remedied. Following from this, the dissertation aims to provide a comprehensive and practical way forward in pursuit of environmental justice.

The transnational agencies that will be examined are Shell Petroleum Development Company in Nigeria, as well as Tullow Oil and Cortec Mining in the Kenyan context; and how several

[13] Obulutsa G, Miriri D and Nasralla S, 'Kenya signs milestone crude processing deal with oil firms', Reuters, 25 June 2019 <https://www.reuters.com/article/us-kenya-oil/kenya-signs-milestone-crude-processing-deal-with-oil-firms-idUSKCN1TQ1SF on 27 November 2019>.

[14] Omoteso K and Yusuf H, 'Accountability of transnational corporations in the developing world: The case for an enforceable mechanism' 13(1) *Critical Perspectives on International Business*, 2017, 55.

institutional failures have brought to light the problems with guaranteeing a clean and healthy environment vis a vis the economic prosperity that international investment promises.

1.4 Hypotheses

1. If contracts between host states and TNCs operating in the developing world as foreign investors had enforceable provisions regarding environmental obligations, this would provide a solution to the violations that take place.

2. Kenya has a sound and robust environmental framework that can combat the concern from the operations of TNCs.

1.5 Research objectives

1. To assess the current position regarding international investment in the extractives sector;
2. To examine how the framework of international investment law interacts with that of environmental law and what the gaps in this are; and
3. To analyse the efficacy of the current framework and how other countries have dealt with this issue while proposing changes Kenya can make.

1.6 Research questions

1. Why does international investment in pollution heavy industries such as oil operations take place in countries where the environment is always adversely affected?
2. What is the framework of international investment law that allows these violations to proliferate?
3. What is the present situation in Kenya regarding oil exploitation and what are the environmental safeguards in place to counter any adverse acts?
4. What lessons can this prospective study learn from other countries who have faced similar situations?

1.7 Justification of the study

The increasing power and resources of transnational corporations (TNCs) often exceeds those of states which not only makes them powerful at the global level, but it also makes states

increasingly reluctant to regulate their conduct.[15],[16] In response to this void, calls for human rights obligations and responsibilities for TNCs are becoming increasingly frequent, despite the fact that, as Hazenberg argues, legally speaking it remains impossible for TNCs to violate human rights under international human rights law[17]. This arises from the state-centris organisation of international law in general and international human rights law in particular, and the scarcity of mechanisms to enforce the law against non-state actors such as TNCs.[18],[19] This study is justified by the unique dichotomy between international environmental law, a regime designed to ensure the equitable use of shared resources between states, and international investment law which allows states to voluntarily relinquish certain sovereign rights over commerce.[20] These two regimes work to restrict a State's power over its natural resources and their dissonance has presented itself when the State attempts to regulate the environment which is seen as a form of expropriation by investors in the regulated industries.[21] In the field of international investment law, environmental norms are yet to be recognised as having a substantial role to play where the primary motive undergirding the regulatory laws in this regime are instead those that 'seek to promote investment flows by establishing norms that prohibit expropriation or inequitable treatment'.[22] The status quo leaves it pertinent to strive for the balance between 'the potentially competing objectives of environmental protection on the one hand, and the protection of foreign investors rights on the other'.[23]

1.8 Literature Review

The available literature on environmental protection in the developing world against the backdrop of international investment is wide and expansive. This dissertation shall be

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[15] Hazenberg J, 'Transnational Corporations and Human Rights Duties: Perfect and Imperfect', *Human Rights Review*, 2016, 485.

[16] See Nolan J, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights' 30(78) *Utrecht Journal of International and European Law*, 2014, 10, where the author expresses the fact that 'in developing countries, laws are sometimes weak, but enforcement weaker still and corruption can be endemic...thus reliance on the state to ensure human rights are protected remains a long term proposition'.

[17] Hazenberg J, 'Transnational Corporations and Human Rights Duties: Perfect and Imperfect', *Human Rights Review* (2016), 485.

[18] Droubi S, 'Transnational Corporations and International Human Rights Law' 6(1) *Notre Dame Journal of International and Comparative Law*, 2016, 121.

[19] Clapham A, *Human Rights Obligations and Non-State Actors*, Oxford University Press, UK, 2006, 25–28.

[20] Sundararajan A, 'Environmental Counterclaims: Enforcing International Environmental Law Through Investor-State Arbitration', Salzburg Global Seminar, 2.

[21] See *Methanex v USA* (2005) 44 ILM 1345.

[22] Sands P, 'Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law', Global Forum of International Investment organised by the OECD, 27-28 March 2008, 2.

[23] Sands P, 'Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law', 2.

interspersed with examples of this literature within each chapter, however an overview of the same is captured here.

From the outset, Robert-Cuendet comments that international investment law has revealed all of its possibilities and negative impacts through the numerous investment arbitrations associated with the host state's regulatory environmental framework.[24] Cases such as the *Cortec Mining* case will be discussed further in the paper to shed light on how this has manifested in practice.

Regarding international investment, article 2 of the Charter of Economic Rights and Duties of States acknowledges that a state has 'full permanent sovereignty, including possession, use and disposal, over all its wealth and natural resources'.[25] This, as well as other instruments of international law, create the presumption that a state has the right to unreservedly dispose of all the natural resources originating within its territory and if they so choose, to contract other parties to whom they may assign the right. This creates obvious implications regarding the environment and Sundararajan comments that the two separate bodies of international investment law and international environmental law have 'independently sought to restrict a state's power over its natural resources'.[26] She proposes that the solution to this problem is through investor state arbitration which provides the mechanism of counterclaims as a means through which to resolve the conflict.[27] Her assertion is that if investors are aware of the fact that they can be held liable for environmental harm in the event of a dispute, they are more likely to 'develop investment projects with a mind toward environmental protection'[28], or at the very least will be 'incentivised to comply with domestic environmental regulation'.[29] This study will outline how this assumption has failed multiple times especially in the context of developing countries with weak regulatory frameworks.

Kariuki Muigua also contributes to the study of international investment and environmental damage by commenting that corporations have recently been more involved in improving the

[24] Robert-Cuendet S, 'Protection of the environment and international investment law' in Krajewski M and Hoffman R (eds) *Research Handbook on Foreign Direct Investment*, Edward Elgar Publishing, 2019, 596.
[25] Article 2, Charter of the Economic Rights and Duties of States, A/RES/29/3281, (1974).
[26] Sundararajan A, 'Environmental Counterclaims: Enforcing International Environmental Law Through Investor-State Arbitration', 1.
[27] Sundararajan A, 'Environmental Counterclaims: Enforcing International Environmental Law Through Investor-State Arbitration', 2.
[28] Sundararajan A, 'Environmental Counterclaims: Enforcing International Environmental Law Through Investor-State Arbitration', 2.
[29] Sundararajan A, 'Environmental Counterclaims: Enforcing International Environmental Law Through Investor-State Arbitration', 2.

lives of the communities that live adjacent to their operations and in doing so they fill the gaps left by inefficient or absent government bodies.[30] In doing so, his study is cognizant of the fact that it is the impact of operations in extractives from international investment that creates these problems in the first place and is exacerbated by the fact that these operations take place in environments where 'government institutions may be absent, weak, lack in capacity, or corrupt'.[31]

This study intends to build on the available literature by further analysing the relationship between international investment in oil operations and environmental regulations. The focus will be on how Kenya can benefit from the returns of this sector without compromising its environmental standards.

1.9 Research Design

1.9.1 Research design and methodology

The study will rely on primary sources of data as well as secondary sources of data. The primary sources include various international environmental law instruments such as the Rio Declaration, domestic environmental legislation, cases on international investment law and the various regulatory instruments within the international law framework in consideration. These will be essential for an exposition on the legal framework governing the interaction between TNCs, host governments and environmental law. These sources will be accessed through the internet.

Secondary sources of data for the study will include books, journals, academic articles, institutional reports and working papers as well as various internet resources from open access online sources. These open access resources provided by the Strathmore Library will be vital in the collection of this secondary data. The data collected will be qualitative in nature analysed apropos of the hypothesis and objectives of this study.

1.9.2 Assumptions

The author assumes that the present framework of law will remain the same for the duration of the study so as to enable an effective critique of it and proposals to change. The author also

[30] Muigua K, 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development', 2018, 10.
[31] Muigua K, 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development', 10.

assumes that the investment treaties and national laws will remain the same for the duration of the study.

1.9.3 Limitations

The limitations of this study come in the form the unavailability of some court decisions necessary for this study in the English language. The study has also been limited by inaccessibility to literature online due to lack of institutional access. The most pertinent limitation is the conflict of laws governing the regime in the developing world.

