LOOKING BEYOND OIL PROFITS: AN APPRAISAL OF THE LAWS GOVERNING NATURAL RESOURCE MANAGEMENT BY MULTINATIONAL CORPORATIONS IN KENYA, TURKANA COUNTY

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DECLARATION

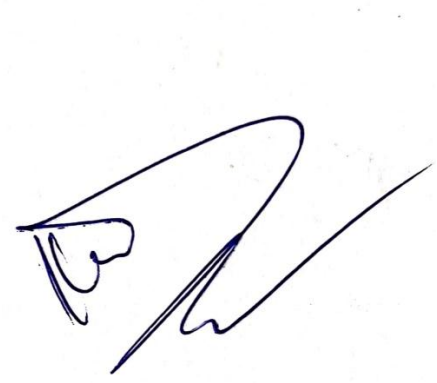
I, **OLESI RAEL ODDIAGA**, declare that this is my original work and that the same has not been presented to any institution of higher learning for the award of a diploma, degree or post-graduate qualifications. The research has included other Author's work, which has been clearly referenced, with relevant quotations made.

Signature….....Date……11/03/2020…….……

OLESI RAEL ODDIAGA

This project has been presented for examination with my authority as the university supervisor.

DR. KARIUKI MUIGUA



21/11/2020

Signature……..……Date…….....……

DEDICATION

"*…One of the conditions of happiness is that the link between man and nature shall not be broken …"*

- *Leo Tolstoy*

'… The earth will not continue to offer its harvest, except with faithful stewardship. We cannot say we love the land and then take steps to destroy it for use by future generations.'

— Pope John Paul II

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ABSTRACT

In the wake of industrialization and expansion of activities by Multinational Corporations in the oil and gas industry, it becomes imperative that the effect of their activities to the environment are effectively monitored so as to attain better governance of natural resources. It is indeed clear that currently in the International scene, the codes in place to censure any harmful practice to the environment propagated by these companies are merely persuasive. The onus is therefore on individual states to put in place robust laws and to ensure their proper implementation in order to benefit both the environment and their citizenry. This study presents a background to the problem with special emphasis on Turkana County in Kenya. It highlights key environmental and associated issues that are critical in the management of natural resources. It further presents an analysis of various persuasive codes and the legislative framework applicable to Kenya. A best practices approach analysis is also presented of the Kingdom of Norway through a discussion of its legislation which is contrasted with the legislation of the Federal Republic of Nigeria. It is the study's conclusion that the national and Turkana county policies and laws on management of national resources need to be updated to cater for any overlap in functions and fill for any deficiency in legislation in areas where they occur. Implementation of the available legislation becomes paramount for the realization of the right to a clean and healthy environment and for this, coordination between the various government agencies both at the national and county level as well as the goodwill of the state is critical.

LIST OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
BO	Beneficial Ownership
COK	Constitution of Kenya
CSR	Corporate Social Responsibility
EIA	Environmental Impact Assessment
EITI	Extractives Industries Transparency Initiative
EMCA	Environmental Management and Coordination Act, 1999
EPRA	Energy and Petroleum Regulatory Authority
ESD	Ecologically Sustainable Development
FDI	Foreign Direct Investment
GHG	Greenhouse Gas
IEIA	Integrated Environmental Impact Assessment
ILEG	Institute of Law and Environmental Governance
LC	Local Content
MDG	Millennium Development Goal
MNC	Multinational Company/Corporation
NEMA	National Environment Management Authority
NCS	Norwegian Continental Shelf
PCA	Pollution Control Authority
SDG	Sustainable Development Goal
TNC	Transnational Corporation
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
WTO	World Trade Organization

LIST OF STATUTES

INTERNATIONAL REGULATION

The UN Global Compact

The Organization for Economic Cooperation and Development (OECD) Guidelines

The 2003 UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1992

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997

KENYAN STATUES

The Constitution of Kenya 2010.

The Companies Act No. 17 of 2015

The Environment Management and Co-ordination Act, No. 8 of 1999

The Access to Information Act No.31 of 2016

The Petroleum Act, 2019

The Energy Act, 2019

The Climate Change Act, 2016

The Land Act, 2012

The Community Land Act, 2016

The Water Act, 2016

The Access to Information Act No. 31 of 2016

The Bribery Act, 2016

KENYAN POLICY INSTRUMENTS

The Turkana County Environmental Policy, 2018

Draft Policy Framework for Extractive Industries in Turkana County

KENYAN REGULATIONS

Waste Management Regulations, 2006

The Environment Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009

The Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2016

NIGERIAN STATUTES

Associated Gas Re- Injection Act, 1979

Associated Gas Re-injection (Continued Flaring Of Gas Regulations), 1984

The Flare Gas (Prevention of Waste and Pollution Regulations), 2018

The Nigerian Extractive Industry Transparency Initiative Act, 2007

The National Oil Spill Detection Agency establishment Act, 2006

National Oil and Gas Industry Content Development Act, 2010

The Harmful Waste (Special Criminals Provisions) Act, 1988

The Environmental Impact Assessment Act (Decree Number 86 of 1992)

NORWEIGIAN STATUTES

The Constitution of the Kingdom of Norway

Pollution Control Act No. 13 of 1991

Act 29 November 1996 Number 72 Relating to Petroleum Activities

Greenhouse Gas Emission Trading Act, No. 99 of 2004

Carbon Trading Act, 1991

LIST OF CASES

Dodge v Ford Motor Company 170 N.W.668 (Mich.1919)

Hutton vs. West Cork Railway [1983] 23 CH.D.654 (Eng.)

Union Carbide Corporation vs Union of India 1990 AIR 273, 1989 SCC (2)540.

Sarei er al-vs.- Rio Tinto PLC et al 9th US Circuit, Court of Appeals, No.02-56256.

Martin Osano Rabera & Another-vs- Municipal Council of Nakuru and 2 Others [2018]eKLR.

Mathatani Limited v Commissioner of Lands and 5 others [2013] Eklr

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CHAPTER ONE

1.1 Introduction

Multinational Corporations have exhibited growth since the Second World War (World War II) with most of them expanding to foreign countries especially where there are less regulatory barriers and the cost of production of products is relatively low.[1]This benefits the host country in many ways, some being the transfer of technology and capital which is brought about by multinational corporations.[2]

A multinational corporation (MNC) can be defined as a company which has a home state and has established several auxiliary companies which are present in other countries for purposes of channeling investment by supervising, owning and controlling activities in those countries.[3]The OECD Guidelines on Multinational Enterprises is more elaborate as it defines such companies to comprise of companies or other entities that are found in several countries and are able to run their activities based on the links they have within their structures. The ownership and control of MNCs may be through the government, private individuals or a mixture of the former and the latter.[4] MNCs may also take the form of a Transnational Corporation (TNC) which is a type of MNC that does not have a home state but transcends borders of various states for purposes of investment.

Whilst economic development is good for any country whether developed or developing, developing countries are often plagued with issues such as economic and political instability making them easy targets for MNCs which would like to manipulate the national systems and engage in ventures such as prospecting of minerals or oil deposits at the expense of the environment or the indigenous persons living in the area[5]. MNCs would want to yield returns on investment in a very short time and in a lot of instances, the approaches and systems they employ

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[1] Samia Rekhi, Multinational Corporations (MNCs) Meaning, Origin and Growth seehttp://www.economicsdiscussion.net/multinational-corporations/multinational-corporations-mncs-meaning-origin-and-growth/20921 last accessed 2nd October 2019.

[2] Joseph E. Stiglitz, Making Globalization Work (2006)

[3] Dunning J.H. and Lundan S.M.(2008) Multinational Enterprises and the Global Economy , 2nd Edition, Cheltham: Edward Elgar Publishing

[4] OECD Guidelines for Multinational Enterprises 27th June 2000, Concepts, Principles para. 3 http://www.oecd.org/daf/investment/guidelines/mnetext.htm at pp.3 last accessed 2nd October 2019.

[5] Madeley J 1999,Big Business, Poor People ,Zed Books: London in PETER Newell,(2001)Managing Multinationals: The governance of investment for the Environment ,J.Int .Dev 13 pp. 907-919

in carrying out their work may be harmful to the ecology of the place where they operate.[6]Notably, most developing countries also lack proper legislative safeguards to protect them from the ills of environmental harms that are caused by the actions of these MNCs.

Kenya being a developing country, still suffers from issues such as poverty, inequality and environmental issues such as climate change which leaves the country susceptible to any internal and external shocks alike.[7]This makes the country vulnerable in terms of the exploitation when it comes to dealings with MNCs.

According to a recently released report,[8] it was established that most countries in the world have at least one environmental law and have put in place various agencies to address environment problems. However, the biggest crisis amidst having all these laws and structures is the implementation of the laws currently existing in the various legal frameworks of these countries in a bid to solve these pertinent environmental issues. This is the situation in most developing countries, Kenya not being an exception. Notably, whilst development is imperative in any society this must be seen and done through the lens of sustainability as per the Sustainable Development Goals[9] (SDGs) which aim to promote industrial growth whilst ensuring that nature is protected.

1.2 Background Of The Study

The history of the establishment of MNCs and TNCs alike, dates back to the 16th Century and into the colonial era where there was a bid to acquire foreign territory and foster trade. One of the earliest companies to be established for these purposes was the British East Indian Trading Company which was being used as an investment vehicle for what is now known as FDI.[10]Paul

[6] Saummermann D. 1986,The regulation of Multinational Corporations and Third World Countries South African Year Book of International Law, pp. 55.
[7] World Bank Website, (Website W. B.)last accessed on 4th July 2019.
[8] Carl Bruch et al, UNEP (2019). Environmental Rule of Law: First Global Report. United Nations Environment Programme, Nairobi pp.1
[9] United Nations Website, https://un.org/sustainable development /infrastructure-industrialization last accessed on 3rd July 2019.

[10] Jed Greer and Kavaljit Singh, (2000) a Brief History on Transnational Corporations, also see *https://www.globalpolicy.org/empire/47068-a-brief-history-of-transnational-corporations.html* last accessed 1st August 2019.

Zamfir opines that MNCs choose to invest in other countries other than their home country in search of market for their goods, resources, assets, technology and to combat competition from their fellow MNCs.[11]Indeed, these reasons have not changed over time. It has emerged that especially in Africa, there has been a search for resources and cheap labor by MNCs which has had the effect of keeping the costs of production for MNCs low enough to enable them make maximum profit and give them an edge over their competitors.

This utilization of natural resources or human capital could be utilized to the detriment of the host state which could end up on the losing end especially where there is extraction of non-renewable natural resources that is not carefully monitored and which could impact on the sustainability of the environment. Two of the most significant effects of MNCs in a country would be their ability to influence policymakers and consequently the leaders of a country owing to their financial might.[12]This is mostly done through bribery and provision of kickbacks to ensure that the status quo is maintained as the MNCs proceed with their activities in a particular state.

Secondly, is the effect of MNCs activities on the environment which has caused issues such as pollution and the exhaustion of hydrocarbon deposits and which issues shall be discussed in detail in this thesis. There is therefore a need to put a check on the activities of MNCs by having well-coordinated laws on protection and management of natural resources so that there are no gaps in the law capable of being manipulated to propagate the agenda of any MNCs with no regard for protection of the environment.

The main aim of Vision 2030[13] is to lay a foundation for changing Kenya into an a hub of industries and enhance its income status by improving the livelihood of its people by the year 2030.The nation's leadership is working towards the realization of this vision and one of the ways this will be achieved is by significantly supporting both local and international companies which run businesses in Kenya and presenting Kenya as a favorable investment country.

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[11] Paul Bogdan Zamfir, University of Târgu Jiu, Economy Series, Issue 4/2012,The expansion of the Transnational and Multinational Corporations in the global economy. http://www.utgjiu.ro/revista/ec/pdf/2012-04.I/42_ZAMFIR%20Paul-Bogdan.pdf last accessed 1st August 2019.

[12] Ibid, see the case of the Company International Telephone and Telegraph (ITT) which offered the US Central Intelligence Agency US$1 million to finance a campaign to defeat the candidacy of Salvador Allende in Chilean national election

[13] UNDP Website, http://www.ke.undp.org/content/kenya/en/home/sustainable-development-goals.html last accessed on 4th July 2019.

Turkana County is considered the second largest county after Marsabit measuring approximately 68,680.3 square kilometers. It enjoys a hot and dry climate where temperatures range between 20°C to 41°C. However the county has been a victim of climate change which affect the quality of their soils and pastoralism which is their main economic activity.[14] The county has suffered under previous political regimes before devolution earning its name as being 'marginalized'. According to the national population census report results released in 2019, Turkana County was recorded as having a population of 926,976 [15]persons up from 855,399[16] in the 2009 results. For a long time Turkana County has been termed as marginalized and print media propagating the face of a poverty stricken and underdeveloped county. Therefore, the surge in population translates to escalated scramble for the already scarce resources.

A little less than a decade ago, Kenya discovered oil deposits which could be harnessed for commercial use in Turkana County.[17] These oil deposits have drawn attention to the Country and Turkana County alike in anticipation of the benefits set to be realized from the discovery. The discovery was made by a company known as Tullow Oil which is a multinational company.Tullow Oil works on execution of the project via a joint venture with Africa Oil Kenya B.V and Total S.A. [18]Tullow oil has drilled various oil wells some of which are namely Agete -1, Amosing -1, Etuko 1, Ewoi 1, Ekales-1 and Twiga- 1.There are also plans to build a pipeline from Turkana County to Lamu County for purposes of aiding in the transportation of oil.[19]The first export of crude oil was flagged off by our President, His Excellency Uhuru Kenyatta and was sold to a company known as ChemChina UK Limited.[20]

It was expected that there would be sustainable exploration of oil whose main aim would be to conserve the environment for the use of generations to come as well as improvement of the livelihoods of the county's occupants spurred by the presence of the multinational company. This

[14] Draft Policy Framework for Extractive Industries in Turkana County, 10th September 2018 pp.1
[15] 2019 Kenya Population and Housing Census, Volume 1, Population by County and Sub-county November 2019.pp.7.
[16] Supra note 14.
[17] Emmanuel Onyango, 'Kenya strikes oil in Turkana ', https://mobile.nation.co.ke/business/Kenya-strikes-oil-in Turkana/1950106-1373886-format-xhtml-fbwalbz/index.html last accessed on 3rd July 2019.
[18] Draft Environmental and Social Impact Assessment Report of the Foundation Stage of the South Lokichar Development for Upstream Oil Production in South Lokichar ,Block 10BB and 13T,15th June 2020, pp. 1-1
[19] Supra note 14,pp. 2
[20] Fredrick Obura, "President Uhuru Kenyatta Flags off Kenya's First Crude Oil Export" https://www.standardmedia.co.ke/business/article/2001339562/president-uhuru-flags-off-kenya-s-first-crude-oil-export last accessed on 31st August 2019.

would be done through CSR projects in conjunction with the county leadership. This move would benefit the people of Turkana and counter the notion of reference to Turkana County as being marginalized.

The people of Turkana expect benefits from the MNCs which at some point even spurred conflict over the issue of sharing any profits with the local community from the generated funds as a consequence of the sale of oil. The Government of Kenya is interested in getting revenue and taxes alike from the oil that will be sold in foreign markets.[21] It may be possible that all actors in the whole prospecting chain to wit the prospecting company, the Government of Kenya and the people of Turkana are all too keen on getting the benefits of oil production that they are willing to overlook any environmental harms that come about with oil exploration. In fact the focus currently may not be in the area of conservation of the environment but on the target of reaping maximum financial yield from the sale of oil retrieved from Turkana County. Indeed, there are reported cases of gas flaring and felling of trees as seismic studies were being conducted adding to the global crisis of climate change.[22]

1.2.1 The Oil Exploration and Production Cycle

This oil life cycle starts when an MNC get licenses from a country in which it want to carry out oil exploration to the production and to where the oil reserves have been fully harnessed and the land needs to be returned to its rehabilitated back to be able to sustain animal and plant life. [23]These stages can also be referred to as the upstream, midstream and downstream oil operations. At all these stages there needs to safeguards to guarantee that there is proper management of natural resources with little or no impact to the ecosystem.

[21] George Omondi, "Munyes: Sh 300billion Turkana Oil Deal to remain secret," https://www.businessdaily africa.com/news/Sh. 300bn-Turkana -oil- deal-to-remain-secret/539546-5171844-xdshhvz/index.html last accessed on 13th July 2019.

[22] Cordaid Report (2015) Oil exploration in Kenya :Success requires consultataion,Assessment of Community Perceptions of Oil Exploration in Turkana County , pp.35 https://www.cordaid.org/en/publications/new-report-community-perceptions-oil-exploration-turkana-county-kenya/ last accessed on 29th July 2019

[23] Tullow oil website , https://www.tullowoil.com/about-us/oil-life-cycle/ last accessed 18th November,2020.

1.2.2 The Environmental Challenges Associated with the Oil exploration and production Cycle

1.2.2.1 Oil spills

Oil spills are also a likely occurrence in areas where there has been oil exploration and transportation and in case of such an occurrence there needs to be in place suitable mechanisms for dealing with the situation. Oil spills if not addressed immediately and efficiently can be a cause of pollution to marine, human beings animal and plant life alike.[24]

1.2.2.2 Gas Flaring and Climate Change implications

Gas flaring is another serious problem that is associated with oil production. This is because gas flaring has significant effects on the environment such as the elevation of the temperature of an area on an average basis causing global warming and ultimately the change of climate due to the increase of release of various greenhouse gases (GHG) which include methane and carbon dioxide, and other fluoro carbons. GHG are usually emitted into the atmosphere because of the oil production process. Kenya is a signatory to the Paris Agreement of 2015 (the "Paris Agreement") which was ratified on the 28th December 2016.[25] The Paris Agreement increases the realization of the various articles of the United Nations Framework Convention on Climate Change (UNFCCC) of 1992 and which aims to lower the release of GHG. The Paris Agreement specifically aims to lower the temperature recorded averagely to 2 degrees above pre- industrial levels and to regulate the increase in temperature by maintaining it at 1.5 degrees Celsius above pre-industrial levels.[26].Parties to the Paris Agreement also commit to also commit to increase their capacity their individual infrastructure and capacity to address the climate change problem.[27]

Kenya has enacted the Climate Change Act 2016 which legislation aims to provide a regulatory framework to fight climate change and its effects on the ecology. Further, the National Climate

[24] See the case of Makueni county oil spills on Thange River, Makueni County Website, 'Makueni county contemplates suing KPC over two oil spills, available at https://makueni.go.ke/news/makueni-contemplates-international-justice-over-two-kpc-oil-spills/ last accessed on 31st July 2019.

[25] The United Nations Treaty Collection, Website , https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&lang=_en&clang=_en last accessed on 18th November 2020.

[26] Article 2, the Paris Agreement 2015.

[27] Article 7 ,the Paris Agreement 2015

Change Council [28]mandates NEMA to monitor whether public and private entities which include MNCs to ensure allowable levels of GHG as prescribed by regulations to be determined as stipulated in the Act.[29] Kenya also committed to reduce release of GHG by thirty per centum (30%) by the year 2030 as per its Intended Nationally Determined Contribution.[30]

This thesis posits that there should be a zero tolerance on gas flaring as captured in the Norwegian 'ten oil commandments' as the phenomenon is still being witnessed in Turkana County on account of oil production . The flaring of gas also results in the development of rain that is highly acidic which harms both marine and plant life alike. Acid rain has been seen to be formed as consequence of sulphur dioxide combining with water present in air. The same result of formation of acid rain has also been witnessed where nitrogen oxide is present instead of sulphur dioxide.[31]

The current government reports as relayed by the Human Rights Watch indicate that there has been a rise in the cumulative average temperatures in Kenya and which includes Turkana County. It has been observed that the air temperature has increased by 2 and 3°C, the former representing the minimum and later the maximum air temperatures respectively between the years 1967 and 2012.These temperature increases are higher than in the global scene which has recorded a mean temperature increase of approximately 0.8°C as observed in the last one hundred years.[32] This should sound an alarm for key stakeholders to deliberate on preventive measures before the situation becomes irreversible. There should be a drive for massive tree planting in the area as trees act as carbon sinks to mitigate the effects of climate change. However, there has been no major action from the key stakeholders.[33]

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[28] Section 5 of the Climate Change Act, 2016.
[29] Section 17(1)(c) of the Climate Change Act ,2016
[30] The Ministry of Environment and Natural Resources, Kenya's Intended Nationally Determined Contribution,23rd July 2015.also https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Kenya%20First/Kenya_NDC_20150723.pdf last accessed on 18th November 2020.
[31] Ajugwo, Anslem O. "Negative Effects of Gas Flaring: The Nigerian Experience." *Journal of Environment Pollution and Human Health* 1.1 (2013): 6-8 available at http://pubs.sciepub.com/jephh/1/1/2/# last accessed on 2nd August 2019.
[32] Human Rights Watch Website,' There is no time left, Climate Change, Environmental Threats and Human Rights in Turkana County, Kenya, 'available at https://www.hrw.org/report/2015/10/15/there-no-time-left/climate-change-environmental-threats-and-human-rights-turkana last accessed on 4th August 2019.
[33] Leopold Obi, 'Climate Change driving oil rich Turkana to the brink', Daily Nation Newspaper pp.26 -29.

To appreciate the gravity of the situation one has to look at how this issue of gas flaring is currently affecting countries which have been in the oil exploration industry for a longer time than Kenya such as Nigeria. Nigeria began crude oil exploration in the 1950s but ultimately had to ban the gas flaring practice in the year 1984 due to the immense negative effects on the environment such as increase in soil temperature and destruction of crops.[34]However, to date despite the ban it has proved to be a herculean task for the government of Nigeria to enforce the ban as most of the involved companies choose to settle imposed penalties that are economically cheaper than the option of injecting gas back to the oil fields and averting the effects of climate change being felt in different parts of world.[35] This compounded with corrupt government officials as well as the reliance on the exploration of oil as a revenue generation stream for the country has made the enforcement of the ban next to impossible. This could be situation in Kenya should adequate safeguards not be put.

1.2.2.3 Interference with Ecosystem Services

Ecosystem services refer to the advantages that human beings enjoy as a result of a well-balanced and healthy environment. These services include the provision of food, fresh water, and wood as well as the support of soil formation and nutrient cycling. The services further enhance the regulation of the climate and keeps diseases at bay whilst promoting aesthetic beauty of nature and spiritual needs of persons.[36] Indeed, ecosystem services have for a long time been linked to the well-being of a human being. The Draft 2020 EIA on South Lokichar area recognizes that the oil production activities would affect the vegetation present in the arid and semi-arid areas which hinder desertification and the vegetation does provide for food, forage for their animals. The Draft 2020 EIA in South Lokichar further recognizes that a project ought to strive to maintain the proper functioning of an bionetwork so that there exists a balance in nature.[37]The reported felling of trees and clearing of vegetation make the land susceptible to soil erosion.

