

**FOREIGN INVESTMENTS' ENTRY REQUIREMENTS IN SOUTH SUDAN:
MAKING THE CASE FOR LEGAL REFORMS TO GUARANTEE
ENVIRONMENTAL PROTECTION**

**RESEARCH PAPER SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE
AWARD OF THE DEGREE OF MASTER OF LAWS (LLM)**

BY:

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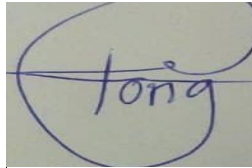
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DECLARATION

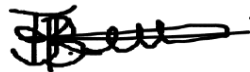
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Dr Jackson Bett

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I thank my supervisor, Dr. Jackson Bett, for his tireless effort and kindness to get this work done and above all his being so polite. Dr Bett, despite your busy schedules and other responsibilities, your timely response chapter by chapter has made me finish the project without delay. On the same note, I extend words of thanks to Dr. Njaramba Gichuki for his timely allocation of the supervisor and for follow-up during the supervision period. I dearly thank you Dr. Njaramba for without your commitment and passion in seeing me finish my project on time, I would not have had the stamina and courage to complete the project within the time frame. Finally, had not been the cooperation and group studies with many colleagues, among them Husnah Julius, the class representative, James Denis Maina, Deputy class representative, Faith Nganga, Bona Bol Madut Ayii, Mayen Mangok Ruop, Shantey Onyango, Noel Ngoloma and many other colleagues, the journey would have been tough and tiresome. I credit you all dear colleagues on this achievement as the victory belongs to all of us.

DEDICATION

I dedicate this Project to my brother Kuol Majok Mabior, for funding the entire program, and to my Supervisor, Dr. Jackson Bett, for his tireless effort and commitment to get this Thesis done on time. Once again, had it not been brother Kuol, I would not have managed to study Master of Laws at the University of Nairobi, given its expensive demands in terms of requirements including tuition fee. Without reservation, you deserve this credit, Kuol Fidel. Thank you!

ABBREVIATIONS

1. CSR - Corporate Social Responsibility
2. UK – United Kingdom
3. OECD-Organization for Economic Cooperation and Development
4. FDI – Foreign Direct Investment
5. UDHR-Universal Declaration of Human Rights
6. UN-United Nations
7. FCN – Friendship, Commerce and Navigation
8. MFN – Most Favoured Nations
9. GATT-General Agreement on Tariffs and Trade
10. ICSID-International Centre for Settlement of Investment Disputes
11. MIGA – Multinational Investment Guarantee Agency
12. MAI – Multilateral Agreement on Investment
13. NGOs – Non-governmental Organizations
- 14.FIPA – Canadian Foreign Investment Promotion Agreement
- 15.NAFTA-North America Free Trade Agreement
16. BIT – Bilateral Investment Treaty
17. ASEAN-Association of Southeast Asian Nations
18. AFCFTA-African Continental Free Trade Area
19. EAC – East African Community
20. CNPC-China National Petroleum Corporation CNPC
21. ONGC-Oil and Natural Gas Corporation
22. NILEPET – Nile Petroleum Corporation
23. PETRONAS – Petroleum Nasional Berhad
24. DPOC – Petroleum Operating Company
25. EPA-Environmental Protection Agency
26. UNEO-United Nations Environmental Programme

27. JICA – Japanese International Cooperation Agency

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The Environmental Management and Coordination Act, 1999.

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- Government of South Africa, 'National Waste Management Strategy, 2020'.
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ABSTRACT

Transferring both intangible and tangible assets for commercial use from the investor's country of residence, with the investor's home-based controlling profits and assets. These investment activities violate aspects of human rights like environmental protection and human health. South Sudan like other countries around the world has opened a foreign investment environment. The activities of foreign investment are regulated by the Investment Promotion Act, of 2009, and other relevant Laws-Petroleum Act of 2012, in the oil industry. The Investment Promotion Act of 2009 governs investments, however despite its existence, it says nothing about safeguarding the environment and public health from foreign industries' contamination. A few laws that refer to protecting the environment and human health from pollution are vague and do not include any corrective actions. Therefore, it is against this introduction that the research has analysed international bilateral and multilateral treaties and national regulatory legal frameworks in an attempt to seek legal reforms that would guarantee environmental safeguards in terms of admission of foreign direct investment. The research looks at the impacts caused by foreign Direct Investment on environment and health in South Sudan. These impacts are discussed in the context of soil, water and land pollution. The thesis investigates the control measures in terms of legislative measures and the policy framework. To achieve environmental protection and health safeguard against foreign investment impacts, reforms in the legal framework are necessary. These reforms cover the incorporation of provision that promotes the principle of polluter pays so that remedies for environmental pollution are guaranteed, and making environmental protection compliance a prerequisite for FDI.

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CHAPTER ONE

1.1 Background and Context

Scholars defined Foreign investment as the transfer of intangible and tangible assets from the home state of the investor or any other country to another country for business purposes, where the profits and assets are controlled by the home country of the investor.¹ As per the definitions provided by the IMF and Organization for Economic Cooperation and Development (OECD), direct investment refers to the objective of a resident entity from one country (the direct investor) to acquire a long-term stake in an enterprise located in another economy (the direct investment enterprise).² In addition, the World Trade Organization says that foreign investment aims at utilising resources for economic growth and improvement of environmental protection.³ This recognizes that while increasingly opening out for production and international trade, investors shall observe the objective of sustainable development by deploying preservative and protective environmental measures that conform with needs of economic development.⁴ Hence, the balance concerning goals of market liberalization and calls to protecting environment is of universal concern. In addition, customary international law recognises that the entry and exit of foreign investment lie with the host state.⁵ This means that the contracting party to say, multilateral agreements is free to adopt appropriate measures which make investor(s) adhere to environmental safety or make the polluter pays the cost in the event of a violation.⁶

South Sudan has signed investment agreements with several countries, but the country is yet to adopt entry requirements for foreign investments regarding environmental protection. Even though the Investment Promotion Act, of 2009 expressly lays out that a foreign investor interested in carrying out business in South Sudan shall apply to the investment Authority for the issuance of a license, the Investment Promotion Act does not contain a clause for

¹ M. Sornarajah, *The International Law on Foreign Investment* (5th edn, Cambridge University Press 2021).

² Maitena Duce and Banco de España, (2003) 'Definitions of Foreign Direct Investment (FDI): a methodological note'. < <https://www.bis.org/publ/cgfs22bde3.pdf> > accessed on 7 December 2023.

³ Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis, and Michael Hahn, *The World Trade Organization Law, Practice, and Policy* (3rd edn, Oxford University Press 2015), PP. 716-717.

⁴ Ibid, PP.716-717.

⁵ M. Sornarajah, *the International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010), PP. 273-275.

⁶ *ibid*, PP. 273-275.

environmental protection.⁷ The words environmental protection are found in the Petroleum Act, 2012. The Act obliges the contractor to carry out the environmental impact assessment before commencement of related activities and imposes liability for the damage resulting from pollution without regard to fault.⁸This law concerns only environmental protection accorded by foreign investors in petroleum operations. The Republic of South Sudan's constitution also guarantees everyone the right to a healthy environment for current and future generations.⁹ - to implement this right, the constitution mandates parliament to take legislative and appropriate measures to enact a law that prevents pollution and environmental degradation.¹⁰This should have been the case by incorporating a provision that protects people from environmental pollution into the Investment Promotion Act, of 2008.

Importantly, the aforementioned insufficiency in the legal regime to protecting environment against foreign investments' activities is the subject of this investigation.

1.2 Statement of the Problem

Notwithstanding enactment of the Investment Promotion Act, of 2009, which allows foreign investors to invest in South Sudan, environmental protection has not been addressed. There are a few laws with scattered provisions governing environmental protection in areas of concern: For instance, (I) The Petroleum Act, 2012 governs specifically environmental protection in the oil industry, which makes environmental pollution caused by foreign investments in other areas unregulated. (II) The constitution under Article 41 guarantees that environment be protected through legislative measures. This provision is not complied with since the Parliament did not adopt appropriate measures to incorporate environmental protection into the Investment Promotion Act, of 2009. An example of a foreign legal framework that imposes environmental protection as entry requirement for investors, is the Government of Canada International Trade and Investment Agreements, 2021. It provides evidence of the state's legal authority to control foreign investments in order to safeguard the environment.¹¹

Therefore, the defect in the law regarding the liability of foreign investors for environmental pollution includes social-environmental issues: First, it has negatively impacted the

⁷ The Investment Promotion Act, 2009, s 21(2).

⁸The Petroleum Act, 2012, s 59(3), 61(1).

⁹ The Transitional Constitution of the Republic of South Sudan, 2011, Article 41.

¹⁰ *ibid.*

¹¹ Government of Canada International Trade and Investment Agreements, 2021, article 3.

population of the people and the animals in the areas that host major foreign investments in the country. For instance, foreign hotels like Crown and Landmark situated in Juba to mention a few, have been constantly accused by the residents of Juba for dumping waste materials into the riverside. In 2018, a study carried out in Juba city as a result of diseases outbreak like typhoid, skin disease and cholera, revealed that most hotels and factories dump garbage and sewage directly into the riversides which causes water and air pollution.¹² It is important to note that residents of Juba and elsewhere in the country depend on water directly fetched from the rivers.

Second, despite this environmental pollution and consequent social impacts, there have been difficulties in getting remedies against the polluters as the law is not clear on who bears the liability and the procedures of the claim thereof. South Sudan is party to both the 1992 African Convention on the Conservation of Nature, and the 2017 United Nations Convention to Combat Desertification. But, none of these instruments has a specific clause for foreign investments' environmental protection.

With this backdrop, the victims of environmental pollution cannot be remedied under national laws regulating foreign investments. Though the constitutional entitlement to a healthy environment is enforceable, it lacks defined sanctions against the polluters and the would-be available compensations for the victims. As reflected in the United Nations General Assembly Guiding Notes on human rights and the environment, that for the benefit of all people, the human rights framework shall offer an unquestionable moral and legal basis for swift action to safeguard the environment,¹³ the researcher argues that there is a compelling need for the regulation of entry requirements for foreign investments to guarantee environmental protection as human right, in South Sudan.

¹² John Leju, Andrew L. Athiba, Stanislaus Tombe, and Moses Lomoro, "Investigation on the Impact of Water Pollution on Human Health in Juba County, Republic of South Sudan" *Journal of Environment Pollution and Human Health*, vol. 6, no. 3 (2018): 89-95. Doi:10. 12691/jephh-6-3-2. < <file:///C:/Users/Admin/Downloads/Investigation-on-the-Impact-of-water-pollution-on-.pdf> > accessed 26 March 2022.

¹³United Nations Development Group, 'Human Rights And The Environment Excerpt from the UNDG Guidance Note on Human Rights for Resident Ccoordinator's and UN Country Teams 2 0 1 7.< <https://unsdg.un.org/sites/default/files/2020-03/Human-Rights-and-the-Environment.pdf> > accessed on 7 December 2023.

1.3 Objectives

The objectives are categorized into three:

1. To assess international and national Investment regulatory frameworks concerning environmental protection.
2. To analyse the impacts of foreign investment activities on the environment and human health in South Sudan.
3. To analyse the control measures of the impacts of foreign investment on the environment through legal reforms that guarantee environmental and health safeguards in South Sudan?

1.4 The Research Questions

The researcher is seeking to answer three questions:

First, what are the international and national investment regulatory framework concerning environmental protection?

Second, what are the impacts of foreign investment activities on the environment and human Health in South Sudan?

Third, what are the control measures of the impacts of Foreign Investment on the environment through legal reforms that guarantee environmental and health safeguards in South Sudan?

1.5 Hypotheses

The hypotheses of this study predict:

First, shortcomings in international and national foreign investments' activities regulatory framework have created legal vacuum regarding environmental protection and health in South Sudan.

Second, as a result of lack of regulations for foreign investment's activities in South Sudan, environment and human health are negatively impacted.