1.9.4 Chapter breakdown

The study shall be both descriptive and analytical and will consist of 5 chapters.

1.9.4.1 Chapter 1. Introduction to the study

As an introduction to the study, this chapter will highlight the background to the study, the statement of the problem, the justification for the study, and the literature review. It will provide the research design and methodology of the study and a breakdown of all the chapters.

1.9.4.2 Chapter 2. An assessment of the current position regarding environmental violations committed by TNCs operating abroad

This chapter will look into the theoretical framework through which the research will be undertaken and in doing so, it will establish the current theories that undergird environmental violations committed by TNCs operating abroad.

1.9.4.3 Chapter 3. The legal and policy framework governing international investment law

This chapter will explore the early beginnings and current framework of international investment law in a bid to situate environmental protection within the extant framework and outline how the two fields of law interact. In doing so, this chapter aims to show the current framework within which countries seeking to promote FDI are caught between as they seek to also enforce compliance with environmental regulations.

1.9.4.4 Chapter 4. The current state of international investment vis a vis environmental law in Kenya

This chapter will contextualise the study by looking into the present situation in Kenya as a state that has robust environmental regulations in place and undertakes international investment in the pollution heavy industry of oil and gas exploitation. The chapter will outline what

challenges the country may face in light of the status quo by providing a case study of Nigeria and the challenges faced.

1.9.4.5 Chapter 5. Conclusion and Recommendations

Finally, this chapter will offer a conclusion on the findings from the study. Recommendations will be provided with regards to the promotion of international investment in developing countries such as Kenya while at the same time ensuring compliance with environmental regulations.

1.10 Definition of terms

The *environment* is the 'complex of physical, chemical and biotic factors that act upon an organism or an ecological community'.[32]

Environmental degradation is 'any change or disturbance to the environment perceived to be deleterious or undesirable'.[33]

Expropriation or *nationalisation* is 'the taking of foreign property by a state, whether for public purposes or other reasons'.[34]

Foreign Direct Investment (FDI) is 'funds transferred by a multinational corporation from a source country to a 'host' country in order to finance the setting-up and operating of a subsidiary or an affiliate there'.[35]

International investment law 'governs foreign direct investment and the resolution of disputes between foreign investors and sovereign states'.[36]

A *transnational corporation (TNC)*, also known as a multinational corporation, is a 'for profit entity that engages in enough business activities outside the country of origin so that it is dependent financially on operations in two or more countries'`.[37]

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[32] Merriam-Wester, 4th ed.
[33] Johnson DL, Ambrose TJ et al, 'Meanings of environmental terms' 26 *Journal of Environmental Quality*, 1997, 581-589.
[34] United Nations Conference on Trade and Development, *Expropriation: A Sequel*, 2012, 1.
[35] Clunies Ross A, Forsyth D and Huq M, *Development Economics*, McGraw-Hill Education, London, 2009, 635.
[36] Georgetown Law, *International Investment Law Research Guide*, 2012, 1.
[37] Greer J and Singh K, 'A Brief History of Transnational Corporations' Global Policy Forum, 2000, <https://www.globalpolicy.org/empire/47068-a-brief-history-of-transnational-corporations.html> accessed on 2 December 2019.

1.11 Outline of the dissertation and its flow of argument

The dissertation will begin with the first chapter outlining the path the research will take by setting out research objectives, covering a literature review as well as presenting a statement of the problem which highlights the key objective the study intends to focus on.

Chapter 2 will cover a theoretical framework which is presented as the lens through which to view the entirety of the study. It will comprise of theories that underpin the phenomena observed and how these theories help analyse and discuss the issue.

Chapter 3 provides an in-depth review of the history and rationale behind international investment law which legitimises the position international investors have vis a vis the host state, and how this enables international investment to trump environmental welfare.

Chapter 4 picks up from the research in the preceding chapters by presenting what the case is in Kenya and a case study weighed against it to highlight the position Kenya may find itself in. The environmental law framework of Kenya is brought to light to examine its effectiveness in responding to environmental concerns with regards to oil exploration and exploitation. The case study of Nigeria is highlighted for comparative purposes.

Chapter 5 will conclude with a summary of the key findings in relation to the research questions posed in chapter 1, as well as present recommendations on what Kenya can implement or improve regarding international investment and the avoidance of environmental harm in the oil and gas sector.

1.12 Chapter summary

This chapter has presented the background of the study that will be expounded on throughout the dissertation. In order to do so, a literature review pertaining to international investment and environmental harm has been undertaken so as to outline what this study may contribute to the existing body of work. The available literature reveals that the relationship between international investment law and environmental law is tenuous at best, and antagonistic at worst. Additionally, several deficiencies were highlighted which this study intends to build on. The chapter has provided a general overview of how the dissertation will progress as well as highlighting the argument flow that the study will take.

CHAPTER 2: THEORETICAL FRAMEWORK

Regulation of FDI involves, amongst others, TNCs and their interactions and impact on the environment. It has been noted that the laws and regulations that a country comes up with which focus on environmental rules can directly impact the levels of competition concerning the FDI that they are exposed to.[38] Following from this, it becomes evident that developing countries face a conundrum: to have stringent environmental policies that may lead to less FDI on the one hand, or less stringent policies but more FDI which may lead to economic growth on the other.[39] The first theory underpins the understanding that the developing world ought to take advantage of FDI opportunities so as to maximise on benefit to their citizens, and in order to do so institutional strengthening is necessary. This is because 'the capacity of developing countries to attract FDI, maximize the related benefits and minimize the risks depends on the usefulness of their institutional and policy frameworks'.[40]

The second theory set out herein postulates that the effect of attracting FDI has led these countries to have lax environmental policies which effectively leads to the high amounts of environmental degradation experienced at the hands of TNCs. It is through this framework that the dissertation will be analysed with regards to remedying the harmful environmental impact of TNCs activities.

2.1 TNCs and FDI

FDI is traditionally understood to be 'funds transferred by a multinational corporation from a source country to a 'host' country in order to finance the setting-up and operating of a subsidiary or an affiliate there'.[41] FDI is mostly made by multinational or transnational corporations and thus serves as 'the vector through which these companies expand across the

[38] Kalamova M and Johnstone N, 'Environmental Policy Stringency and Foreign Direct Investment', 33, OECD Environment Working Papers, 2011, 34-56 available at https://www.oecd-ilibrary.org/docserver/5kg8ghvf85d5-en.pdf?expires=1569164914&id=id&accname=guest&checksum=ED087B255D3FD387B51D454C857542E6 on 22nd September 2019.

[39] Sarmidi T, Shaari Md Nor AH and Ridzuan S, 'Environmental Stringency, Corruption and Foreign Direct Investment (FDI): Lessons from Global Evidence' 11(1) *Asian Academy of Management Journal of Accounting and Finance*, 2011, 85-96, available at <https://core.ac.uk/download/pdf/154383454.pdf> on 22nd September 2019.

[40] Kareem S, Kari F, Alam G et al, 'Foreign Direct Investment and Environmental Degradation of Oil Exploration: The Experience of Nigeria' 6(4) *International Journal of Applied Economics and Finance*, 2012, 117 – 126, available at https://scialert.net/fulltext/?doi=ijaef.2012.117.126.

[41] Clunies Ross A, Forsyth D and Huq M, *Development Economics*, 635.

world'.[42] These corporations are a major force in the globalization of the world economy as they have become 'global factories' searching for opportunities anywhere in the world.[43] They are therefore of particular interest herein as they expand primarily through FDI. By employing the framework of economic rationality, scholars have tried to explain why firms such as TNCs seek economic operations all over the world, and postulate that they seek to do so in order to exploit some locational advantages such as raw materials.[44]

In the modern age where the quest for development is driving the agenda, open trade in the market and FDI remain the most realistic options of attaining sustainable development.[45] The concepts that underpin this are collectively known as neoclassical economic theories. They are said to be generic in the sense that they ought to be able to apply to any economy, but when applied to developing countries they not only fail to take account of the distinctive and unmeasured social and political factors, but make no progress in understanding these attributes thus failing to sufficiently analyse the issue of FDI attraction for development.[46] To have a comprehensive view of the same, this paper will be built within the framework of institutional utilitarianism.