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[34] Deutsche Welle website, 'Gas flaring continues scotching Niger Delta' available at https://www.dw.com/en/gas-flaring-continues-scorching-niger-delta/a-46088235 last accessed on 2nd August 2019.

[35] Ibid

[36] Millennium Ecosystem Assessment, 2005. Ecosystems and Human Well-being: Synthesis. Island Press, Washington, DC. Preface, pp vi.

[37] Draft Environmental and Social Impact Assessment Report on the Foundation Stage of the South Lokichar Development for Upstream Oil Production in South Lokichar,pp.6-169 to 6-183

1.2.2.4 Water Pollution and Scarcity

The Draft 2020 EIA of South Lokichar area recognizes that the oil production process has the capacity to interfere with water courses due to the discharges and waste releases into the adjacent waterways due to waste storage and disposal. There are suggested mitigating measures in the EIA such as the monitoring of the water quality in areas near the Turkwel river as well as ensuring proper waste management through a developed plan. However, these initiatives by the company will only be effective if backed by national legislation which can hold them to account for any incident of pollution.[38]

1.2.2.5 Need for more stakeholder Engagement on Environmental Impact Assessments

On the issue of Environmental Impact Assessments (EIA) being carried out in the specific blocks of oil exploration in Turkana County, there is sufficient evidence to show that the same was carried out as a matter of procedure only and was done as an afterthought after the exploration of oil had already began.[39] However since then, several EIA reports have been released for specific blocks that seek to highlight the various environmental and social concerns and how the concerned companies intend to mitigate the effects. The latest report being a Draft 2020 EIA of the Blocks 10BB and 13T for the upstream oil production in South Lokichar.[40]

However, despite these documents being available in Tullow Oil website for review, and even in the 'Kiswahili' language, the Turkana community is also largely unaware of the existence or contents of some of these environmental reports nor do they have substantial background and knowledge on preservation of natural assets due to illiteracy levels and lack of computer know how to access the documents which makes it hard to question any findings indicated thereon once in the stakeholder engagement avenues.[41] However, the duty is upon their elected leaders to familiarize themselves with the said documents so that there is meaningful public participation in the organized forums of engagement with stakeholders.

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[38] Ibid pp.NTS-15

[39] Shitemi Khamadi, Environmental Impact of Tullow Oil Drilling a Mystery see also http://www.shitemi.com/extractive-industry/environmental-impact-of-tullow-oil-drilling-a-mystery/ last accessed on 26th September 2019.

[40] Tullow Oil website, also https://www.tullowoil.com/our-operations/africa/kenya/environmental-social/ last accessed on 18th November 2020.

[41] Ibid

The involved multinationals also need to foster more stakeholder engagement if they are to get the community's 'social license to operate' in order to circumvent falling prey to the bias of the Shareholder Primacy Theory which presupposes that the directors of a company have to prioritize interests of shareholders above other stakeholders who are keen on the overall the performance of a given going concern. This theory gets its backing from the fact that shareholders are the persons who grapple with the risk of their investment owing to having shares in the company.[42]The case of *Dodge v Ford Motor Company*[43], espoused that the Company's directors have an onus to perform acts and make decisions which ultimately benefit shareholders. They are further required to make decisions that would not in any way lead to a reduction of profit thereof. The case of Hutton v West Cork Railway [44]echoed the sentiments of *Dodge v Ford Motor Company case* as the court went on to state that CSR activities or what the court termed as 'charity' had no room in boardrooms and the spending of the company based on charity purposes should be done in line with the business of the enterprise.

It is against this background in mind that emerging and developing economies such as Kenya need to be wary of the influence of MNCs and put adequate safeguards in place.

1.3 Statement Of The Problem

From the analysis of the various environmental problems highlighted above, there is a pollution problem and/or a potential pollution problem associated with the lack of a compulsory legal framework at the internationally to check on activities of MNCs with regard to natural resource management.

Secondly, despite Kenya having a wide array of laws available to manage natural resources in a bid to protect the environment from actions of MNCs, there seems to be insufficient enforcement of the already available ones. For instance, The Petroleum Act, 2019 is yet to have several guidelines enacted such as the ones on oil spill response, gas flares and the decommissioning processes to enable its proper operationalization. Further, the relevant laws and regulations that

[42] Vasudedev, P.M.(2012) "The stakeholder Principle ,Corporate Governance ,and Theory :Evidence from the Field and the Path Onward," Hofstra Law Review: Vol. 41:Iss. 2,Article 6,pp. 401
[43] 170 N. W. 668 (Mich .1919).
[44] [1983] 23 CH. D.654 (Eng.)

seek to aid in the management of natural resources are still in 'draft' form and are unable to have any legal force.[45]

There is also a lack of capacity at the county level and proper co-ordination between the two levels of government. This thesis will focus on a discussion on the adequacy or inadequacy thereof of the laws governing protection of the environment due to actions of multinational corporations in Kenya and more specifically Turkana County. The study will delve into and analyze issues such as policy and legislative adequacy, institutional capacity as well as enforcement difficulties in the International, National and County government level.

1.4 Justification Of The Study

This work is justified because although there is a number of literature on the topic of MNCs and their industrial interactions in developing countries, there is scarcity of literature that relates to the effect of their industrial activities to the environment in Kenya and more specifically Turkana County. The study will seek to analyze and look at the sufficiency and efficacy of the legislative framework governing activities of MNCs together with the administration of natural resources in Turkana County.

This research is important as it will evaluate the realization of the right to a clean and healthy environment as guaranteed in the Constitution of Kenya (COK)[46]can be realized in the wake of operations by MNCs alongside other important issues in oil and gas production namely transparency initiatives and incorporation of local content (LC) provisions. Additionally, this research is important because it will serve as an eye opener to various government institutions currently charged with management of the environment to formulate relevant policies which shall serve to ensure that the environment is protected at all times and especially from environmentally unfavorable actions of MNCs as well as establishment of avenues for cooperation amongst all levels of government.

[45] See the Draft Public Participation Bill,2019,the Draft Environmental Management and Co-ordination (E-Waste) regulations, Draft Sovereign Wealth Fund Bill(2019),Draft (Local Content),Regulations ,2019,Draft Environmental Management and Co-ordination(Toxic and Hazardous Industrial Chemicals and materials management) Regulations (2018), Draft Environmental Management and Co-ordination(Strategic Assessment, Integrated Impact Assessment and Audit)Regulations (2018), Draft Environmental Management and Co-ordination(Conservation and Management of Wetlands)(Amendment Regulations (2017).

[46] See Article 42 of the Constitution of Kenya and Section 3 of the Environmental Management and Co-ordination Act, 2019.

Finally, the result will be that Kenya will be counted amongst one of the countries which has made impeccable strides in upholding the SDGs and consequently contribute to sustainable development through efficient utilization of products of the ecosystem for use by future generations.

1.5 Objectives Of The Study

These are outlined as follows;

a) to evaluate the sufficiency or otherwise of international, national and county legal and regulatory framework for natural resource management by MNCs in the oil and gas industry;

b) to examine how other developing and developed countries have regulated key inadequacies identified in natural resource management because of MNCs activities operating in the oil and gas industry ; and

c) to propose solutions to inadequacies exhibited in various legislation that will have been identified.

1.6 Research Questions

The thesis will provide responses to the outlined questions:

a) What are the strengths and weakness of the current international, national and county legal and regulatory framework on natural resources management by MNCs in the oil and gas industry?

b) How have some of the key challenges identified in natural resource management by MNCs in the oil and gas sector been addressed in developing and developed countries?

c) What solutions can be fronted to address the inadequacies in the legislation.

1.7 Theoretical Framework

Positivism

Firstly, the positivist school of thought as propounded by HLA Hart analysis the relationship that between the law and morality and makes the conclusion that most legal rights and duties may be observed without reference to morality.[47] Ronald Dworkin on the other hand criticizes Hart's theory by describing it as 'under inclusive'[48]and underscores Hart's Theory which focuses on mainly legal rules that do not consider customs of a people and their concepts in decision making. However, in this research, the theory of positivism will be applicable because the laws governing natural resource management are recognizable and have been reduced into writing. These laws in addition to the COK form the foundation of upholding the right to a hazard free environment by all citizenry. Laws create and obligation on persons to obey and perform all matters specified in them and this obedience should not be pegged on any moral justification. A critical look at the criticism fronted by Dworkin is not applicable in this instance as maintaining the observance /performance of the laws should not be based on other circumstances other than the law. Further, positivism is a philosophy that ensures that the researcher uses a structured methodology to prove or disprove certain hypothesis. In this sense, this philosophy would be highly applicable in the research herein and shall be considered the underlying theory of this thesis.

1.8 Methodology

The research will be carried out by using qualitative data collection which will involve documentary review where secondary data will be obtained as the main source of data connection.

This research will focus on library and internet research of relevant policy documents, books, journal articles, research papers, committees report and presentations, newspaper articles and internet sources. The data will be collected mainly from the World Bank reports and the United

[47] HLA,Hart The Concept of Law (Oxford Clarendon Press,1994 pp.268
[48] James Donato 'Dworkin and Subjectivity in Legal interpretataion'40 Stanford Law Review 1517(1987-88)

Nations Environmental Programme additional websites including databases with relevant information.

This type of methodology is suitable for this type of research as it will assist in answering the research questions which will require an analysis of the guidelines /codes governing the regulation of MNCs and laws and policies of different jurisdictions as the basis of case study on the best practices available.

1.9 Literature Review

A lot of literature is available on the interaction oil exploration MNCs and all this literature points to two major issues. Firstly, is the enforcement difficultly faced by victims of environmental harm and secondly, is the insufficiency of the legislative framework in host countries to give reprieve to environmental degradation which occurs as a consequence. The literature herein is going to highlight what various scholars have posited with regard to the enforcement difficulty against MNCs as well as literature on salient environmental management issues that have arisen because of the oil exploration activities in Turkana County.

This study has reviewed literature under five major themes to wit the regulation of the entity known as the MNC, the MNC and corporate liability, the MNC and the conservation of the environment, here the right to a uncontaminated environment, the MNC and Transparency and Accountability initiatives and lastly the MNC and Local Content provisions will be considered.

1.9.1 Regulation of the MNC

It cannot be gainsaid that the regulation of the MNC as an entity has been problematic to say the least especially when one explores environmental conservation. It is even a worse problem when the countries in which MNCs operate in are either lacking in appropriate legislation or where the available legislation is not easily enforceable either by being ambiguous or the lacking in the will to enforce the said legislation by enforcement authorities.

Peter Newell, (2001) recognizes that despite MNCs or Transnational Corporations (TNCs) spearheading development, it has proved to be a herculean task to regulate them both at the national and international arena. He coins it as a situation of '*power without responsibility*' where the global power and influence of MNCs is not parallel to regulation meted by the host

nation. The article cites three major avenues of regulation whilst critically analyzing the pros and cons of each method. Firstly, is the issue of formal regulations. This type of control has been used to ensure compliance in various sectors seeking to safeguard the environment. However, the same has not been effected against MNCs because of the absence of an international code for regulation of their activities. The country playing host to the MNC has been left to regulate its activities with the MNC already on its land, which usually presents a big challenge.

Secondly is the issue of civil regulation which is a method that has been adopted by civil society organizations seeking to hold MNCs accountable. However, this method has one disadvantage as most of the time, the focus is usually on one MNC hence many other polluting MNCs may escape the compliance net as the method has limited application.[49]The third approach is that of litigation which is an approach geared at making the MNCs accountable. This is because cases encourage positive reform. This can be seen in the Bhopal gas leak disaster case[50] where governments are now keener on the impact on the activities of the MNC on the environment and increasingly require the disclosure of any activities that would harm or have the potential of harming the environment.

However, litigation has had its challenges by been viewed as a costly affair especially where a community has been affected by environmental harms and they are expected to raise money for court filing fees and other incidental costs like lawyers costs. The ignorant victims of environmental harm may also lack understanding of the processes and fall victim to unethical legal personnel who may want to take advantage of their ignorance. One legal hurdle would be the doctrine of *'forum non convenience'* which has been a tactic used by defendants which position is usually held by MNCs, to claim that the forum where the case has been filed is not convenient where there is no option of another forum. This allows MNCs the leeway to continue forum shopping to the great disadvantage of the plaintiffs who are usually the victims of environmental harm caused by activities of MNCs.[51]

Michael Ewing Chow (2009) has recognized the fact that the world is considered a 'global village' where actions that harm the environment in one country can have its effects felt in

[49] Newell P,2001,Managing Multinationals: The Governance of Investment for the Environment,pp.908
[50] Union Carbide Corporation vs Union of India 1990 AIR 273, 1989 SCC (2) 540
[51] Ibid pp. 916

another country/state. He coined it thus that places are interconnected, take for instance the case of climate change. This phenomenon was what spurred the development of Environmental Law as we know it today. He takes the reader through the various development ages in the area of environmental law which he has divided into three. The first age was the age of creation of environmental laws domestically by states, then bilateral and regional legislation followed to our current situation which is deemed to be a compliance era where states are now being pushed to comply with the environmental regulations already in place.[52]

Ewing just like Newell above suggests other avenues for the control of MNCs. These include the use of other laws such as tax, investment and trade law. He is also for the creation of an international regime which mainly fosters self- initiative from the MNCs themselves to protect the environment. Ewing proposes the employment of use of the levers of *pain*, *gain* and *shame* to influence how a corporation will act. A corporation is inspired to make a change if it suffers some sort of loss/pain on its account. Trade restrictions have been highlighted in the article as one of the ways in which the pain lever against corporations has been employed in a bid to protect the environment.[53]

The classic Tuna[54] and Shrimp[55] cases offer great examples where the use of restrictions which checked the use of fishing methods that deplete the amount of dolphins in the sea in the former case and equivalent standards similar to those applicable for Shrimp fishing were recognized in other jurisdictions. The concept of EIA also fits squarely through this lens as this tool is used as a devise to enable a country ascertain the likely environmental impacts to the environment. A critical look at the use of this tool has been captured by Ms. Ayugi Rose J's thesis '*Environmental Impact Assessment as a devise for the Protection and Management of the Environment: A study in Comparative Perspective' (1995),* where she captures EIA as a tool which if employed well can provide information to host countries by enabling them cater for the

[52] Ewing Chow Michael and Soh, Darryl(2009) "Pain ,Gain or Shame: The evolution of Environmental Law and the Role of Multinational Corporations ,"Indiana Journal of Global Studies :Vol 16:Iss,1 Article 7
Available at :http//www.repository.law.indiana.edu/ijgls/vol16/iss1/7
[53] Ibid
[54] Report of the Panel, United States – Restrictions on the Imports of Tuna ,L/5198 (Feb. 22,1982),GATT b.i.s.d (29th Supp.);Panel Report, United States -Restrictions on Imports of Tuna ,WT/DS29/R(June 16,1994)(unadopted)
[55]Appellate Body Report ,United States - Import Prohibition of Certain Shrimp and Shrimp Products ,WT/DS58/AB/R (Oct. 12 ,1998) (ADOPTED Nov 6,1998)

specific necessities of their country for investment and securing the future of future generations.[56]

Florian Becker et al (2019) in their article '*MNC's corporate environmental responsibility in emerging and developing economies*' emphasize the move from over reliance on the pollution haven hypothesis and lay emphasis on weak institutions and institutional voids as the main cause of lack of enforcement of environmental regulations against MNCs. The pollution haven hypothesis as described by Aliyu (2005) may be discussed in three main ambits. Firstly, most of companies with a high propensity to pollute the environment will move to developing countries with either fragile environmental regulations or where the existing regulations are not adequately enforced in order to reap profits. The second aspect is seen in the disposal of oil exploration waste which maybe hazardous. The third aspect of this hypothesis occurs when there is uncontrolled extraction and use of natural resources with fast diminishing deposits present in non-developed countries at the expense of both the environment and future generations.[57] The article further cites that these institutional voids being referred to are either the lack of formal rules or a deficit in the implementation measures which is the situation in many developing countries like Kenya.

Dennis Rondinelli (2007) argues in part that MNCs have a duty to prepare reports concerning effects of their activities with regard to the environment in an effort to achieve Sustainable Development Goals (SDGs). However as it turns out, most of the reports are usually done to cover up any practices that are harmful to the environment. This is thought out to be because these MNCs do not have long term commitments with the communities in which they operate.[58]

Evans Osabuohien et al. (2015) in their article analyse three issues to wit; trade, energy and MNCs which they coin with the phrase 'Tripod' as being important for economic growth of any developing country. Trade immensely facilitates Foreign Direct Investment and ensures labour is procured from the community. The presence of MNCs in a country together with energy

[56] Ayugi Rose,2009 ,Environmental Impact Assessment as a devise for the protection and Management of the Environment :A study in Comparative Perspective pp. 51

[57] Aliyu Mohammed Aminu, Foreign Direct Investment : the Pollution haven hypothesis revisited, Paper prepared for the Eight Annual Conference on Global Economic Analysis, Lübeck, Germany, June 9 - 11, 2005,pp3

[58] Dennis A. Rondinelli, (2007) "Globalization of Sustainable Development: Principles and Practices in Transnational Corporations", Multinational Business Review, Vol. 15 Issue: 1, pp.1-24, https:// doi.org/10.1108/1525383X200700001 pp.1-3.

production contributes to development. They further note that the Tripod does indeed contribute to environment pollution through carbon emissions through increase of greenhouse gases in the air.[59] This situation can only be remedied through co-operation between the MNCs and environment protection institutions in the host state. This position is supported by Commons Jr in his article 'Institutional Economics' where he calls for collective action to be used to control and liberate individual action. This means that institutions that are entrusted with safeguarding the environment have a role of monitoring and restraining excesses of activities of the Tripod that are the probable cause of environmental degradation.[60]

Gilbert Nyamweya (2011) in his thesis, '*Integrating Environmental Management in the Direct Foreign Investment Regime within a Sustainable Framework'* discusses the issue of MNCs accountability by exploring various principles under International Law and how those principles conflict with sustainable environment management. One such principle that was highlighted is '*the fair and equitable treatment standard'*. He defines this by referring to it as the ability of a legal framework to be effective which would allow MNCs to advance the operations in a host state without any interference from a host state. This principle he says has been enshrined in various Bilateral Investment Treaties (BITs) which curtails any form of regulation with regard to the activities of the MNCs on the environment from the host states going against most environmental principle. He discusses the issue of regulation of MNCs activities on an International Forum. This thesis will look both globally and locally to fill in the gaps of what Kenya should do in terms of regulatory compliance.[61]

1.9.2 MNCs Corporate Liability

Amanda Perry-Kessaris, (2010) in her article '*Corporate Liability for Environmental Harm'* demystifies the definition of MNCs and proposes them to be seen as more of objects of International Law and not its subjects. She supports this position because the MNCs state of origin advocates issues on their behalf. Human beings can be liable for not upholding human rights. However, it is a challenge to hold MNCs accountable through the same moral compass.

[59] Evans Osabuohien, Uchenna R. Efobi, Ciliaka M. Gitau, (2015) "Environment challenges in Africa: further dimensions to the trade, MNCs and energy debate", Management of Environmental Quality: An International Journal, Vol. 26 Issue: 1, pp.118-137, https://doi.org/10.1108/MEQ-04-2014-0058.
[60] Commons Jr, (1931) 'Institutional Economics,' American Economic Review, Vol.21 pp.648-657.
[61] Gilbert Nyamweya Omoke, (2011) 'Integrating Environmental Management in the Direct Foreign Investment Regime within a Sustainable Framework' pp.4, 35-36.

This position is supported by Bakan J (2004) where he terms corporations as being selfish creations which are immune to feelings of others and therefore unable to take responsibility for wrongs perpetuated by them.[62]

Amanda further notes that MNCs are mostly driven by the principles of profit maximization and shareholder value which makes it difficult for these MNCs to place environmental protection on a higher pedestal than reaping profits for their shareholders. This essentially means that MNCs are concerned with increasing shareholder value which emanates from increase in revenue. MNCs can only do this by cutting down costs which would mean that they employ the use of inferior technology in developing countries in their bid to run their operations. Amanda agrees with Newell above that MNCs are able to influence host states and their environmental regulation institutions due to their financial muscle and advanced technology.[63]

Amanda has also discussed the legal hurdle of *forum non convenience* by highlighting a case which allowed a victim of environmental harm to attain justice in a foreign court regardless of the fact that the remedies available to the victim in their home country were not exhausted. In the case of *Sarei vs. Rio Tinto Plc. et al,*[64] the Court entertained an action by former residents of Papua Guinea to institute proceedings against a British MNC named Rio Tinto Plc. which had been accused of dumping mining waste which caused water contamination in Guinea.

Abdulai Abdul-Gafaru, (2006) provides a contrasting view which echoes the view of writers who dissent with the view that MNCs contribute to the pollution haven hypothesis discussed above. He argues in part the position taken by the dissenters where they claim that MNCs are not any better or even worse at protecting the environment because there is evidence that MNCs have been involved in fewer environmental violations compared to companies incorporated in host states. However, he quickly counters this argument by stating that the fact that there are few reported instances of environmental harms perpetrated by MNCs does not absolve MNCs from the overall responsibility of protection of the environment. This is because MNCs have the

[62] Bakan J, (2004), ' The Corporation: The Pathological Pursuit of Profit and Power, New York: Free Press.pp.56-57,60.
[63] Amanda Perry-Kessaris, (2010), Research Handbook on International Environmental Law, edited by Malgosia Fitzmaurice et al.pp.1-19.
[64] Sarei et al-vs- Rio Tinto Plc et al 9th US Circuit, Court of Appeals, No.02-56256.

financial muscle to use superior technology to avoid environmental harms and promote sustainable development as compared to nationally incorporated companies.[65]

Dr. Kariuki Muigua (2018)[66] comprehensively writes on MNCs and their role in natural resource management in Kenya. He discusses an important issue of state sovereignty over natural resources control over which he says has been diluted by the fact that most MNCs take advantage of weak legal regimes and use their financial might to enter into disadvantageous contracts that do not guarantee complete protection of the environment due to activities from MNCs. His assertion further supports the sentiments of most of the writers in this literature review. While this thesis will discuss the regulatory regime for control of activities by MNCs hazardous to the environment, it will also explore the role of MNCs in a bid to attain sustainable environmental organization and safeguarding the right to enjoy an environment free of pollutants. Further, it will review best practices available in both emerging and developed economics to provide a model to analyse and configure to our Kenyan situation.