Third, unless environmental protection requirements are included in the legal regime on international foreign investment, environmental and health protection cannot be guaranteed.

1.6 Theoretical Framework

1.6.1 Corporate Social Responsibility Theory (CSR)

The CSR theory assigns responsibility to the corporation to consider ethical and social commitments that include human rights protection like the environment in the course of its profit maximization.¹⁴ Despite the long-time existence of business operation in centuries, this idea called CSR was adapted in 1953 from American Economist Howard Bowen in his book “Social Responsibilities of the Businessman”.¹⁵ Right away, Bowen was frequently referred to as the founder of CSR. However, CSR never came into effect in the jurisdiction of United States of America until 1970s. The CSR developed and spread all over when the Committee for Economic Development made a standing agreement between the society and corporations seeking or undertaking investment in the period of 1971. The arrangement progressively brought to light the idea that companies must fulfil societal demands in order to maintain public support for their operations.

As governments, the media, social campaigners, and the community become more active in holding businesses accountable for the outcomes of their actions, CSR has not only received academic support from inception going forward, but it is also beginning to enter the mainstream for many organizations. A number of writers like Hetherington (1973) say that a company is considered a member of society and that its activities impact negatively the environment.¹⁶ He says that since most of the shareholders may not be interested to engage in the non-profit making which reduces the market performance of their stock or dividends, the authority has a right to impose legal compliance connected to human rights like environmental protection.¹⁷ In addition, he expresses that corporations are social enterprises and that their existence and decisions should be justified when they serve the public purpose.

Keith Davis proposed in 1960 that " CSR" is equated as company obligation and undertakings that are at least partially taken for reasons other than immediate commercial or technological

¹⁴ Maxwell Chufama and Fortunate Sithole and Tyonne Utaumire, ‘A Review of Corporate Social Responsibility Theories and Models.’ International Journal of Economics, Commerce and Management United Kingdom ISSN 23480386 Vol. IX, Issue 3, March 2021 < <http://ijecm.co.uk/wp-content/uploads/2021/03/938.pdf> > accessed 4 August 2022.

¹⁵ Thomas (2019), ‘Brief History of Corporate Social Responsibility’ Thomas (2019), < <https://www.thomasnet.com/insights/history-of-corporate-social-responsibility> > accessed 3 August 2022.

¹⁶ David Crowther and Guler Aras, ‘Corporate Social Responsibility’ (200) < <https://www.mdos.si/wp-content/uploads/2018/04/defining-corporate-social-responsibility.pdf> > accessed 4 August 2022.

¹⁷ Ibid.

interest of the business.¹⁸ The concept of social responsibility asserts that a business not solely bound by legal and financial obligations but also carries responsibilities to society that extend beyond the pursuit of wealth maximization.¹⁹ This means that the investors need to be aware that their ability to keep providing goods and services and to make money will be based on how well-liked they are by a global society. The preservation of human rights is increasingly viewed as a need of the corporate license to operate according to a 2003 report by Amnesty International-Business Group (UK). The acceptability test shall be restricted to this trend.

Furthermore, the expanded number of supporters of CSR says that when investors propose investment in a given area or a country, they have the responsibility to satisfy first, the guarantee of human rights protection.²⁰ This theory is applicable in guiding this research in the sense that measures like corporate social responsibility are duties enforced on the investors through legal reforms. This can be strongly achieved when the government pursue legal reforms in the area of laws related to foreign investments so that protection of the environment from foreign investment activities is punishable and remedied.

1.6.2 Polluter Pays Model

The basic tenet of the Polluter Pays Theory is that individuals who destroy the environment must pay for their actions.²¹ State Parties for Organization for Economic Cooperation and Development (OECD) first introduced this idea in 1970s, by creating a payment system that required polluters to pay for pollution control expenditures rather than the general public.

The Model is concerned with international economic concepts of environmental protection; it provides for the methods of prevention of pollution, control means for environmental

¹⁸ Salifu Mohammed, 'Components, Theories and Business Case for Corporate Social Responsibility'. International Journal of Business and Management Review Vol. 8, No. 2, pp. 37-65, March (2020.<<https://www.eajournals.org/wp-content/uploads/Components-Theories-and-the-Business-Case-for-Corporate-Social-Responsibility.pdf>>accessed 5 August 2022.

¹⁹Mohammad Sepahvand (2009), 'Analysing The Concept of Corporate Social Responsibility: With the Monetary and Ethical Approach'. <<https://www.diva-portal.org/smash/get/diva2:210546/FULLTEXT01.pdf>>accessed 5 August 2022. Thesis.

²⁰Lance Moir (2001), 'What do we Mean by Corporate Social Responsibility?<<https://files.core.ac.uk/pdf/23/138652.pdf>> accessed 6 August 2022.

²¹Adis Israngkura, 'The Polluter-pays: So Who Pays? Published in TDRI Quarterly Review Vol. 11 No. (1996), pp. 12-15 Editor: Belinda Fuller <<https://www.thaiscience.info/journals/Article/TQR/10475122.pdf>> accessed 2 August 2022.

protection and how to avoid unfavourable investments into the environment.²² The model was first formulated in 1972 and its first application was in 1973.²³ The widely accepted corrective justice principle, or, to put it another way, the idea that people who unjustly contribute to harm or the threat of harm have a responsibility to pay for redressing the harm or threat (by preventing, mitigating, or compensating it), is the foundation for the polluter pays principle, as it is commonly understood by climate change justice theorists.²⁴

The primary aim is to deter polluters from polluting the environment by imposing compensation for their irresponsible harm to the environment.²⁵ In essence, the objective of the model lies in incorporating the social and environmental costs into the intended activities. The other aim of the model is that the polluter is financially responsible to pay the expenses to implement the measures carried out by the public authority for environmental protection.²⁶ It is incorporated into the Rio Declaration which obliges the states to promote environmental protection in economic instruments of international trade and investments while putting into account that the polluter pays for his damage for the public interest.²⁷ The responsibility imposed on the injurer encompasses compensation to the individuals suffering harm and the restoration costs suffered as a result of contamination.²⁸ In this case *Bulankulama v Secretary*, the Supreme Court cited the Polluter Pays Principle to invalidate the decision made by the government when they entered the arrangement of the lease with a foreign investor for phosphate mining in Sri Lanka, without regard to environmental protection.²⁹ Held that damage caused to the environment has to be borne by the party who causes it, then making it fall on the public to pay by increasing taxation to cover the cost of environmental degradation. The model is relevant to the study of this problem for the following reasons; (i)

²² BC. Nirmal and Rajnish Kumar (eds), *Contemporary Issues in International Law Environment: International Trade, Information Technology and Legal Education* (Spring Nature Singapore Pte Ltd 2014), PP, 105.

²³ Aida, M., and Setiawan, I. (2021). The Implementation of Polluter Pays Principle in Indonesian Land Policy Regulation. *Jurnal Ilmiah Hukum dan Hak Asasi Manusia*, 1(1), 37-42 <<file:///C:/Users/Admin/Downloads/415-Full%20Manuscript-1669-2-10-20210702.pdf>> accessed 15 March 2022.

²⁴ Paul Bowman, 'On the Alleged Insufficiency of the Polluter Pays Principle'. The Institute for Futures Studies. Working Paper (2019) <<file:///C:/Users/Admin/Downloads/Bowman%20On%20the%20Alleged%20Insufficiency%20of%20the%20Polluter%20Pays%20Principle.pdf>> accessed 5 August 2022.

²⁵ Ibid.

²⁶ See B.C. Nirmal (n 20 above).

²⁷ Rio Declaration on Environment and Development, 1992, P, 16.

²⁸ Aid, M., and Setiawan, I. (2021). The Implementation of Polluter of Pays Principle in Indonesian Land Policy Regulation. *Jurnal Jihham*, 1(1), 37-42 <<file:///C:/Users/Admin/Downloads/415-Full%20Manuscript-1669-2-10-20210702.pdf>> accessed 15 March 2022.

²⁹ *Bulankulama and Others Vs. Secretary*, Ministry of Industrial Development and Others. [2000] 3 Sri LR 243.

relying on this model the government may incorporate under investments regulation the “polluter pays principle” guaranteeing liability for environmental pollution against foreign investors; and (ii) the would-be victim may have a defined remedy and can bring the lawsuit before a competent Court for environmental pollution.

Contrary to the aforementioned concept of the model with the supported argument, there may be other challenges against the model: First, lack of implementation and enforcement mechanism because of judicial constraints where judges can be bribed by powerful investors; and second, inadequate public awareness about the environmental pollution triggered by investors' activities and the available remedies thereof.

1.7 Justification of the Study

The review of various existing findings revealed that multilateral and bilateral treaties, both regionally and internationally, as well as national legal frameworks which regulate foreign direct investment undermine environmental protection, but rather focus on the protection of the investors. Therefore, this research discovers the discrepancies and inefficiencies in regulatory frameworks and extents the legal reforms in environmental protection to South Sudan.

1.8 Significance of the Study

The significance of this project is confined to the realization of the right to healthy environment, and holding the polluters to account for harm caused by their activities. This can be achieved by necessary legal reforms to make environmental protection guarantees an entry requirement to the foreign investors.

1.9 Literature review

Regarding review for current literature revolves around the environmental protection imposed by the host states' legal regulatory framework on the investors at the entry points. The function of law is preserving the environment in light of foreign investment activity.

In Dan and Zehua, in the ‘An examination of how Brazil’s Environmental Protection Policies and Legal Framework Impact Foreign Investment Activities.’ The authors say that free trade encompasses attracting investors whose activities bring in to the host country unfriendly

technologies to the environment.³⁰ The authors commended that Brazil has strong environmental protection laws including the protection stipulated in the constitution and the specific environmental regulations and laws.³¹ According to the finding, Brazil's Legislative Assembly legislates on Federal environmental protection and the State Assembly supplement by enacting laws regulating the local environment.³² They concluded that international trade and environmental protection have inseparable links, and as such, they restrict each other. They added that permitting the investors without proper environmental regulations makes the environment and the residents exposed to environmental pollution transferred by the production activities.³³ Despite Brazil having strong laws the enactment of the environmental laws is too general. It is more about local environmental protection, and so the laws lack mandatory obligations that imposed environmental protection conditions for the issuance of licenses to foreign investors. Focusing on the legal reforms that guarantee environmental protection from foreign investment activities is the gap that the study centres to address.

By extension, in Juan, Bin, He & Yalong's article, 'Sustainable of Enterprise Export Expansion from the Perspective of Environmental Information Disclosure', the government of China forces companies involved in export to make environmental information disclosure.³⁴ The finding reveals that the focus is to make investors cooperate with the authorities by carrying out their activities with consideration of the protection of the environment from pollution.³⁵ The second reason behind the disclosure of environmental information is that it builds the investors' reputation concerning environmental protection guarantees.³⁶ As part of making companies comply with environmental protection measures, the government gives them the benefit of export subsidies.³⁷ The researchers concluded that among the mechanisms the government of China employed to control environmental risks, is

³⁰Dan Wei and Zehua Tian, 'Analysis of the Impact of Brazil's Environmental Protection Legal Mechanisms on Foreign Investment Activities'. *Macau Journal of Brazilian Studies*, Vol. 4, Issue 2, Oct. (2021) <<http://aebm.mo/en/uploads/ueditor/file/20210720/1626751330375135.pdf>> accessed 12 March 2022.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Juan Lu a, Bin Li b, He Li a and Yalong Zhang, 'Sustainable of Enterprise Export Expansion from the Perspective of Environmental Information Disclosure.' *Journal of Cleaner Production* (2019) <<https://www.sciencedirect.com/science/article/abs/pii/S0959652619347092>> accessed 12 March 2022.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

the continuous cooperation with exporting foreign investors to voluntarily disclose their environmental protection information.³⁸

The gap this literature reveals is that the finding focused on environmental information disclosure in foreign investments' export as a way of achieving environmental protection. They researchers have disregarded the fact that the efficient protection of the environment from foreign investment activities starts at the entry points so that no investors are issued with the licence before satisfying environmental protection guarantees. It is this gap the author will close by recommending legal reforms that guarantee environmental protection from the entry point.