2.1.1 Institutional Utilitarianism

According to the World Bank Worldwide Governance Indicators, institutional indicators such as control of corruption, government effectiveness, regulatory quality and accountability allow for the 'unbundling' of institutions to assess their quality.[47] There exists an abundance of literature that points to the fact that good governance attracts FDI, or that the 'natural resource curse could be turned into a blessing through institutional improvements'.[48] When natural

[42] Hassan MB, 'The Politics of Foreign Direct Investment for Economic Development in Nigeria: An Assessment of the Fourth Republic Strategies (1999-2014)' 12(7) *International Journal of Humanities and Social Sciences*, 2018, 829.
[43] Gilpin R, *Global Political Economy: Understanding the International Economic Order*, Princeton University Press, New Jersey, 2001, 687.
[44] See Caves R, *Multinational Enterprise and Economic Analysis*, 2nd ed, Cambridge University Press, Cambridge, 1996.
[45] Hassan MB, 'The Politics of Foreign Direct Investment for Economic Development in Nigeria: An Assessment of the Fourth Republic Strategies (1999-2014)', 829.
[46] Hassan MB, 'The Politics of Foreign Direct Investment for Economic Development in Nigeria: An Assessment of the Fourth Republic Strategies (1999-2014)', 830.
[47] Kurul Z and Yalta Y, 'Relationship between Institutional Factors an FDI Flows in Developing Countries: New Evidence from Dynamic Panel Estimation' Economies, 2017, 4.
[48] Carril-Caccia F, Milgram-Baleix and Paniagua J, 'Foreign Direct Investment in oil-abundant countries: The role of institutions' PLoS ONE, 2019, 2.

resources such as oil are available for exploitation, TNCs tend to be encouraged by 'lower institutional quality'.[49] This enables them to evade compliance.

Institutions are 'human invented constraints consisting of structural, economic, political and social issues'.[50] They 'represent the formal and informal rules of the game in which different players and economic actors interact and perform actions to maximise their profits and returns'.[51] According to North, good institutions affect economic activities through different channels, and 'good quality institutions help reduce the cost of doing business which increases profitability'.[52] On the other hand, markets with poor institutions take up more time and resources on supervising, and international investors are hesitant to invest in such a precarious and unfavourable environment.[53] In order to link this to utilitarianism, the following ought to be kept in mind:

> 'Institutions and public policies were not to be rated as good or bad relative to some visionary, and always arbitrary, conjecture of human rights and obligations, but as more or less beneficial according to some fixed standard of utility in human affairs'.[54]

Utilitarian's believe in the possibility of improving the living standard of masses through effective state legislation and socio-economic policies where the supreme consideration of any state ought to be the welfare of the people in general.[55] Drawing from this background, this theory assists in understanding that institutions can provide credible commitment to FDI attraction for maximising happiness to the greatest number of people.

2.2 The pollution havens theory

FDI has potentially large benefits for both the host and investor states such as more proficient production patterns, technology and knowledge transfer, and economic development.[56]

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[49] Carril-Caccia F, Milgram-Baleix and Paniagua J, 'Foreign Direct Investment in oil-abundant countries: The role of institutions', 3.
[50] Sabir S, Rafique A and Abbas K, 'Institutions and FDI: evidence from developed and developing countries' 5(8) *Financial Innovation*, 2019, 3.
[51] Sabir S, Rafique A and Abbas K, 'Institutions and FDI: evidence from developed and developing countries', 3.
[52] See North D, *Institutions, Institutional Change and Economic Performance*, Cambridge University Press, Cambridge, 1990.
[53] Sabir S, Rafique A and Abbas K, 'Institutions and FDI: evidence from developed and developing countries', 4.
[54] Mill JS, *Utilitarianism, Liberty, and Representative Government*, Every-Mans Library, New York, 1910, 456.
[55] Hassan MB, 'The Politics of Foreign Direct Investment for Economic Development in Nigeria: An Assessment of the Fourth Republic Strategies (1999-2014)', 830.
[56] Garsous G and Kozluk T, 'Foreign Direct Investment and the Pollution Haven Hypothesis – Evidence from Listed Firms' Organisation for Economic Co-operation and Development, Economics Department Working Papers No. 1379, 5, 2017, available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ENV/EPOC/WPIEEP(2016)17/FINAL&docLanguage=En on 22nd September 2019.

Empirical evidence shows that FDI inflows have performed a significant role in spurring growth in host countries,[57] and the past decade has witnessed huge changes in foreign investment policy as governments in developing nations have eliminated many controls on financial flows in and out of their countries.[58] In the same breath, FDI may have led to a rise in the level of pollution in host countries.[59] The pollution havens theory details one hypothesised effect of what the removal of barriers to investment has meant for the natural environment in host countries relying on FDI for natural resource use and extraction: the creation of pollution havens. It is worth noting that over the past few decades, most developing countries have attracted huge amounts of FDI inflows from pollution-intensive industries.[60]

The 'pollution havens' hypothesis postulates that 'companies will move their operations to less developed countries to take advantage of less stringent environmental regulations which in turn makes these countries purposely undervalue their environment in order to attract new investment'.[61] When this happens, it leads to an increase in non-optimal levels of pollution and environmental degradation. One facet of this proposition is seen through the vigorous debate on the environmental impact of China's investments in Africa,[62] a continent where it is worth noting that safeguarding the environment has never been an acutely 'high priority' for governments.[63]

The hypothesis has been contested over the years despite its plausibility and popularity and the lacuna in evidence to support it has been filled by multiple studies that lend it credence.[64] The impact of environmental policy on location decision has been studied with the finding being that 'dirty FDI outflow is positively correlated with the environmental policy of the host

[57] Garsous G and Kozluk T, 'Foreign Direct Investment and the Pollution Haven Hypothesis – Evidence from Listed Firms', 7.
[58] Mabey N and McNally R, 'Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development' World Wildlife Fund , 1999, 3, available at <http://www.oecd.org/investment/mne/2089912.pdf>
[59] Zheng J and Sheng P, 'The Impact of Foreign Direct Investment (FDI) on the Environment: Market Perspectives and Evidence from China' 5(8) *Economies*, 2017, 1.
[60] Sarmidi T, Shaari Md Nor AH and Ridzuan S, 'Environmental Stringency, Corruption and Foreign Direct Investment (FDI): Lessons from Global Evidence', 86.
[61] Mabey N and McNally R, 'Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development', 5.
[62] Shinn DH, 'The Environmental Impact of China's Investment in Africa' 49 *Cornell International Law Journal*, 2016, 25-67.
[63] Shinn DH, 'The Environmental Impact of China's Investment in Africa', 29.
[64] The academic papers cited herein all arrived at findings that support the hypothesis. See Garsous G and Kozluk T, 'Foreign Direct Investment and the Pollution Haven Hypothesis – Evidence from Listed Firms' Organisation for Economic Co-operation and Development, Economics Department Working Papers No. 1379, 5, 2017.

country'.[65] The hypothesis thus has three dimensions:[66] (1) The relocation of heavy polluting industries from developed countries with stringent environmental policies to developing countries where similar policies either do not exist, or are lax or simply not enforced; (2) the dumping of hazardous waste generated from developed countries (industrial and nuclear energy production) in developing countries; (3) and of particular interest herein, the unrestrained extraction of non-renewable resources in developing countries by transnational corporations. Ultimately, what is gathered from the hypothesis is that countries with lax environmental regulations can gain a comparative advantage in pollution intensive industries[67] but this ought to be taken into consideration with a combination of factors like labour market conditions, market size and access, environmental compliance expenditure etc[68] which would therefore mean that environmental policy alone would not confer advantage on countries seeking to attract foreign investment.

2.3 Conclusion

This chapter highlighted the pollution havens theory as explaining the relationship between pollution heavy industries and international investment taking place in developing countries. What this theory reveals is that there is a direct correlation between the increase in pollution in specific countries, and the existence of international investment in those specific sectors. This theory will guide the study in so far as understanding why exactly international investment in extractives in the countries analysed presents unique challenges for the environment. Coupled with this is the theory of institutional utilitarianism which underpins the need for institutional strength and capacity in countries such as Kenya. These theories go hand in hand in analysing the situation in Kenya and providing a better understanding of the impact international investment in oil may have, as well as the inherent weaknesses that may impede on safeguarding the environment.

[65] Aminu AM, 'Foreign Direct Investment and the Environment: Pollution Haven Hypothesis Revisited' Paper prepared for the 8th Annual Conference on Global Economic Analysis, Lubeck, Germany, 9-11 June 2005, 1.
[66] Aminu AM, 'Foreign Direct Investment and the Environment: Pollution Haven Hypothesis Revisited', 2.
[67] Garsous G and Kozluk T, 'Foreign Direct Investment and the Pollution Haven Hypothesis – Evidence from Listed Firms', 7.
[68] Aminu AM, 'Foreign Direct Investment and the Environment: Pollution Haven Hypothesis Revisited', 10.