Hosseini Moghaddam et al. (2017) in the article '*Responsibility of Multinational Corporations on Environmental Issues'* approaches the issue of regulation of activities of MNCs through the lens of protection rights due to the human being.[67] It cannot be gainsaid that the enjoy a clean ecosystem is a basic human right, in fact, MNCs are tasked with the onus of observing basic liberties due to persons albeit currently captured under soft law instruments.[68]

1.9.3 Multinational Corporations and Protection of the Environment

The oil and gas production requires protection of the ecology and this is important fundamentally because the activities associated with oil exploration give rise to various environmental ills. The oil exploration process is mainly been divided into three areas to wit the upstream,[69] midstream

[65] Dicken, P. (1998) Global Shift: Transforming the World Econom,3ed ed. (London Chapman)pp.250.
[66] Dr Kariuki Muigua, (2018),'Multinational Corporations, Investment and Natural Resource Management in Kenya,' pp.9-10.
[67] Hussein Moghaddam, Mohsa & Zare, Ali. (2017). ' Responsibility of Multinational Corporations on Environmental Issues.,Journal of Politics and Law.10.78..10.55539/jpl.v10n5p78.pp.81-84.
[68] Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises(2005) pp.14.
[69] Petroleum Act,2019 Definitions section 'Upstream petroleum operations' means all or any of the operations related to the exploration, development, production, separation and treatment, storage and transportation of petroleum up to the agreed delivery point
'Midstream petroleum operations' refer to operations related to petroleum transportation, storage, refining operations, or natural gas processing operations on several development areas as well as operations for turning into liquid of gas.

[70]and downstream [71]production areas. There different challenges in natural resources management due to activities of multinationals at every phase of oil exploration and therefore the legal and regulatory regime needs to be able to address the issues effectively for to attain efficiency in the system.

The Draft Policy Framework for the Extractive Industries in Turkana, 2018 has analyzed in detail the various issues currently facing the sector to include revenue volatility and transparency, contract transparency, hazardous waste management, interregional conflicts, water crisis, as well as local content policies in Turkana County. On the issues affecting the environment specifically such as hazardous waste management, there is some form of laxity in enforcing available legislation. [72]

As per the draft policy, there seems to be a lot of toxic waste oil generated waste from the whole exploration process whose disposal is worrisome. Typically, hazardous wastes should be treated with caution. There is also a feeling that the same should not be recycled as is being done by Tullow's subcontractor Environmental Combustion Consultants Limited (ECCL).[73]Another concern with regard to waste management is that the communities involved feel that there was no public participation when the location of the specific dumpsite was chosen to wit Kangpetei area which they feel was a good area for grazing their livestock.[74] This goes to show that public participation is an important aspect of the process if conflicts are to be arrested before they erupt.

The Constitution of Kenya guarantees the right of use of fresh and hygienic water and in sufficient quantities to every citizen as part of the socio-economic rights of the person.[75]However, the realization of this right has become more of a pipe dream given that water is a scarce resource and is a recipe for conflict once exploration properly begins to take place and this is because water is usually a requirement in the oil exploration process whilst the environmental governance machinery have not made any concrete plans to address this

'Downstream petroleum operations' refers to operations related to distribution of petroleum to various customers.
[70] Ibid
[71] Ibid
[72] Supra note 16 pp 5-8
[73] Ibid
[74] Pastoralist Development Network of Kenya - Turkana Chapter, April 2018 'Triggering the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) in the Context of Oil Extraction in Kenya's Turkana County :A Case Study' pp.3
[75] Article 43(d) of the Constitution of Kenya.

availability resource for use. The enforcement mechanism at the county level is also wanting starting with the unavailability of policies to guide the relevant officers on various environmental management issues.

1.9.3.1 Environmental Degradation as a Reality not Fiction

According to the National Environment Management Report 2010, global warming and climate change are seen as serious threats in our time enough to affect sustainable development. The effects are far reaching and includes unpredictable weather patterns and rise in temperatures that have caused the thinning of mountain glaciers such as Mount Kenya. Having in place a Climate Change policy plan and the Climate Act 2016, one would anticipate robust efforts in terms of combating the said phenomenon.[76] It therefore a disservice to Turkana County and Kenya as whole for us to have a policy addressing the climate change phenomenon yet facilitate activities that add onto the said phenomenon.

Globally, according to reports on assessment of the ecosystem, there is a solid relation between ecosystem services which include climate and flood regulation and the well-being of a human being. The report significantly notes that there has been a lot of change in the ecosystem due to human activities due to demand for food and fuel. These strides are seen as gains but there is an equal effect on the environment which causes it to degrade and hinder the realization of the Millennium Development Goals which encompass protection of the environment for sustainability.[77] It is therefore the onus of different state actors charged with protection of the environment in collaboration with various entities including MNCs to lay out adequate legal framework to mitigate the harmful effects of ecological degradation.[78]

Polly Higgins was a staunch supporter and campaigner for climate change and advocated for the crime of ecocide[79] to be included in International legal documentation specifically being the

[76] National Environment Management Report, 'Kenya, State of Environment and Outlook, 2010, supporting the delivery of 2030'.pp.12

[77] World Health Organization Website also see https://www.who.int/topics/millennium_development_goals/about/en/ last accessed 27th September 2019.

[78] Millennium Ecosystem Assessment (2005) Ecosystems and Human Well Being: Biodiversity Synthesis, World Resources Institute, Washington. DC pp.1 also see htttp://www.maweb.org/documents/document.354aspx.pdf (last accessed on 11/10/2019)

[79] Refers to extensive damage and destruction of or loss of ecosystem(s) over a given territory whether by human agency or by other causes to such extent that peaceful enjoyment by inhabitants of that territory has been severely diminished.

Rome Statute which is the governing statute for the International Criminal Court (ICC).[80] Her main question in her proposal was whose duty was it to take care of the earth? Indeed there needs to be a shift of thought from putting the human being on a pedestal over all other living things existing in nature as the laws as they are need to be drafted in a way that is mutually beneficial to all organisms that occupy the earth.[81]

In her proposal, she cites weak compliance of available legislation and voluntary compliance by actors in the environmental damage debate as one that has proved inefficient. For instance reporting by corporations with regard to compliance with environmental regulations is usually a requirement in most national laws. However this is rarely done, in fact there is evidence to suggest that corporations allied to United Nations Global Compact Initiative are non-compliant with the obligation to report environment damage as required.[82]The directors of foreign corporations which includes MNCs should be held responsible and this can only be done through proper legislation.

1.9.3.2 MNCs and Infringement of Human Rights

Infringement of human rights by MNCs especially in the oil and gas exploitation business can best be summed up by the thoughts of Harper C. L. who attributes MNCs actions as being responsible for various environmental ills by engaging in unfavorable practices and especially underscores the effect of Texaco which was an MNC in Nigeria as being responsible for most environmental harms after dominating the industry there for more than a decade.[83]

Human rights violations usually take place because of lack of relevant laws to protect against these violations and secondly laxity in the enforcement of the available legislation or both. Human rights violations are far and reaching and include issues such as discriminatory labour practices to violations of environmental standards in the host country and oppression of minority groups. In such an environment, the protection and upholding the need to have a healthy environment becomes key in all activities of an MNC operating the oil and gas sector.

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[80] Jojo Mehta, Polly Higgins Obituary, the guardian.com/environment/2019/Apr./25/polly-higgins-obituary.See also Polly Higgins et al, protecting our planet: a proposal for ecocide.

[81] Cullinan, C. (2010) Earth Jurisprudence: From Colonization to Participation. In World Watch Institute (Ed) State of the World 2010, transforming cultures.

[82] Huisman, W (2010). Business as Usual, Corporate Involvement in International Crimes, the Hague Eleven International Publishing.pp.59.

[83] Harper ,C.L. 1996,'Environment and Society :Human Perspectives in Environmental Issues' pp.373

1.9.3.3MNCs and the Human Right to a Clean and Healthy Environment

Through the doctrine of company conscience, it behoves MNCs operating in host countries to guarantee that the actions of their businesses are aimed at conserving the environment. Host states in which MNCs operate make the effort to have laws that restrict environmental degradation and even though most countries have enshrined this right to a clean and healthy environment in their supreme law to wit the Constitution, the realization of this right because of acts of negligent acts of MNCs curtail the right from being realized.

The concept of human rights is as old as humanity itself. These are rights that accrue to a person by virtue of being human. Different writers refer to human rights differently, some as 'basic rights', and others as 'natural rights'. [84]As years went by there has been general acknowledgement of rights due to an individual by virtue of being a human being from as early as the Magna Carta of 1215 to the current international conventions for protection of various human rights.[85]

Human rights can be categorized into three categories, to wit, first, second and third generation of human rights.[86]First generation rights are referred to as civil and political rights which represents rights an individual can claim fulfilment from their state. These comprise, amongst others the right to life, freedom of speech, freedom from slavery, equality in the eyes of the law and the right to a fair trial. Second generation rights are also referred to as socio-economic rights and include rights, to wit, right to food, education, housing and medical care.[87]

Environmental rights fall in the third category of rights referred to as third generation rights. The human right to a clean and healthy environment has further been classified into substantive and procedural environmental rights. Substantive environmental rights denote a right to the environment in a certain condition .These are covered under various legal statutes and refers to how the environment is viewed. Most of the statutes employ the use of the words 'safe',

[84] Kaur, Gagandeep and Pawar, Rajinderjit Kaur, Tracing the Footprints of Human Rights from Natural Law to 21st Century (November 13, 2018). Available at
SSRN: https://ssrn.com/abstract=3283948 or http://dx.doi.org/10.2139/ssrn.3283948
[85] Ibid
[86] Karel Vasak, "Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights", *UNESCO Courier* 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977
[87] See articles 22-28 of the Universal Declaration of Human Rights

'healthy' or 'clean'.[88] Procedural environmental rights refer to steps that have been taken to achieve the realization of environmental rights[89].The right to information, [90]right of public participation[91] and the right to access justice are some examples of rights that fall under this category.[92]

The human right to an unpolluted environment is currently enshrined in many constitutions and legislations in the world[93] and has been espoused in various declarations since the time when activities around environment protection began in earnest.

The 1972 Stockholm Declaration ("the Stockholm declaration") on the Human Environment is a non-binding document that serves as a benchmark to guide different states in addressing various environmental problems in the wake of development. The Stockholm declaration is made up of twenty six principles covering various aspects but most importantly the declaration put forth a basis for enshrining the fundamental right to a clean and healthy environment in various pieces of legislation by state parties. The declaration recognized that human beings are to be free of any form of slavery and should all be treated equally regardless of their diverse backgrounds in all facets of life while ensuring those fundamental rights are achieved.[94]

The principle of intergenerational equity is also a theme that runs in the declaration which is pivotal to the achievement of the right to a clean and healthy environment. This is seen from the recognition that natural resources to wit, air, water, land and flora as well as renewable resources and ecosystems are to be preserved with foresight of future generations.[95]

Pollution and sustainable exploitation of fossil energy in Turkana County forms the crux of discussion in this thesis. This was covered in the Stockholm Declaration where there was a call

[88] Unger Jason, (1971) Environmental Rights in Alberta Module 1,Substantive Environmental Rights; See also elo.ab.ca/wp-content/uploads/2016/12/EBR_MOB-1_Substantive-Environmental-Rights-in Alberta, pdf.
[89] UNEP Website, https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what last accessed on 20th October 2019.
[90] See Article 35 of Constitution of Kenya
[91] See Articles 118,12,201 and 232(d) of the Constitution of Kenya
[92] See Article 48 of the Constitution of Kenya
[93] See Article 42 of the Constitution of Kenya, 2010, Article 39 of Uganda's Constitution, Article 24 of South Africa's Constitution, Article 53 in the Constitution for the Democratic Republic of Congo and Article 14 in Equador's Constitution.
[94] Principle 1, 1972, Stockholm Declarations on the Human Environment.
[95] Principle 2 and 3, 1972, Stockholm Declarations on the Human Environment; See also 'Our Common Future', Brundtland Report Article 27-30 on definition of sustainable development.

for responsible exploitation of non-renewable resources of the earth so as to avoid depletion of the resource. There was a further call for protection of pollution above acceptable limits which would likely cause damage that cannot be undone to the environment.[96]

It has been argued that the 1992 Rio Declaration ("the Rio Declaration") did not come out clearly in espousing the right to a clean and healthy environment. The Rio Declaration's main focus was sustainable development where human beings were seen to be entitled to live a life in congruence with nature.[97] Hence, the discussion of the right to a clean and healthy environment was not adequately captured.[98]

The interpretation of the terms used in legislation with regard to the right to a clean and healthy environment presents a challenge as there is no clear cut position on what tenets are to be considered when one is analyzing what a healthy environment is. Dr. Kariuki Muigua in discussing this right opines that it has been hard to define the exact standard of measure of a clean and healthy environment as it has remained difficult to ascertain the point at which the right is said to have been infringed.[99]

In the case of *Martin Osano Rabera & Another -vs- Municipal Council of Nakuru and 2 Others [2018]eKLR.* The petitioners were residents of Nakuru County who were living near Gioto West disposal site and were not pleased with how the said dumpsite was being managed by the Respondents who included NEMA and the County Government of Nakuru. The petitioners sought a declaration that the 2nd and 3rd Respondents were abdicating their responsibilities which acts contravened Article 42 of the Constitution of Kenya 2010. The Petitioners sought a relief in the form of a declaration where they accused the Respondents of denying them the attainment of the right to a clean and healthy environment. The petitioners sought injunctive orders including a mandatory injunction to compel the 2nd and 3rd Respondents to restore the degraded dumpsite. The court declined to grant a mandatory injunction to stop the dumping of waste in Gioto dumpsite. Notably, the court recognized that the Petitioners right to a clean and healthy environment had been violated in the manner the Respondents had operated the dumpsite. However, the court cited that there was no alternative dumpsite should the Gioto dumpsite be

[96] Principle 5 and 6 of the Stockholm Declarations on the Human Environment.
[97] Principle 1, 1992 Rio Declaration.
[98] See Patricia Birnie et al,(2009) International Law and the Environment, Third Edition, pp.271.
[99] Dr. Kariuki Muigua, (2015) Reconceptualising the Right to a Clean and Healthy Environment in Kenya, pp.5.

closed. Therefore, despite the court acknowledging that the right to a clean and healthy environment had been infringed, the court declined to issue a mandatory injunction to compel the Respondents to stop dumping waste at the Gioto dumpsite. The Respondents had to also take several steps to remedy the situation so that this right could be realized. This case presents a situation where the right to a clean and healthy environment has been recognized but the same was not immediately afforded to the Petitioners as a matter of right which makes the realization of this right cumbersome in some situations.

Another case in which the realization of the right of clean and healthy environment is obscured is the case of *Powell and Rayner vs. United Kingdom*[100].This case centered on noise pollution caused by aircraft taking off and landing at the Heathrow Airport. The petitioners claimed an infringement of the right to privacy and home as a result of noise pollution which is an environmental harm. The Court refused to award the petitioners reliefs justifying its decision that the noise was necessary and that there needed to be a consideration of the rights of a person vis a vis that of the government while applying the principle of proportionality.

A contrast view is espoused in *Gbemre vs. Shell Petroleum Development Company and Others*[101]. This matter was presented by Mr. Gbemre as a representative of the Iwhereken community domiciled in delta area of Nigeria. The applicants applied to court seeking it to recognize their right to life and to be treated with dignity and in effect issue enforcement orders.[102]They cited contravention of the Africa Charter on Human and People Rights ('African Charter).[103]The Respondents in the matter operated as oil and gas companies in Nigeria which were involved in the processing of crude oil. The issue of contention was gas flaring which was causing pollution of air and the result being respiratory diseases, impaired health conditions of the residents, acid rain as well as climate change. The applicants claimed that the Respondents did not possess valid ministerial gas flaring certificate as per the law. Among other orders, the applicants specifically sought to have a relief that the selected sections of the Associated Gas Re-injection Act and Regulation that allowed continued gas flaring in Nigeria was an affront to their right to life and thus was a nullity and unconstitutional. The court held that the right

[100] 1989/163/219 Council of Europe, European Court of Human Right, 24th January 1990 available at http:/www.refworld.org/cases,ECHR,3ae6b7028.html.[last accessed 12th October 2019].
[101] Suit No. FHC/B/CS/53/05;2005 AHRLR151 (NgHC 2005)
[102] Sections 22(1) and (34) of the Federal Republic of Nigeria.
[103] See Articles 4, 16 and 24.

guaranteed under the country's Constitution included the right to a hazardous free environment and the Respondents actions were not consistent with this. The Respondents were ordered to stop their action of gas flaring and the Attorney General was directed to put in place mechanisms to amend relevant pieces of legislation so they are in consonance with what the Constitution provides. The above case provided a shift in reasoning because for the first time there was reliance on articles of the African Charter seeking recognition of rights owing to the human being in a bid to conserve the environment. Indeed various environmental law scholars have expressed the difficulties in arriving at consensus in defining and identifying the points of infringement of this right. However, one clear cut position is that every case is judged on its merits based on statutes and with the help of scientific evidence.[104]

In the Ogoni land Case[105], the Applicants who were two Non-Governmental Organizations presented a representative suit for the Ogoni people before the African Commission on Human and People's Rights where they claimed that Nigeria's government had gotten into a partnership with Shell Petroleum Development Cooperation for oil exploration activities which had led to environmental dilapidation which affected the environment and the well-being of the Ogoni land people. The two applicants argued violations of various articles of the African Charter encompassing the violations of various rights that are due to the person to offending the right to life, proprietary land rights and physical well-being and the freedom to manage their natural resources in a suitable environment.[106]The applicant argued that there was laxity in monitoring by the state of the oil exploration activities which resulted in grave pollution. There was also no full disclosure from the Government of Nigeria as to dangers of the exercise to the human beings and environment.

The African Commission on Human and Peoples' Rights held that the above listed articles of the African Charter had been contravened and directed the Nigerian Government to protect and assist in realization of these salient rights that are due to its people. The Commission suggested that this should be done through adequately compensating the victims of the harms caused by

[104] Supra note 7, pp.9.
[105] Communication 155/96, The Social and Economic Rights Action Center and the Center for Economic, and Social Rights/Nigeria. Also see http:// www.cesr.org/text%20files/nigeria.PDF For background information about the general human rights situation in Ogoniland, see SI Skogly, 'Complexities in Human Rights Protection: Actors and Rights Involved in the Ogoni Conflict in Nigeria', in 15 Netherlands Quarterly of Human Rights (1997), 47–60
[106][106] See Articles 2,4,14,16,18,21 and 24 of the African Charter on Human and Peoples Rights

Shell Petroleum Development Cooperation and ensure that and polluted land or rivers is cleaned up. The Commission further directed that there be transparency and adequate information to the residents of Ogoni area on the effects of oil exploration and that Environmental Impact Assessment was to be employed as an a tool to ensure environmental sustainability.

3.2 Multinationals Corporations and Transparency Initiatives

Transparency can be viewed in terms of revenue, contract and ownership transparency which is of of utmost importance. This enables the citizenry to appreciate the value of the natural resource and also keep a check on the government's spending of the money received from the exploitation of the natural resource.

The Draft Policy Framework for the Extractive Industries in Turkana, 2018 [107]has also highlighted this issue as a challenge seen in the county. It has been noted that confidentiality clauses are doing more harm than good as there is need for the citizenry to have a clear idea as to various issues such as who the beneficial owners of the MNC are, how much money in terms of revenue will go to the government, Does the national or county government have a stake in the ownership of the MNC? If so, how much? What is the nature of material that is to be reserved as confidential and why? The knowledge of beneficial owners of an MNC assist in curbing practices such as corruption and nepotism where oil blocks may be allocated to companies that are not suitably qualified for the task. This may lead to companies employing substandard technology that may not assist in the conservation of the environment. There is also no transparency by the MNCs on the nature of waste being churned out as a result of the various processes and the communities remain aloof of any dangers they could possibly cause. This information is not available to either the communities of Turkana neither is it fully available to the county leadership.

3.3 Multinationals Corporations and Local Content Provisions

It has further been highlighted through *The Draft Policy Framework for the Extractive Industries in Turkana*, 2018 that the issue of observance on the requirements of local content in Turkana County which is being done at a suboptimal level. There are still areas of improvement such as

[107] The Draft Policy Framework for the Extractive Industries in Turkana, 2018,pp 5

ensuring MNCs report on their progress in achieving various local content tenets. This can be achieved by MNCs ensuring that they cater for local procurement, employment, training and capacity building, research and development and well as enter into meaningful community development agreements whose main aim is to guarantee that the customs and traditions of the Turkana people are secured as well as the protection of the environment through joint partnership.[108]This should be done to avoid a situation in which the MNC is seen as an intruder just out to take advantage of the availability of the natural resource and once it is depleted, it moves on to another country.

The various writers acknowledge that MNCs operate in different countries under differing legal systems which situation could be a cause of conflict where one state has different rules compared to another. They go on to discuss liabilities of the main/parent companies. It is with no doubt that most MNCs in developing countries have parent companies based in other countries. They further discuss the limited liability theory where an affiliate company is considered to be independent from parent company due to the nature of its operations and structure. A victim of environmental harm may only be able to achieve justice from a litigious claim if they can show that the parent company materially controls and influences the processes of the affiliate enterprise situated in the host country. They note that in India the principle of strict liability for MNCs has been accepted and this should be adopted in other countries. It is therefore the onus of the parent company to ensure that the activities in the developing country are checked to align to the standards where the parent company is based. In concluding their article just like Amanda Perry Kessaris they acknowledge that MNCs are not to be viewed as subjects of International Law and consequently victims of dealing with polluted ecology may face hurdles in ensuring they receive justice. They suggest an overall uniformity of international regulations governing activities of MNCs as well as improving enforcement mechanisms of the regulations of host states. This literature review has further sought to highlight the situation of regulation of MNCs at the international level which has given evidence of prevailing gaps especially in respect of the lack of a mandatory legal mechanism.

The literature review has also highlighted the various issues under consideration such as the lack of transparency, local content provisions, and general conservation of the environment through

[108] Ibid pp. 15

the observance of the right pollution free environment. These issues currently plague Turkana County even in the midst of existing legislation that seeks to protect the environment from harmful activities of MNCs. This thesis shall seek to provide solutions especially in the Kenyan context by looking outward to other jurisdictions in order to remedy Kenya's regulatory regime.

10.0 Limitations

The limitations of this study will be characterized by the nature of research being carried out being qualitative research. Firstly, this type of research is highly subjective which means that the biases of the researcher will play a role seeing as the researcher will be expressing ideas on the subject as they perceive them.

11.0 Hypotheses

This thesis is grounded on the hypothesis that the lack of a binding International legal frame work for the regulation of the activities of MNCs especially in developing countries has contributed to various human rights abuses which include the right to a clean and healthy environment.

Secondly, the fragmented nature of Laws in Kenya seeking to protect against the environmental ills caused by MNCS as well as deficiency of enforcement mechanisms in the available laws makes it difficult to regulate MNCs activities.

1.12 Chapter Breakdown

1.12.1 Chapter 1- Introduction

This will contain the introduction to the thesis comprising of an elaboration on various themes including but not limited to the context that informed the study, statement of the problem, reasoning behind study, objects and the thematic research questions, comprehensive review of literature and the underlying hypothesis to the research. It will give the reader a summary of what to expect in the thesis.

1.12.2 Chapter 2 - Legal Framework Governing Activities of Multinational Corporations in the Oil and Gas Industry for Natural Resource Management in Kenya

This will specifically deal with the International, Regional, National and County codes and regulations that are available in Kenya for purposes of regulating the actions of Multinational Corporations especially with special prominence on conservation of the environment. The chapter will seek to establish the strengths and the gaps existing in the current laws and policies and the extent to which these laws are being implemented.