In addition, environmental concern was raised by Garang and Jean, In their article, 'Impact of Crude Oil Exploration and Production on the Environment and Implications on Human Health: South Sudan Review' that the environmental protection in the oil-producing state, has not been properly regulated.³⁹They say that oil linkages, spills and noise resulting from exploration have caused environmental contamination, especially in water, air and soil.⁴⁰They argue that unless the government makes a clear policy on environmental protection, the result can be risky to human health and environment, in the long run.⁴¹In their conclusion, the government and the oil companies should urgently carry out environmental protection awareness campaigns in the affected areas.⁴²

The gap in this finding is that it addresses the environmental concerns for foreign investments in the oil industry, leaving out the entire problem in the other fields. It is this gap the researcher is intending to address by focusing on the entry requirements for entire foreign investment activities concerning environmental pollution in South Sudan.

Furthermore, balancing investment and environmental protection was stressed by Valery and Oksana, in their article, 'Investment Activity and Environmental Protection: Balance Investors' Interests and Environmental Challenges'. The article reveals that in Russia, the general requirements for investors to enter the market are set out under Article 3 of Federal

³⁸ Ibid.

³⁹Simon Garang and Jean Pierre, 'Impacts of Crude Oil Exploration and Production on the Environment and Its Implications on Human Health: South Sudan Review'. International Journal of Scientific and Research Publications, Volume 9, Issue 4, April (2019) 247 ISSN 2250-3153 <http://www.ijsrp.org/research-paper-0419.php?rp=P888456>> accessed 13 March 2022.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

Law, and this includes environmental protection.⁴³The law prohibits investments whose projects do not meet environmental guarantees and other standards considered to be prejudiced to human safety and hygiene.⁴⁴The government has applied direct administrative measures to ensure strict compliance with environmental protection guidelines by the investors.⁴⁵The researchers concluded that to achieve effective compliance with environmental protection, the state has to combine administrative methods of controlling the investors and mechanisms of attracting investments into the country.⁴⁶The study is relevant to this investigation since its finding indicates that Russian environmental laws make environmental protection an entry requirement for foreign investments. However, geographically, this research is looking at the legal reforms on the foreign investment laws regarding environmental protection in South Sudan.

Finally, Farruhbek said in his article, ‘ Screening of Foreign Investments in the Context of Turkmenistan’s FDI Regime,’ that the state has a right to ensure that it screens investments entrance into the country.⁴⁷The purpose of screening is for the investors to conform to standards needed for health and environmental protection while achieving economic benefits.⁴⁸He added that while most developing countries employ low standards for health and environmental requirements at the entry points, Turkmenistan had imposed a high standard of safety, health and environmental protection for the public interest.⁴⁹ “It has been a general rule that adopting the high standard for environmental protection at the entry point against foreign investors, is not a concern of the investors but the host state,” He concluded.

But, the study did not specify the exact law, whether it is the constitution or investment-related act that imposes the aforesaid environmental guarantees, and the measures taken to ensure compliance with the said provisions. To suit it to South Sudan perspective, the thesis will identify the areas of reforms within foreign investment laws and the measures to be put

⁴³ Valery Istomin and Oksana Beldina, ‘Investment activity and environmental protection: Balancing investors’ interests and environmental challenges.’ published by EDP Sciences, E3S Web of Conferences 296, 06035 (2021) <https://www.e3s-conferences.org/articles/e3sconf/pdf/2021/72/e3sconf_esmgt2021_06035.pdf> accessed 13 March 2022.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Muminov F and Varol Ae, “Screening of Foreign Investment in the Context of Turkmenistan’s FDI (Foreign Direct Investment) Regime” (2020) 40(1) PPIL 417. <https://doi.org/10.26650/ppil.2020.40.1.0025> accessed 13 March 2022.

⁴⁸ Ibid.

⁴⁹ Ibid.

in place for maximum compliance. The existing literature review supports the host states to adopt environmental protection guarantees as entry requirements for admitting foreign investments. However, the literature is silent about the needed necessary legal reforms in the area of foreign investment. Second, the research does not highlight the discrepancy between the global regulatory system and the national regulatory framework regarding environmental protection.

Therefore, in South Sudan where an influx of foreign investments is on the rising, this research focuses on reviewing both international and national laws governing foreign investment in respect to environmental protection and recommends necessary legal reforms. The research is, therefore an extension of the scope of the existing finding.

1.10 Research Methodology

This study used a thorough desk-review research process, often known as doctrinal legal research. Particular attention was paid to both primary and secondary materials by the applicant. constitutional law, pertinent international and regional legal documents, domestic legislation and policy frameworks, and court pronouncements are some of the key primary sources used in the study. The secondary sources used were books, journal articles, internet sources and reports that were published. The University of Nairobi School of Law physical library, Google Scholar HeinOnline, JSTOR, LexisNexis, researchgate website, and the Kenya Law website were all used to discover all of these materials. Lastly on this topic, the comparative analysis has been applied in this project; looking at the Kenya environmental protection Law, South Africa and Nigeria, briefly.

1.11 Scope and Limitation

Though legal framework inefficiencies are wide, this study focuses on the legal reforms in the context of foreign investment activities regarding environmental protection. This is because looking at the legal reforms entirely on foreign investment will be too vague.

In addition, the researcher avoided the fieldwork or quantitative method of data collection on the ground that fieldwork which may require interviews or answering questionnaires may be confined to a specific area. Therefore, the responses to be collected in one area or from specific people may not represent the entire problem concerning foreign investment activities against the environment. Second, the resource constraints have prevented the researcher to reach the intended fields. This project covers the period of 2011 when country gained independence from Sudan to the time of completion of this research.

1.12 Chapter Breakdown

The research contains five chapters.

Chapter 1: Outlines the scope and context of the study. These encompass an introduction statement of the problem, objectives, research questions, Hypotheses, theoretical framework, literature review, scope and limitation and Methodology.

Chapter 2: Covers the assessment of the existing legal framework, both international and national instruments regulating foreign investments in the context of environmental protection by the host state of South Sudan.

Chapter 3: Focuses on the impacts of foreign investment activities on the environment human health and areas of legal reforms.

Chapter 4: Covers the control measures against impacts of environmental pollution caused by foreign investment and the need for legal reforms that guarantee environmental and health safeguards. The analysis focuses on the legal dimension.

Chapter 5: Summary of findings, Conclusion and recommendations.

CHAPTER TWO

INTERNATIONAL FOREIGN INVESTMENTS AND NATIONAL REGULATORY FRAMEWORKS

2.1 Introduction

Part of the area on protection of environment traced extensively and discussed in this project is the historical evolution of the foreign investment regulation framework. The chapter recounts the development of the legal regimes in relation to the question of whether there is a legislation that adequately protects the environment from activities involving foreign investment. This survey covers multilateral and bilateral treaties. Further to that, the researcher examines the standing agreements under which South Sudan is party to. Finally, the chapter studies South Sudan's legal frameworks concerning environmental protection in the context of foreign investment activities.

2.2 Historical Development

The 192 United Nations member states have made it mandatory for the governments to adopt administrative, legislative, and judicial steps in the 21st century in order to address environmental safety issues as a right while investing.⁵⁰ But, the adoption of international investment rules is dated to the formal acceptance of the United Nations Charter and Universal Declaration of Human Rights (UDHR), 1945. But regrettably, the UN Charter and UDHR do not have provisions related to environmental protection by the investors. But the state's attempts to create a comprehensive multilateral regulatory framework after World War II have encountered a number of setbacks amongst host countries and FDI investors.⁵¹ The disagreement is attributed to host states' claim of infringement of sovereign rights regarding the rules related to compensation of foreign investors in the event of expropriation and many others like environmental protection.⁵² In order to improve trade links with its allies, the United States and Nicaragua signed the first bilateral treaties of friendship, commerce, and navigation (FCN) in 1956.⁵³ Among the goals of the agreements was to safeguard the belongings of citizens of the signatory nations.⁵⁴ These encompass payment for compensation

⁵⁰ Pm Dupuy F Francioni and EuPetersmann, *International Economic Law Series; Human Rights in International Investment Law and Arbitration* (Oxford Press, 2009), PP. 46-50.

⁵¹ Stephen W. Schill, *The Multilateralization of International Investment Law*, (Cambridge University Press, first Published (2009), PP. 23-25.

⁵² Ibid.

⁵³ Kenneth J. Vandavelde, *A Brief History of International Investment Agreements* (2005), PP. 162-163.

⁵⁴ Ibid.

in the event of expropriation, national treatment with respect to business activities and guaranteeing of Most Favoured Nation (MFN) treatment. Under FCN, human rights issues like the protection of the environment were never included, and therefore, the treaties were weak and not favourable to environmental protection as far as this research is concerned. In contrast, the General Agreement on Tariffs and Trade (GATT), formally established in 1948, was negotiated in Uruguay in 1947. It is a global agreement that safeguards intellectual property rights as well as trade in products and services.⁵⁵ The Most Favoured Nation (MFN), were the GATT Core Principles and reduction of national tariffs. Since it is undisputable that trade and investments overlap when it comes to environmental pollution and degradation of natural resources concerns, no environmental protection-related clause was ever included in the GATT agreement. Additionally, in order to encourage the expansion of the production and trade of commodities, the Economic and Social Council of the United Nations decided to hold the International Conference on Trade and Employment in a decision made from February 18, 1946.⁵⁶ The Havana Charter for an International Trade Organization was adopted in the Conference held in Cuba.⁵⁷ The document was presented later to the representatives of the governments, but it never came into force. But, more importantly, the Charter never included any provision related to the protection of the environment.

Likewise, the International Centre for Settlement of Investment Disputes (ICSID or the Centre) was established in accordance with the Convention on the Settlement of Investment Disputes Between States and Nationals of other States.⁵⁸ The Convention was drafted by the Executive Directors of the World Bank's International Bank for Reconstruction and Development. The Convention and an associated report were delivered to the World Bank member countries for review, signing, and ratification by the Executive Directors on March 18, 1965.⁵⁹ On October 14, 1966, the Convention came into force after being approved by 20 nations. The goals of ICSID are to facilitate the resolution of disputes through conciliation

⁵⁵ General Agreement on Tariffs and Trade, 1948.

<https://www.wto.org/english/res_e/booksp_e/agrmtseries2_gatt_e.pdf> accessed 23 May 2022.

⁵⁶ United Nations Conference on Trade and Employment: Havana Charter, 1948

<https://www.wto.org/english/docs_e/legal_e/havana_e.pdf> accessed 23 May 2023.

⁵⁷ Ibid.

⁵⁸ International Centre for Settlement of Investment Disputes, 1965 article 29 and 36

<<https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf>> accessed 24 May 2022.

⁵⁹ Ibid.

and arbitration or fact-finding between the member states and the investors.⁶⁰ This settlement of disputes is interpreted to cover the disputes of violations of environmental protection. Environmental related dispute may arise in a situation where investor's licence is withdrawn or revoked on environmental violation grounds. As it is the case for *Methanex V. United States*, when the Court held that the measures taken by the state to ban the company were for public purpose, capable of protecting the environment.⁶¹ This signifies that in modern times, most treaties like NAFTA make it mandatory for investors to protect the environment, and state interference with foreign investments can be justified on the environmental ground.

In addition, the World Bank has worked to increase private investment flows in order to boost the impact of its own resources and to support operations that it deems worthwhile but are outside its purview.⁶² Thus, it lobbied for the creation of the Multilateral Investment Guarantee Agency (MIGA) in order to achieve genuine investment, which went into effect in October 1985. MIGA's goals are to "promote the transfer of money between members for beneficial causes, particularly among underdeveloped states, hence supplementing" the International Finance Corporation, the World Bank and other international development finance institutions.⁶³ MIGA, on the other hand, never mentions investors' responsibility to protect the environment.