CHAPTER 3: INTERNATIONAL INVESTMENT LAW

This chapter will begin by discussing the history of international investment law and it will then examine the legal framework governing the same. It will then investigate the mechanisms that govern environmental violations by international investors including the rights they are obligated to uphold. It will introduce the adverse environmental actions occurring within the territory where the investor (in this case the TNC) operates, and how these are currently handled. As a whole, this chapter will attempt to canvas the related aspects of environmental law in the context of international investment.

3.1 Background of international investment law

From prior discussions in the study, it is evident that the main objective of international investment law is to promote investment in a number of ways.[69] At present day, the primary legal document in international investment agreements is a bilateral investment treaty (BIT), however the development of international investment law pre-dates the existence of these treaties and is largely attributable to developments in international customary law and the doctrine of sovereignty of the state.[70] It is worth noting that under the rules of customary international law, no state is obligated to admit foreign investment in its territory, and while this right to exclude is an expression of state sovereignty, 'the power to conclude treaties with other states will also be seen as flowing from the same concept.'[71] The presumption that a state may freely dispose of its natural resources by contracting with private parties to assign that right is inherent in all instruments of international law.[72]

3.1.1 A brief history

The law on international investment has its genesis in the international law concerning the protection of aliens.[73] Although it is considered to be one of the oldest branches of international law, the International Court of Justice has termed it as a relatively underdeveloped area of

[69] Muigua K, 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development', Africa International Legal Awareness Conference, Nairobi, 5 November 2018, 2.
[70] Mann H, 'Reconceptualising International Investment Law: Its Role in Sustainable Development' 17(2) *Lewis and Clark Law Review*, 2013, 522.
[71] Dolzer R and Schreuer C, *Principles of International Investment* Law, Oxford University Press, New York, 2008, 7.
[72] Sundararajan A, 'Environmental Counterclaims: Enforcing International Environmental Law Through Investor-State Arbitration', 1.
[73] Subedi S, *International Investment Law: Reconciling Policy and Principle*, Hart Publishing, Portland, Oregon, 2008, 8.

international law.[74] The stunted growth of this field has nevertheless witnessed remarkable growth and is presently 'one of the fastest changing areas of international law.'[75]

The history of foreign investment can be traced back to when European traders would travel to Asia, Africa, and Latin America to trade with local communities and in doing so, they refused to have local laws apply to them seeing as they were already subject to their respective domestic laws which they carried with them wherever they went.[76] The implication of this is that the European traders sought superior treatment from the local populations they traded with and due to this, their assets could not be nationalised through domestic legislation: because the local law was inferior it could never apply to foreigners whose law was superior.[77] It is evident since the conception of foreign investment law that no state could expropriate or nationalise foreign assets, and invoking national laws to substantiate any such action was barred by the international minimum standard.[78] In the next portion of development of this body of laws when the number of independent states grew, it became common and accepted practice for states to nationalise assets of foreigners under strict conditions and contingent on the payment of compensation.[79]

In present day, formerly sparse BITs have now not only incorporated the customary international law principles of foreign investment law but have gone as far as to extend the scope of these rules by containing provisions designed to offer as much protection as possible to foreign investors for the purposes of attracting and protecting such foreign investment.[80] The inevitable concomitant of this is that the growing changes in this area of law have been mismanaged and are stifling the policy space of developing countries because emerging jurisprudence has gone too far in limiting the sovereign rights of host countries.[81]

[74] Subedi S, *International Investment Law: Reconciling Policy and Principle*, 1.
[75] Subedi S, *International Investment Law: Reconciling Policy and Principle*, 1.
[76] Subedi S, *International Investment Law: Reconciling Policy and Principle*, 7.
[77] Subedi S, *International Investment Law: Reconciling Policy and Principle*, 7.
[78] Subedi S, *International Investment Law: Reconciling Policy and Principle*, 8.
[79] Subedi S, *International Investment Law: Reconciling Policy and Principle*, 8.
[80] Subedi S, *International Investment Law: Reconciling Policy and Principle*, 2.
[81] Subedi S, *International Investment Law: Reconciling Policy and Principle*, 2.

In order to protect themselves, states have started to include provisions in BITs and other international investment agreements (IIAs) to protect the environment, promote human rights, reduce poverty, and implement certain aspects of Corporate Social Responsibility.[82]

3.1.2 International investment and the environment: a (dis)connection

It has been noted that increased openness to FDI to accelerate the use of resources and generate revenue is unsustainable because of 'the deficiency of laws governing natural resource exploitation and its poor enforcement in most developing countries'.[83] Environmental concerns by a host state as a result of the activities of an investor tend to be treated quite differently seeing as although a host of countries have left room in concluded BITs for national policy makers to regulate environmental issues, there is still no global consensus on how to align investment protection with maintaining a healthy environment.[84]

The interaction between international investment and the environment is viewed in terms of the private sectors role in environmental governance which has, over the past two decades, moved from being on the periphery to being at the centre.[85] This is important to note owing to the realization that the public sector alone cannot fund the move from a brown to a green economy, and thus the private sectors 'globalised' economy has the capital and resources necessary for implementing this change.[86] Furthermore, this process of deeper involvement by the private sector has been reflected in the field of investment law which has in recent years taken cognizance of environmental law considerations.[87] From this exposition it has been noted that in order to close the distance between investment law and the environment, the question of the place of environmental laws within the regime is invoked.[88] One solution to this proposed

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[82] 'The Canada-Peru BIT of 2006 provides that certain regulatory measures under narrowly defined conditions do not constitute indirect expropriation.' See Subedi S, *International Investment Law: Reconciling Policy and Principle*, 3.

[83] Kareem S, Kari F, Alam G et al, 'Foreign Direct Investment and Environmental Degradation of Oil Exploration: The Experience of Nigeria' 6(4) *International Journal of Applied Economics and Finance*, 2012, 117 – 126, available at https://scialert.net/fulltext/?doi=ijaef.2012.117.126.

[84] Diepeveen R, Levashova Y and Lambooy T, 'Bridging the Gap between International Investment Law and the Environment Conference Report', The Hague, 4th – 5th November 2013, available at https://www.utrechtjournal.org/articles/10.5334/ujiel.cj/print/

[85] Diepeveen R, Levashova Y and Lambooy T, 'Bridging the Gap between International Investment Law and the Environment Conference Report'.

[86] Diepeveen R, Levashova Y and Lambooy T, 'Bridging the Gap between International Investment Law and the Environment Conference Report'.

[87] Diepeveen R, Levashova Y and Lambooy T, 'Bridging the Gap between International Investment Law and the Environment Conference Report'.

[88] Diepeveen R, Levashova Y and Lambooy T, 'Bridging the Gap between International Investment Law and the Environment Conference Report'.

by Martijn Scheltema is to modify the content of investment treaties from a regime that solely protects the financial interests of investors, to one that also secures public interests such as environmental concerns.[89]

3.2 Legal framework for international investment

3.2.1 Sources of international investment law

For a claim relating to a norm of international law of foreign investment to be accepted as a principle of international law, it must be based on an accepted source of public international law.[90] These sources of public international law are listed in article 38(2) of the Statute of the International Court of Justice and will be expounded upon below.

3.2.1.1 Treaties

Multilateral treaties in this legal regime are sparse and there are therefore no relevant treaties among many states which provide an extensive codex on foreign investment. Efforts towards this have been made, most notably by the Organization for Economic Cooperation and Development (OECD) on a Multilateral Agreement on Investment in the 1990s but this was met with failure due to dissent from developed states and opposition from NGOs because the treaty only took account of the interests of multinational corporations.[91] The only successful convention is the ICSID Convention which is a procedural treaty and sets up the machinery for the settlement of investment disputes via arbitration.[92] The reasoning behind a procedural piece of legislation was that if procedural means for protection were created, principles on investment protection stemming from disputes would be able to build the substantive aspect of the law that was lacking.[93] From this exposition it is evident that the efforts of creating multinational agreements in this field have served as indicative of the dissent among states as to what the rules on international investment at the global level are.[94]

Regional treaties with provisions on foreign investment abound such as Chapter 11 of the North American Free Trade Agreement (NAFTA) which is largely based on the model BIT of the United States and creates a framework for the free movement of investments within the

[89] Diepeveen R, Levashova Y and Lambooy T, 'Bridging the Gap between International Investment Law and the Environment Conference Report'.
[90] Sornarajah M, *The International Law on Foreign Investment*, 3rd ed, Cambridge University Press, New York, USA, 2010, 79.
[91] Sornarajah M, *The International Law on Foreign Investment*, 80.
[92] Sornarajah M, *The International Law on Foreign Investment*, 80.
[93] Sornarajah M, *The International Law on Foreign Investment*, 80.
[94] Sornarajah M, *The International Law on Foreign Investment*, 80.