12.4 Chapter 3- Comparative Analysis

This research has been carried out in answer to the deficiencies in the Kenyan legal framework on this topic, it will entail a case study of the Federal Republic of Nigeria and the Kingdom of Norway in a bid to understand the strengths and weaknesses in both of their regimes particularly with emphasis on the legislation of actions of Multinational Corporations as a means to conserve the environment. In the conclusion to the Chapter, lessons learnt from the two regimes will be drawn.

12.5 Chapter 4- Findings, Recommendations and Conclusion

This will provide an evaluation of the entire thesis, report the findings and propose the most apt suggestions with the aim of enhancing the current laws in Kenya to address the various maters captured in the administration of ecological resources as a result of activities of MNCs

CHAPTER TWO

LEGAL AND REGULATORY FRAMEWORK GOVERNING ACTIVITIES OF MULTINATIONAL CORPORATIONS IN THE OIL AND GAS INDUSTRY FOR NATURAL RESOURCES MANAGEMENT IN KENYA

2.1 Introduction

There are various consequences in connection with actions of MNCs in the oil and gas sector in various states for instance Nigeria,[109] these include severe environmental harm and other forms of human rights abuses. These occurrences have formed some of the case studies available to nascent oil industries such as Kenya to learn from and endeavor to avoid being in the same situation in the event of a similar happening.

The control of pollution of the ecosystem, access to information and public participation, transparency of dealings, bribery and corruption as well as disaster management systems are some of the issues that will be considered whilst analyzing the available legislation on management of natural resources by MNCs in the oil and gas industry in Turkana County.

Four salient questions can be posed at this juncture. One is whether Kenya is ready to deal with regulation of the different MNCs which will slowly be interested in the exploration of oil blocks allocated to them in Turkana County. One thing that stands out is the difficulty in regulation of MNCs at the international scene because of the unavailability of a legally binding multilateral agreement as most attempts at regulation are voluntary in nature and do not have consequences for any non-compliance of agreed terms.

Second, is whether the regulatory framework adequately caters for the negative or unintended consequences for the entire oil and gas production cycle which are a result of activities of MNCs. Thirdly, is whether the regulatory framework as it is can be adequately enforced by environmental establishments for the advantage of Turkana County people in the wake of the influx of MNCs into the country. Lastly, what is the role of MNCs in the exploration process to aid in the management of natural resources. These questions will form the running thread in the discussions herein through the various levels of regulation to wit the international, national and county spheres. This chapter therefore, presents a comprehensive analysis of the regulatory

[109] Supra note 24

mechanisms available relating to regulation of MNCs actions in the oil and gas business in the International, the National and at the County spheres.

2.2 International Regulation of MNCs and the Management of Natural Resources

MNCs have become important actors in contemporary international relations in every Nation-State[110]. Any typical multinational corporation comprises of both the parent company and the subsidiary company in one or more other states[111].MNCs have constantly sought to avoid regulation by local states and they have been successful in this endeavor by describing themselves as operating on the international scene traversing various states hence placing themselves under the realm of international law as opposed to domestic laws of a single country.[112]. However, numerous scholars have disputed this position.

The United Nations through its auspices tried to regulate the activities of MNCs at the international level[113]. Closely related to this regulation, is the international regulatory agency which presumably seeks to oversee the activities of MNCs under a code of conduct endorsed for that purpose[114].Some of the attempts to control MNCs actions are deliberated herein:

2.2.1 The UN Global Compact

The above code in legal terms is considered as a 'soft law' where enterprises which recognize various rights enjoyed by a person pledge to observe and uphold these rights. It has its origins from the Universal Declaration of Human Rights (UDHR) and is echoed through other instruments such as the ILO's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the UN Convention against Corruption.

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[110] Barnet & Miller, Global Reach 13-21 (1974); Brown, World Without Borders 210 (1972); Diebold, Multinational Corporations: Why Be Scared Of Them, In A Reordered World 137

[111] Menno. T Kaminga, "Multinational Corporations in International Law" https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0049.xml last accessed on 3rd October 2019.

[112] Akindele Babatunde Oyebode, International Regulation Of The Multinational Corporation: A Look At Some Recent Proposals, 1977 Https://Escholarship.Org/Content/Qt3nz79708/Qt3nz79708.Pdf Last Accessed On 4th October, 2019

[113] Group of Eminent person's Report, a 162-paged document, which also contained dissenting comments by some members of the Group, was submitted to the UN Secretary-General on May 22, 1974 and released on June 9, 1974

[114] Akindele Babatunde Oyebode, International Regulation Of The Multinational Corporation: A Look At Some Recent Proposals, 1977 https://escholarship.org/content/qt3nz79708/qt3nz79708.pdf last accessed on 4th October, 2019

This code was first publicized by the then Secretary-General Kofi Annan and launched in the year 2000. Currently, it has more than 12,000 business participants from over one hundred and sixty (160) countries, and as such is one of the major non-binding corporate accountability frameworks in the world[115].

Further, this code comprises of ten ideologies that guide participating members in their furtherance, observance and respect of human rights [116]protection of the environment and most importantly on an issue pivotal to the discussion herein, is the protection of the environment which states that businesses should adopt a precautionary approach[117] when dealing with the environment, companies including MNCs should take greater environmental responsibility[118] and they should use environmentally sound technologies.[119]

Business including companies are further urged to steer clear of ills such as corruption and bribery[120] which hinder effective compliance with other UN Global compact ideologies which include protection and conservation of the environment.

An interesting move towards ensuring the realization of the ten ideologies is the development of the UN Global Compact Management Model which acts as a guide for companies. This model employs a six part step and which involves companies committing to the UN Global Compact ideologies, evaluating the dangers presented in the areas of operation, having in place goals, strategies and policies to tackle specific issues, implementing the said strategies, measuring the impacts of the implemented strategies geared towards achieving the listed goals for the company and finally reporting on the achievements and areas of improvement.[121]

One of the main weaknesses of this mechanism is that it a merely persuasive mode of regulation and despite its high participatory number, more companies including MNCs are yet to subscribe to it hence rendering its effectiveness minimal.

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[115] 'UN Global Compact Website, https://www.unglobalcompact.org/what-is-gc/participants last accessed on 28th October 2019

[116] See Principles 1 and 2 of the UN Global Compact Principles

[117] See Principle 7 of the UN Global Compact Principles

[118] See Principle 8 of the UN Global Compact Principles

[119] See Principle 9 of the UN Global Compact Principles

[120] See Principle 10 of the UN Global Compact Principles

[121] Deloitte Touche Tohmatsu, "UN Global Compact Management Model Report ,Framework for Implementation of Human rights, Labour, Environment and Anticorruption pp. 8 also see ahttps://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2010_06_17/UN_Global_Compact_Management_Model.pdf last accessed on the 20th October 2019.

2.2.2 The Organization for Economic Cooperation and Development (OECD) Guidelines (OECD Guidelines)

The OECD Guidelines for Multinational Enterprises are agreed of non-binding recommendations to serve as a guide for business behavior and activities. These OECD Guidelines were at the onset put in place in the year 1976 with the sole purpose of regulating foreign investment in countries and strengthening cooperation among OECD Member States and addressing the problems arising from the operations of MNCs. A revised version of the OECD Guidelines which was adopted in the year 2000, recommended MNCs to 'respect the human rights of those affected by their activities. The 2011 version demystified this recommendation addressing the issue of human rights in a whole chapter hence capturing the human right to a clean and healthy environment which shall be succinctly discussed in the following chapter. This chapter proposes that MNCs should respect human rights by circumventing any harm likely to be caused which may be adverse to human rights. The chapter also invites MNCs to address and mitigate the impacts of their activities and to have policies in place in a bid to observe human rights by ensuring due diligence is carried out before any major activity and to finally provide for compensation of persons as a result of adverse effects of human rights non observance[122].

One of the pivotal issues elucidated by the OECD Guidelines is the requirement that MNCs respect and observe the national legislation and that the guidelines should not be construed to override the host state's requirements under any of its laws.[123] With regard to the oil and gas industry, this is essentially important because national law put in place has the end goal of being observed by all. However, in a scenario where there are serious violations of national legislations, it begs the question of whether the MNC in question actually respects the national legislations of the host states and even to some extent requires the reexamination of the issue of state sovereignty as the said action could be considered as an affront to it.

Under part VI, the OECD guidelines also have a segment on safeguarding of the environment which mandates multinational enterprises which include MNCs to continually seek to protect the environment in which they carry out their activities. MNCs are further mandated to improve their 'corporate environmental performance' by use of technologies and operating procedures that take into account protection of the environment. For instance in the oil and gas industry, it is the

[122] Multinational Corporations in International law, Jan Wouters Anna-Luise Chané, December 2013, file:///C:/Users/advocate/Downloads/SSRN-id2371216.pdf last accessed on 28th October 2019

[123] OECD Guidelines for Multinational Enterprises (2011) at pp. 17

onus of the MNCs to use superior technology to prevent gas flaring or occurrence of any oil spills that may damage the habitat of human beings and animals alike as well as cause water and air pollution.

MNCs are also mandated to create cognizance of the environmental impacts of their activities to the communities in which they operate.[124]

The chapter in essence embodies the principles and objectives contained in major environmental declarations and multilateral environmental declarations to wit in the Rio Declaration on Environment and Development as well as Agenda 21.It also highlights the (Aarhus) Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters as well as the International Environmental Management Standards.

These standards were formed by the International Standards Organization in the year 1996 to form the ISO14001 standards which may be applied across the divide between small and big enterprises and indeed MNCs regardless of the fact that the corporations or enterprises may be different in size, culture or even geographical location.[125]

On the issue of bribery and corruption which is a common occurrence in most developing countries especially where natural resource exploitation is involved, there is a requirement under part vii of the OECD regulations that the multinational enterprises should desist from offering any money to public officers who in Kenya's case would be state officers in national and county governments gain advantage in the their dealings. This is a move to engage transparency and accountability from the MNCs.

It should be noted that there has always been a push to have a codified law to govern MNCs activities in host states. In fact, there was an effort to do that between the year 1995 and 1998. The OECD made attempts to draft a Multilateral Agreement on Investment (MAI) in order to replace the multitude of BITs which often have unfavourable terms for host states as compared to the MNCs. However, there was robust opposition by NGOs and developing countries, lack of support by various business ventures. There were major disagreements between the negotiating parties, especially on the exceptions to be employed in the various sectors where MNCs were operating as well as lack of consensus on various environmental issues which led to the downfall

[124] OECD Guidelines for Multinational Enterprises (2011) ,Chapter VI, at pp. 43
[125] Supra Note 53 at pp. 80

of the initiative[126].These guidelines still suffer the fate of other mechanisms by taking the form of being voluntary for MNCs to adhere to the same or not.

2.2.3 The 2003 UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

The Draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (Draft Norms) were drafted in an effort to create binding international human rights obligations for MNCs[127]. These Draft Norms define the 'transnational corporation' as an entity with presence in various states carrying out business therein[128]. The Draft Norms sought to place the duty of observance of human rights directly on MNCs in tandem with International Human Rights law[129].

The main hurdle that has been encountered by various countries in enforcing against harmful actions of MNCs is the lack of culpability caused by the absence of binding rules in international law. These challenges have spread across board. Under international law, multinational corporations are deemed to bear rights but they have no duty to observe obligations[130]. There has been effort by United Nations and some regional institutions to try and bring MNCs under the ambit of control of International law.[131]The imbalance of power between various states and their dealings with MNCs has played a crucial role as it may be easier for a developed country to have a say in an MNCs activities in their country as compared to a developing country which would be depending on the MNC for business venture and employment for its citizenry alike.[132] Lesser developed states have suffered immensely as a result of unequal bargaining power.

The International Labour Organization (ILO) and the Organization for Economic Co-operation and Development (OECD) refer to the MNC as a "multinational enterprise." Under the International law ambit there is yet to be in place a successful framework law to guide natural

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[126] Ibid

[127] Multinational Corporations in International law, Jan Wouters Anna-Luise Chané, December 2013, file:///C:/Users/advocate/Downloads/SSRN-id2371216.pdf last accessed on 28th October 2019

[128]UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UNCHR, Sub-Commission on the Promotion and Protection of Human Rights (26 August 2003)

[129] Op Cit 9

[130] Ibid

[131] Akindele Babatunde Oyebode, International Regulation Of The Multinational Corporation: A Look At Some Recent Proposals, 1977 https://escholarship.org/content/qt3nz79708/qt3nz79708.pdf last accessed on 4th October, 2019

[132] Ibid

resources sharing and utilization across Nation- States[133]. Some scholars argue that basic rules have been put in place to enable nations to assert their property rights in administration of resources. While these strategies would be beneficial as a whole, it would consequentially influence how nations deal with resource allocation. Apart from international law, there are other factors that influence management of natural resources in Nation- States and they vary significantly being influenced by the politics of the state under question, its economic and social standing as well as the ability to harness and use science to its advantage. It is worth noting that under international law, property rights and environmental rights are addressed under national law based on the principle of sovereignty or control of territory[134].

Developing states have in the course of globalization have involuntary signed agreements with (MNCs) for exploitation of natural resources, due to their lack of proper infrastructure and technological expertise as well as financial and human resource factors[135].

2.3 International Bodies that have addressed the question of regulation of multinational corporations for the management of Natural Resources

Top among the list of International bodies that have dealt with the question of MNCs is the U.N. Conference on Trade and Development (UNCTAD). UNCTAD has established a Committee on Transfer of Technology with two working subsidiary groups which are made up of a Group of Experts on a Code of Conduct on Transfer of Technology and a Group of Experts on Patent systems to review the international patent system to cater for the operating environment in various developing countries[136].

There is equally the Food and Agriculture Organizations (FAO) which have been the most important and remarkable work done by the United National General Assembly. The FAOs find their place in ensuring that MNCs have found fertile lands to grow in the developing countries with less stringent environmental regulations and there has been availability of raw materials and

[133] Bilder, R.B., 'International Law and Natural Resources Policies,' Natural Resources Journal, Vol. 20, 1980, pp. 451-486 at p. 451.
[134] Ibid
[135] Giuliani E., Multinational corporations, Technology spillovers and human rights' impacts on developing countries, No. 2010/06. LEM Working Paper Series, 2010. Available at http://www.lem.sssup.it/WPLem/files/2010-06.pdf [Accessed on 16/11/2018]; cf. Osuagwu, G.O. and Obumneke, E., "Multinational corporations and the Nigerian economy." International Journal of Academic Research in Business and Social Sciences 3, no. 4 (2013): 359.
[136] Akindele Babatunde Oyebode, International Regulation Of The Multinational Corporation: A Look At Some Recent Proposals, 1977 https://escholarship.org/content/qt3nz79708/qt3nz79708.pdf last accessed on 4th October, 2019

cheap labour in the process[137].The Organization for Economic Cooperation and Development (OECD) has made considerable progress in drafting voluntary guidelines for MNCs. The interests of developing nations are however not adequately addressed by the OECD to the extent they have been addressed by other international bodies[138].

There have been other organizations that have considered different aspects on the subject of activities of MNCs and they include the U.N. Commission on International Law (UNCITRAL), the International Labor Organization (ILO), the U.N. Industrial Development Organization (UNIDO), the World Intellectual Property Organization (WIPO), the economic Commission for Latin America (ECLA), the Organization of American States (OAS), the Inter American Foreign Ministers' Working Groups on Transnational Enterprises and Science and the Transfer of Technology and the European Economic Community (EEC)[139].

There is dire need for creation and implementation of international laws which seek to regulate the conduct of transactions beyond country borders. However, as previously discussed, there is a lot of political lobbying that influences how and which regulations are passed to be operational. Further, national regulations whose main concern is to address the welfare of the society at large, would influence the implementation of such laws. International agreements should ensure that the bare minimum requirements with regards to protection of natural resources are adhered to in order to facilitate investments across different countries. In the quest to foster investment in their countries, it has been proposed that countries should take a cautious approach when negotiating international agreements so that they can protect their interests. A balance should be maintained to avoid ambiguities capable of being used to their disadvantage at the cost of their interests.[140].

There are various issues that are presented through the activities of MNCs that continually change and will always be a subject for debate especially in the ever fast paced changing economic environments of the modern world. However, a lot of co-ordination and co-operation needs to be done between the MNC and the host state[141].

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[137] Sumitra Sripada,The Multinational Corporations and Environmental Issues, Volume 31, No. 4 pp. 534-552

[138] Supra Note 126

[139] Ibid

[140] Joseph E. Stiglitz, Volume 23, Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities, 2007. https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1025&context=auilr last accessed on 4th October 2019.

[141] Akindele Babatunde Oyebode, International Regulation Of The Multinational Corporation: A Look At Some Recent Proposals, 1977 https://escholarship.org/content/qt3nz79708/qt3nz79708.pdf last accessed on 4th October, 2019

However and regardless of this prior position, it is generally agreed that the international law design needs to accommodate the various economies which are ever evolving to provide environmental security in the conduct of transnational business activities[142]."

2.4 Regional mechanisms, laws and regulations that seek to regulate multinational corporations in the management of natural resources

Different States and Nations have negotiated agreements with Multinational Corporations (MNCs) for utilization of their natural resources[143].This has made it possible to establish a relationship between national governments and (MNCs) as relates to Foreign Direct Investment (FDI) in the countries in which MNCs operate. These relationships shape the actions of the host state especially with regard to implementation of available policies and regulations to govern the activities of MNCs. There are various entities and levels of government in the host state that need to be consulted for participation to ensure FDI is properly managed. This will ensure that benefits of FDI flow from the MNCs to the citizenry at the grass root level[144]. This by far is the preferred position in cases of FDI by MNCs especially in developing countries.

2.4.1 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their disposal ("Basel Convention")

The Convention controls the transportation of hazardous wastes to third world countries mostly which stemmed from the NIMBY syndrome in the developed countries. This has increasingly been done by MNCs even though the states which are the home countries of these MNCs are parties to the Convention. For instance, the transportation of poisonous wastes past the border between the United States of America and Canada, is a practice that is outlawed by the Basel Convention. In the year 1986, Canada entered into a bilateral agreement between itself and the

[142] Behrman, The Multinational Enterprise: Its Initiatives and Governmental Reactions, 6 J. INT'L L. & ECON. 222-26 (1972); Salter, The Dynamics of the Multinational Enterprise: Example for World Government, 8 INT'L LAWYER 11-19 (1974)
[143] Giuliani E., Multinational corporations, technology spillovers and human rights' impacts on developing countries, No. 2010/06. LEM Working Paper Series, 2010. Available at http://www.lem.sssup.it/WPLem/files/2010-th last accessed on 7th October 2019
[144] Ibid

United States of America to aid in the censure of transportation of hazardous wastes between the two countries.[145]

Due to the principle of national treatment, most bilateral trade agreements usually stipulate that discrimination should be limited in instances of dealing with firms from other countries. However, more developed countries find ways to have exceptions to this rule and protect their interests through lobbying for better terms in the agreements.[146]Incidences such as the Koko case in Nigeria where hazardous wastes were dumped in someone's backyard without the knowledge of the extent of their toxicity go to reflect the callous nature of some of these MNCs. Thereby the need to regulate their activities in the international forum.

2.4.2 OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Bribery Convention")

The OECD Bribery Convention addresses the issue of bribery amongst officials mostly in governments of less developed countries who constantly seek out bribes in a bid to allow actions that are damaging to the environment to continue being perpetuated by MNCs to take place. However, despite the measures taken and state parties in which MNCs hail from being parties to the OECD Bribery Convention, some MNCs still use bribes as bait for unscrupulous government workers who are highly susceptible to taking these bribes for their own benefit to the disadvantage environment protection.[147]

Local governments which are akin to county governments as captured in Kenya's constitutional arrangement ought to look for more platforms to engage with MNCs on matters concerning investment in their areas especially where there is likely to be economical befit to the locals and protection of the environment is concerned. One thing that has been a common denominator is the lack of bargaining power with stems from the national/central government. One of the key issues to reduce the ills or bribery and corruption has been to ensure that there is no monopoly of decision making being done by the national government. Decentralization of power to make decisions would be able to foster public participation by the locals and enabling the county governments negotiate agreements with MNCs that better serve the interests of the community

[145] 1986 Agreement between Government of Canada and United States of America concerning Transboundary Movement of Hazardous Wastes.

[146] Stiglitz, Joseph E. "Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities." American University International Law Review 23, no.3 (2007):511-512

[147]Ibid

including matters of environment conservation. Decentralization would further encourage competition amongst the various devolved units to provide better avenues for investment for different MNCs while protecting their interests.[148]

2.5 National Laws Regulating Management of Natural Resources by MNCs

In Kenya, there are several laws which have been passed to regulate and manage natural resources which laws govern how MNCs carry out their activities in the country with special emphasis in the oil and gas processing industry.

2.5.1 The Constitution of Kenya

The apex law being the Constitution of Kenya under Chapter Five has wholly attempted to deal with the question of land and environment[149]. Therefore, any MNC which has an interest in the exploitation of natural resources in the country has to abide by the supreme law of the land.

The Constitution provides for National ideals and ethics of governance which includes social justice, human rights protection, transparency and accountability as well as sustainable development which are all crucial in the discourse of environmental law and its conservation.[150] These ideals form the 'golden thread' that will keep reappearing in the statute law both draft and enacted as discussed herein.

This supreme law further makes reference to access to information by every citizen.[151]It guarantees every citizen a chance to access material in the purview of the government its institutions and directs the state through its enforcement machinery to publish and publicize any important material that is required to be publicly known. This constitutional article is important as MNCs being industry players in the oil and gas business are obligated to work in collaboration with government institutions to assist in realization of this right.

The Constitution, provides for the approval of all agreements by the Parliament of Kenya which involve the granting of a concession to any person whose subject involves the use of natural resources.[152] This article places responsibility on the Parliament to provide a check system as

[148] K. Kuswanto, Herman W. Hoen & Ronald L. Holzhacker, Bargaining between local governments and multinational corporations in a decentralised system of governance: the cases of Ogan Komering Ilir and Banyuwangi districts in Indonesia pp 190-191 .https://www.tandfonline.com/doi/pdf/10.1080/23276665.2017.1368246?needAccess=true last accessed on 7th October 2019

[149] Chapter 5 of Constitution of Kenya

[150] Article 10 of the Constitution of Kenya

[151] Article 35 of the Constitution of Kenya

[152] Article 71 of the Constitution of Kenya

part of its oversight power of the licensing system of various institutions including MNCs. However, it lacks the expertise or technical know-how required to censure some of the recommendations for ratification and Parliament ends up relying on decisions of the relevant cabinet secretaries and government institutions to make decisions which greatly hampers this important function[153].

The State has a responsibility to ensure natural resources are used sustainably and that the environment is conserved in line with the principle of equitable sharing of accruing benefits derived therein[154].Despite having clearly set out articles that seek to protect the environment, the problem however, has been the lack of proper implementation of the articles as enunciated in the Constitution to achieve their realization.