Again, referring to its reply to Economic and Social Council's request in its resolution 1982/68 on October 27, 1982, the Intergovernmental Working Group on a Code of Conduct established the "Draft United Nations Code of Conduct on Transnational Corporations" 1983.⁶⁴ The main purpose was to regulate Transnational Corporations. According to Article 7, transnational firms must abide by the laws, regulations, and administrative procedures of the nations in which they conduct business.⁶⁵ They operate to the extent mandated by these nations' national laws. In accordance with article 13, multinational enterprises are required to uphold the fundamental liberties and rights of the people in the nations where they conduct

⁶⁰ Ibid.

⁶¹ Kara Dougherty, *Methanex V. United States: NAFTA Chapter 11 and Environmental Regulation Realignment*, 27 *Northwest Journal of International Law and Business* 735 (2006-2007).

⁶² The World Bank, *Convention Establishing the Multilateral Investment Guarantee Agency* (1985) <<https://www.miga.org/sites/default/files/archive/Documents/MIGA%20Convention%20February%202016.pdf>> accessed 24 May 2022.

⁶³ Ibid.

⁶⁴ *Draft United Nations Code of Conduct on Transnational Corporations*, 1983 article 7 and 13 <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2891/download>> accessed 24 May 2022.

⁶⁵ Ibid.

business.⁶⁶ These obligations to observe, respect, and abide by host country laws, including those pertaining to respect for human rights, might be read to include environmental protection as a right of the inhabitants and host country. For the protection of the environment specifically, there is not any explicit language. The Organization for Economic Cooperation and Development's Ministers resolved to start negotiations with its member nations in 1995 in order to negotiate a Multilateral Agreement on Investment (MAI) by 1997, marking the last attempt to achieve a multilateral Agreement.⁶⁷ The negotiation started in Paris, in 1995, and the Agreement was to open for signatures by the non-member states who would be consulted.⁶⁸ The agreement was meant to increase the protection of investors' rights and expand the liberalization of investments.⁶⁹ It would be a binding agreement among all parties and establish a dispute resolution mechanism. The agreement after its collapse never had a provision that protects the environment.

Having summarized this historical development, the evidence establishes that most of the investment treaties provide protection exclusively for the interest of foreign investors only, and rarely consider environmental protection as a human right in host states.⁷⁰ One of the few examples that have a provision of environmental protection is the NAFTA which stipulates under article 114(1) that a state's ability is not limited to adopt, maintain, or enforce measures deem appropriate within its territory for environmental protection.⁷¹ Until recently same treaties have included environmental concerns as pressure mounted by Non-governmental Organizations (NGOs) and activists. By way of example, the Belgium-Luxembourg Model Treaty is the only treaty of European Union (EU) member States with a separate article on environmental protection.⁷² Articles 5 and 6 recognizes the right of a member state to adopt its own domestic laws and measures concerning environmental safety. Similarly, the US Model (2004) provides under articles 12 and 13, the obligation of the investors to safeguard the environment, and this was borrowed from NAFTA and FTAs.⁷³ By extension, article 10 and 11 of Canadian Foreign Investment Promotion and Protection Agreement (FIPA) permits

⁶⁶Ibid.

⁶⁷ William W. Witherell, the OECD Multilateral Agreement on Investment, 1997
<https://unctad.org/system/files/official-document/iteitv4n2a2_en.pdf> accessed 24 May 2022.

⁶⁸Ibid.

⁶⁹Ibid.

⁷⁰ Daniel Rosentreter, Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the Principle of Systemic Integration in International Investment Law and Arbitration, (Library of Congress Press, 2015).

⁷¹Ibid.

⁷²Ibid.

⁷³Ibid.

adoption and enforcement of measures obligatory for human health, plant, animal and environmental protection.⁷⁴

In conclusion, the attempt to establish a comprehensive multilateral treaty that protects investors and the environment thereof has regrettably failed. More importantly, the history of investment protection shows little about environmental issues and protecting it by the states. The researcher looks at regional treaties and national laws as far as this thesis is concerned.

2.3 Bilateral and Multilateral Treaties Regulating Foreign Investment

Bilateral and multilateral treaties are the main legal frameworks that provide environmental protection for operations involving foreign investment.⁷⁵ The most significant distinctions between them are the number of players and the type of rules they develop. Bilateralism refers to the arrangement of interactions between only two states, whereas multilateralism includes three or more states.⁷⁶ But, more crucially, multilateralism entails obligations that are distinct from bilateralism. Multilateralism is an institutional framework that uses broad norms of conduct to coordinate relations between three or more governments.

2.3.1 North America Free Trade Agreement, 1994

The North America Free Trade Agreement is the multilateral signed by three countries: the United States of America, Mexico and Canada which created a trilateral trade agreement in the block of North America.⁷⁷ The agreement became effective on January 1, 1994. The beginning of the protection of the environment by NAFTA is found in the Preamble of the treaty which states as follows: “The Government of Mexico, Canada, and United States of America agreed to:⁷⁸ enhance Promotion of sustainable development and Strengthen environmental legislation and regulatory enforcement thereof. Further to the Preamble’s strong assertion, the resilient commitment by the parties not to compromise the environmental protection is found in article 104 (1) which expresses that in the event of any conflict between the NAFTA and Environmental and Conservation Agreements;⁷⁹ (a) The

⁷⁴Ibid.

⁷⁵Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford Press, first Edition published in 2014), PP. 111-115.

⁷⁶Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales, *The Foundations of International Investment Law: Bringing Theory into Practice*.

⁷⁷ North America Free Trade Agreement 1994, Article 105 <

<https://www.italaw.com/sites/default/files/laws/italaw618%286%29.pdf> accessed 27 May 2022.

⁷⁸ Ibid.

⁷⁹ Ibid.

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes; and (b) the Montreal Protocol on Substances that Deplete the Ozone Layer, 1987, NAFTA's provisions shall take precedence to the extent of any inconsistency.

In my opinion, NAFTA has uncompromisingly put its protection of the environment at the centre of its objectives, making it one of the forefront treaties with strong assertions on environmental safety. However, South Sudan has no bilateral agreement with the members of NAFTA as substantiated by the United States Department of State's report titled "Investment Climate Statement: South Sudan (2019)".⁸⁰ It clearly mentioned that South Sudan has no Investment Treaty with the U.S.A. What was signed and continues to exist among these two countries is "Investment Guarantee" agreement which says the two parties by recognizing the overseas private investment businesses and development organizations of the United States of America, they indicate their shared goal to encourage economic activity in the Republic of South Sudan.⁸¹ This investment guarantee is an international arrangement rather than a treaty, and it mentions nothing about environmental safeguards.

Therefore, the benefit of NAFTA with respect to environmental protection may not extend to South Sudan. This is to say that NAFTA's environmental provisions protect only the member states, making it not a universal treaty on the question of environmental protection in respect to the danger posed by foreign investment activities elsewhere.

2.3.2 Canada International Trade and Investment 2021 Model FIPA

The International Trade and Investment 2021 Model FIPA, is a regional-based agreement, sometimes called the Foreign Investment Protection Agreement, with objectives of protecting trade and investments while safeguarding the environment.

According to article 3, the parties can pursue justifiable policy goals for environmental protection, issues related to climate change, or the protection and promotion of the health and safety of indigenous people.⁸² Furthermore, it is non-derogatory for the parties to recognize investment and trade expansion while taking measures that promote the safeguarding both the environment and people's health and safety of the Indigenous people.⁸³ In essence, the parties agreed that nothing may derogate the respect for right to environmental protection measures

⁸⁰ United States (2009), Investment Climate Statement: South Sudan < <https://www.state.gov/reports/2019-investment-climate-statements/south-sudan/> accessed on 27 May 2022.

⁸¹ Investment Guaranties Agreement: Between the United States of America and South Sudan, 2013.

⁸² See Canada International Trade and Investment (n 10 above).

⁸³ See Canada International Trade and Investment (n 10 above).

while alongside promoting, and safeguarding investments. The Canadian Model 2021 is another treaty with a high emphasis on environmental safety concerned. But, as far as this research is concerned, South Sudan has no agreement with the Canadian government nor is it a party to the agreement. Again, like NAFTA Canada International Trade and Investment Model 2021 is not an internationally binding treaty. Therefore, it is a weak treaty besides NAFTA to safeguard the interest of environmental safety in South Sudan and elsewhere by extension.

2.3.3 ASEAN Comprehensive Investment Agreement, 2007

On 23 August 2007 in Makati City, Philippines, members of the Association of Southeast Asian Nations (ASEAN), the Republic of Indonesia, the government of Brunei Darussalam, the Kingdom of Cambodia, the Lao People's Democratic Republic, the Union of Myanmar, Malaysia, the Republic of Singapore, the Kingdom of Thailand, and the Socialist Republic of Viet Nam, came together to update the terms of the covenant signed in Makati City on October 7, 1998. Finally, the ASEAN Comprehensive Investment Agreement was ratified and became legally obligatory for all parties.⁸⁴

To meet long-term objective of economic integration under ASEAN Economic Community (AEC), as outlined in the AEC Blueprint, this agreement aims to establish a free and open investment system in the ASEAN by putting into place the following measures:⁸⁵ The investment regimes of member states should be gradually liberalized; all investors and their investments should be better protected; and, to promote more investment, the rules, regulations, and procedures should be made more transparent and predictable.

The agreement is silent about environmental protection. And therefore, cannot even protect the member states' environmental issues, in addition to the fact that South Sudan is not a member of the Treaty.

⁸⁴ ASEAN Comprehensive Investment Agreement, 2007.

⁸⁵Ibid.

2.3.4 The African Continental Free Trade Area (AfCFTA), 2019

The agreement received much ratification by most member states of the African Union. South Sudan signed the agreement in 2012 but has not formally ratified it. On May 30, 2019, the agreement became enforceable for the 24 nations who had presented their ratification instruments by that date.

The AfCFTA's general objectives are:⁸⁶ To meet the target for economic integration in the continent of Africa and the Pan African Vision of (an integrated, prosperous, peaceful Africa),” Agenda 2063 appeals for: (a) the free market economy; (b) establishment of single market for goods and services, facilitated by free movement of people; (c) encourage industry development through regional value chain development and diversification; and (d) the promotion of industrial development through diversification. The agreement's preamble reiterates the member states' authority to govern inside its borders, as well as the goals of their policies in the fields of the environment, public health, and safety, as well as the preservation and promotion of cultural variety.⁸⁷

The AfCFTA is another weak agreement in my view. It has no mandatory statement on the environmental safeguard as it only reaffirms the rights of the state to regulate its internal activities falling in the area of the environment and the like. Another regrettable matter is the fact that South Sudan is not a full member at the time of writing this thesis, as it did not formally ratify the treaty. This is due to the fact that article 23 (2) of the Agreement requires the Investment Treaty to enter into force by ratification within 30 days, which the government of South Sudan did not do. According to the Vienna Convention on the Law of Treaties, ratification, acceptance, or approval are all acceptable ways to express permission to be bound by a treaty. Article 23 (2) is in keeping with this statement. As an example, if a treaty stipulates that such consent may be expressed through ratification, the state has given its consent to be bound by the pact.⁸⁸

2.3.5 The Treaty for the Establishment of the East African Community (EAC), 1999

The Republic South Sudan acceded to the treaty for the Establishment of the East African Community in 2016. In order to further the attainment of the Community's objectives, the

⁸⁶ The African Continental Free Trade Area, 2019 article 3.

⁸⁷ Ibid.

⁸⁸ Ibid.

Member Countries agreed to adopt steps in the area of industrial growth, particularly those that will: The industrial sector needs to become more competitive in order to promote the expansion of industrial goods trade within the Community and the export of industrial goods from Partner states in order to bring about the structural transformation of the economy. Additionally, it will promote steady and balanced industrial growth. It is my finding that the treaty has not taken into consideration the environmental safeguards despite having a provision that allows investment cooperation among the member states.