NAFTA region.[95] The treaty has generated considerable case law such as *Methanex* based on environmental considerations.[96] Other regional treaties include the Association of Southeast Asian Nations (ASEAN) Treaty on the Protection and Promotion of Foreign Investment and the Mercosur Agreement which both create regional arrangements with protection granted in varying degrees to the foreign investment of the participating regional states.[97] Besides these treaties, the ubiquitous BITs have been said to create customary international law although it has been noted that the variance in detail contained in these treaties makes it difficult to argue that they are capable of giving rise to customary international law.[98]

The argument that investment treaties secure the exportation of pollution heavy industries into the developing world has been posed and for this reason, investment treaties should contain exemptions to allow host states to protect the environment.[99] Where countries have responded to this concern by containing provisions addressing environmental concerns,[100] tribunals have shown a propensity to 'read down' the effects of these provisions which effectively preserves the original foundation of theses treaties purely as tools of investment protection.[101]

3.2.1.2 Custom

This refers to the expression of *opinion iuris* within the international community that the principle in question is obligatory and in foreign investment one such custom is that whenever property is taken over by the state, except as an exercise of their regulatory powers, the action must be accompanied by the payment of compensation.[102] This area is governed by rules that are extracted from arbitral awards and the writings of publicists which are in themselves the weakest sources of law.[103]

3.2.1.3 General principles of law

The weight given to this source of law is not the same and its limited scope is generally accepted by authorities.[104] The contribution of general principles such as the principle of compensation

[95] Sornarajah M, *The International Law on Foreign Investment*, 80.
[96] Mann H, 'Reconceptualising International Investment Law: Its Role in Sustainable Development', 526.
[97] Sornarajah M, *The International Law on Foreign Investment*, 81.
[98] Sornarajah M, *The International Law on Foreign Investment*, 81.
[99] Sornarajah M, *The International Law on Foreign Investment*, 225.
[100] See NAFTA Article 1114(4) which states that 'Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure, otherwise consistent with this Chapter, that it considers appropriate to ensure that the investment activity in its territory is undertaken in a manner sensitive to environmental concerns.'
[101] Sornarajah M, *The International Law on Foreign Investment*, 226.
[102] Sornarajah M, *The International Law on Foreign Investment*, 82.
[103] Sornarajah M, *The International Law on Foreign Investment*, 83.
[104] Sornarajah M, *The International Law on Foreign Investment*, 85.

and notions of equity must be acknowledged, but the high degree of subjectivity which relates to their use must also be kept in mind.[105] The existence of some general principles solidified by long acceptance within arbitral jurisprudence has led to them acquiring a role in shaping the rules of international investment protection.[106]

3.2.2 Rights and obligations of investors

At present there is the increasing expectation, particularly among developing countries and Non-Governmental Organisations (NGOs) that home states of TNCs should exert control over the activities of their corporations operating abroad.[107] It is important to note that while the international legal regime has recognised that the assets of TNCs operating abroad are protected by investment treaties and customary international law, there still exists a lacuna with regards to recognising the obligations of TNCs towards host states and the communities within which they operate, with the fiction that they do not in fact have personality in international law being a justification for the same.[108]

3.2.3 Laws and policies governing violations

It has been noted that if investors are aware of the fact that they can be held liable for environmental harm in the event of an investment dispute they are 'more likely to develop investment projects with a mind toward environmental protection'[109] or at the very least will be incentivised to comply with the host state's environmental regulations. Furthermore, states will then be able to enforce regulations that are designed to rein domestic law in line with international norms against investors. The governance of violations by TNCs is dependent on the domestic laws of a country and some of these laws in Kenya with respect to the environment will be analysed in the next chapter.

Environmental regulations have frequently been in direct conflict with international investment law as investors have historically challenged 'the application and enforcement of domestic environmental regulations as a form of expropriation'.[110] The investors, particularly those in oil exploration, have argued that environmental regulations decrease the value of their

[105] Sornarajah M, *The International Law on Foreign Investment*, 85.
[106] Sornarajah M, *The International Law on Foreign Investment*, 86.
[107] Sornarajah M, *The International Law on Foreign Investment*, 144.
[108] Sornarajah M, *The International Law on Foreign Investment*, 145.
[109] Sundararajan A, 'Environmental Counterclaims: Enforcing International Environmental Law Through Investor-State Arbitration', 2.
[110] Sundararajan A, 'Environmental Counterclaims: Enforcing International Environmental Law Through Investor-State Arbitration', 10.

investment such that compliance would make their investment economically inviable.[111] This was exemplified in the case of *Glanis Gold v USA* in which a Canadian mining company alleged that Californian regulations preventing certain forms of open-pit mining to prevent environmental degradation made their project 'economically infeasible and constituted an unlawful expropriation in violation of NAFTA'.[112] This undergirds the fact that BITs protect investors and when the host state attempts to implement regulations regarding the environment, the right of the investor to not have their investment expropriated operates to deter such kinds of regulations from working against them.

3.3 Conclusion

This chapter has analysed the history and development of international investment law in order to contextualise the position environmental violations have within the framework. The key finding of this chapter's research is that investment treaties have enabled the exportation of pollution heavy industries to the developing world because of their lack of obligations which would allow the host state to protect their environment. This has spelled disaster in the realm of environmental protection seeing as host states have been left to resort to expropriatory acts in order to recover the costs of damage incurred. This chapter has provided the foundation of understanding how host states, especially those with weak institutional and regulatory frameworks, have had their environment damaged by TNCs who remain protected and enabled by the BIT.

[111] Dupuy MP, 'Looking at the Past to Shape the Future' in Dupuy MP and Vinuales JE (eds) *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards*, Cambridge University Press, 2013, 20 – 21.
[112] *Glamis Gold, Ltd. v United States of America*, UNCITRAL, Award, (2009), paragraph 358.

CHAPTER 4: INTERNATIONAL INVESTMENT AND THE ENVIRONMENT IN KENYA

'*While there has not been a universal 'race to the bottom', increased globalisation [of foreign investment]...has inhibited a 'race to the top' and caused environmental commitments to be stuck in the mud.*'[113]

This chapter will provide a case study of present-day Kenya and the challenges it faces regarding the promotion and protection of international investment vis a vis environmental protection. It will begin by briefly canvassing the legal framework on environmental protection as well as that of FDI in the country. The chapter will then progress to detail foreign investments made in the country, how these have failed to comply with environmental standards, as well as the causes and the consequences of the same. By providing case studies on other developing countries, this chapter ultimately puts forward the notion that Kenya fits into the status quo outlined in previous chapters and what circumstances in the country have allowed this to prevail.

4.1 Environmental protection in Kenya

Kenyan environmental law describes the legal rules in Kenya relating to the environment and the various issues brought to light by attempts to protect, conserve and reduce the impacts of human activity on the environment. Sources of law on the same are found in international law, the Constitution of Kenya and various statutes. It is worth noting, however, that Kenya has no comprehensive national environmental legislation that is specific to the extractives industry and the legal framework thus relies on extant legislation on ecosystem protection.

4.1.1 Constitution of Kenya

The supreme law of the land outlines citizens right to the environment under article 42 in stipulating that 'every person has the right to a clean and healthy environment'.[114] The Constitution further explicates on the content of this right by posing obligations on the state to respect and protect the same under article 69 whereby the State shall 'ensure sustainable exploitation, utilisation, management and conservation of the environment and natural

[113] Zarsky L, 'Havens, Halos and Spaghetti: Untangling the Evidence About Foreign Direct Investment and the Environment' OECD Conference on Foreign Direct Investment and the Environment, OECD Doc. CCNM/EMEF/ EPOC/CIME(98)5, 1999, 3.
[114] Article 42, *Constitution of Kenya* (2010).

resources'[115] as well as 'eliminate processes and activities that are likely to endanger he environment'.[116] Article 70 then elucidates on the enforcement of environmental rights in stating that if a person alleges that their article 42 right has been infringed upon, they may apply to the court for redress.[117]

4.1.2 National Legislation

Prior to the promulgation of the 2010 Constitution, the starting point for environmental management and conservation was the Environmental Management and Coordination Act (EMCA) which establishes the legislative framework for the appropriate management of the environment including the structural and institutional framework. A key element of the Act in relation to this study is the Environmental Impact Assessment (EIA)[118] as a tool for environmental management, and the establishment of the institution in charge of the same, the National Environmental Management Authority (NEMA).[119]

The Petroleum Act of 2019 contains provisions relating to the environment that mandates persons involved in petroleum business to 'comply with applicable environmental, health and safety laws'.[120] From the outset, article 2 provides that best petroleum practices are intended to 'protect the environment by minimizing the impact of upstream petroleum operations'.[121] The act goes further to state that every petroleum agreement requires contractors to 'adopt measures necessary for the conservation of petroleum and other resources as well as protect the environment'.[122] Additionally, contractors are required to carry out operations 'in accordance with all the applicable environment, health, safety and maritime laws and best petroleum industry practices',[123] and if pollution does occur they should disperse it in an 'environmentally acceptable manner'[124] which is not defined in the Act. The Act goes further to implore contractors to take precautions to 'protect the environment and natural resources including taking precautions to prevent pollution'.[125]

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[115] Article 69(1)(a), *Constitution of Kenya* (2010).
[116] Article 69(1)(g), *Constitution of Kenya* (2010).
[117] Article 70(1), *Constitution of Kenya* (2010).
[118] Part 6, *Environmental Management and Coordination Act* (1999).
[119] Section 7, *Environmental Management and Coordination Act* (1999).
[120] Section 97(1), *Petroleum (Exploration and Production) Act* (2019).
[121] Section 2, *Petroleum (Exploration and Production) Act* (2019).
[122] Section 19(1)(f), *Petroleum (Exploration and Production) Act* (2019).
[123] Section 59(1), *Petroleum (Exploration and Production) Act* (2019).
[124] Section 59(1)(i), *Petroleum (Exploration and Production) Act* (2019).
[125] Section 66(1)(b), *Petroleum (Exploration and Production) Act* (2019).