Kenya is highly endowed with vast natural resources in comparison to other Nation – States, however in spite of this high ranking, it is ranked amongst the countries with struggling economies in Africa[155]. The country has depended on the utilization of natural resources to support its citizens livelihoods since the country gained its independence and this has substantially contributed to the domestic income kitty. MNCs have in various instances targeted the natural resources in Kenya for exploitation and there has been need to ensure that Kenya has safeguards specifically on the issue of preservation of natural resources.

The Government of Kenya recognizes that the protection of the environment is directly related to the poverty levels and consequent economic growth of a people and to this effect has passed laws and that dictate rules of engagement with different players and MNCs alike in the governance of natural resources. [156].

Further, Vision 2030 aptly captures various strategies to be employed strategies for environment sector of environment protection.[157] Laws have been employed to that natural resources are well managed and conserved. These include:

[153] Supra note 185 pp.19
[154] Article 69 of the Constitution of Kenya
[155] Denmark in Kenya, Ministry of Foreign Affairs in Kenya, Natural Resource Management, https://kenya.um.dk/en/danida-en/nrm/ last accessed on 7th October 2019
[156] Denmark in Kenya, Ministry of Foreign Affairs in Kenya, Natural Resource Management, https://kenya.um.dk/en/danida-en/nrm/ last accessed on 7th October 2019
[157] Ibid

2.5.2 Environmental Management and Co-ordination Act, 1999 (Act No 8. of 1999) (EMCA)

This is the principle legislation that deals with protection of the environment and management of natural resources in Kenya. Therefore any MNC in Kenya whose activities have an impact on the environment are subject to it. At the onset EMCA begins by laying the foundation for protection of the environment which is also captured in the Constitution of Kenya[158] and guarantees every person in Kenya a clean and healthy environment which is an achievement by expanding the scope of the persons having locus to bring environmental causes for infringement of this right.[159]This section further enables the High Court to issue orders requiring perpetrators of environmental pollution to reinstate the polluted environment to the position it was in before any degradation occurred. Further, victims of pollution have the right to be awarded compensation as a result. This especially falls squarely in the ambit of MNCs whose activities would likely result in damage to the environment.

This Act is lauded for having various bodies to enhance its enforcement mechanism these institutions include; National Environment Management Authority, Public Complaints Committee, National Environment Tribunal, National Environment Action Plan Committees, and County Environment Committees. NEMA was established as the main institution of government charged with the supervisory role to oversee the implementation of all legislation with regard to the environment, and which is the body in charge of all coordination on matters relating to environment protection. This Act would equally apply to local companies operating in various areas as well as MNCs.

NEMA works in consultation with various government and non-government institutions and is empowered to come up with regulations and set out standards for the protection and preservation of natural resources. An MNC would be bound by the duties and obligations imposed by NEMA this being a national law in a country in which they are operating. The Act provides for environmental protection through, environmental impact assessments, environmental audit and monitoring and eenvironmental restoration orders, conservation orders.

[158] Article 42 of the Constitution of Kenya
[159] Section 3 of the Environment Management and Coordination Act, 1999.

Significantly, EMCA has captured the issue of EIAs as a requirement before the commencement of works that may negatively impact on the environment. This is especially crucial for MNCs in the oil and gas sector as they are required to select an expert authorized by the Authority at their cost for purposes of carrying out the assessment.[160]However, this provision has come under sharp criticism due to the fact that the expert may be easily manipulated to issue a report in favour of the MNC due to the fact that the MNC is paying the experts fees for the said report.[161]

It is a further requirement that EIA has to be carried out in accordance with the regulations that are attendant to them. Currently, the regulations that apply are the Environmental (Impact Assessment and Audit Regulations), 2003. The 2003 EIA regulations stipulate that EIA shall be undertaken by a lead expert who shall consider environmental, socio-economic and legal matters in coming up with their report whilst identifying the impact of the project in each of these spheres and the scale thereof.[162]The lead is free to suggest any alternatives to the project as well as mitigation measures to be taken.

It is also a requirement that the proponent carrying out the EIA seeks views of the public with regard to the proposed project in line with the constitutional rule on public participation.[163]The proponent is also required to have at least three public hearings on the project's effects and to receive the community's oral and written comments.[164]

However, there have been discussions to repeal the 2003 EIA regulations and replace them with the Environmental Management and Coordination (Strategic Environmental Assessment (SEA), Integrated Impact Assessment and Environmental Audit) regulations, 2018 which seek to incorporate use of strategic environmental assessment and address issues of climate change in line with the Climate Change Act 2016.The 2003 EIA regulations were deemed to be too general

[160] Section 58 of the Environment Management and Coordination Act,1999
[161] See the discussion on Webiner on Realizing a People Responsive Oil and Gas Sector; Lessons from Turkana County,(Tuesday, June 30th 2020, 11am -12:30 noon) also available on https://www.youtube.com/watch?v=yVWnEa_AT3c last accessed on 30th June 2020
[162] Regulation 16 ,Environmental Impact Assessment and Audit Regulations,2003
[163] Article 10 (2) (a) of the Constitution
[164] Regulation 7 (2) (b) of the Environmental Impact Assessment and Audit Regulations,2003

and did not envisage current environmental struggles such as climate change and were not very specific on certain deliverables under the EIA reports.[165]

Part IV and VI of the draft 2018 EIA regulations are instrumental in that they provide for provision of the Integrated Environmental Impact Assessment (IEIA) study which is done for all high risk projects and the exploration of oil is deemed to fall under this category.[166]The IEIA Report under the 2018 draft EIA regulations requires that the proponent who could be chosen by an MNC to provide more information as compared to the 2003 EIA regulations apart from the highlighting of the effect of the project on the effect of the project on the environment, social, economic and legal considerations safety and health considerations have been added in the list of considerations to be highlighted. As will be discussed in chapter three of this thesis, the right to health is instrumental to the enjoyment of the right to a clean and healthy environment and the two go hand in hand.

Among the contents of an IEIA report there is a requirement that a proponent submits to National Environmental Management Authority (NEMA), an integration of climate change vulnerability assessment adaptations and mitigation actions.[167]The same has been captured in the environmental audit report as well.[168]EIAs have recently come under scrutiny as they have been seen to be done as a matter of procedure to tick the boxes before the commencement of any project as opposed to being done to assess the likelihood of risk of environmental harm to the environment.[169] Tullow oil has uploaded some EIA reports for the wells where exploration has begun.[170]Even though the EIA reports are said to be available at the NEMA headquarters and county offices as per the Tullow oil website, the reports are not easily available to the ordinary citizen and even when available, they are not easily understandable as they are deemed to be technical in nature. This curtails any effort available for conservation of the environment by the

[165] KEPSA Website , https://kepsa.or.ke/kepsa-participates-in-the-2nd-national-validation-of-the-draft-environmental-strategic-assessment-integrated-impact-assessment-and-audit-regulations-2018/ last accessed on 20th October 2019.
[166] Second Schedule of EMCA Act ,1999
[167] Regulation 20(1) (m) of the draft 2018 Environmental Management and Coordination (Strategic Environmental Assessment (SEA), Integrated Impact Assessment and Environmental Audit) regulations, 2018
[168]Regulation 34(g) of the draft 2018 Environmental Management and Coordination (Strategic Environmental Assessment (SEA), Integrated Impact Assessment and Environmental Audit) regulations, 2018
[169] Supra note 25
[170] Tullow website, Kenya ESIA Documentation, https://www.tullowoil.com/operations/east-africa/kenya/environmental-social/esia last accessed on 20th October 2019.

community. Still under this Act, there are several regulations that are crucial to the management of natural resources in Turkana County .These regulations include:

2.5.2.1 The Waste Management Regulations, 2006

These regulations specifically underscore the importance of dealing with industrial waste under part III of the regulations by putting an obligation on the industrial undertaking which includes MNCs taking action to have technology that mitigates pollution and caters for the treatment of waste stemming from the activities of the company.[171]For instance in the oil and gas industry, the gas produced as crude oil is being processed is deemed to an industrial waste and there needs to be enough measures taken by MNCs to avoid its disposal into the atmosphere causing air pollution.

2.5.2.2 The Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations 2009

The regulation is specific to noise pollution. The oil exploration process by its nature is a noisy one due to the machinery used to drill oil wells and to extract the oil from the earth. The regulation also seeks to control the levels of noise caused by mining and similar practices.

The regulations state that these activities should be done in the allowable levels of noise as outlined in the Second and Third Schedules of the Regulations and that NEMA officials are supposed to ensure that excavation sites where companies have set up their equipment are located at least two kilometers away from human habitation. Though good on paper, the enforcement of this piece of legislation in Turkana County may be cumbersome given the nomadic nature of the inhabitants.[172]

2.5.2.3 The Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2016

This Act primarily in relation to natural resources seeks to curb activities that may translate to the untenable use of natural resources. Multinational Corporations seeking to exploit natural resources in Kenya must enter into an agreement and fill in a consent where they declare and

[171] Regulation 17 (1) and (2) of the Waste Management Regulations ,2006
[172] Regulation 14 of the Environmental Management and Coordination (Noise and Excessive Vibration Pollution)(Control) 2009

commit themselves to cooperate with government institutions charged with protection of the environment and its sustainable use[173].

2.5.3 The Energy Act 2019

This Act came into force on 28th March 2019 and it sought to repeal the Energy Act, 2006, the Kenya Nuclear Electricity Board Order No. 131 of 2012 and the Geothermal Resources Act, 1982[174].The Energy Act was established for various purposes among others the regulation of midstream and downstream petroleum operations**.**

The Energy Act further establishes the Energy and Petroleum Regulatory Authority [175] ("EPRA") as well as the Energy and Petroleum Tribunal (EPT)[176].EPRA's duties include the regulation and supervision of upstream petroleum operations in Kenya in accordance with relevant laws relating to petroleum regulation as well as the regulations that are made as a result and relevant agreements relating to petroleum.[177]The EPRA further oversees the decommissioning process after the exploration process is over by a contractor which may be an MNC as well.[178]

The EPT has the jurisdiction to adjudicate over matters referred to it, falling in the realm of the energy and petroleum industry as well as having appellate jurisdiction over matters from the EPRA.[179]This provides an avenue for regulation of activities of MNCs. The most notable benefit of this Act is the harmonization of previous laws which ordinarily would fail in implementation when concerns were raised in exploitation of natural resources.

2.5.4 The Petroleum Act, 2019

The Petroleum Act, 2019 (hereinafter, 'the Petroleum Act') came into effect on 28th March 2019, and it repealed the Petroleum (Exploration and Production) Act, Chapter 308 Laws of Kenya (hereinafter referred to as the 'Petroleum Act ,1984')which entered into force in 1984.The Petroleum Act has come in to remedy some of the inefficiencies of the Petroleum Act 1984 by ensuring that it is in line with the Constitution of Kenya 2010 and consolidating the

[173] The environmental management and coordination (conservation of biological diversity and resources, access to genetic resources and benefit sharing) regulations, 2016
[174] The Energy Act, 2019
[175] Section 9 of the Energy Act,2019
[176] Section 25 of the Energy Act ,2019
[177] Section 10 (b) of the Energy Act ,2019
[178] Section 10 (i) of the Energy Act,2019
[179] Section 36(i) of the Energy Act,2019

administration of the entire Petroleum exploration life cycle under one single piece of legislation to wit upstream, midstream and downstream operations on petroleum exploration.

For purposes of analyzing the Petroleum Act, there is reference to the word 'contractor' in most of the sections which for purposes of this thesis be interpreted to include MNCs as well. The Petroleum Act provides for sharing of revenue resulting from the sale of petroleum. The revenue due to the County Government has been placed at twenty percent (20%) of the share allocated to the National Government whilst the local community is entitled to five percent (5%) of the amount allocated to the National Government to be held in a trust fund on behalf of the local community. This will guarantee that the County Governments and local communities get the direct value of exploitation of petroleum resources located in their counties by MNCs and other business organizations that undertake their activities therein[180].This has gone a long way in ensuring that there is benefit sharing among the communities in Turkana County by ensuring there is the general 'social contract to operate' on the part of the MNCs and the subsequent avoidance of any resource based conflict that may arise.[181]

Part VIII of the Petroleum Act is instrumental as it covers issues on the Environment, Health and Safety as a block which issues are great prerequisites in the governance of MNCs activities in Turkana County. On the issue of conservation of the environment, the Petroleum Act states that the contractors involved are required to prevent the pollution of the general ecology to include water bodies, land and air from harmful waste products which are a result of the oil exploration process. Further, should there be release of any of these harmful products into the environment, the same should be done in line with acceptable environmental conservation practices.[182]

Control of gas flaring, is an important aspect which regulatory bodies involved in the oil and gas industry should address by stipulating a zero tolerance for gas flaring except in very exceptional circumstances. This is because of the adverse effects this practice has caused to the environment not only where the oil exploration plant is located but also the environment in other areas due to the production of greenhouse gases which in the end contribute to global warming and consequently climate change which are major environmental issues. The Petroleum Act allows

[180] Section 58 of The Petroleum Act, 2019
[181] Kennedy Mkutu and Gerard Wandera(2016),Conflict, Security and the Extractive Industries in Turkana Kenya,pp.5
[182] Section 59 (2) (h),(i) of the Petroleum Act,2019.

for gas flaring with the consent of the Energy Regulatory Commission and that the same should be done at the lowest possible level. However, this low level is relative and depending on which side of the divide one falls, what is a low level of emission to one party might not be low to another. There is urgent need to have regulations to guide this practice to ensure that the same is kept in check.

Still on the issue of gas flaring, the Petroleum Act provides for provision of a Petroleum Agreement entered into between a contractor which may be an MNC and the National Government or County Government which agreement is required to contain terms on how to utilize associated gas being churned out as a result of the whole oil extraction process. The Petroleum Act further provides that where the contractor is not desirous of putting to use this associated gas, a chance may be given to the National Government to make use of the same.[183].While the legislators might have the right intention, the leeway of not blankly putting a zero tolerance to gas flaring in the law could be subject to exploitation by contractors and more particularly MNCs where they can claim that they were not desirous of putting to use the associated gas.

Loopholes created under the law can end up being detrimental as was the case in Nigeria. Indeed, years of the environmental damage in the Nigerian delta region was said to have been instigated by MNCs operating in the area. The occurrence of oil spills as a consequence of the companies actions and destruction of several structures put up to aid in the transportation of oil by militants resulted in environmental pollution. Further, gas flaring until now continues a lot of air pollution which has a lot of hazardous effects to human beings, plants and animals[184].

The Finance Minister of Nigeria in the year 2018 when the gas flaring nuisance was on a climax attributed the pollution to a loophole in the law where the government sought to control the remittance of associated gas by these companies by introducing a charge which would be paid depending on how much of the associated gas was released into the atmosphere. However, this proved to be a miscalculated move as most of the MNCs in the industry preferred to pay the charge and did not view it as a penalty but rather an additional production cost. Therefore, the

[183] Section 34 of the Petroleum Act, 2019

[184] A legal loophole has enabled years of environmental damage by global oil companies in Nigeria, Yomi Kazeem, January 30, 2018 https://qz.com/africa/1192558/nigeria-gas-flaring-oil-biz-escapes-tough-fines-for-environmental-damage// last accessed on 29th October 2019

MNCs continued to flare the associated gas while paying the charges which was not the intention of the legislation to wit to achieve a penalty for the action so as to curtail it.[185].I reiterate that from the onset, gas flaring should have been impermissible except in very exceptional circumstances which should be guided by guidelines on the same as this could turn out to be detrimental in the long run as was the situation in Nigeria.

Another important issue has been captured under the Petroleum Act is that of decommissioning and abandonment. Decommissioning simply refers to a process that ensures that the oil exploration site is restored to its original position before issuance of the exploration permit by the relevant authority. This process has increasingly become an extremely expensive affair, especially for oil companies including MNCs alike. The purpose of decommissioning is to ensure that the environment which had been damaged is reinstated and rehabilitated to its position.[186]Decommissioning can be of an offshore or onshore oil well. Onshore refers to the area within the state limits and territory while offshore refers to the area that extends into the sea and extends to the end of the continental shelf. In the case of Turkana County, the exploration being done is onshore.[187]

Since this process can be a costly affair, there is a decommissioning fund [188]that has been set up that receives contributions from the contractor as well as the government where it has a participating interest and which is aimed at covering the future cost of rehabilitation of the environment. This intricate process is to be done under the collaborative effort and supervision of the national and county government. There is urgent need to come up with set guidelines on defining the extent of this collaboration and the obligations of different participants in the entire decommissioning process and more so where the original contractor is not the one who completes an oil exploration venture.[189]This is because the lack of clear cut guidelines on the same possesses a risk of having a blame game on responsibilities once an MNC is done with its

[185] Ibid
[186] Adebowale Adeniyi,(2019),Key considerations in decommissioning and abandonment in Nigeria http://www.mondaq.com/Nigeria/x/831370/Oil+Gas+Electricity/Key+Considerations+On+Decommissioning+Abandonment+Costs+In+Nigeria last accessed 29th October 2019.
[187] Government of Western Australia,' 'Decommissioning Guidelines' also see https://www.dmp.wa.gov.au/Documents/Petroleum/PET-DecommissioningGuideline.pdf last accessed 1st November 2019.
[188] Section 40 of the Petroleum Act,2019
[189] Section 127 (t) of the Petroleum Act,2019

exploration process and leaves the site without proper rehabilitation of the environment to its former state or in a position near that state.

The issue of oil spills is also quite crucial which if not well checked could end up having disastrous effects on the environment which include aquatic life as well as the health of both animals and human beings. Even though the Petroleum Act mentions in passing the issue of oil spills, the same should have been given more prominence in the Petroleum Act given the nature of the operations in place. The Petroleum Act states that the Cabinet Secretary shall prepare guidelines to deal with the issue of oil spills should it take place including the development of a National Oil Spill Response plan which plan is meant to address how fast an oil spill is addressed to avoid damage to the environment. The plan is supposed to come up with a compensation regime in case of an oil spill.[190]This needs to be urgently addressed as the only oil spill plan in place is the National Contingency Plan for Marine Spills from Shipping and offshore Installations, 2014 which mainly concerns oil spills in the sea and not on land and which is still a draft.

One other issue under consideration which influences MNCs exploitation of natural resources is the one on local content. Simply put local content refers to the additional worth brought to the Kenyan people mainly by ensuring that the MNC operating in the area makes use of labour from the Kenyan citizens and this would include procurement of their services as independent contractors as well as their supplies and lastly sharing of any monetary gain from the venture in agreed proportions.[191] The observance of local content provisions by MNCs is particularly important because there needs to be inclusivity of the nationals of a country in the activities that they undertake especially in the case of developing states such as Kenya so that nationals of the country can benefit from employment and other advantages such as qualification for tenders for materials which are to be sourced locally.

In the Petroleum Act, 2019, the Cabinet Secretary in the Ministry of Energy is given powers to create regulations governing things such as development of local content, capacity building and general development in the upstream petroleum sector.[192]Part iv of the Petroleum Act 2019 is

[190] Section 101 (v) of the Petroleum Act,2019
[191] Definition section of The Local Content Bill,2018
[192] Section 127(bb) of the Petroleum Act 2019.

specifically dedicated to Local content provisions which provide for the recruitment and training of Kenyans, this is through the provision of a Training Fund. There is the requirement for foreign enterprises to have preference for Kenyan goods and services as well as apt use of transfer of technology to equip local a capacity. In a sense reinforcing the slogan '*buy Kenya, build Kenya'.*

Although the sections on local content in the legislation come in to govern the relationship between MNCs and other industry players, they are not specific in that there is no specified number of percentage of Kenyans indicated to be employed by prospective contractors and indeed MNCs. Secondly, in administration of the Training Fund, the Cabinet secretary in the energy ministry has been a lot of leeway in the administration of the Funds which if left unchecked provides an avenue for ill administration of the same. There is also no method prescribed for monitoring whether these provisions on local content are actually being adhered to. It is insightful to note that in the Model Production Sharing Contract, local content provisions have been inculcated under part IV of the said contract which model forms a precedent to be used in the oil and gas industry matters.[193]

Various proponents believe that the Local Content Bill, 2018 which forms an overarching piece of legislation on issues of local content is a waste of time and would bring regulatory overlap. They cite that the Petroleum Act, 2019 already covers local content issues in the upstream petroleum sector whilst the Mining Act 2016 governs local content issues in the mining sector. Proponents of this school of thought are of the view that there just needs to be a Local Content Policy which would then guide what needs to be done and legislation should only come in a resource when the available legislation in the two principal Acts of Parliament mentioned herein are not working.[194]However, other proponents believe that there needs to be a comprehensive national stand-alone law on local content provisions because the ones currently available are only restricted to issues on employment for the locals and procurement of local materials while

[193] Schedule to the Petroleum Act 2019,pursuant to section 18.
[194] Patrick Wachira, 'Proposed local content law will only create regulatory confusion', Business Daily 10th July 2018 https://www.businessdailyafrica.com/analysis/ideas/local-content-law-will-only-create-regulatory-confusion/4259414-4656344-38pj58z/index.html last accessed 22nd October 2019

in essence, the local content issue is wide and does not only involve employment and procurement issues.[195]

2.5.5 The Land Act, 2012

Access and ownership of land has for a long time been termed as an emotive issue.[196]Therefore its use and management is bound to bring conflict should there be a perception of unfairness due to the sentimental value it attaches. This could very well hamper the activities of MNCs who are interested in the exploration of oil in Turkana County.

Central to this Act is the issue of compulsory land acquisition where land is procured for use by the general public, it is stated that the compensation of the affected persons must be full, prompt and just.[197]The said principle has its underpinnings in the Constitution of Kenya where the state is not allowed to indiscriminately deny a citizen the right to own property unless the same is being acquired for the good of the general public.[198]

This should be done to also avert any conflict based on demands for compensation hence stalling the work of MNCs in the county. However, most of time, the reality is that compensation is usually a mirage and does not take place until the relevant authorities are taken to court over compensation claims.

In the case of *Mathatani Limited v Commissioner of Lands and 5 others [2013] Eklr,* the Petitioner took the Respondents to court over acquisition of property that had been earmarked by the Government for compulsory land acquisition for the purpose of rehabilitation and /or construction of the Embakasi –Machakos turn off and Machakos turn off at Sultan Hamud. The Petitioner claimed that he had not been served with the preliminary gazette notice on the acquisition of the land as well as the notice of acquisition of land as per sections 6 (2) of the Land Acquisition Act, CAP 295. Further, the Petitioner stated that the final compensation award four years down the line after the purported inquiry or use by the government failed to meet the test of prompt and just compensation as captured by the Constitution of Kenya. The judge agreed

[195] Kenya Civil Society Platform on Oil Gas Report (2014),Setting the Agenda for the Development of Oil and Gas Resources, The Perspectives of Civil Society ,pp.38
[196] National Land Commission Website, http:www.landcommission.go.ke/article/faqs last accessed 1st November 2019
[197] Section 111 of the Land Act 2012
[198] Article 40(3) of the Constitution of Kenya

with the Petitioner and subsequently, granted all the Petitioner's prayers which included an order seeking to quash the compensation awarded which was to be reviewed.