2.4 South Sudan Investment Treaties with Foreign Countries

South Sudan entering into investment treaties with foreign governments has been slow progress. Most of the documents signed by the country's leadership with foreign heads of state and governments are not investment treaties in the literal meaning of investment treaties.⁸⁹ It was November 2018 when the government signed with the South African Government, a document worth USD 1 billion which was expected to be spent on refinery development and oil exploration.⁹⁰ The arrangement was brought to light by state-owned oil companies. However, it can never be interpreted as bilateral agreement since it was a mere Petroleum Sharing Agreement. Again, South Sudan has signed two Bilateral Agreements with two countries only:⁹¹(a) South Sudan-United Arab Emirates Bilateral Agreement, 2019, and has not come into force up to date. The Morocco-South Sudan Bilateral Agreement, 2017, not in force as well. However, lack of proper bilateral agreements between the government of South Sudan and foreign governments is not itself a blockage to the legal reforms to guarantee environmental protection against investment activities. There is foreign investment taking place in different forms, like hotel owners, and the increment is highly expected as a country returns to a peaceful track. The activities of these scattered investments are a threat to the environment and therefore, need law reforms that guarantee the protection of environmental pollution. This is to say, having environmental protection regulations and measures in place is independent of whether the country has investment treaties with foreign governments or not for the time being.

⁸⁹See United States, Investment Climate Statement (n 78 above).

⁹⁰See United States, Investment Climate Statement (n 78 above).

⁹¹ United Nations (2019), Investment Policy Hub: South Sudan Treaties with Investment Provisions<<https://investmentpolicy.unctad.org/international-investment-agreements/countries/196/south-sudan>> accessed 29 May 2022.

However, the country has major investments in the oil industry, under which most of the bilateral agreements are in form of an Oil Petroleum Sharing Agreement. The Petroleum Sharing Agreement was signed by the government of Sudan and the leading foreign oil companies operating in South Sudan, including Petronas of Malaysia and China National Petroleum Corporation (CNPC). This standing agreement was reached prior to the independence of the Republic of South Sudan. By implication, the South Sudanese administration permitted international firms participating in the oil sector to operate in conformity with the agreements reached with the government of Sudan.

2.4.1 The Exploration and Production Sharing Agreement: Between the Government of the Republic of Sudan and China National Petroleum Corporation, 1997

While observing the conditions stated in the agreement, the government agreed to grant the Contractor the exclusive right to carry out petroleum operations in the contract area specified in the agreement, along with all other supporting activities typically associated with such petroleum operations.⁹² The following are the terms and circumstances of such a grant of rights:⁹³ The Contractor shall conduct petroleum activities in conformity with the terms of the Agreement; assess, develop, and produce commercial discoveries in the contract area. For all of the Contractor's obligations and liabilities under the Agreement, each of the Parties that together make up the Contractor shall be jointly and severally accountable to the Government.⁹⁴ More importantly, the contract states that the Contractor, its representatives, and subcontractors must observe, comply with, and abide by all laws and rules of Sudan, including but not limited to those governing environmental protection.⁹⁵

This agreement discloses the need to protect the environment by the contractors and that should be attained by applying the Sudan laws and regulations on the environment. In fact, as the essence of this project is the reforms in the legal regulatory framework to safeguard the environment from foreign investments activities, I applaud this petroleum agreement between the government of Sudan and China for stipulating the protection of the environment in the oil exploitation agreement as a condition of entry. In the context of South Sudan which has

⁹²The Exploration and Production Sharing Agreement: Between the Government of the Republic of the Sudan and China National Petroleum Corporation, 1997.

⁹³Ibid.

⁹⁴Ibid.

⁹⁵Ibid

allowed Sudan contracts agreement to govern and bind the current investors in the oil industry, the investors are expected to abide by the petroleum Act, of 2012. Though the act does not cover the overall environmental problems caused by the activities of foreign investment.

2.6 Regulation of Foreign Investment in South Sudan

South Sudan has the number of laws that impliedly or directly talk about foreign investments in the country. Mading (2017) mentioned one of the investors' challenges as fragmentation and inconsistency of the investment laws.⁹⁶ In the context of this thesis, the challenge remains that those laws do not provide for comprehensive protection of environmental and health pollution with respect to foreign investment activities.

2.6.1 The Transitional Constitution of the Republic of South Sudan, 2011

The will of the people serves as the constitution's source of authority who give it sanctity to bind all individuals, organizations, and government bodies.⁹⁷ Therefore, the authority of the state constitutions and all laws derive their authority from this constitution and conform with it. According to the constitution, everyone has a duty to preserve and conserve the environment for the benefit of present and future generations.⁹⁸ Furthermore, the constitution mandates that the environment be safeguarded through appropriate governmental action and other measures that stop pollution and ecological degradation. However, the challenge remains that a few legislations enacted with investment connotations like the investment promotion act lacks environmental protection provisions. This goes against both what the constitution declares as right to clean environment which is intended to be protected.

2.6.2 The Investment Promotion Act, 2009

The constitution recognizes the country's engagement with the communities of nations for the purposes of investment.⁹⁹ In order to achieve economic; cooperation among regional nations; within ongoing regional plans, the constitution of the South Sudan states that, foreign policy shall serve the national interest and be carried out independently and transparently. This includes international cooperation for the purposes of treaty obligations and fostering a

⁹⁶ Mading, GMD (2017), 'Protection of Foreign Investment in South Sudan: Making a case for Consolidation for Fragmented Foreign Investment-related Laws'. LL.M Mini Dissertation, University of Pretoria, Pretoria, Viewed yymmdd <http://hdl.handle.net/2263/64621> accessed on 4 August 2022.

⁹⁷ See the Transitional Constitution of the Republic of South Sudan (n 8 above).

⁹⁸ Ibid.

⁹⁹ See the Transitional Constitution of the Republic of South Sudan (n 8 above).

just world economic order, as well as African economic integration.¹⁰⁰The parliament enacted the investment promotion Act to implement the constitutional obligations regarding foreign investment. Article 32(2) and 55 of the Interim Constitution of the then Southern Sudan, 2005, which grants the government of Southern Sudan control over matters of commerce, trade, and commerce rules relating to foreign investment, serve as the legal foundation for this Act.¹⁰¹ All investments made in the Republic of South Sudan are subject to the terms of this Act.

According to the Act, a foreign investor who wishes to invest in South Sudan applies investment Authority for certificate of operation.¹⁰² If an applicant satisfies the requirements for granting a certificate, including that the investment must be advantageous to the local people, the applicant will be entitled to an investment certificate. When assessing whether an investment and the associated activities are advantageous to the people of Southern Sudan, the Authority takes into account the degree to which the investment or activity will help Southern Sudanese;¹⁰³ get a job, learn something new, pay taxes or contribute to other forms of government funding, give Southern Sudan access to technology, boost foreign exchange, whether through exports or import substitution, and manufacture and utilize native goods, supplies, and services. However, the act is not clear as to measures to be undertaken to determine that the investor complies and would respect and abide by both environmental and health pollution measures. In addition, no mention of the environmental assessment and promise related to polluters' pays principle's compliance as a condition for license issuance. It is this gap that needs reforms to guarantee the environmental safety and health pollution from foreign investment activities.

2.6.3 The Petroleum Act, 2012

The legislation derives its authority from article 5 of 2011 constitution as mentioned above. It regulates the exploitation and management of petroleum activities, including environmental related management in the country. The foreign companies involve in oil exploration and exploitation include Petronas of Malaysia, China National Petroleum Corporation (CNPC)

¹⁰⁰Ibid.

¹⁰¹ See the Investment Promotion Act (n 6 above).

¹⁰²Ibid.

¹⁰³ See the Investment Promotion Act (n 6 above).

and Oil and Natural Gas Corporation Limited (ONGC), Indian company.¹⁰⁴ These companies are under a partnership called “Joint Operating Companies’ Agreement” with South Sudan’s state owned company, Nile Petroleum Corporation (NILEPET).¹⁰⁵ The activities of these companies including environmental safeguards are entirely regulated by this Act.

Prior to the exploration, development and drilling, and production program, the Ministry has the mandate to initiate and coordinate environmental assessment in conjunction with the ministry in charge of the environment.¹⁰⁶ The licensee or contractor is required to conduct thorough environmental baseline research that enables an understanding of the current environment in the contract area where the activities are scheduled to take place concurrently with the environmental and social impact assessment.¹⁰⁷ The evaluations must be appropriate to reveal the scope and potential consequences of the petroleum activity.¹⁰⁸ This includes consulting with the general public, and local communities, and evaluating the potential effects of petroleum activities on a variety of interests in the relevant area. These areas encompass local communities, the environment, sites of historical significance, trade, agriculture, and other industries after taking into account the consultations that have been conducted.¹⁰⁹ The international standards for social and environmental performance set out by the International Finance Corporation should be followed in the environmental impact assessment.¹¹⁰

The assessment results have to been made public and published in the Gazette with the purpose of informing the interested party. The interested persons are given a period of ninety days from the time of publication to present their positions about the outcome.¹¹¹ The Ministry shall offer the assessment to the Commission along with the opinions of those who are interested, and the Commission shall report the assessment to the Council of Ministers.¹¹²

¹⁰⁴Apofeed Africa Partner Press Release (2021), ‘South Sudan: Invest in the Renewal in the Region’s Oil Largest Producer’.<[https://african.business/2022/05/apo-newsfeed/south-sudan-invest-in-the-renewal-of-the-regions-largest-oil-producer/#:~:text=The%20sector%20now%20consists%20of,Strategic%20Fuel%20Fund%20\(a%20South](https://african.business/2022/05/apo-newsfeed/south-sudan-invest-in-the-renewal-of-the-regions-largest-oil-producer/#:~:text=The%20sector%20now%20consists%20of,Strategic%20Fuel%20Fund%20(a%20South)

¹⁰⁵ Conference Room Paper of the Commission on Human Rights in South Sudan. Human Rights Council Forty-Eighth Session 13 September -08 October 2021 Agenda Item 4.

¹⁰⁶ The Petroleum Act, 2012, section 59.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

The Council of Ministers will decide whether or not to open the relevant region for petroleum operations and will set the environmental and social conditions for those activities after giving the evaluation and the opinions of interested parties fair consideration.¹¹³

A licensee or contractor must create an environmental management plan before beginning petroleum activities in order to implement the environmental requirements for the activities in a methodical manner.¹¹⁴ The environmental management plan must be based on the area's pertinent environmental and social impact assessments and include a description of the research done to determine environmental risks associated with the planned activity.¹¹⁵

The steps that will be taken to control the risks and identified hazards, and the steps for reduction of pollution, repair of pollution-related damage, and compensation of harmed parties should be made public.¹¹⁶ The licensee or contractor must inform the impacted communities about the environment management plan and frequently update them on any changes to the plan. Without regard to fault, the licensee or the contractor is responsible for any pollution harm. The Petroleum Agreement's Contractors are jointly and severally liable for any pollution-related damage.¹¹⁷ When there are many license holders, this principle also holds true for licensees.¹¹⁸ For the purpose of cleaning up and rehabilitating the site where the pollution damage is identified, the licensee or contractor must establish a pollution damage fund.

It is my view that the Petroleum Act has set the standard for foreign investors' activities regarding environmental protection and the health of the communities in the oil field. However, the act is applicable to the oil industry only. The other areas of investments like hotels and non-oil-related factories are not covered by these measures under petroleum law. Again, even within the petroleum field, issues of implementation continue to be challenging.

2.6.4 Environmental and Social Management Framework, 2022

The Ministry of Agriculture and Food Security came up with this policy framework in 2022.

¹¹³ Ibid.

¹¹⁴ The Petroleum Act, section 60.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ The Petroleum Act, section 61.

¹¹⁸ Ibid.