4.1.3 International law

International law forms part of the laws of Kenya by dint of article 2(5) of the Constitution.[126] Various international conventions have been legislated in pursuit of environmental protection with the foremost documents being the Rio Principles[127] and the Stockholm Principles.[128] The principles contained therein form the foundation of protection of the environment against anthropogenic harm. They are found in various iterations in domestic legislation such as the 'polluter pays' principle captured in principle 16 of the Rio Declaration is also captured under section 2 of EMCA.

In addition to this, Kenya is signatory to a number of United Nations and Regional Cooperation Conventions and multi-lateral agreements (specific to the environment and extractives operations) which are binding on the national government and serve as a foundation for drafting a national regulatory framework. These include the International Convention for the Prevention of Pollution of the Sea by Oil,[129] the International Convention on Civil Liability for Oil Pollution Damage,[130] and the Convention on Biological Diversity.[131]

Following from this, a look into activities in the extractives sector and the resultant environmental harm will now be explored.

4.2 International investment in the extractives sector in Kenya

This study has its focus on extractives since it is a particularly pollution intensive industry, coupled with the fact that the exploration and production of oil results in FDI inflows only when the activities are financed by foreign TNCs.[132] The discovery of significant quantities of oil in Uganda in 2006 ushered in a new era of discoveries of oil deposits in East Africa.[133] In mid-2012, oil was discovered in Kenya and ever since then there have been expectations as to how the country will be resultantly transformed, as the wealth from this could potentially bring huge foreign earnings into the country.[134] Pursuant to this end, section 9(1) of the Petroleum

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[126] Article 2(5), *Constitution of Kenya* (2010).
[127] *Rio Declaration on Environment and Development*, 13 June 1992, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874.
[128] *Declaration of the United Nations Conference on the Human Environment*, 16 June 1972, U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416.
[129] *International Convention for the Prevention of Pollution of the Sea by Oil*, 12 May 1954, 327 UNTS 3.
[130] *International Convention on Civil Liability for Oil Pollution Damage*, 29 November 1969, 973 UNTS 3.
[131] *Convention on Biological Diversity*, 29 December 1993, 1760 UNTS 79.
[132] Muigua K, 'Multinational Corporations, Investment and Natural Resource Management in Kenya', 2018, 8.
[133] Okuthe I, 'Environmental and Social Challenges of Oil and Gas Exploration in Kenya' 17(1) *International Journal of Innovation and Scientific Research*, 2015, 164.
[134] Okuthe I, 'Environmental and Social Challenges of Oil and Gas Exploration in Kenya', 165.

Act provides that the national government 'shall create a conducive environment for investments in petroleum operations and infrastructure development'.[135]

It has been noted that the developing oil and gas industry in Kenya faces several environmental management challenges including institutional capacity, infrastructure, finance, and land access.[136] Examples of major activities which pose environmental challenges include seismic drilling, production, development and transportation.[137] The most pertinent issue, even before environmental harm has occurred, is the lack of transparency and accountability in the regime which requires the country to put in place sound frameworks that are capable of addressing the same. Even though, as outlined above, a well formulated and robust legal framework is in place which regulates the operations of extractives companies, the environmental regulations fall short seeing as they are not strictly enforced.

One infamous example of this failure is seen in *Cortec Mining Kenya, Cortec (Pty Limited and Stirling Capital Limited)*[138] which involved investments in the mining sector including a 21-year license for the extraction of rare earth metals. The government later revoked the mining license issued, citing irregular, corrupt and unlawful awarding of the contracts, and this action landed the parties in arbitration. The tribunal held that the claimants' failure to comply with the regulatory regime constituted violations of Kenyan law that warranted the response of denying treaty protection of the investment.[139]

In more recent developments, Kenya launched the Early Oil Pilot Scheme (EOPS) on the 3rd of June 2018.[140] The corporation in charge of the commercialisation of these resources, Tullow Oil, held consultations regarding the Environmental and Social Impact Assessment (EISA) for the scheme on the 29th of June 2018.[141] This discrepancy could either mean that the EOPS was either launched without the requisite ESIA being carried out, or that the scheme launched was indeed not the EOPS. According to EMCA, the EISA ought to be carried out prior to the commencement of a project.[142] At present date it remains unclear as to whether the ESIA was

[135] Section 9(1), *Petroleum (Exploration and Production) Act* (2019).
[136] United Nations Environment Program, 'Greasing the wheels of Kenya's nascent oil and gas sector', 2018 <https://www.unenvironment.org/news-and-stories/story/greasing-wheels-kenyas-nascent-oil-and-gas-sector>.
[137] Okuthe I, 'Environmental and Social Challenges of Oil and Gas Exploration in Kenya', 166.
[138] *Cortec Mining Kenya, Cortec (Pty Limited and Stirling Capital Limited)* ICSID Case No. ARB/15/29 (2015).
[139] *Cortec Mining Kenya, Cortec (Pty Limited and Stirling Capital Limited* ICSID Case No. ARB/15/29 (2015), paragraph 365.
[140] Makore G, 'The Early Oil Pilot Scheme: A Litmus Test of Kenya's Oil Governance', Oxfam, 2018, <https://kenya.oxfam.org/latest/blogs/early-oil-pilot-scheme-litmus-test-kenya%E2%80%99s-oil-governance>.
[141] Makore G, 'The Early Oil Pilot Scheme: A Litmus Test of Kenya's Oil Governance'.
[142] Section 58(2), *Environmental Management and Coordination Act* (1999).

indeed carried out, but nonetheless over 150,000 bbls of oil have been delivered from Mombasa with Tullow expecting the first export to be sold in the third quarter of 2019.[143] These actions carry severe concerns about the future of oil commercialisation if the preliminary steps could not be carried out with transparency and compliance. The prospects of developing the extractives sector into a significant earner in the Kenyan economy is promising, but the impacts on the environment coupled with the observed weaknesses in laws and regulations requires urgent attention.

4.3 Environmental violations by TNCs in the extractives sector

As a result of their global reach and influence through international investment, TNCs control over 50% of all oil extraction and refining, and a similar proportion of the extraction, refining, and marketing of gas and coal.[144] Following from the discussion on FDI in the previous chapter, the TNC would enter into a contract with the state which are drawn up in such a manner that ensures the corporation has unlimited rights to the natural resources.[145] The TNCs that operate in the developing world have been accused of environmental degradation and pollution by countries, especially those with prominent or nascent oil operations.[146]

Kenya is currently on the brink of its very own oil revolution owing to the EOPS resulting from the deposits of oil found in the Turkana region.[147] Corporations have already engaged in a joint venture partnership to exploit these resources and the environmental implications of this operation will undoubtedly be resounding if the activities being undertaken are not in line with environmental regulations. Nonetheless, other countries in the developing world have experienced similar discoveries of immense natural wealth, but mismanagement and a host of other deficiencies led to unprecedented environmental damage which begs the question: what can Kenya learn from these experiences?