2.5.6 The Community Land Act, 2016

This legislation was primarily established for the registration, administration of community land and to elaborate on the role of the county government on the administration of unregistered community land. As already discussed above, land being a central issue when there are instances of natural resources being present in community land, there is a requirement that they are used sustainably for the benefit of the community who have rights to it. This should be done with transparency and accountability to cater for all community members. This is not only a requirement bestowed on the government regulatory bodies but MNCs as well which are to adopt sustainable exploration of land.[199]

Should an MNC consider having an investment project in community land, there needs to be an assurance that after completion of the project, the land that as used will be rehabilitated to return to the position it was before the said action on the land.[200]

2.5.7 The Climate Change Act, 2016

This law was passed in May 2016 and is a culmination of the domestication of international conventions that Kenya ratified and is a member party to such as the United Nations Frameworks Convention on Climate Change (UNFCCC).The said convention was ratified in August 1994.

It cannot be gainsaid that the change of climate is a current world problem which is affecting the seasons and some of the main contributors of this phenomenon are seen to be emanating from industrial works which include oil and gas exploration activities. As deliberated in Chapter 1 of this thesis, gas flaring tends to lead to emission of greenhouse gases into the atmosphere which in turn cause global warming and change of climate in the long run.

The Act has described greenhouse gases in its definition section to include gases such as nitrous oxide, hydro fluorocarbons, carbon dioxide and methane amongst others. Most importantly, National Climate Change Council has the powers to have discussions with the Cabinet Secretary for the Environment and relevant state entities and subsequently mete out obligations and

[199] Section 35 of the Community Land Act,2016
[200] Section 36 of the Community Land Act ,2016

restrictions with regard to activities on private entities these include MNCs that may have an effect on the climate. [201]These private entities are required to provide reports on their compliance with the laid down regulations on climate change in the performance of their regulations. NEMA is also mandated to collaborate with the council to ascertain that the levels of greenhouse gas emissions are at acceptable levels as stipulated in the Act.[202]

If these provisions are well implemented, the Act forms a robust legal framework to management climate change and in turn natural resources caused by the activities of MNCs.

2.5.8 The Water Act, 2016

One of the issues that is critical apart from prevention of pollution of water resources is the adequacy of this already scarce resource. The Act specifically does not allow the throwing of any dangerous effluent which may consist of poisonous chemicals and matter into or near any water resource.[203] This creates an onus on MNCs to avoid the pollution of water resources.

Secondly, it is the duty of the Water Resources Management Authority in conjunction with the county government of Turkana to safeguard this already scarce amenity and make it available to the residents for their use as well as their livestock.[204]

2.5.9. The Access to Information Act No. 31 of 2016

This legislation aptly captures the issue of disclosure of information as a pinnacle in the oil and gas industry. The Act is a codification of the constitutional article on access to information.[205] The material upon which access is requested is widespread ranging from openness on the retrieval of licenses, EIA reports, amount of tax paid to the national government as well as the revenues generated from the exploitation activities conducted by MNCs. [206]

One of the fundamental objectives of this Act is to lay ground for the provision of mechanisms upon which both public and private enterprises disclose information by providing it on their own volition or upon reasonable time upon request. This will be done in compliance with the Constitutional provisions on disclosure of information. Private bodies such as MNCs are also

[201] Section 16 of the Climate Change Act,2016
[202] Section 17 of the Climate Change Act,2016
[203] Section 94 of the Water Act 2016
[204] Section 8 (1)(i) of the Water Act 2016
[205] Supra note 142
[206] Draft Policy Framework for Extractive Industries in Turkana County ,2018 pp.10

captured under the Act where they are expected as required under the Constitution to provide information. The Act further makes provision of that this information should be up to date and done provided routinely in line with the principles of accountability, transparency, public participation and access to information.[207]

2.5.10 The Bribery Act, 2016

This Act was established to provide for the curtailing, enquiry and punishment of bribery. This Act has put into perspective the real situation as it is in practice. There are state officers who receive bribes and officials of private entities including MNCs who offer bribes to enable special consideration. It is important that there needs to be transparency in all dealings in the projects of such a great magnitude as oil and gas exploration. This is because if standards are compromised in favour of issuing a private entity the people who suffer are the communities who shall feel the environmental impact of activities that were not well vetted by the relevant environmental entities.

Part II of the Act has stated the offences that contribute the giving of a bribe and Part III putting a duty on both public and private enterprises to set guidelines to prevent bribery and corruption.[208]If the sections of this Act were to be fully implemented, then it would be easy to implement other laws that govern management of natural resources by MNCs.

2.6 Management of Natural Resources by Devolved Governments

To 'devolve' simply refers to the transfer or transition of a right, liability, title, estate, or office from one person to another[209]. Devolution is therefore, a system of delegation of power to lower levels of governance from the national government on specific issues as captured through the Constitution of a country[210].

Management of natural resources in Kenya since independence, was primarily a state affair but presently, we have the devolved units (counties) which stand at forty seven (47) in number under the 2010 Constitution,Turkana County being one such devolved unit.

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[207] Section 3,Access to Information Act,2016
[208] Section 9 of the Bribery Act,2016
[209] 'The Law Dictionary,' http://thelawdictionary.org/devolution/ last accessed on 7th October 2019,
[210] Nyamwamu, C.O., 'From a Centralized System to A Devolved System of Governments: Past, Present and Future Dynamics

I reiterate the sentiments captured by Dr. Collins Odote in a workshop *'Report for Natural Resources Management, Extraction and Development in Turkana County'*.[211] The Constitution has endowed the county assemblies with three main roles to wit legislation, oversight and representation of the constituents.[212] The county assemblies should take advantage of these functions bestowed upon them and utilize them for the benefit of the people of Turkana. This includes the formation of policies and laws or guidelines on the administration of natural resources at the county level. The leaders owe it to their constituents to ensure that the principles of public participation and transparency are realized.

However to date, since the beginning of oil exploration in the county in the year 2012,there are no guidelines or county policies governing activities of Multinational Corporations with regard to management of natural resources in Turkana County. There was little effort to ensure that there was community participation in decisions made that affect their livelihood. The National Government together with other state institutions has been acting as a preserve of information and decision making with members of the community playing a very minimal role.

Under the Constitution of Kenya, there are adequate provisions on matters relating to conflict of laws between the two levels of government. In instances where there is conflict the national legislation has been constitutionally permitted to be upheld and observed on matters of environment conservation and to have general oversight authority on actions of county governments on matters of environmental conservation[213].Some county governments depend on the natural resources to act as a catalyst for development in the counties. This has partly been because of the constitutional requirement that county governments generate their own income to enable them to procure and provide services successfully for the greater benefit of the citizens[214].

[211] Dr. Collins Odote, Workshop Report on Natural Resources Management ,Extraction and Development in Turkana County ,Capacity Building Seminar for Turkana County Assembly (Lodwar Politechnic Lodwar) (11th -12th November 2013).
[212] Article 185 (2),(3) and (4) of the Constitution.
[213] Article 191 of the Constitution of Kenya
[214] Kariuki Muigua, Ph.D, Devolution and Natural Resource Management in Kenya, 2018 http://kmco.co.ke/wp-content/uploads/2018/09/Devolution-and-Natural-Resource-Management-in-Kenya-Kariuki-Muigua-September-2018-1.pdf last accessed on 7th October 2019.

This mandatory requirement is supposed to be attained through utilization of the natural resources deposited within the County. In the 1999 Sessional Paper on Environment and Development, it was captured that key issues such as environmental protection and development go hand in hand and should be matters that are constantly considered together in the discourse of environmental protection[215].The Policy paper endorsed the idea that local communities were to be encouraged to participate in conserving biodiversity in their regions. This would serve as an incentive for optimum protection of biodiversity by local communities with the expectation that they would benefit greatly from the natural resources. However, the implementation of the same under the existing legal framework has not been adequately addressed[216].

The campaign for environmental justice in the exploitation of natural resources is one of the objectives of devolution[217]. Devolution reinforces the concept a people being able to make their own decisions in how they would want to use and benefit from natural resources in their area. Devolution further encourages public participation by communities on legislation, guidelines or proposed projects subject to decisions of the National government to guarantee that they are able to take part in decisions affecting them. Devolution by and large has sought to recognize the right of communities to determine and protect the interests and rights of various interest groups and communities deemed to be marginalized'.[218]

2.6.1 The Draft Turkana County Environmental Policy, 2018

The draft Policy is a comprehensive document that succinctly captures the issues currently facing Turkana County in terms of the extractive industry as well as possible solutions that are available for the county in terms of remedying the situation.[219]

The formulation of the Policy paper was mainly anchored on the COK 2010 and the County Governments Act, 2013[220]. Chapter 5 (Land and Environment)of the Constitution of Kenya in

[215] Republic v Lake Victoria South Water Services Board & another [2013] eKLR, Miscellaneous Civil Application 47 of 2012, para. 28.
[216] Dr. Kariuki Muigua, Ph.D, Devolution and Natural Resource Management in Kenya, http://kmco.co.ke/wp-content/uploads/2018/09/Devolution-and-Natural-Resource-Management-in-Kenya-Kariuki-Muigua-September-2018-1.pdf last accessed on 7th October 2019
[217] Rossouw, N. and Wiseman, K., "Learning from the implementation of environmental public policy instruments after the first ten years of democracy in South Africa," Impact Assessment and Project Appraisal 22, no. 2 (2004): 131-140.
[218] Article 174 of the Constitution
[219] Supra notes 63,64 and 72

Part 2 (Environment and Natural Resources) placed an onus on the State and the County Government regarding the sustainable exploitation, use and conservation of the environment[221]. In developing this Policy, the County government employed a consultative, participatory and inclusive approach that involved a large number of discussions and workshops with stakeholders at both the county and sub-county levels[222].

The Turkana County Environmental Policy,2018 has equally identified different causes of environmental problems facing the County, some being solid and liquid waste management, water pollution ,air pollution due to mining and quarrying activities, soil erosion due to lack of enough vegetation cover to prevent the same, vibrations from oil and gas exploration activities and climate change.[223]The presence of such guiding policies provides a benchmark set for MNCs seeking to engage with the county governments especially on undertakings that provide an undesirable impact of the environment.

Fundamentally absent in the county framework or plans should be county development and [224]county investment plans. In the absence these plans when the county allocation comes in from the national government through allocation based on the Equalization Fund [225]as guaranteed for marginalized communities or as agreed in The Natural Resources (Benefit Sharing) Bill 2018 [226] there shall still be a problem of development as the common 'mwananchi' may not benefit from the natural resources being exploited from their county.

The Institute of Law and Environmental Governance(ILEG) in partnership with Friends of Lake Turkana (FoLT) held a seminar with Turkana County leaders and other participants on key issues among them conservation of the environment in light of the oil exploitation activities taking place in the county. Conflict management owing to the said discovery was key to enable the community get the benefit from the said activities and address various social, economic and environmental issues which were likely to lead to what has been termed as the "*resource*

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[220] Turkana County Environmental Policy, 2018
[221] Ibid
[222] Op Cit 65
[223] Supra note 165
[224] Mohamed Amin's presentation in Workshop Report on Natural Resources Management ,Extraction and Development in Turkana County ,Capacity Building Seminar for Turkana County Assembly (Lodwar Politechnic Lodwar) (11th -12th November 2013).
[225] Article 204 (3) (b) of the Constitution ,2010
[226] Section 9 of the Natural Resources (Benefit Sharing) Bill ,2018

curse[227]. ILEG has in several instances come out strongly in influencing policy in order to avoid the 'resource curse'.

2.7 Role of Multinational Corporations in the Supervening Legal Framework

It is posited by various writers that an MNC should not have it existence solely pegged on the making of profit. However, it has been observed for years on end that for a corporation to survive in a particular market or industry, it has to think long term and consider its contribution to the society that it operates in.[228]Unfortunately most corporations do not go to the extent of stating their guiding principles which is evidence of their corporate conscience. It is also not worthy that this conscience may not be the same for all companies and may not apply uniformly.[229] A responsible MNC ought to maintain its standard with regard to protection of environment both where the parent company is based and in countries where the company has its branches.[230]Further, an MNC should have an environment awareness or conservation code which guides most of the works of the company.

Another role of an MNC is to observe the law and the regulations laid down in host state on the issue of environment protection and ensure co-operation between the state and the community in which it operates. This can be done by adoption of sustainable business practices through the John Elkinton's model '*Triple bottom line*' which refers to a situation where an MNC observes three main pillars in their operations. These pillars include environment, economy and social sustainability for the benefit of future generations.[231] Triple bottom line theory suggests that companies should uphold environmental protection policies as well as address social matters with the same zeal that they would to earn profits. Therefore, instead of looking at one bottom

[227] Consultative Meeting with Turkana County Leaders and other stakeholders on sustainable exploration and development of oil and other natural resources in the county, **http://ilegkenya.org/2018/08/07/land-natural-resources//** last accessed on 29th October 2019
[228] Alfred S.Farha 'The corporate conscience and environment issues: Responsibility of the Multinational Corporation '10NW.J.Int'l, L. & Bus.379 (1989-90),pp.382.
[229] Ibid.
[230] Supra note 71, pp.394.
[231] M.I .Syakir et al. The role of Multinational Agenda Companies for World Sustainable Development.pp.7

line which is profit there are three issues for consideration which include profit, people and the planet.[232]

There is also need for MNCs to take out industrial insurance which ensures that direct victims of environmental degradation or environmental disasters caused by the actions of MNCs are fully compensated. However, this option provides a shift from the traditional methods that have been used for regulation of MNCs through the use of so called '*command control rules'* as well as liability as established by the court process. These methods have been criticized for being overly costly for the parties involved. However, MNCs on their part are not willing to take out this insurance due to the costs involved on their part to cover incidental pollution activities.[233]

MNCs should further adopt the concept of Ecologically Sustainable Development (ESD). ESD refers to development where MNCs recognize the effects of their activities to the environment and strive to operate in a sustainable manner this can be done by MNCs striving to be environmental leaders in their industry through conservation of non-renewable natural resources by pacing exploration to allow these resources to naturally regenerate.[234]

Another suggested theory in advancement of the position of MNCs in enhancing the right to a clean and healthy environment is that they strike a balance between the stakeholder protection model which has the interests of various stakeholders at heart such as the community the MNC is operating in as opposed to the shareholder wealth maximization theory which places emphasis on the realization of profits for the shareholders of the MNC.[235]

Under the Companies Act 2015[236] one of the duties of a director has been explicitly stated as observance of Corporate Social Responsibility (CSR). However, CSR does not only refer to the environmental protection and an MNC may be free to decide where to lay emphasis, for instance on issues such as education and housing. This presents a challenge because protection of the environment may feature as a last resort in the list of priorities and activities to be undertaken by

[232] Will Kenton (2019) Triple Bottom Line, Investopedia.com/terms/t/triple-bottom-line.asp .last accessed on the 17th October 2019.
[233] Alberto Monti, LLM,PHD (2012), Environmental Risks and Insurance, "A comparative Analysis of the Role of Insurance in Management of the Environment-Related Risks' pp.7.
[234] Paul Shrivastara (1995) 'The Role of Corporations in Achieving Ecological Sustainability'. The Academy of Management Review, Vol.20 No.4.pp.940-960.
[235] George Dallas et al (2016), Corporate Governance Policy in the European Union, Through an Investors Lens.pp.4.
[236] See Section 140 of the Companies Act 2015.

the MNC. However, it is recommended that MNCs embrace CSR especially with regard to activities that conserve the environment.

The Companies Act 2015 obligates directors of quoted companies[237] to provide their report for the financial year including information relating to the environment which covers matters such as the effect of the company's activities to the ecosystem. It is this thesis' proposal that the said section's requirements be extended to also unquoted companies in the interest of protection of environment. The highlighted requirements in the Companies Act echo the principle of transparency and accountability as captured by the Extractives Industry Transparency Initiative (EITI) which is considered the pinnacle for effective administration of minerals and oil resources. EITI stipulates that there should be transparency from the beginning of extraction of the resource to the revenue collection by the government of the day.[238]

Currently Kenya is considered neither a compliant nor a candidate country seeing as the extractive industry may be considered to be a relatively nascent one. However, there is an onus both on the Government and MNCs involved in prospecting for both minerals and oil deposits to begin the process of compliance with the EITI standard even at this nascent stage of the industry by publishing oil or mineral revenues and the like.[239]

Most MNCs directors have been heard to argue that EITI is a government process that bounds states and that their role is quite limited and that they owe a primary duty of care to only their shareholders.[240] However, what they do not realize is that their companies influence the political process as most MNCs are members of business interest groups which have been used severally in lobbying for certain decisions to be taken by government agencies in negotiation of contracts and tax issues. These same platforms could be used to lobby for adoption of EITI standards by host states.

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[237] See Section 654 (4)(b)(i) of the Companies Act 2015.Quoted company refers to a public joint stock company whose shares are traded either on the main stock exchange or related secondary markets. Collins Dictionary of Business, 3rd ED.2002, 2005.C .Pass, B.Lowes, A.Pendleton, L.Chadwick, D.O'Reilly and M Afferson.

[238] EITI Website also see https://eiti.org/who-we-are last accessed on 20th October 2019.

[239] Base Titanium Website see this http://basetitanium.com/governance/extractive-industries-transparency-initiative last accessed 20th October 2019.

[240] Jedrzej George Frynas, Journal of Business Ethics, Vol 93 Supplement 2: New Perspectives on Business Development and Society Research (2010), pp.163-169 see also https://www.jstor.org/stable/27919164 last accessed on 25th August 2019.

2.8 Benefits of Proper Management of Natural Resources

In order to enjoy the fruits of natural resources, there needs to be proper administration of these resources so that current and future generations can benefit. Management of natural resources enables civic participation where the community is involved in public participation by channeling their views on various ways to conserve the environment through structured frameworks that are laid out in collaboration with the National government. This is turn, ensures that their social, economic and environmental rights are recognized and protected[241].

Economic growth of a people is closely intertwined with natural resources conservation and management. This is because, most communities depend on the use of these resources and will either give up the said resources for short term benefits or would not be able to make informed decisions that could benefit them in the long term. An approach that focuses on the latter option should be encouraged[242].

Proper natural resource management fosters a move from the traditional state centered approach of governance on all issues from laws to the institutional decisions on matters of environmental conservation. There is currently more emphasis on collaboration between devolved units of governance guided by principles of accountability and public participation, embracing the use of various systems of knowledge in environment protection to cater for emerging issues in the global sphere[243].Indeed there is need to focus on adaptive governance which recognizes the importance of inculcating various levels of government including the devolved unit in decision making on matters of natural resource management[244].

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[241] Serageldin, M., et al, 'Treating People and Communities as Assets: Local Government Actions to Reduce Poverty and Achieve the Millennium Development Goals,' Global Urban Development Magazine, Vol. 2(1), March 2006. Available at http://www.globalurban.org/GUDMag06Vol2Iss1/Serageldin,%20Solloso,%20&%20Valenzuela.htm/ last accessed on 9th October 2019

[242] DANIDA, 'Natural Resource Management,' available at http://kenya.um.dk/en/danida-en/nrm// last accessed on 9th October 2019

[243] Akamani, K. &Wilson, P. I., "Toward the adaptive governance of transboundary water resources," Conservation Letters, Vol.4, No.6, 2011, pp. 409-416.

[244] Ibid

2.9 Challenges and complexities on the proper management of natural resources by Multinational Corporations

In terms of objectives, local governments appear keen on gaining benefits in order to enhance sectors as well as ensure a wide array of various sectors in their individual county governments by increasing revenue collection through employment opportunities for local workers. This is not always the case and a number of challenges have been posed namely:

1. Where MNCs venture in exploitation of natural resources they do not automatically maximize local employment opportunities and especially the implementation of local content policies in place. These obvious differences in objectives has hampered the realization of the benefits of utilization of natural resources by compromising the bargaining position of states with the stakes involved being the sustainable use of natural resources versus economic benefits of member states being placed at a disadvantage[245].
2. Secondly, as already discussed, one will note there are different legal regimes available for governing management of natural resources by MNCs both at the International and national arena which could mean that there could be instances of overlap of duties and regulation as the case may be. This may then lead to inefficient compliance. There is therefore need for harmonization of the available laws.[246]This can be evidently seen through the multiple oversight authorities such as NEMA and EPRA.
3. The legislation as is it does not inspire observance beyond what is stipulated. In other words, the legislation is 'prescriptive' as opposed to being goal oriented or 'performance based' as in other jurisdictions.[247] Hence, MNCs would only want to achieve the bare minimum as set in the legislation.
4. County governments have unfortunately demonstrated that they have limited human capital to meet specific requirements that the MNCs have mostly due to lack of expertise. This would have enabled the locals further their agenda from a technically informed

[245] K. Kuswanto, Herman W. Hoen & Ronald L. Holzhacker, Bargaining between local governments and multinational corporations in a decentralised system of governance: the cases of Ogan Komering Ilir and Banyuwangi districts in Indonesia https://www.tandfonline.com/doi/pdf/10.1080/23276665.2017.1368246?needAccess=true last accessed on 7th October 2019

[246] Dr. Melba K. Wasunna and Laura Muniafu et al. Establishing A Holistic Environment, Health and Safety (EHS) Strategy For Kenya's Petroleum Value Chain, Kenya Extractives Policy Dialogues Paper No. 3, The Extractives Policy Working Group, 7th-8th August, 2018, pp.20

[247] Ibid ,pp.7

perspective while being able to evaluate the perspectives of MNCs involved. This has further deepened the inefficiency of the monitoring and evaluation aspect at county level.

5. Interaction with MNCs fosters trade and industry growth and consequently positively influences the economic position of members of the community by fostering financial independence. However, there has been a lack of co-ordination and cooperation on the two levels of government, related institutions and the local communities. There is proper demonstration that all these bodies have legislative obligation to make decisions which favour of the inhabitants of Turkana County.[248].

2.9.1 Approaches to grow the bargaining position of County governments at the National and County Level

In view of the challenges we have briefly noted and drawn attention to, it is important to ensure strategies are in place to increase the bargaining positions of the local governments. Some of the strategies that would possibly work would be:

1. There should be an effort to have simple investment procedures that cater for environmental safety and conservation. This will aid in making the investment favourable in the national and county regions. Most County Governments in Kenya have placed measures to promote investment in their individual counties but there can be improvement.
2. The other strategy that should work in improving the bargaining positions would be constant monitoring and assessment of legislation and regulations in place including incentives offered to MNCs in response to changing circumstances of the exploitation climate and position taken by the two levels of government[249].
3. There should be more concerted effort to build local capacity and to encourage MNCs to use local products which are environmentally friendly as well as campaign for transfer of technology arrangements where MNCs use environmental friendly technologies.