The Environmental and Social Management Framework 2022's goals are to make sure a preliminary evaluation is done before the Project is prepared and put into action.¹¹⁹ This Framework was designed to make sure that social and environmental sustainability were evaluated before the implementation.¹²⁰ One of the objectives is to establish exact rules and procedures for the environmental and social screening, planning, review, approval, and execution of the intended operations.¹²¹ It is vital to define suitable roles and duties for managing and monitoring environmental and social concerns associated to projects and make sure that projects are designed and implemented in a way that is both environmentally and socially sustainable.¹²² Still, this policy framework does not meet the need of addressing foreign investment environmental impacts on the ground that it is not a law, and may lack legal enforcement when the need arises.

Conclusion

This chapter covered the historical background of foreign investment activities and environmental protection. History reveals that environmental concerns have not been given provisions in the various treaties that later failed to address foreign investment protection. The chapter examined multilateralism and bilateral treaties. It looked at South Sudan's treaties with foreign countries. More importantly, the national legal frameworks governing foreign investment and environmental protection have been evaluated, and the study shows that both international treaties and national laws applicable to environmental and health protection have not provided adequate protection.

¹¹⁹ The Environmental and Social Management Framework, 2022.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

CHAPTER THREE

IMPACTS OF FOREIGN INVESTMENT ACTIVITIES ON ENVIRONMENT AND HUMAN HEALTH IN SOUTH SUDANA

3.1 Introduction

The issues that come with foreign investment undertakings on the environment and human health are a universal concern. The study carried out by Zhenghui, Hao, Zimei and Pierre from forty countries revealed that FDI has negative effects on the environment, such as pollution.¹²³ The study shows that an estimated 1% expansion in FDI makes up a 0.05% pollution increment.¹²⁴ These pollution issues caused by FDI are water pollution, air pollution and waste and land pollution, which also affect South Sudan. Nevertheless, on the ground of instability in South Sudan and without proper FDI statistics, the investment industry is performing low, with the oil sector forming a big part of FDI given its role in the economy.¹²⁵ According to the UKAID report (2015), the oil companies investing in South Sudan range from Malaysia's Petroliam Nasional Berhad (PETRONAS), to China's National Petroleum Company and many others. In addition to non-oil FDI, there are other international companies like, mineral water companies, for example, Aqua'na and Hotel. Regarding measures for environmental protection by a group of oil firms led by (CNPC) and DAR Petroleum Operating Company (DPOC), South Sudan is in a pickle situation.¹²⁶ There has been criticism against the Oil Operating Companies, which have been operating in the country since before South Sudan became a sovereign nation without sufficient arrangements for waste management and environmental audits.¹²⁷ Although over 90% of South Sudan's income comes from oil production, the ongoing problems of managing waste with impunity

¹²³ Zhenghui Li, Hao Dong, Zimei Huang and Pierre Failler, (2019) 'Impact of Foreign Direct Investment on Environmental Performance'. < [file:///C:/Users/Admin/Downloads/sustainability-11-03538=v2%20\(2\).pdf](file:///C:/Users/Admin/Downloads/sustainability-11-03538=v2%20(2).pdf) >accessed 24 September 2022.

¹²⁴ Ibid.

¹²⁶ Samia Satti Osman Mohammed Nour, 'Assessment of the Impact of Oil: Opportunities and Challenges for Economic Development in Sudan'. African Review of Economics and Finance, vol. 2, June 2011.

¹²⁷ Mary Ajith Goch, 'China's Sharp Power in Africa'. China Explores South Sudan's Oil Sector without Environmental Care. < <https://www.hoover.org/sites/default/files/research/docs/gochwebread.pdf> >accessed on 30 September 2022,

thereof is endangering both environment and the people's lives and their animals in and around the oil-producing states.

The FDI impacts on environmental pollution are of great concern given the fact that South Sudan has weak environmental laws and institutions. In 2019, the Ministry of Petroleum announced, for the first time, that South Sudan was planning to carry out an environmental and social audit of the petroleum operations.¹²⁸ The environmental and social audit provides empirical and scientific evidence and the extent of pollution, all of which help policymakers make informed decisions and policies for environmental protection.¹²⁹ However, little is known, about how the plan ended and the results of it at the time of writing this project.

It is well known that most investors invest in countries with weak governance to maximize their profits with more violations on the environment. According to the WWF-UK Report from 1999, the "pollution havens" theory is currently the main topic of debate about FDI and the environment. The report's main claim is that most companies shift to developing countries and take advantage of their weak legal frameworks and regulatory measures. Moreover, number of countries might purposefully underestimate the value of their environments to draw in more investment and South Sudan is no exception.¹³⁰ In any case, this lack of environmental restrictions imposed on the investors causes chances of high pollutant levels and environmental deterioration in the given country like South Sudan. However, under the Corporate Social Responsibility theory, companies can no longer limit their attention to making profits alone since the culture of today demands that businesses accept accountability for their deeds, including violations of environmental protection.¹³¹ Thus, it seems that there is a better global understanding of the increased accountability that businesses must bear for addressing social and environmental issues.

With this backdrop and given the fact that oil investment contributes great portion of the total FDI in South Sudan, the oil impacts on the environment will constitute a big part of the discussion on water pollution, air pollution and waste and land pollution respectively.

¹²⁸ Nhial Tiit mamer, (2019) 'Confronting a life-threatening Pollution: A Guide for Credible Environmental and Social Audit of Petroleum Companies' Operations in South Sudan'. The Sudd Institute.

¹²⁹ Ibid.

¹³⁰ A WWF-UK Report by Nick Mabey and Richard McNally, (1999), 'Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development.

¹³¹ Jennifer Pitkänen B.Sc, (2017), 'The environmental impact of service oriented companies'. Master's Degree Programme in Creative Sustainability.

3.1.1 Water Pollution

According to the Oxford Dictionary, water pollution is the polluting of water bodies, including lakes, rivers, seas and subsurface waters. The contamination of water is a global issue, and experts say that an estimated 14,000 people die daily from water-related diseases like cholera.¹³² As Juba city grows in terms of infrastructures and population demand for water usage, it has in turn led to aquatic ecosystem pollution and deterioration of water quality.¹³³ The blame game is attributed to hotels owned by foreign investors which are located along river Nile tributaries in Juba. Examples of these hotels include Crown hotel, Landmark hotel and Quality Hotel.

Often time the report produces that, these hotels have their sewage pipeline channelled directly to the riverside which causes direct water pollution. Some of the factors responsible for water pollution include South Sudan is among the countries with weak laws and regulations on the safety of the environment, and it lacks a proper system for dumping waste. This has made many investors both foreign and locals in the cities dump garbage, plastic bottles and sewage into the water bodies. When water is polluted, it is not unsafe only for human usage, but animals and birds.¹³⁴ In addition, it is indisputable that people living in major cities in South Sudan, drink and birth directly from water tanks fetched from the rivers.¹³⁵ In 2018, an study of the impacts of water pollution on human health was carried out.¹³⁶ The results from 57.5% of respondents revealed that sources of drinking water in Juba are directly from the river.¹³⁷ About 42% of the respondents revealed that water contamination affects human lives seriously and some of the diseases contracted from contaminated water encompass cholera and skin diseases.¹³⁸ The other cause of FDI's water pollution is found in oil exploration and exploitation. Environmental pollution by crude oil as a result of exploration and production activities is a typical occurrence oil-producing

¹³² Deng A. Kuol, (2018) 'Water Pollution A Case Study in Juba Payam'. < <https://www.academia.edu/13803926/waterpollutionACasestudyinjubaPayam> < accessed on 7 February 2023.

¹³³ Ladu, J.L.C., Lu, X. and Loboka, M.K. (2012), "Experimental Study on Water Pollution Tendencies around Lobuliet, Khor Bou and Luri Streams in Juba, South Sudan", International Journal of Development and Sustainability, Vol. 1 No. 2, PP. 381-390.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ John L celestinoLadu and Andrew L. Athiba and Stanislaus Tombe VenustoLako and Moses Lomoro Alfred, (2018), "Investigation on the Impact of Water Pollution on Human Health in Juba County.

¹³⁷ Ibid.

¹³⁸ Ibid

countries, particularly in developing nations.¹³⁹ In addition, the country has endured a protracted civil war that has severely damaged oil production areas and oil facilities like pipelines, leading to oil leaks and spills.¹⁴⁰ As a result, the total environment (air, soil, water and land) has been significantly contaminated, which has had a detrimental effect on human health and animals.¹⁴¹ As explained in chapter two, several foreign oil companies are investing in South Sudan including Malaysian and Chinese oil-owned companies, oil pollution occurs in form of oil spills when pipeline leakage happens due to poor maintenance.¹⁴² When oil pipeline leakages occur, hazardous hydrocarbons like benzene and polynuclear aromatic hydrocarbons are released into the soil and water sources.¹⁴³ These spills contaminate large areas of land and water, harming not only crops but also fish and animal life and domestic water supplies.¹⁴⁴ In addition to how oil pollution occurs, the oil industry release effluents or sewages and waste into the environment and occasionally into the water. For instance, drill cuttings, drilling mud, and fluids are utilized by oil firms during exploration or seismic surveys to increase production. These pollutants scatter and settle in the water, where they may bury nearby bottom-dwelling plants and animals and as a result kill or affect plants and animals.¹⁴⁵ Only in oil-rich Unity State 35 incidents of oil spills have been documented between 1993 and the middle of 2007.¹⁴⁶ This is, in addition, to the unreported oil spills and unseen slicks.

In other words, despite the good news that South Sudan has confirmed oil reserves of 3.5 billion barrels, some local populations, particularly in Melut County, are suffering from the exploitation of this natural resource.¹⁴⁷

¹³⁹ Simon GarangKuch,(2019), 'Impacts of Crude Oil Exploration and Production on Environment and its Implications on Human Health: South Sudan Review.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Bill Wan YualDhuor, 'Effects of Oil Production Activities on the Socioeconomic Wellbeing of Communities Living in Greater Unity, South Sudan'. A Research Thesis Submitted in Partial Fulfillment of the Requirements for the Award of Master of Sciences Degree in Environment and Natural Resource in the Department of Environment and Natural Resource Management, School of Science and Technology of Africa Nazarene University (2019).

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid

¹⁴⁷ NhialTiitmamer and KwaiMalakKwai, (2021), 'Sitting on a Time Bomb: Oil Pollution Impacts on Human Health in Melut County, South Sudan

Furthermore, crude oil and its hazardous by-products have an impact on health, causing everything from short-term side effects like dermatitis to long-term, life-threatening conditions like cancer.¹⁴⁸

In Melut and Paloich areas, individual interviews, focus group discussions and field research discovered the following:¹⁴⁹ (a)- In Paloich and Melut County, many residences are situated close to oil wells and a big lake with harmful generated water nearby, and close to facilities, exposing them to extremely dangerous contaminants; and (b) Communities have frequently voiced their displeasure with the significant incidence of petroleum problems related to birth abnormalities and other problems with reproductive health brought on by pollution including infertility among women and head malformations and sexual organ problems.

This is a possible catastrophe that, if not addressed, might make the local petroleum industry's operations commit more harm to the environment, and people and animals' lives will be in jeopardy. In the case of *M.c.Mehra and Anr.Etc. vs. Union of India and Ors. Etc*, the Supreme Court of India established the concept of Absolute Liability in a landmark decision. The court determined that no hazardous enterprise could be permitted to operate in close proximity to a place where people live, and the industry was relocated as a result.¹⁵⁰

Therefore, there is a need for Assessment of the social and environmental implications to be done by the oil operating companies under the supervision of the government. So that when environmental and health impacts are discovered, the measures to address them should be taken immediately, including relocation of the inhabitants or total suspension of the project.