4.3.1 Case Study

In the recent past, many new oil exporting countries in the developing world have consistently failed to give adequate attention to the environmental and social facets of the petroleum sector in its early development stages where Kenya presently finds itself.[148] It is then precisely

[143] Tullow Oil plc, 'About Tullow in Kenya', https://www.tullowoil.com/operations/east-africa/kenya.
[144] Muigua K, 'Multinational Corporations, Investment and Natural Resource Management in Kenya', 2018, 4.
[145] Muigua K, 'Multinational Corporations, Investment and Natural Resource Management in Kenya', 5.
[146] Eweje G, 'Environmental Costs and Responsibilities Resulting from Oil Exploration in Developing Countries: The Case of the Niger Delta of Nigeria' 69(1) *Journal of Business Ethics*, 2006, 30.
[147] Makore G, 'The Early Oil Pilot Scheme: A Litmus Test of Kenya's Oil Governance'.
[148] Okuthe I, 'Environmental and Social Challenges of Oil and Gas Exploration in Kenya', 169.

because of this failure that the countries found themselves in adverse economic, environmental, social and political situations.[149] The following case study will outline the situation faced by Nigeria from its commencement of petroleum exploration, the environmental harm caused by foreign companies and the consequences of their unchecked actions. This country has been selected as it is a successful oil exporting nation, however the environmental consequences of unregulated activities of the international investors will present key lessons for the prospective study on Kenya.

4.3.1.1 Nigeria

Nigeria is a country rich in oil mineral resources with proven reserves of 35 billion barrels of oil which ranks it as the world's sixth largest oil producing nation.[150] The discovery of oil in commercial quantities at Oloibiri in 1956 quickly garnered Nigeria the moniker of a country that is both blessed and cursed with crude oil.[151]

Oil production in Nigeria is mainly done through joint ventures between the government and a number of multinational oil companies.[152] Several decades since the exploitation of oil reserves began has seen the waters and landscape destroyed beyond beneficial use which is largely due to the degraded state of the environment caused by oil producing countries in the region.[153] The TNCs which are responsible for the oil production continuously act in a manner that is without due regard for environmental consequences.[154] This is evidenced by the fact that between 1976 and 1997 there were 5,334 reported cases of crude oil spills that released about 2.8 million barrels of oil into the land and coastal waters.[155] It has been posited that in other oil producing

[149] Okuthe I, 'Environmental and Social Challenges of Oil and Gas Exploration in Kenya', 169.
[150] Eweje G, 'Environmental Costs and Responsibilities Resulting from Oil Exploration in Developing Countries: The Case of the Niger Delta of Nigeria', 34.
[151] Hassan MA, 'The right to a clean and healthy environment as a tool for seeking redress for damages caused by environmental pollution in Nigeria, with particular reference to the Niger Delta region: A case study of *Jonah Gbemre vs. SPDC* (2005) AHLR 151 (NgHC 2005)' 3 *Journal of the Mooting Society University of Lagos*, 2018, 7.
[152] Eweje G, 'Environmental Costs and Responsibilities Resulting from Oil Exploration in Developing Countries: The Case of the Niger Delta of Nigeria', 34.
[153] Hassan MA, 'The right to a clean and healthy environment as a tool for seeking redress for damages caused by environmental pollution in Nigeria, with particular reference to the Niger Delta region: A case study of *Jonah Gbemre vs. SPDC* (2005) AHLR 151 (NgHC 2005)', 7.
[154] Hassan MA, 'The right to a clean and healthy environment as a tool for seeking redress for damages caused by environmental pollution in Nigeria, with particular reference to the Niger Delta region: A case study of *Jonah Gbemre vs. SPDC* (2005) AHLR 151 (NgHC 2005)', 7.
[155] Ugochukwu C and Ertel J, 'Negative impacts of oil exploration on biodiversity management in the Niger De area of Nigeria' 26(2) *Impact Assessment and Project Appraisal*, 2008, 148.

countries which are more developed than Nigeria, TNCs do not carry out their activities with the same culture of impunity and environmental disregard.[156]

The origins of exploration activities in the country with environmental ramifications was borne by the entry of Royal Dutch Shell into the Nigerian market through the Shell Petroleum Development Company of Nigeria Limited (SPDC)[157] and their ensuing extraction activities that have resulted in numerous cases demanding justice from the Shell corporation.[158] One case in point is that of Ogoniland where the first oil exploitation and production in the Niger Delta took place.[159] SPDC entered the region in order to exploit the oil resources in the area through a consortium with the Nigerian government and left immense damage in its wake, particularly environmental degradation and health problems caused by pollution of the environment.[160] The consortium exploited the reserves with no regard for the environmental implications and thus caused harm by disposing toxic waste into the environment and local waterways, as well as causing several preventable oil spills.[161]

The environmental pollution stemmed in part from negligence of the oil companies as well as the political nature of Nigeria.[162] This political stance saw the Nigerian government show preference for maximising its returns from TNC oil revenues.[163] This meant that concern for the environment and ensuring compliance with regulations was not as important as ensuring the country's economic prosperity through the international investment made in the sector.

In 1991, the Department for Petroleum Resources issued the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN). This document outlines the

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[156] Hassan MA, 'The right to a clean and healthy environment as a tool for seeking redress for damages caused by environmental pollution in Nigeria, with particular reference to the Niger Delta region: A case study of *Jonah Gbemre s. SPDC* (2005) AHLR 151 (NgHC 2005)', 8.
[157] Reuters, 'Timeline: Shell's operation in Nigeria', 2018, https://www.reuters.com/article/us-nigeria-shell-timeline/timeline-shells-operations-in-nigeria-idUSKCN1M306D.
[158] These include *SERAC and another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), *Jonah Gbemre v SPDC* (2005) AHLR 151 (NgHC 2005) and *Kiobel v Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).
[159] Eweje G, 'Environmental Costs and Responsibilities Resulting from Oil Exploration in Developing Countries: The Case of the Niger Delta of Nigeria', 37.
[160] Hassan MA, 'The right to a clean and healthy environment as a tool for seeking redress for damages caused by environmental pollution in Nigeria, with particular reference to the Niger Delta region: A case study of *Jonah Gbemre vs. SPDC* (2005) AHLR 151 (NgHC 2005)', 15.
[161] Hassan MA, 'The right to a clean and healthy environment as a tool for seeking redress for damages caused by environmental pollution in Nigeria, with particular reference to the Niger Delta region: A case study of *Jonah Gbemre vs. SPDC* (2005) AHLR 151 (NgHC 2005)', 15.
[162] Eweje G, 'Environmental Costs and Responsibilities Resulting from Oil Exploration in Developing Countries: The Case of the Niger Delta of Nigeria', 36.
[163] Eweje G, 'Environmental Costs and Responsibilities Resulting from Oil Exploration in Developing Countries: The Case of the Niger Delta of Nigeria', 35.

environmental and safety standards that must be complied with by oil operators in Nigeria to prevent, minimise, and control pollution from the various aspects of petroleum operations.[164] EGASPIN sought to adopt international best practice, but it has failed to properly regulate the petroleum industry for several inherent weaknesses such as the lack of stringency, compliance and transparency.[165] However, its main shortfall remains the fact that its legitimacy does not stem from parliamentary authority and this lack of independent supervision greatly impedes on the application of the standards and guidelines. Recommendations have been made for this to be remedied by the implementation of a comprehensive piece of legislation for the oil sector which would allow for independent supervision of environmental risks in the sector.

The case study of Nigeria has presented the crux of this study which posits that countries in the developing world seek to maximise on returns from international investment from TNCs at the expense of the environment. The government of Nigeria was able to create an enabling environment for this by having weak environmental provisions, and they were brought to justice for complicity in human rights abuses as a result of reneging on their obligations to citizens. In the midst of all of this, the TNCs were not held accountable for their actions in the Niger Delta and when they were, the penalties were barely punitive. An example of this is the inability of the government to stop gas flaring and their attempt at implementing a penalty of N10.00 (0.0215) for every cubic foot of gas flared begs the question on the existence of any real intention on preventing pollution.[166] The country's interaction with extractives at the hands of TNCs provides an important outlook on the inability of their laws to check violations and the failure of a legislative regime to resolve deficiencies and provide real solutions.[167] Owing to the fact that Kenya has faced instances where legislative safeguards remain unenforceable, the study of Nigeria provides key insights.

4.4 Conclusion

The discussion in this chapter has primarily revolved around the present situation in Kenya regarding the environmental regulatory framework in the context of international investment in oil and gas exploitation in the country. This has revealed that the environmental regulations are indeed robust and widespread throughout legislation, but do not cater for the unique

[164] Olawuyi DS and Tubodenyefa Z, 'Review of the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria', 2018, 4.
[165] Olawuyi DS and Tubodenyefa Z, 'Review of the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria', 2 – 10.
[166] Chuks-Ezike C, 'Environmental Crime liability of the Nigerian government in its oil pollution menace' AlliedAcademics.org, 2017, 2.
[167] Chuks-Ezike C, 'Environmental Crime liability of the Nigerian government in its oil pollution menace', 2.

environmental challenges that the oil industry presents. With such deficiencies present considering the increased foreign investment in the sector, the challenge Kenya faces is how to balance the exploitation of natural resources against the right of citizens to a clean and healthy environment with all the implications that right entails. The case study of Nigeria was outlined as a country that found itself in a similar conundrum at the height of its own oil boom, as well as what the consequences of failing to provide an adequate framework entailed. This case study serves as an example of the road Kenya could go down if adequate attention is not given to environmental considerations in light of international investment in oil exploitation.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The purpose of this study, as outlined in chapter 1, has been to contribute to the existing body of research on the topic. The key findings of this study will first be outlined below and will be followed by recommendations that are relevant in the Kenyan context.