[248] Ibid
[249] Ibid

4. The National and County governments can also seek to have in place regulations which are pursuant to laws already in place to aid in their implementation and as a result assist to check on the negative environmental effects of foreign investment in the country[250].
5. NEMA is mandated with ensuring that environmental audits are carried out. The environmental audits should be done as required in line with the available laws and to ensure sustainable use of natural resources[251].
6. There is also inadequate legislation with regard to disaster management with regard to Oil Spills. We have the Thange Oil spills[252] and Sachangwan Oil spills[253] where people's water sources were contaminated and lives ended respectively. There needs to an onshore oil spill policy as well as and oil spill fund to cater for any uneventuality. These measures should cater for all forms of transportation of oil be it by road through the tankers as currently being done in the early oil pilot scheme or through a pipeline. There should also be a mechanism to notice any leakage in the pipeline to avert the same from spilling into adjacent water bodies resulting in contamination of the same.

2.9 Conclusion

The framework that relates to Multinational Corporations at the International Level in matters concerning management of natural resources is there but is more persuasive than compulsory for MNCs to abide by. At the national level, there is sufficient legislation although there are still gaps as highlighted in the preceding paragraphs of this chapter which may lead to a problem of implementation of the available legislation. At the county or local level, a lot needs to be done in terms of legislature update and oversight as well as capacity building for the leaders and education of the community.

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[250] K. Kuswanto, Herman W. Hoen & Ronald L. Holzhacker, Bargaining between local governments and multinational corporations in a decentralised system of governance: the cases of Ogan Komering Ilir and Banyuwangi districts in Indonesia https://www.tandfonline.com/doi/pdf/10.1080/23276665.2017.1368246?needAccess=true last accessed on 7th October 2019

[251] National Environmental Management Authority Website http://www.nema.go.ke/index.php?option=com_content&view=article&id=155&Itemid=274 last assessed on 7th October 2019

[252] Supra note 21

[253] Peter Mburu,'10 years later Sachangwan tragedy still haunts residents',31st January 2019 also available at https://www.nation.co.ke/counties/nakuru/Sachangwan-tragedy-still-haunts-locals/1183314-4959318-b5e6qx/index.html last accessed on 2nd November 2019.

In terms of the three fundamental questions raised at the beginning of this chapter, in this thesis, this chapter has clearly demonstrated the strong point and weak points of the legislative and regulatory structure governing management of natural resources by MNCs both in the international and national sphere. Further, that enforcement of the already available legal framework would go a long way towards achieving the goal of effective management of natural resources. Are we therefore ready as a country? Yes and No. Yes because of the robust legal framework currently in place which provides a platform for effective governance of the activities of MNCs with regard to safeguarding of the environment. No because of the insufficiencies in the legislation highlighted above that need to be cured in good time.

If the leadership especially at the county level can have adequate checks for ills such as corruption, impunity and political interference, the residents of Turkana County will greatly benefit from the resource for years to come.

CHAPTER THREE

COMPARATIVE ANALYSIS

3.1 Introduction

This Chapter lays out a comparative analysis of how activities of MNCs in the oil and gas sector are legislated to provide a guide on ways to properly manage natural resources. The study highlights particular issues which have been highlighted in parts of chapter 1 and chapter 2.Firstly is the issue of disaster preparedness through the management of oil spills regulation and gas flaring and general hazardous wastes, secondly is the issue of transparency and accountability on the part of MNCs and lastly is the issue of requirement of observance of local content by MNCs. In the discussion there shall continue to be drawn a parallel between what in presently in our legislation or lacking thereof in a bid to identify the best practices to adopt.

The chapter shall further examine regulatory regime of two different countries, to wit, the Federal Republic of Nigeria (Nigeria) and the Kingdom of Norway (Norway) to establish their strengths and weaknesses. It shall be seen from the analysis herein below, the Federal Republic of Nigeria still suffers from the lack of a comprehensive enforcement framework despite having a plethora of legal statutes governing protection of environment from activities of oil MNCs. The county has been selected in this study because of its long outstanding history of oil exploitation in Africa as well as its historical interaction with various MNCs in the oil and gas industry. The country's experience may be used as a mirror to enable Kenya avoid the failures they experienced and learn from their triumphs.

Nigeria is a perfect example of what Kenya's nascent oil and gas industry could become in the wake of weak enforcement mechanisms especially in the past. Norway on the other hand is seen as the model country in terms of adoption of regulatory practices which have been used as best practices for many developing nations. From the analysis of the literature review in chapter 1 and the available legislations in chapter 2, the issues under comparison in the case study are environmental issues to wit, gas flaring, oil spills as well as waste management, local content and transparency initiatives. The comparative study shall be limited to these areas because of the obvious influence MNCs have in terms of being able to manage oil exploration as a natural resource.

3.2 The Nigerian Perspective

Nigeria also officially referred to as the Federal Republic of Nigeria and is positioned in West Africa. Nigeria is comprised of Thirty Six (36) states with its capital at Abuja. Nigeria has estimated population of 202,895,839 as at November 2019 as per the UN data.[254] Nigeria has up to forty barrels of oil reserve and has conducted its activities in the oil exploration industry for slightly above five decades.[255]Nigeria has recently been ranked the fifth largest explorer of crude oil as of August 2019 coming in after countries such as Saudi Arabia, Canada, Iraq and the United States of America.[256]

Oil exploitation in Nigeria typically is conducted in the Niger Delta region (This area is crucial as shall be seen in succeeding paragraphs). The exploration of oil in the Niger Delta area was done during the advent of colonial rule in Nigeria. However, it was not until 1956 through a joint venture between Shell-D'Arcy Exploration Parties (SDEP) and Anglo Iranian Oil Company (BP) that oil was discovered in quantities large enough to be considered for commercial purposes.[257]

However, as Nigeria was attaining independence in the year 1960 there had already been conflict whose main cause was the struggle for power and oil profits. In fact this led to the killing of the Independent Prime Minister Sir Abubakar Tafawa Balewa through a military coup. The year 1967 was notable for the Biafra Civil War and even though there were several likely reasons for its eruption, one of the main reason was deemed to be that oil MNCs had been suspected of fueling the continuance of the war.[258]

Several coups later one notable incident in the year 1995 was the murder of the famous activist Ken Saro Wiwa who advocated for the plight of the people of Ogoni who dwelled in a large area of the delta region. The Ogoni felt that there had been unfair distribution of the oil wealth revenue as well as environmental challenges that they experienced especially coupled with the

[254] Worldometres website also world ometres.info/world-population/Nigeria-population/ last accessed on 7th November 2019.
[255] Eiti.org/Nigeria, last accessed on 8th November 2019.
[256] Knoema website also knoema.com/atlas/topics/Energy/Oil/Exports-of crude-oil last accessed on 7th November 2019.
[257] SDN, 'A history of the Niger Delta', also see stakeholderdemocracy.org/the-Niger-delta/niger-delta-history/last accessed on 8th November 2019.
[258] Ibid.

fact that they were the main occupants of the Niger Delta area. They sensed that their government and the MNCs had failed to address their issues.

First forward to today, despite Nigeria being the fifth exporter of crude oil the Niger Delta has constantly been characterized by environmental ills such as spillage of oil and persistent flaring of gas caused by the negligent actions of the MNCs operating in the region as the government does not adopt strict enforcement mechanisms.[259]Nigeria has been chosen in this study due to the potential likelihood of similarity in challenges as Kenya especially with regard to the managing of natural resources in the era of operation of oil and MNCs.

3.3 Nigerian Laws Regulating Management of Natural Resources by MNCs

Nigeria just like Kenya has enough legislation that governs sustainable use of natural resources and conservation of the environment as a whole and places responsibility on MNCs operating in the oil and gas industry. The preceding chapters will attempt to demonstrate the various strengths and weaknesses of these laws.

3.3.1 Associated Gas Reinjection Act, 1979

This Act was passed to require companies that were exploring oil and gas in Nigeria which industry was dominated mainly by MNCs to ensure that they submit concrete plans to stop gas flaring through the reinjection of the same as the said practice had become a menace.[260] In fact there was a categorical declaration that gas flaring was to cease and none was to be flared past the 1st January 1994.[261]However the said Section 3 of the Act that outlawed gas flaring but also allowed it upon settling of an amount that the minister would indicate. The said amount was to be settled for approximately 28 standard cubic meter of gas that would be let out into the atmosphere[262].This left a loophole in the enforcement of regulation as companies were able to pay the amount demanded for the flared gas as per the regulation and walk scot free.

Despite the penalty for gas flaring also stating that there would be forfeiture of concession granted for oil fields by the end of 1994 there had been no compliance of this Act by MNCs and

[259] Olubisi Friday and Olubayo Oluduro, 'Oil Exploitation and Compliance with International Environmental Standards: The Case of Double Standards in the Niger Delta of Nigeria, Journal of Law, Policy and Golobalisation,ISSN 2224-3240(paper) ISSN 2224-3259 (online) Vol.37,2015,pp.68.
[260] Section 2 Associated Gas Reinjection Act, 1979.
[261] Section 3.
[262] Section 3(b).

congruently no tangible enforcement from the government side. One of the reason fronted in literature was the fact that there had been over reliance on oil profits by the country and thus enforcing the said ban would result to a pull of investments by the MNCs resulting in a decline in economic performance.[263]

3.3.2 Associated Gas Reinjection (Continued Flaring of Gas Regulations) 1984

These regulations became operational after the 1979 regulations described above and stipulated the conditions to be adhered to for continuous flaring of gas in a bid to remedy the situation. This was because oil MNCs claimed that it was too costly to re-inject the gas.[264] The date set for the end of gas flaring shifted from 1994 to the years 1998, 2000, 2004, 2006 and 2008. Despite several attempts at regulation of gas flaring, Nigeria has been ranked in the top ten countries which have a reputation for gas flaring in the world.[265]

3.3.3 The Flare Gas (Prevention of Waste and Pollution Regulations) 2018.

These regulations begun being operational on the 5th July 2018, the objects of the regulations include conservation of the environment, viable use of natural resources and addressing of financial and social benefits to the community as a result of gas captured from gas flaring.[266] The regulations further introduced the Nigerian Gas Flare Commercialization Programme which was previously not present in the other legal statutes. In a bid to address the gas flaring issue Nigeria has made international commitments for reduction of routine gas flaring reduction by 2030.[267] This initiative aims at involving all governments and oil companies including MNCs to end the gas flaring industrial practice which results in global warming and subsequently climate change and which impacts heavily on fragile ecosystems. Nigeria further ratified the 2015 Paris Climate Change Agreement. The Nigerian Gas Flare Commercialization Programme is aimed at utilization of gas through commercial ventures where the gas is bided to third parties through auctions and presentation on projects based on the technical and financial qualifications of the

[263] V.B. Agogin, 'Gas Flaring , Government Policies and Regulations in Nigeria; 2003, a myth or reality,pp.31 and 32, the Nigerian Oil Industry; JPPL 6 and 7,1986/1987 pp.83.
[264] Yinka Omorogbe , Regulation of Oil Industry Pollution in Nigeria, In New Frontiers in Law (147-163) (epiphany Azinge ed, Oliz, 1993) Oil Companies Inability to Adhere to the Proposed Alternative to the Gas Flaring).
[265] Ishaya Amaza ,(5th April 2018), The Nigeria Gas Flare Commercialization Programme, A Win Win Situation?
[266] Regulation 1(b, c and d)
[267] Climateinitiativesplatform.org/index.php/o-routine-flaring-by-2030, last accessed 10th November 2019.

said third parties. The seller of the gas is the Federal Republic of Nigeria while the producers are the oil MNCs.[268]

The regulations further develop a system of gas flare data which is submitted to the petroleum resources department in a set period of 30 days from the date of request. Failure to provide the same by an oil company is deemed to be an offence and attracts a penalty of N50, 000 or a term in prison being six months and above.

3.3.4 The Nigerian Extractive Industry Transparency Initiative Act, 2007 (NEITI Act).

This Act just like the Nigerian Constitution and the Petroleum Act vests all minerals, oil and gas in Nigeria both onshore and offshore in the Federal Government of Nigeria.[269] Nigeria began to take part in the Extractives Industries Transparency Initiative in the year 2007 and as 3rd October 2019 the country had reported satisfactory progress in terms of accountability and transparency. Under the Act, there is formation of a statutory board referred to as the Nigerian Extractive Industry Transparency Initiative (NEITI) which is tasked with ensuring transparency of payment made by oil companies inclusive of MNCs to the Federal Republic of Nigeria and all recipients mandated under statute law. The board is further mandated to eradicate corruption that is mostly exhibited in process of revenue determination and remittance of the same as received from extractive industries.[270]

NEITI is further charged with dissemination of information as it is required to publicize matters of revenue determination and collection as received when it deems the same to be necessary. It is the analysis of this thesis that there should not be an option on the part of the government to volunteer information in their purview. Further the mode of publication should also be clearly indicated in the section for instance through newspaper of daily circulation or the NEITI website. This will foster commitment and signify adherence to the transparency principles. NEITI has the mandate to appoint independent auditors to audit the entire collected proceeds due to the Nigerian government from the extractive industry.[271]

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[268] Nigeria Gas Flare Commercialization Programme, Programme Information Memorandum (January 2019) Rev 1, Report pp.19 see also ngfcp.dpr.gov.ng last accessed 12th November 2019.
[269] Section 1 NEITI Act, Section 1 and 3 Petroleum Act, Cap 350, LFN 1990, Article 44 of the 1999 Nigerian Constitution.
[270] Section 2.
[271] Section 4.

There is a further check by the National Assembly on NEITI where it is a prerequisite to submit a report by the 30th September of every year indicating its happenings for the previous year.[272]MNCs are obligated to give true information with regard to volume or production sales as well as income. If the MNCs renders a false statement of account it is due to be fined a hefty N 30 Million.[273]The obligation is also extended to government officials who are required to render true statement of accounts. If this is not done the said official becomes liable upon being found guilty to two years and above as imprisonment or to a fine of N 5 Million and above.

In terms of transparency in regard to licenses the Petroleum Act just like in the Kenyan situation gives the minister a discretionary power to grant either a license to explore or prospect for petroleum or a mining lease.[274] This section is further backed by regulations which forms the first schedule of the Act that governs the activities as per each type of license. In my view the unfettered and unchecked powers of the minister can be both favorable and unfavorable. Firstly it may fall subject to abuse if the minister may result to use their discretion based on discriminatory practices to favour certain companies based on monetary compensation thereby aiding corruption. The flipside however may be advantageous given the ease in the making of decision with regard to various licenses.

Another critical issue under the head of Transparency and Accountability is the one on Beneficial Ownership (BO). Nigeria has partly complied with the requirements of the same but has also expressed its challenges over the same.BO as per the EITI guidelines refers to a natural person (s) who is charged with control a corporate entity and the same may be done either directly or indirectly.BO disclosure is required under the 2016 EITI standards because the lack of it fostered issues such as corruption and lack of tax evasion. The said 2016 EITI standards require that Politically Exposed Persons (PEPs) to declare their ownership in companies especially in the extractive sector. Further, this information is to be made public so that the public can know the face behind a certain company.[275] The guidelines require the revelation of the name, nationality and country of residence of the owner of the company. PEPs are persons likely to influence the allocation of oil blocks for exploration purposes. However, apart from

[272] Section 14 (3).
[273] Section 16(b).
[274] Section 2 (1)(a)(b) (c), Petroleum Act, Cap 350 Laws of Nigeria
[275] Requirement 2.5 of the EITI Standard 2016

corruption, one of the likely impacts of giving exploitation and /or prospecting licenses to underserving companies that do not meet the basic requirements for the job is that there is a possibility that they may not have capacity to undertake the work using technologies that ensure the lest damage to the environment. Therefore in the end, the people who suffer are the communities who live adjacent to those areas.[276]

Nigeria has cited part compliance with BO disclosure by citing reasons such as lack of BO regulation in place, violation of nondisclosure clauses in contracts between the Government of Nigeria and the MNCs in oil production, the availability of the common law principle of 'lifting of the corporate veil' and the lack of support from the political class as they see it as an avenue that can be misused by their political enemies.[277]

3.3.5 The National Oil Spill Detection and Response Agency (Establishment) Act, 2006

This legislation is lauded for its endeavors to curtail oil spills which are more often than not an incidental occurrence of oil exploration and /or prospecting. It is an Act that came in to ensure that there is adequate protection from the acts of MNCs.[278]The legislation institutes the National Oil Spill Detection and Response Agency whose mandate is to address oil spillages occurring in the whole of Nigeria in an expedited manner and to ensure proper cleanup of the site where the spillage has occurred.[279]However, as has been noted in literature, there is enough evidence to suggest that even when a cleanup is performed by MNCs it never is thorough and there is a reason to believe that there is weakness in the enforcement mechanism.[280]

There is a requirement by the oil spiller under the Act which may include an MNC to report to the Agency in written form within 24 hours after an incident of oil spillage and where a spillage is not reported, would result in a penalty of N500, 000 for every day in which the spillage is not reported. Further, a failure to do a cleanup would result in a further fine of N1,000,000.This punitive measure is meant to serve as a measure to curtail oil spillages by oil companies including MNCs alike. The National Control and Response Centre was formed for purposes of responding to incidences of oil spillages in Nigeria. It usually has a representative from the

[276] eiti.org/beneficial-ownership last accessed on 11th November 2019
[277] NEITI Initiative,' Pilot Assessment of Beneficial Ownership (BO) Disclosure: Nigeria's Experience (NEITI) 2015 pp. 10.
[278] Section 1, The National Oil Spill Detection and Response Agency (Establishment) Act, 2006
[279] Section 5(c)
[280] Supra Note 242

Agency and they receive reports of incidents from the offices located in the zones of the Agency while coordinating the response thereof.[281]In the case of a major oil spill, the Federal Government of Nigeria may also be involved through the various ministries to provide support to the Council and Agency herein and to further serve as a mediator between the affected communities and the perpetrator of the oil spillage.[282]The exact duties to be performed by each Ministry is captured in the second schedule to the Act an includes for instance the Federal Ministry of Health dealing with the provision of medical care to persons affected by the spill as well as the Ministry of Defence whose duty shall be amongst others to assist in evacuation of people from the area where spillage has occurred.[283]

One of the things that plagues the Agency as identified in literature is the lack of necessary facilities to function. Secondly, even though MNCs agree on the occurrence of oil spills they dispute the figure given in official documentation on oil spillage in the Niger Delta. Further, there has been low maintenance of pipelines by the concerned MNCs making the pipelines susceptible to busting and leakage. In other words enforcement of this law seems to be weak and hence the lack of proper management of oil spills.

3.3.6 National Oil and Gas Industry Content Development Act, 2010

This legislation seeks to increase the involvement of Nigerian citizens in oil production business. This is done through the use of local labour and available raw materials.[284] Further, the Act mandates that only Nigerian independent contractor shall enjoy priority in terms allocation of oil blocks and other oil exploration related warrants.[285]Most important to note is that the Act requires exploration and /or exploitation of oil as a natural resource to be done by Nigerian companies. These Nigerian companies are defined as companies registered in Nigeria in accordance with Companies and Allied Act with at least fifty one (51%) equity shares being held by Nigerians. Special consideration is given to these companies once they have demonstrated ownership of equipment to be used in the oil exploration process.[286]However, this provision has been criticized because the oil and gas industry usually requires heavy financial investment and

[281] Section 18
[282] Section 19
[283] Second Schedule to The National Oil Spill Detection and Response Agency (Establishment) Act, 2006
[284] Section 1
[285] Section 2
[286] Section 3(2)

hence in most cases oil companies lease equipment from the owners. It therefore becomes a herculean task to meet the requirements as per the Act.[287] Further having in mind that the oil and gas industry in Nigeria has from time immemorial been controlled by MNCs the move to have 'Nigerian Companies' is seen as a risk by foreigners who have invested heavily in the industry. There needs to be a proper management of this change so that the effects are not largely felt in the industry.[288]

On employment and training the Act requires an operator to provide in the plans submitted to the Board for approval and employment and planning plan for Nigerians which should include among other things the hiring and training needs of the operator as well as highlight any skills shortage in their manpower.[289] The Act has recognized the development wants of the country through the requirement that an operator submits a research and development plan which is typically a three to five year strategy and further that the operator submits a report to the Nigerian Content Monitoring Board on a quarterly basis ensuring accountability.[290]

3.3.7 The Harmful Waste (Special Criminals Provisions) Act, 1988.

The legislation principally bans transportation of hazardous waste both on onshore and offshore of Nigeria's territory. Specifically and with reference to MNCs is the issue of corporate liability. The Act criminalizes the dumping of waste which is committed by a body corporate with the full knowledge of the directors, managers or any other officer in a similar position of authority.[291]

However, the Act weakness lies in the lack of catering for reparation to victims of environmental harm due to environmental damage. The Act further does not specify the penalty due to the officers in charge of the corporate body.

3.3.8 Environmental Impact Assessment Act (Decree Number 86 of 1992)

The main objective of this legislation was to safeguard the environment from the possible negative impacts from various industries which are to be adequately catered for before the commencement of a project.[292] Similar to the Kenyan situation the EIA report has to have some

[287] Assets.kpmg/content/dam/kpmg,ng/pdf/tax/Nigerian-oil-and-gas-industry-content-development-act pdf last accessed on the 7th November 2019.
[288] Ibid
[289] Section 29
[290] Section 38
[291] Section 7.
[292] Section 1 and 2 (1)

bear minimums which include among others a description of the proposed actions and their potential effect on various ecosystems.[293] The principle of public participation is further taken into account where the public, experts and interested groups can make submission on the project before it commences.[294] This fosters inclusivity by ensuring that the public and any interested party is afforded an opportunity to be heard and to air their concerns on the anticipated project. There is a further requirement fostering the principle of transparency and accountability by requiring the EIA report to be supplied to public registries where information on specific projects can be accessed by the general public for perusal.[295]

3.4 The Norwegian Perspective

Norway is officially referred to as the Kingdom of Norway. It is found in Europe towards the North West. A third of the country is located north of the Arctic Circle.[296] The country measures approximately 365,268 square kilometers and has a population of 5,398,550 people[297] as at November 2019 with its capital city at Oslo. The Kingdom of Norway just like the Federal Republic of Nigeria has large oil deposits which play a huge part in the country's economic state and contributes to 40-70% of the country's exports.[298]

It is currently positioned as the highest producer of crude oil after Nigeria, Mexico and Angola.[299] The discovery of oil in Norway's Continental Shelf (NCS) was done in the year 1959 after natural gas was found in Groningen, Netherlands. After several attempts at oil exploration it was only in 1969 that a company referred to as Phillips Petroleum discovered commercially viable oil at Ekofisk. This oil field turned out to be the biggest of the oil wells discovered for

[293] Section 4
[294] Section 7
[295] Section 55
[296] https://www.nationsencyclopidia.com/Europe/Norway-location-size-and-extent.html last accessed 10th November 2019
[297] Worldometre website https://ww.worldometres.info/world-population/norway-population/last accessed 11th November 2019.