3.1.2 Air Pollution and Waste

Air pollution, as defined by the Oxford Dictionary, is the contamination of the air brought on by the presence of substances in the atmosphere that are harmful to both human health and the health of other living things. The many different types of air pollution include gases (such as carbon monoxide, sulphur dioxide, nitrous oxides, methane, and carbon dioxide), particles (both organic and inorganic), and living molecules, to name just a few. Humans can develop

¹⁴⁸ Gilbert Nyamweya Omoke, (2014), 'Intergrating Environmental Management in the Direct Foreign Investment Regime within a Sustainability Framework'.

¹⁴⁹ See Nhial Tiitmamer and Kwai Malak Kwai, (2021) above.

¹⁵⁰ *M.c.Mehra and Anr.Etc. vs. Union of India and Ors. Etc. 1986 SCR (1)321.*

illnesses, and allergies, and even pass away due to air pollution.¹⁵¹ Other living things like animals and food crops, can also be harmed, and the environment destroyed.

According to the United States Environmental Protection Agency (EPA, 2002), sound environmental management is accomplished when the 3Rs approaches are applied in the following order: source reduction (reduction of the source of pollution), recycling (recycling of the materials like bottles) and waste reuse.¹⁵²

The United Nations Environmental Programme (UNEP) commissioned in April 2013, a study of solid waste management in Juba, 'Municipal Solid Waste Composition Analysis study.'¹⁵³ And the Japanese organization, "Japanese International Cooperation Agency(JICA)" provided assistance to create Waste Dumping site to be called as Juba's municipal solid waste. For the control of waste, there were some mechanical equipment. Juba has been reported one of the cities with rapid population increase and that the solid waste management situation was alarming because Juba Lagoon Dump Site's estimated capacity was just two years at the time of the study.¹⁵⁴ This governmental attempt was put in place to counter foreign investment impacts on the environment in terms of waste management. However, the 2016 abrupt fighting in Juba forced the JICA out of the country and as a result, the support for the waste management program collapsed. Currently, no report so far for governmental waste management programs in both cities in South Sudan.

3.1.3 Land Pollution and human health

Land pollution, according to Wikipedia, is the existence of man-made chemicals or other alterations to the natural soil environment that result in soil contamination, or land pollution and make land use hazardous for animals, people, and plants. The typical reasons include industrial activities or inappropriate waste disposal. In addition, other substances that result in terrestrial pollution include petroleum hydrocarbons, lead, and other heavy metals.¹⁵⁵

¹⁵¹ The Impact of Air Pollution on Health and Measures to Reduce Exposures in Kosovo
<https://www.unicef.org/kosovoprogramme/media/1091/file/UNICEF%20Report_Air%20Pollution.pdf%20.pdf>accessed on 8 October, 2022.

¹⁵²GarangManyok John, 'Assessment of Solid Waste Management Practices in Bor Town, South Sudan'. A Thesis Submitted to the Graduate School in Partial Fulfilment for the Requirements of the Award of a Master of Science Degree in Environmental Science of Egerton University (2017).

¹⁵³ Zoran Chachorovski, DraskoAtanasoski, Micho Apostolov and Aneta Stojanovska-Stefanova, 'South Sudan Vehicle Workshop Hazardous Waste Management'. Journal of Traffic and Transportation Engineering 5 (2017) 157-169 doi: 10.17265/2328-2142/2017.03.004.

¹⁵⁴Ibid.

¹⁵⁵See Garang Manyok (n 149 above).

In addition to foreign companies investing in the production of purified water in South Sudan, like Aqua'na and Lit water companies. These companies use plastic bottles with no recycling policy or plan. People would drink and drop the bottles which the running water would transport to water bodies and cause water and land pollution as plastics cannot decompose. Despite the ban on plastic bags and dropping off bottles on road sites by the government of South Sudan in 2015.¹⁵⁶ There have been constant reports from local radios like Miraya FM and Eye Radio about the danger of plastic bags and bottles dropped on the road sites in Juba, Malakal, Bentiu and Wau cities. Nevertheless, the Investment Promotion Act, of 2009, the law that regulates investment, is silent about environmental protection as discussed in chapter two.

Again, as mentioned above, oil exploitation and exploration form larger part of FDI activities with negative impacts on the environment inside the country. The International Organization for Migration (IOM) in 2012, revealed that oil extraction contaminates both land and water sources, which also harms the local area's woodlands. Almost all oil-fields are situated in the northern of the country. The report in the region of the greater Upper Nile, prior investigation on the nation's oil pollution, shows that locals in oil-producing regions are suffering greater sickness and birth defect occurrence rates.¹⁵⁷In addition to the fact that the area's primary source of income is cattle, they are apparently experiencing more illnesses as a result of contaminated water sources and grazing pasture problems.¹⁵⁸The largely affected areas are melut and Paloich. Furthermore, the most severe and detrimental effects of oil contamination in Paloich have a profound impact on all other facets of lives. For example, the traditional livelihoods and lifestyles have been completely tempered, because the rights of animals and the unborn was compromised by oil spills. The effects of Paloich's unregulated oil contamination include:¹⁵⁹ The wildlife and game have been forced out of their natural habitats by oil firms, and farmlands rendered unproductive with severe neglect far away.

In **conclusion**, this chapter discussed the impacts of FDI in South Sudan, majorly on the land, water and soil. The studies carried out show those impacts caused health issues in human and

¹⁵⁶ Martin WullaKwori, (2019), 'South Sudans ban of plastic carrier bags: An empirical move or an emulation?' City and Environment Interactions journal homepage: www.elsevier.com/locate/cacint.

¹⁵⁷ IOM, (2021), 'Deforestation in South Sudan.

¹⁵⁸ Ibid.

¹⁵⁹Loro Emmanuel LaduLegge and Lu Zhibo, (2018), 'The Environmental and Social Impacts of Oil Exploration and Production on Melut basin of South Sudan. International Journal of Scientific and Research Publications, Volume 8, Issue 10, October 2018 197 ISSN 2250-3153.

animal lives. Conversely, Oil Companies remain the biggest polluters plus foreign-owned non-oil companies like purified water companies (Aqua'na) and hotels. The literature reveals that weakness and lack of a clear legal framework are among the blamed factors for the increase in environmental pollution. As discussed above, South Sudan still relies on Petroleum Act when it comes to environmental protection. However, Petroleum is only applicable to pollution caused by in oil industry.

CHAPTER FOUR

CONTROL OF THE IMPACTS OF FOREIGN INVESTMENT ON THE ENVIRONMENT THROUGH LEGAL REFORMS THAT GUARANTEE ENVIRONMENTAL AND HEALTH SAFE GUARDS IN SOUTH SUDAN

4.1 Introduction

As discussed in chapter three how foreign investment impacted the environment, this chapter focuses on the control measures and areas of legal reforms in the national legislation. The chapter investigates the areas of reforms for the control measures against investment activities on the environment and health. These control measures are in the context of what should be imposed on the investors as deterrence or to undertake environmental legal obligations before and after the activities, to safeguard the environmental safety and remedy the damage caused. The discussion will focus on water pollution, air pollution and waste and land pollution control measures. By way of reference, two major Worldwide Conferences on the advancement of environmental legislation had been organized in an effort to balance ecology, economy, and sustainability. The first was the Stockholm Conference in 1972, also referred to as the "Earth Summit," and the second was the R10 Conference on Sustainable Development, mostly referred to as "R10 Declaration," convened in 1992. The fundamental goal of the "R10 Conference" was to achieve sustainability while maintaining an ecological balance.

4.1.1 Water Pollution Control

According to Netherlands Commission for Environmental Assessment report in 2019, the draft National Environmental Bill 2013, which should have established South Sudan National Environmental Management Authority has not been signed into law up to the date of writing this project.¹⁶⁰ This has made the country operate without a watchdog body that monitors and enforces compliance with environmental measures and laws. The Penal Code, Act 2008 criminalizes water pollution, which reads, 'anyone who wilfully taints or pollutes any public well, reservoir, or other water supply to make it less suitable for the function for which it is typically used commits an offence, and upon conviction, they face a penalty of up to two years in jail, a fine, or both.'¹⁶¹ However, the Act is too vague in defining water pollution since it does not define water pollution in the context of water from the lakes, Nile and rivers.

¹⁶⁰ Netherlands Commission for Environmental Assessment: South Sudan (2019) <<file:///C:/Users/Admin/Downloads/countryprofile.pdf>> accessed 6 October 2022.

¹⁶¹ The Penal Code, Act 2008, s 186.

Again, the Act does not determine the level of polluted waters. But, more importantly, with the absence of an institutional body to enforce the provision of this Act, it is regrettable that despite the level of environmental and health impacts caused by foreign investment as discussed in chapter three, no record of the natural person or legal person prosecuted for the offence related to water pollution in South Sudan. But, most importantly, criminalizing the pollution of water does not meet the interest of the victims whose their priority is compensations. Regarding the civil aspect, the Code of Civil Procedure Act, of 2007 is silent about pollution nor any compensation related to pollution.

In Nigeria, there is an established Federal Environmental Protection Agency (FEPA), established after the discovery of negative impacts of foreign investment activities on the environment in Delta State in 1988.¹⁶² The agency is in charge of the determination of the permissible standard for industrial waste management regarding water pollution. It assists in the capacity building of the state Agencies and formulation of waste management control. In the context of South Sudan, lack of a body responsible for monitoring, compliance and formulation of policies for waste control, has advantaged the investors whose activities pollute the environment and human health and go unpunished, as discussed in chapter three.

4.1.2 Air and Waste Pollution Control

A developing country like South Sudan uses selected disposal sites for dumping waste without paying attention to its impacts on the groundwater, air pollution and running water which affects children mostly as they like to play in open places.¹⁶³ This is in addition to waste dumping at the reach of the polluter. The behaviour of waste dumping is of great alarm to the South Sudanese population.

As discussed in chapter three, dumping of waste everywhere in Juba city is rampant, and there is a need for proper regulation to be put in place to control and regulate the investors in waste management. In South Africa, the management and avoidance of waste includes initiatives to promote public and private spending on extended producer responsibility, which comprises producers taking on financial and/or physical responsibility for their products after customers use them to avoid disposal;¹⁶⁴ to ensure that producers and consumers take responsibility for waste prevention, incentives are needed to stimulate a change in behavior,

¹⁶² John OlatunjiAdeoti, (2001), 'Technology Investment in Pollution Control in Sub-Saharan Africa: Evidence from Nigeria Manufacturing.

¹⁶³ J. Jeffrey Peirce, P. AarneVesilind, Ruth F. Weiner, (1997), '*Environmental Pollution and Control*, 4th edition.

¹⁶⁴South Africa National Waste Management Strategy 2020.

particularly the internalization of the social and environmental costs of waste. South Sudan lacks such a policy nor does it have a law that regulates waste management, and as a result, the investors' activities produce waste without proper procedures of control, (the situation of malut and Paloich discussed above is an example). In the activist lawyer case *M.C. Mehra Vs. Union of India, Air 1988 SCR (2) 583*, filed a writ case against the Union of India, requesting the closure of several polluting tanneries close to Kanpur, which polluted several water sources, it was held that the action was similar to that of company which does not pay minimum wages to its employees, and that a large organization as such without treatment plant cannot be authorized to remain in business.

Regarding air pollution and the dumping of waste which in turn causes pollution, the polluter should be held to account by law, under the polluter pays principle. The principle holds producers accountable for the costs of environmental harm and health.¹⁶⁵ It is only Petroleum Act, 2012 under section 61, that supports polluter pays principles, it says, "the Petroleum Agreement's contractors are equally and severally liable for any pollution-related damages. When there are many license holders, this principle also holds true for licensees. And that the polluters are by law obliged to clean up and restore the location where the pollution damage is identified, and the licensee or contractor must establish a pollution damage fund". However, this legislation is only applicable to investors in the oil industry. In the case of *KM & 9 Others v Attorney General & 7 others*, the court awarded Owino Uhuru residents in Mombasa \$1.3 billion shillings in restitution for the pollution emitted by a nearby lead smelter that reprocessed lead-acid batteries. The state agencies in charge of enforcing legal requirements at the facility were ordered by the court to pay damages within 90 days and to clean up the area within four months.¹⁶⁶ The pollution was found to be against the right to life and clean environment under the constitution of Kenya, 2010.