5.2 Summary of key findings

This study has drawn the correlation between attraction of international investment and the environmental implications of pollution heavy industries operating in developing countries without strong a strong regulatory framework and weak institutions. The purpose of these findings was to extract key lessons that may be applied in the Kenyan context.

The first finding is that international investment law seeks to protect the investment and not the host state. Owing to this, states can't necessarily seek environmental protection under BITs by securing rights against the TNC, but their environmental laws and regulations are enforceable against the TNC. This would mean that in order to protect their environment, the host state would need to have a strong framework that is capable of being enforced. In the case of Nigeria, this proved impossible seeing as the right to a clean and healthy environment was not even a fundamental enforceable right in the first place.[168] This finding disproves the first hypothesis.

Regarding the second hypothesis, it remains true that Kenya does indeed have a robust environmental legal framework that can combat concerns of the operations of TNCs, however what remains uncertain is whether the relevant authorities are willing to hold TNCs to account. This is called into question considering the evidence presented that ESIAs are still under a veil of uncertainty in reference to the EOPS involving Tullow Oil as aforementioned. NEMA and other lead agencies have the legislative tools they need to adequately protect and conserve the environment, however gaps and institutional weaknesses undermine the otherwise robust framework.

The first research question on why international investment in pollution heavy industries takes place in countries where the environment is always adversely affected has been adequately

[168] Hassan MA, 'The right to a clean and healthy environment as a tool for seeking redress for damages caused by environmental pollution in Nigeria, with particular reference to the Niger Delta region: A case study of *Jonah Gbemre vs. SPDC* (2005) AHLR 151 (NgHC 2005)', 8.

answered in the chapter 2 of this study which points out that companies will move their operations to less developed countries to take advantage of less stringent environmental regulations. Weak institutions further exacerbate the problem which results in huge inflows of 'dirty' FDI and virtually no safeguards against environmental degradation.

Chapter 3 answers the second research question by outlining the framework of international investment law and pointing out the deficiency that allows these violations to proliferate. This being the fact that investment treaties have enabled the exportation of pollution heavy industries to the developing world because of their lack of obligations which would allow the host state to protect their environment. Chapter 4 addresses the situation in Kenya regarding oil exploitation and finds that the environmental safeguards in the form of legislative controls are in place to constrain any adverse action by TNCs, but these have consistently failed to prove effective. The case of Nigeria was also presented to give the prospective nature of this study an experience from which to learn from. This case study came to the conclusion that the government of Nigeria sought to maximise on returns from international investment from TNCs at the expense of the environment which resulted in environmental harm that they were then unable to remedy because their legislative framework failed to adequately protect the right. In doing so, the case study responded to the fourth research question.

5.3 Recommendations

Based on the conclusions reached above, this study proposes the following recommendations that countries such as Kenya may consider when exploiting natural resources through the vehicle of international investment without compromising on environmental considerations.

5.3.1 Environmental legislation and management systems

Effective implementation of environmental regulations is imperative for improving and safeguarding a healthy environment for all citizens.[169] The 'command and control' model Okuthe discusses may be helpful as it propounds that the environmental regulations would clearly stipulate the requirements made by the government to be met by operators in order to address environmental hazards.[170] This would be necessary in the form of sector specific regulations arising from the Petroleum Act that would dictate what the government requires

[169] Barczewski B, 'How well do environmental regulations work in Kenya?: a case study of the Thika Highway Improvement Project' Centre for Sustainable Urban Development, 2013, 14 <http://csud.ei.columbia.edu/files/2013/06/How-Well-Do-Environmental-Regulations-Work-in-Kenya.pdf> on 28 November 2019.
[170] Okuthe I, 'Environmental and Social Challenges of Oil and Gas Exploration in Kenya', 170.

from operators in order to ensure environmental standards are being followed, as well as what the penalty for potential default would be.

5.3.2 Comprehensive environmental regulations for the oil sector must be in place

The environmental regulations that Kenya has in place do not currently serve the needs of oil exploration as they are notably silent on key areas such how oil spills are to be managed. By having the environmental legislation and management systems integrated, it would enable for more efficient addressing of environmental harm. A key example of this is Nigeria's EGASPIN as discussed in the previous chapter which is solely dedicated to outlining environmental guidelines and standards in the petroleum industry. Similar legislative measures could be implemented in Kenya by NEMA working in conjunction with the Energy and Petroleum Regulatory Authority (EPRA) to develop similar rules that would constitute a sector specific environmental management framework. Such regulations would flow from the extant Petroleum Act as opposed to a different piece of legislation altogether.

The regulations should outline the mandatory requirements to be met that are specific to the sector as opposed to having the law scattered throughout domestic and international legislation with no sector specific consolidation. This would potentially solve the problem that Kenya may have to grapple with regarding the inadequacies of the current legislative framework. Furthermore, the imposition of penalties against TNCs for violations could serve to deter them from environmentally adverse actions or at the very least incentivise them to be more environmentally conscious.[171]

5.3.2.1 Elements of a holistic environmental management framework

A holistic environmental management framework moves beyond simply upfront authorisation during approval phases, but also focuses on outcomes-based monitoring. A rigorous and transparent regulatory system with strong compliance requirements enables regulators to 'adequately address the cumulative and systemic environmental risks of oil and gas activities in line with international best practices'.[172]

The first element of an all-inclusive framework is stringency in the obtaining and maintaining of permits and licenses for oil production projects and all the factors (environmental, social,

[171] Sundararajan A, 'Environmental Counterclaims: Enforcing International Environmental Law Through Investor-State Arbitration', 2.
[172] Olawuyi DS and Tubodenyefa Z, 'Review of the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria', 1.

health) should be considered holistically so they may be avoided or mitigated.[173] The second element is compliance whereby operators must meet prescribed environmental guidelines over the entire life-cycle of their operations through continued monitoring.[174] Lastly, the environmental legislation must be transparent through measures such as detailed reporting on how environmental standards are applied to projects.[175]

5.3.3 Strengthening of extant institutions and environmental governance

In order for Kenya to benefit from FDI without compromising on the environment, it would need to strengthen its institutional quality and improve on environmental governance. This would entail effective government control and building on the capacity of environmental regulatory authorities such as NEMA such as through benchmarking practices and training. In order to take full advantage of the benefits of FDI, good environmental governance should take into account the role of all actors that affect the environment and TNCs should operate within the rule of law.

5.3.4 Mandating stakeholders to develop and espouse an 'environmental value culture'

This recommendation flows from the 'self-regulation' approach whereby agreements entered into between the government and investors would place emphasis on setting environmental goals to be met by the investor's operations in the country.[176] This would mean that the TNC would have to define strategies and plans aimed at the overall criteria set by the government on ensuring environmental sustainability of the project. One example of such is a legally binding Environment Action Plan whereby the TNC would be responsible for ensuring as well as providing evidence for compliance. These 'self-audits' would allow the TNC some flexibility in deciding on practical measures to meet environmental objectives, and in being mandated by the government to develop an Environment Management Plan there would be a constant review of the measures being implemented.[177]

[173] Olawuyi DS and Tubodenyefa Z, 'Review of the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria', 2.
[174] Olawuyi DS and Tubodenyefa Z, 'Review of the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria', 2.
[175] Olawuyi DS and Tubodenyefa Z, 'Review of the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria', 2.
[176] Okuthe I, 'Environmental and Social Challenges of Oil and Gas Exploration in Kenya', 171.
[177] Okuthe I, 'Environmental and Social Challenges of Oil and Gas Exploration in Kenya', 171.

5.5 Conclusion

By discussing the independent frameworks or international investment law and environmental law in the context of oil exploitation in developing nations, this study has met its research objectives. The case study undertaken provides a comparative jurisdiction in order for Kenya to learn the judicial and legislative approaches it may espouse in order to avoid the mistakes made by countries that have found themselves in similar situations.

In conclusion, international investment in the exploitation of oil remains an inevitable reality for Kenya, but the environmental destruction that often trails behind this sector is avoidable provided that environmental standards are not compromised on.

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