[298] Andrew Mckay, Black Gold: Norway Oil Story (2019), https:www.live in Norway.net/Norway-oil-history/last accessed 12th November 2019.
[299] Knoema Website: https://knoema.com/atlas/topics/Energy Oil Production-of -crude-oil last accessed 12th November 2019

exploitation use. Further indications about the said oil field predict that it will remain active until 2050.[300]

Norway has been lauded for having progressive legislation and has been relied upon as the oil and gas sector's pace-setter with regard to management of gas flaring, oil spills, hazardous wastes and local content which are the issues under comparison. Even though Norway being a developed country may not face similar challenges with regard to management of MNCs and natural resource management, it nevertheless forms a great guideline to any country seeking to align its laws according to international best practices.

3.4.1 The Norwegian Legislative Framework.

On the issue of gas flaring and general protection of the environment, Norway prohibited the said practice which dates back to when oil exploration first began in the country. This was done through the first pronouncement referred to as the 'ten oil commandments' presented by the standing committee on industry to the Storting (Norwegian Parliament) in the year 1971 and particularly with reference to commandment five which prohibited gas flaring except on a short approved periods.[301]The government of Norway has also partnered with the World Bank group through the Global Gas Flaring Reduction Initiative with the sole aim of reduction of greenhouse emission into the air as a consequence of crude oil exploitation.[302]

3.4.2 Act 29 November 1996 Number 72 Relating to Petroleum Activities

Under this Act a licensee which may be an MNC is required to submit to the Ministry of Petroleum and Energy a detailed plan for development of the procedures of operating the petroleum site. It is a further requirement that the submitted plans takes into account issues such as economic, technical, resource, safety and environmental aspects of the project.[303] Gas flaring management can ably fall under resource and environmental aspects of the plan as any plans of reinjection of associated gas produced during the processing of crude oil highlights the economic aspects where excess gas is preserved. The environmental aspect is also covered where there is a plan for the reinjection or alternative use of the associated gas. The submitted plan requires approval by the Ministry of Petroleum and Energy before any work can begin. Further the Act

[300] Ibid.
[301] Recommendation No. 294 (1970-71) to the Storting: the 10 Oil Commandments.
[302] Global Gas Flaring Reduction Initiative, Report on Consultation with Stakeholders, World Bank Group in collaboration with the Government of Norway, pp1.
[303] Section 4(2)

specifically discourages the combustion of petroleum in surplus quantities than are required under normal operations. The interpretation of this is that the Act seeks to discourage the production of any excess associated gas.[304]

Another method used by Norway in an effort to keep flaring of gas at a minimum, is the use of fiscal incentives such as the use of carbon taxing and emission trading. The government of Norway introduced the Carbon Dioxide tax in a bid to deter the excess flaring of gas in the year 1991. The said tax was levied on all fossil fuels and assessed based on the gas that was flared.[305] This method has been effective to date.

3.4.3 Green House Gas Emission Trading Act, No.99 of 2004

The Act's aim is to aid in the reduction of emission of greenhouse gases which are a product of gas flaring.[306] The Act's application centers on emission from activities occurring on Norwegian territories as well as the NCS where oil exploitation and processing is undertaken. Essentially, emission is a market based system and has been employed to reduce greenhouse gas emission by several governments. There is usually a cap set on the emissions that are allowed. The government involved then issues permits based on certain limit to concerned companies. A company that manages to maintain its level of emissions below the set limits can sell its permits to another hence the trading aspect. This mechanism is usually advantageous as it has proved to be in line with the language that companies understand to wit, costs. It has also significantly assisted in the reduction of carbon dioxide gas emission.

Under this Act, the allowances on emissions are usually determined by the King and for purposes of keeping of records and monitoring, there is the Norwegian Emissions Trading Registry which maintains information on the allocation, transfer, surrender or cancellation of the allocations allowed.[307] There is also a duty for operators (MNCs) to report on the control of emissions of greenhouse gases for the previous years to the Pollution Control Authority (PCA) that will verify the report.[308] Where an operator is found culpable of flouting the allowable limits there is a

[304] Section 4(4)
[305] Dennis Hoffman, (2019) "Carbon Tax in Norway Has Been a Success Since 1991." https://medicinehatnews.com/commentary/letters-to-the-editor/2019/01/23/carbon-tax-in-norway-has-been-a-success-since-1991/ last accessed on 10th November 2019.
[306] Section 1
[307] Chapter 2, Section 6.
[308] Section 16 and 17

provision for leaving of coercive fines on excessive emissions.[309]However this cap and trading system has not been without fault. Literature suggests that it is difficult to maintain the effectiveness of the system in other areas especially where there is emission trading between poor and rich countries. In such a case, the difference in economic power or muscle takes centre stage by rich countries being able to trade because of abundance in resources. The reality however is that they make no effort to reduce their emissions.[310] Norway has also employed the sale of associated gas to the European markets in a bid to address the gas flaring menace just as the Nigerian Gas Flare Commercialization Programme. The exportation is mainly done through pipelines.[311]

3.4.4 MNCs and Norway's Legal Regime on Local Content in the Oil and Gas Sector

Local content (LC) may be defined as an effort by the state or government to ensure that a foreign investor which includes MNCs uses local goods, labour and services. It is a measure aimed at improving the economy of a country as it stimulates participation of the citizens or communities where certain activities is taking place.[312] Local content provisions are usually found in legislation, licensing agreements or contracts and may also appear in policy instruments.[313]

Notably, Norway lacks a stand-alone legislation on local content which would regulate the actions of MNCs operating in the oil and gas business. However, since the advent of oil production activities in Norway, Norwegian authorities have been keen to ensure that the interests of their citizens are fully catered for in different pieces of decrees which advocate for use of the country's locally made products and human capital. The Royal Decree of 4th April 1965 was passed for single resolve of governing of exploration and exploitation of petroleum deposits. The decree ensured that the oil exploitation licenses would be given to Norwegian entities.[314] Further the 10 oil commandments[315] and specifically under Commandment Number 7,

[309] Section 20 and 21
[310] BBC News Website, 'Carbon Trading: How Does it Work also see bbc.com/news/science-environment last accessed on the 13th November 2019.
[311] Perrine Toledano et al((Norway Associated Gas Utelisation Study, Columbia Centre on Sustainable Investment.
[312] Silvana Tordo et al.,Local Content Policies in the Oil and Gas Sector (World Bank Publications 2013).
[313] Isabelle Ramdoo, "Unpacking Local Content, Requirements in the Extractive Sector, What are the Implications for Global Trade and Investments Framework." September 2015.
[314] Article 4 of the Royal Decree of 4th April 1965.
[315] Supra Note 283

the Norwegian state is required to be consulted and made aware of all steps taken and to protect its countrymen's interests in the petroleum industry. Therefore in a bid for an MNC to get the 'license to operate' they have to be willing to take into account local content regulation of a country.

Local content in Norway has also been fronted through international joint venture agreements such as corporation of MNCs and local companies after the approval of exploration of oil in the Statjord field in Norway.[316] Another method in which Norway has captured the issue of local content is through the use of BITs. For instance in the agreement between the government of United Kingdom and Norway on the supply of gas there was a requirement that the license to operate the pipeline shall be given to Norwegians and that the company should be domiciled in Norway.[317]

3.4.5 MNCs and Environmental Protection, Oil Spill Liability

3.4.5.1 The Constitution of the Kingdom of Norway

This supreme law guarantees its citizens the right for them to exist in an ecologically sound environment whose biodiversity is preserved. Further the Constitution considers the principles of sustainable expansion and intergenerational equity by ensuring that coming generations benefit from the products of current conservation strategies. The inhabitants also have a right to information on land use which may present a risk to the environment by likely causing damage to it.[318]

3.4.5.2 Pollution Control Act No.13 of 1991

This legislation was inculcated to ensure that the environment is maintained by avoiding damage through waste and pollution activities. The Act has its application in the NCS where most MNCs and Norwegian oil companies operate.[319]Pollution is captured as the presentation of harmful solid, liquid or gases to the atmosphere, water or ground that substantially damages them. This

[316] Beryl Claire Asigo, 'Norwegian Local Content Model: A Viable Solution? US China Law Review 14.10.17265/1548-6605/201707005 pp.478.
[317] Article 3, ' Agreement between the Government of Great Britain and North Ireland and the Government of the Kingdom of Norway Relating to the Supply of Gas for the Transmission of Petroleum by Pipeline from the Ekofisk Field and Neighboring areas to the United Kingdom."
[318] Article 110 (b)
[319] Section 1 and 4

effectively covers incidental oil spills from oil exploitation activities.[320] The Act places a duty to avoid pollution on operators which includes MNCs before they undertake an activity that may increase the risk of environmental damage.[321] The PCA is mandated to issue regulations on set limits of emissions and the management of permanent and temporary installation for the purpose of prevention of pollution. The PCA is further tasked with vetting of the quality of equipment to be used by MNCs and other oil companies as well as the qualification of the personnel operating the equipment.[322] This goes a long way to ensure appropriate standards are maintained and consequently the risk of pollution is reduced.

MNCs are further under a duty to send notifications on the carrying of an EIA to the PCA if there is a likelihood of a greater amount of pollution to occur.[323] The duty is extended to notifications where equipment use is replaced in a bid to increase the effectiveness of countering pollution or in an instance where pollution increases even without a change of equipment.[324] In an instance where an MNC or a Norwegian oil company stops operations for whatever reason they are required at all times to ensure that during the period of closure there is no pollution on site.[325]

In terms of emergency response to pollution from different avenues including oil spills, the Act places a duty on the MNCs or Norwegian Oil companies to inculcate a private emergency response system and through it they shall work in collaboration with the state machinery to develop contingency plans in the case of an acute case of pollution of the environment. In the case of major cases of pollution an action control group is usually appointed by the King to deal with the incident through various government agencies.[326]

For effective administration the PCA has representation at the national level through the King, Ministry of Petroleum and Energy and the Norwegian Pollution Control Authority itself. At county level, there is the County Municipality and the County Governor.[327] All these entities

[320] Section 6
[321] Section 7.
[322] Section 9
[323] Section 13
[324] Section 19
[325] Section 20
[326] See Section 40 to 42
[327] Section 81

work hand in hand to ensure that there is seamless execution of duties in case an environmental disaster occurs.

MNCs or oil companies are also required to take out insurance to cater for compensation in case of any oil spills or environmental harm as a whole. The insurance package is required to cover any destruction to infrastructure, adverse effects of pollution and other liability as a result of third parties, cost of clean up after destruction and any injury to the MNCs personnel who are engaged in exploitation activities.[328] This ensures that victims of environmental harm are adequately catered for.

3.5 Lessons Learnt from Nigeria and Norway Legislative Framework on Natural Resource Management by MNCs

1. On the issue of gas flaring control, a regulatory framework needs to take into account the realities of operation of the companies in question. Nigeria made several attempts to have in place a gas flaring act but the same kept on being flouted by MNCs. In sharp contrast, Norway does not even have a standalone gas flaring act but has dealt with the gas flaring menace through the use of the Carbon Tax Act of 1991 and the Green House Gas Emission Trading Act, No.99 of 2004 providing both a restrictive law capping the said emissions and an incentive law where the MNCs and the other oil companies can be able to trade.

2. The structure of Norwegian Laws is that they place a duty on the MNCs and other national oil companies to perform tasks stated in statute law. Indeed this is also in sharp contrast with Nigerian and Kenyan Laws as the laws are deemed to be prescriptive laws as opposed to being goal setting laws. If one analyses the outlook of Norwegian laws, they are drafted in a manner that impose duties on the expected recipients of the laws to wit the duty to avoid pollution or to report an EIA as captured in the Pollution Control Act. No. 13 of 1991.[329]

3. On the issue of management of oil spills and other hazardous waste management, there is need to have a sector specific response mechanism to address for acute and major forms of pollution from oil exploitation activities as the same is susceptible to incidental occurrences of pollution

[328] Section 73, 'Regulation to the Act Relating to Petroleum Activities (By Royal Decree of June 27th 1997 as amended by Rooyal Decree of December 22nd 2006 Number 1536) NPD Website, http://www.npd.no/en/Regulation/Petroleum-activities /last accessed on 16th November 2019

[329] Supra note 229

incidences. These issues have aptly been covered under Norway's Pollution Control Act No. 13 of 1991 through the requirement that MNCs and other oil companies alike set up a private emergency response system and the appointment of action control group in case of a major pollution incident.[330]

4. Laws in the petroleum sector should adequately address local content concerns. It is still an open debate whether the same should be done through the use of a standalone legislation like Nigeria or the proposal to have one in Kenya or have the inculcation of LC clauses in many different avenues such as different legislation, permits and procuring requirements before bidding for a job in the case of Norway. However, one thing is certain, that for alleviation of the poverty levels of individuals in a country endowed with natural resources, there is need to have LC provisions to avoid MNCs exploiting the locals by not making use of indigenous material, goods and services.

5. Legislation and other regulatory methods such as the available contracts need to avail compensation clauses for victims of environmental harm. One effective way employed because of the lengthy and costly nature of litigation for victims of environmental harm is the use of environmental insurance.[331]

6. Enforcement of available legislation is everything. Norway might not have a myriad of legislation as compared to Nigeria on regulation of the activities of MNCs in the management of natural resources. However, they have had a strong enforcement mechanism backed by available legislation and political will. Norway's legislation is not bulky and is expressed in the simplest of ways. Despite Nigeria having progressive legislation, they still grapple with issues such as gas flaring and oil spills to this day.

[330] Supra note 308.
[331] Supra note 310.

3.6 Conclusion

This chapter has analyzed in detail the current legislation present in the Federal Republic of Nigeria and the Kingdom of Norway on selected issues for discussion on MNCs and management of natural resources. The Chapter has proven that whilst it is important for a country to have progressive legislation, the drafting of the legislation itself, the will to enforce the legislation by government institutions on points of collaboration between the governments and MNCs are crucial for proper management of natural resources.

CHAPTER FOUR

FINDINGS, RECOMMENDATIONS AND CONCLUSION

4.1 Introduction

The aim of this academic write up is to analyze the adequacy or otherwise of the laws governing natural resource management by oil MNCs in Kenya with special focus on the International, National and County legislation.

Chapter one of this thesis laid the basis for the discussion and highlighted the twin difficulties when a country is dealing with an MNC interested in advancing foreign direct investment in the form of setting up a venture in the extractive industry. These were, firstly, that there is no universal multilateral agreement that governs the business activities of MNCs and ensures liability for their hazardous actions with a focus on environment preservation and protection. Secondly, is that even where legislation is present, in most countries, there exists several inadequacies in the legislation that curtails enforcement efforts.

The objectives and research questions for this thesis were interrelated as they sought to address the same issues. In this conclusion, after undertaking the research, I conclude that the said objectives have been realized as demonstrated in the thesis research questions. Chapter one outlined three important research questions which sought to explore the strong and weak areas of the current international, national and county legal and regulatory framework governing natural resources management by oil exploitation MNCs. These have been adequately covered in chapters two and three of this thesis. Indeed, the identified key strengths include among others the fact that there is a stand-alone piece of legislation governing the entire oil cycle spectrum of the oil and gas exploitation process and further that there is a robust legal framework for natural resource management. However, the legal framework as it is not without blemish as its enforcement mechanisms are weak.

Some of the challenges that have been identified in the previous chapters can be attributed to an absent international legal instrument dictating consequences for the lack of adherence to the dictates of the said statute and necessitating MNCs observance of environmental law principles. Most of the codes are voluntary in nature as has been discussed in chapter one and do not elicit any sense of compulsion for obedience on the part of MNCs. At the national level, whilst the

laws are diverse, there are gaps with regard to lack of proper management of waste, gas flaring and oil spills management, local content and transparency initiatives. There also seems to be overlapping roles of environmental management institutions in the different Acts of Parliament as well as the unavailability of strict implementation mechanisms of legislation. The county scenario is also wanting as the available policy documents as well as legislation are proving to be insufficient as most are draft documents and do not properly safeguard the Turkana county inhabitants from the negative effects of actions of MNCs to the environment. There is also need for sensitization of the inhabitants as well as the leaders and especially members of the Turkana County Assembly whose role is an oversight one to enable better management of natural resources.

In answering one research question, chapter three delved into the comparative analysis by examining the presented challenges through the lens of other countries' perspective. The Nigerian perspective provided a relatable opportunity to Kenya as Kenya is likely to undergo similar teething problems in its nascent oil and gas sector. The Norwegian perspective was evidence of what can be achieved with probably less laws that are well drafted to facilitate a robust enforcement mechanism. The last research question on possible recommendations is being answered in this chapter.

There are two major hypotheses that were put forth in chapter one of this thesis. Firstly, that the lack of a binding International legislation acting as a guideline for the oil exploration activities of MNCs especially in developing countries has contributed to various human rights abuses which include a right to a non- hazardous environment. Secondly, the fragmented nature of Laws in the country seeking to protect against the environmental ills caused by MNCs as well as the inadequacy of appropriate enforcement mechanisms of available laws makes it difficult to regulate MNCs activities. Both of these hypothesis were proven through the analysis of the various legal instruments presented for the three countries to wit Kenya, Nigeria and Norway.

Chapter two discussed the regulatory at legal framework in Kenya at length where the findings indicated several challenges were identified. These included the multiplicity of laws which has led to a weakness in enforcement mechanisms thereof. There is also the lack of an emergency response system with regard to onshore oil spills as well as lack of effective enforcement of waste regulations. There is also sub-optimal transparency where the Turkana community does

not have access to the EIA reports and even when they do they are not adequately literate to understand the technical terms of the said reports. Public participation is also not satisfactory as there has not been enough awareness campaigns on the harmful results of oil exploitation to the environment and the role of MNCs in the whole cycle. The several laws cited have their strengths in environment protection which MNCs have to observe if they are to operate in the country.

Chapter three discussed legislative frameworks for two countries to wit the Federal Republic of Nigeria and the Kingdom of Norway. This analysis has highlighted the importance of a robust implementation and enforcement mechanism in any legislation which has enabled Norway to be able to curtail the activities of MNCs operating in its Continental Shelf. Lastly, this chapter shall outline suggested recommendations for adoption by various enforcement agencies in the country in order to update the inadequacies of the available legislation.

4.2 Recommendations

The recommendations herein may be divided into short term which seek to address the current state of affairs, mid-term goals as well as long term goals**.** This will assist especially in the smooth transition towards achievement of a proper regulatory framework to aid in proper administration of natural resources by MNCs in oil production.

4.2.1 Short – Mid Term Recommendations

4.2.1.1 Revision and strict enforcement of available policy and legal framework at National and County level

There needs to be a review and update of the gaps cited in this thesis in the Kenyan law both at the National and County governments which need cannot be overemphasized. There should be legislation addressing issues such as response to oil spills, waste management and gas flaring. As is the case in both Nigeria and Norway, there should be a sector specific response team in case of dealing with hazardous wastes. Further, even as the Senate pushes for a standalone local content law the available legislation where local content has been inculcated[332] should be enforced across board.

[332] Part iv of The Petroleum Act 2019

4.2.1.2 Ensure Transparency in Revenue generation, Waste Management and Ownership details of Companies

It has been posited that one of the ways to avoid the resource curse is through transparency initiatives. While MNCs may not be seem to be the main culprits in this issue, they do have a part to play as well. The issue of disclosure of Beneficial Ownership in a company as per the EITI initiative as well as the requirement the MNCs Directors prepare a report in their annual reports on how their company's activities has positively contributed towards conservation of the environment.[333]

Revenue disclosure is important as it creates trust from the citizenry. This can be done by MNCs declaring the amount of revenue they have submitted to government entities on account of oil sales. Further, MNCs should disclose the type of waste being handled and the danger it is likely to create if any of it leaks to the environment or is indirectly consumed by human beings. This ensures that bodies like NEMA and the Ministry of environment at the county level are able to manage the situation in from a point of knowledge through appropriate policy programs and /legislation.

4.2.1.3 Improve Capacity and Awareness at National and County Level

The lack of awareness of the potential benefits and dangers posed by this fairly nascent industry especially at the county level is detrimental to them achieving their oversight function as mandated under the Constitution of Kenya. It therefore behoves the bodies National Government as well as MNCs and civil rights groups to ensure there is enough awareness on the processes in the extractives industry. This will assist the county assemblies in passing appropriate county laws in a bid to adequately protect the environment.

4.2.1.4 Enhance cooperation avenues between MNCs and National and County Governments

There needs to be proper cooperation between the two levels of government as well as the MNCs in the fight against issues such as ecocide for better environmental governance should be adopted as a driving factor to spearhead sustainable development. In a situation where MNCs through their representatives are included in various forums that focus on environmental protection, they are able to inculcate the said culture into their system and even enhance community acceptance thereby propagating the 'social licence to operate'. MNCs are known for their financial muscle

[333] Supra note 220

as well as access to appropriate technology which developing countries such as Kenya which will enable the conservation of the environment. Issues such as gas flaring can be dealt with the use of appropriate technology as with the case of Norway.

4.2.2 Long Term Recommendations

4.2.2.1 Explore Environmental Insurance by MNCs

As has been captured in Chapter one of this thesis, it has proved difficult to ensure MNCs bear responsibility for their misdeeds with regard to the environmental harms. Litigation has been a great mechanism that can provide reprieve to victims of environmental harm as a result of actions of MNCs, however, it has been marred with several disadvantages such as high costs and lengthy processes as well as being coupled by unfavourable legal doctrines such as *forum non conveniens*. This puts victims of environmental harm at a disadvantage. An environmental insurance package that covers the risk of pollution to the environment as well as protection of the health of persons may be the way to go in terms of settlement of any claims arising. [334]

4.2.2.2 Push for Internationally Binding Treaty on the Activities on MNCs and TNCs with focus on the Environment

It is well known that states are viewed as to be the subjects of international law by virtue of being parties to several multilateral treaties. There are scholars with the view that these MNCs possess limited international personality which gives them rights and corresponding responsibilities. This means that the MNCs ought to bear the brunt of their negligent actions. which should be easily enforceable through various laws both nationally and internationally.[335] These efforts are being made by the UN Human Rights Council in Geneva for a suggestion on a binding instrument on the international sphere governing Transnational Corporations and Other Business Enterprises. Currently a revised draft is out for comments on the same from member states.[336]

[334] Supra note 125 ,pp. 538

[335] Business and Human Rights Resource Centre, ND, http:// business –human rights.org/en/binding-treaty las t accessed 20th November 2019.

[336] Ibid.

4.3 Conclusion

This study has presented an examination of the legislation for the control of activities of MNCs in a bid to enhance their management of natural resources especially in oil production.It has been noted that a robust legal framework must be combined with a strict enforcement framework for it to achieve desirable results. Further, the gaps within our legal framework has left most issues to be addressed under the CSR ambit by corporations and MNCs alike and which as per the shareholder theory, the same has proved to be inadequate. It is therefore the onus of the governance of the country both at National and County level to take active steps to ensure better environmental governance for the benefit of future generations.

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