Under Polluter Pays Principle, stated in the Earth Summit 1992, National authorities are obliged to implement the international recognized principles like the theory that polluter bears the cost for his pollutant, without prejudice international trade and investment (UNEP, 1992). In Kenya, the Environmental Management and Coordination Act (No 8 of 1999), states that the regulation is to provide clean and healthy ambient air by establishing

¹⁶⁵PallaviSaxena and VaishaliNaik, (2019), 'Air Pollution: Sources, Impacts and Controls.

¹⁶⁶ KM & 9 Others V. Attorney General & 7 others [2020] eKLR.

procedures for the prevention, control, and mitigation of air pollution.¹⁶⁷ And section 4 applies to the location of activities where the sources of pollution come from, including workplaces. This deters and holds the investors to account for pollution caused by their activities. Comparatively, South Sudan lacks such laws and regulations as Kenya has to help regulate the impacts of investors' activities on the environment.

4.1.3 Land Pollution Control

With the adoption of the Land Act, 2009, the Act enables the government to control land use on behalf of the South Sudanese people. The Land Act defines "subterranean resource" as including sand, gold, diamond, uranium, rock, clay, any mineral existing in residue stockpiles or in residue deposits, water obtained from a lake or land for the extraction of any mineral from such water and any material that naturally exists in, on, beneath, or within subsurface water and was created by or subjected to a geological process is also included.¹⁶⁸ However, the act is silent about environmental protection especially land protection after the extraction of underground resources like Petroleum and other minerals. In addition to the dumping of waste on the land, nothing is mentioned in the Act on the protection of the land from waste or garbage dumping. This has left most if not all polluters unaccounted for, and this is against the principle of polluter pays. In the famous case, *Indian Council for Enviro-Legal Action v. Union of India AIR*, the burden of paying to prevent or repair pollution-related harm should be placed on the businesses that create the pollution, according to Justice Jeevan Reedy's decision.¹⁶⁹

This was the same position Nigeria was in 1987 when Nigeria lacked a clear-cut legal framework to deal with environmental issues on the land. For the country's environmental rules and regulations to be enforced and protected, there were "no institutional systems or processes."¹⁷⁰ In reaction to the Koko toxic waste event in Nigeria, The Harmful Waste (Special Criminal Provisions). The Act was passed in 1988, dealing specifically with the illegal disposal of hazardous waste. It forbids transporting, and dumping hazardous material on any land, including territorial waters. This is the position the researcher recommends

¹⁶⁷ The Environmental Management and Coordination Act (No 8 of 1999), section 3 and 4.

¹⁶⁸ The Land Act, 2009 s 3.

¹⁶⁹ *Enviro-Legal Actin v. Union of India AIR 1989 SC 1502.*

¹⁷⁰ Naujil, (2018), 'Remedies for Environmental Damage under the National Environmental Standards and Regulations Enforcement Agency (nesrea) (establishment) Act 2007 and the Harmful Waste (special criminal provisions, etc) Act 1988.

South Sudan should adopt to deter investors' activities from polluting the environment or pay the damages in the event of pollution.

The additional control measures can be found in the principle of Environmental and Social Impacts Assessment. The process of calculating and evaluating how development projects and activities will affect the environment is known as environmental and social impact assessment. Additionally, it specifies the procedures and requirements for averting, minimizing, and lessening such potential environmental effects.¹⁷¹ Again, the environmental impacts and social impacts assessment is found only in Petroleum Act, 2012, under section 59. According to the law, the Ministry must coordinate a strategic environmental assessment with the ministry in charge of the environment before a new area is opened as required by Article 15 of the Act.

In **conclusion**, the chapter has discussed the control measures and the gap in South Sudan legislation against FDI activities on the environment.

Regarding **Water Pollution Control**; there is no law other than Penal Code Act that criminalizes polluting of water. However, the Act does not even define what amounts to pollution and the intended water the Act seeks to protect. Again, the fact that penal code only criminalizes the pollution of water does not address victims' consent since their interest is seeking of the compensation for the damage. Regarding compensation or Polluter Pays Principle, the Civil Procedure Act is holistically silent about the remedy for environmental and health violations by the Investors.

Air and Waste Pollution Control; the study revealed that no waste control in South Sudan as discovered by lack of government's recommended dumping sites. Further to this, it is Petroleum Act which is applicable to oil industry that regulates air and waste pollution. And as discussed earlier, this law is not applicable in other investments activities that violate environmental and health protection, and therefore, it is a weak law to rely on its protection.

Land Pollution Control; the researcher assessed legal regime but found no single applicable law that protects the pollution of the land. This tells that the principle of environmental impact assessment on land regarding foreign investment activities is less regarded in South Sudan. The major issue the investigation disclosed is that South Sudan lacks laws and policy

¹⁷¹ Mathew Baird, 'Key Principles of Environmental Impact Assessment and Examples of Real-World Application', < <http://matthewbaird.com.au/wp-content/uploads/2014/02/matthew-Baird-Key-Principles-of-EIA-Bhutan-2013.pdf> > accessed 7 October 2022.

frameworks as control measures against the investors' activities regarding environmental protection and health.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This research investigates the fact that despite the enactment of the Investment Promotion Act, of 2009, which allows foreign investors to invest in South Sudan, environmental protection has not been addressed. There are few laws with scattered provisions governing environmental protection in areas of concern: (I) The Petroleum Act, 2012 governs specifically environmental protection in the oil industry. This makes environmental pollution caused by foreign investments in other areas unregulated. (II) Article 41 of the Transitional Constitution of the Republic of South Sudan, adopted in 2011 in 2011, states that everyone has the right to a healthy environment that is safeguarded for the benefit of both current and future generations. This provision is not being complied with as the Parliament did not adopt appropriate measures to incorporate environmental protection's provision into the Investment Promotion Act, of 2008. Therefore, the defect in the law regarding the liability of foreign investors for environmental pollution has created two social-environmental issues: First, it has negatively impacted the health of the people and animals in the areas that host major foreign investments in the country. Second, despite this environmental pollution and its social impacts thereafter, there have been difficulties in getting remedies against the polluters as the law is not clear on who bears the liability and the procedures of the claim.

With this backdrop, the victims cannot be remedied under national laws regulating foreign investments.

5.2 Summary of findings

Chapter two covered the historical background of foreign investment activities and environmental protection. It analysed the international treaties, regional treaties and the national legal framework governing investment activities. It looked at South Sudan's treaties with foreign countries regarding environmental safeguards. More importantly, national legal frameworks governing foreign investment and environmental protection have been evaluated. These national legal frameworks include the Constitution of 2011, the Investment Promotion Act, 2009, the petroleum Act, 2011 and the policy frameworks'.

The history reveals that environmental concerns have not been given provisions in the various treaties that later failed to address foreign investment protection, and that the national

legal framework has not adequately addressed environmental and health issues regarding foreign investment activities. Therefore, the objective number one, that is, ‘to assess international and national investment regulatory frameworks concerning environmental protection’, has been met. And therefore, the question as to what are the international and national investment regulatory framework concerning environmental protection has not been answered on ground of lack of specific law that regulates the environmental protection, both in international and national legal framework.

Chapter three discussed the impacts of FDI in South Sudan, majorly on the land, water and soil. The studies were carried out to discover that those impacts caused health issues in human and animal lives. Conversely, Oil Companies remain the biggest polluters plus foreign-owned non-oil companies. The literature revealed that weakness and lack of a clear legal framework are among the blamed factors for the increase in environmental pollution. As discussed above, South Sudan still relies on Petroleum Act when it comes to environmental protection, when Petroleum Act is only applicable to pollution caused in oil industry. Having analysed the impacts of foreign investments, the objective number three, ‘analysis on the impacts of foreign investment activities on the environment and human health in South Sudan’ has been achieved. In addition, the question as to what are the impacts of foreign investment activities on the environment and human Health in South Sudan, has been answered since the research revealed the impacts of foreign investment activities on land, water and air.

Chapter four has analysed the control measures and the gap in South Sudan legislation against FDI activities on the environment. The chapter discussed control measures with examples from South Africa, Nigeria and Kenya by comparison. In analysing the control measures, the discussion focused on land, water and air pollution. The major issue the investigation disclosed is that South Sudan lacks laws, regulations, policies and an institutional framework against the investors’ activities regarding environmental protection. Therefore, control of foreign investment activities against the environment and health by the government of South Sudan is totally weak. And the research concludes that objective number four, ‘analysis on the control measures of the impacts of foreign investment on the environment through legal reforms that guarantee environmental and health safeguards in South Sudan,’ has been achieved. However, the question as to whether there are control measures against the impacts of Foreign Investment on the environment through legal

reforms that guarantee environmental and health safeguards in South Sudan, has not been answered for lack of control measures, both in legislative framework and policy measures.

5.3 Conclusion

The foregoing discussion has revealed many things about the foreign Investment activities in South Sudan. First, having investment in the country is more advantageous to the country, in terms of economic growth, employment opportunities, tax collection for the government and development of the infrastructures. However, second, the impacts caused by the FDI on the environment and human health have been given little attention by the government of South Sudan as well as regional and international treaties, some of which South Sudan is a member.

The analysis of the international investment treaties; both the bilateral and multilateral treaties revealed that most of these treaties lack clear enforcement mechanisms of environmental protection laws. Nevertheless, some of the treaties with environmental safeguard provisions are not applicable in South Sudan on the geographical ground. This makes it difficult for a matter that lacks national remedy to get redress under international treaties regarding environmental protection and health. In addition, no national laws or regulations that comprehensively address environmental problems.

On the impacts of foreign investment activities on the environment, the discussion exposed that the oil sector makes up the bigger per cent of the impacts caused by the investment activities, on environment and health. The measurement of these impacts is found on air, water and land pollution respectively. However, the law is insufficient to remedy this negative impacts, in terms of health and the environment.

After the impacts of the investment activities are identified, they are countered by looking at the control measures; the control measures encompass air pollution and waste control, water pollution control and land pollution control. But the study shows that there is no single measure put in place by the government of South Sudan to curb environmental degradation caused by foreign investments activities.

5.4 Recommendations

Short Terms Recommendations

- i. While the government of South Sudan continues to attract foreign investments, it has a duty to comply with constitutionally guaranteed rights under the Transitional Constitution of 2011, Article 41; clean health and environmental protection as human

right. This can be achieved by amending the Investment Promotion Act, 2009 to incorporate the provision that makes environmental protection a condition for foreign investment's entry. The responsible institutions are the National Legislative Assembly when it comes to the enactment of the law, Judiciary when it comes to application of the law and the executive on the enforcement and compliance.

- ii. Again, the researcher advises the government to enact Environmental Protection Act. This would help in holistic protection of environment and health from foreign investment activities across the sectors. This recommendation is justified on ground that apart from Petroleum Act, 2012 which addresses environmental matters in Oil sector, no another law that remedy the negative impacts of foreign investments' activities on the environment and people's health. The responsible institution is the Law-making body in the country.
- iii. The researcher advises the government to increase control measures on activities of foreign investments by formulating applicable regulations and policies on the environment and health. This may include creating dumping sites for the waste products. The responsible institution is the ministry of the environment and the ministry of investment.
- iv. Amend Civil procedures Act, 2007 to incorporate the provision that remedy environmental and health violations as result of foreign investments activities. This will satisfy the principle of Polluter Pays. The responsible institution is the National Legislative Assembly.
- v. Unless the government makes reforms in environmental and health to counter the negative impacts of foreign investments activities, environmental and health protection cannot be guaranteed as investment continues to expand.

Long Terms Recommendations

- i. International and regional investment treaties should have a mandatory provision for environmental protection in the host country. The importance of this mandatory provision is for investors to carry out their activities in compliance with environmental protection measures as a requirement to invest in host state. The responsible institutions are contracting Parties.

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