BILATERAL INVESTMENT TREATIES AND ITS IMPLICATIONS ON HEALTH AND ENVIRONMENTAL RIGHTS PROTECTION: A CASE OF THE NIGER DELTA OIL AND GAS SECTOR

A thesis submitted to The University of Manchester for the degree of PhD Law in the Faculty of Humanities

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ABBREVIATIONS

AG Associated Gas
BIT Bilateral Investment Treaty
CSR Corporate Social Responsibilities
FDI Foreign Direct Investment
ICESCR International Covenant on Economic Social and Cultural Rights
ICJ The International Court of Justice
IIA International Investment Agreements
ILO International Labour Organization
MAI Multilateral Agreement on Investment
MFN Most Favoured Nation
NAFTA North American Free Trade Agreement
NGO Non-governmental Organization(s)
NNPC Nigerian National Petroleum Corporation
OECD Organization for Economic Cooperation and Development
UN United Nations
UNCITRAL United Nations Commission on International Trade Law
UNCTAD United Nations Conference on Trade and Development
ABSTRACT

The University of Manchester
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Bilateral Investment Treaties and its Implications on Health and Environmental Rights Protection: A Case of the Niger Delta Oil and Gas Sector
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This research discusses the impacts of oil and gas extraction in the Niger Delta region of Nigeria on the right to health and the right to a healthy environment of the Niger Delta people. It highlights the importance of FDI in oil and gas sector development and the responsibility of multinational corporations towards human rights and environmental rights protection in developing host States where national laws and regulations may not be properly developed and adequate in protecting the people’s human rights. The work argues that BITs should rightly be employed in efforts to protect the right to health and a healthy environment against the excesses of oil and gas multinational corporations. The Niger Delta is used as a case study.
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I will conclude by saying that the individuals mentioned above have all done their best to bring the margin of error in this work within tolerable limits. Any errors which remain in this work are therefore entirely mine. I apologise for them though they were not deliberate. The law is stated in accordance with sources and materials available to me as at the 25th of August, 2015.
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Wuraola Olufunke Durosaro obtained her LLM (International Business Law) from the University of Central Lancashire, Preston, United Kingdom before proceeding for her PhD at the University of Manchester. She is a Barrister and Solicitor of the Supreme Court of Nigeria who worked in a law office and an international commercial bank before leaving Nigeria to further her education in the United Kingdom.

She enjoys doing research and has authored a few publications and participated in conferences and seminars during the course of her studies at Manchester.
GENERAL INTRODUCTION

Bilateral Investment Treaties (BITs) govern the relationship between a host State and foreign investors by creating an international agreement between the home State of the investor and the government of the host State. International law recognises treaties as a valid source of law and offers legal protection and enforcement to agreements contained therein.\(^1\) BITs and other instruments relating to international investment agreements, such as the United States Trade and Investment Framework Agreement (TIFA) are currently the dominant means through which investments in foreign countries are regulated under international law.\(^2\) The treaties were a viable response to the weaknesses and ambiguities of customary international law as applied to foreign investments by multinational corporations particularly into countries at low levels of development.

The main objective of any multinational corporation is profit making whereas the government of the host country, particularly developing countries is usually interested in generating revenue and boosting economic development.\(^3\) At the same time, the host country is responsible to its citizens to safeguard the interests of its citizens against the profit-making interests of the multinational investors.\(^4\) This conflict of loyalty has led to a number of host countries to assert sovereignty over foreign investment resources and make claims against multinationals, ranging from total expropriation of the investors’ interests to other subtle forms of expropriation such as the introduction of burdensome regulations, increases in taxes, adverse legislation as well as export or import obligations placed on

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1. Article 38 Statute of the International Court of Justice
2. LJ Tobin and S Rose-Ackerman, ‘When BITs have some bite: The political-economic environment for bilateral investment treaties’ (2011) 6 (1) The Review of International Organizations, 1-32
foreign investors. These led to the popularity of BITs in that the investing States can be guaranteed due protection for their investment. With the increase in the volume of BITs across the globe comes the evolution of a series of new developments in its text, function and purpose.

On a broad note, BITs were created for the promotion and protection of foreign investment in order to promote, liberalize and protect investment amongst nations. One of the main concerns of most capital-exporting countries is to obtain legal protection for investment under international law and thus reduce as much as possible the risks of forfeiting investment facing foreign investors in host countries. This is because the standards of protection in an international agreement are considered to be of a higher and more reliable nature than those provided under domestic law alone, which can be subject to unilateral modification.

Generally, treaties are recognized as a source of law under international law, one broadly accepted definition of sources of international law includes Article 38 of the Statute of the International Court of Justice (ICJ) which lists the sources of law the ICJ shall apply in deciding cases to include treaties or conventions, international custom, the general principles of law recognized by civilized nations and subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of international law. This implies that treaties can be regarded as a source of law in regulating aspects of international relations between States which creates legal obligations for the treaty parties.

7 Neumayer Eric and Laura Spess, ‘Do bilateral investment treaties increase foreign direct investment to developing countries?’ (2005) 33 (10) World development, 1567-1585
8 Article 38 Statute of the International Court of Justice, Set up in 1945 under the Charter of the United Nations
Host States conclude BITs in an effort to attract foreign investment by protecting investors from the investing State party, thereby demonstrating their commitment to providing a favourable investment climate which encompasses fair and equal treatment of parties, reciprocity and mutual benefits based on the belief that being party to a BIT will increase foreign investment flows and generate economic prosperity and development.\(^9\)

However, it is increasingly obvious that business associations between States particularly with the activities of multinational corporations greatly impacts on a number of social and economic human rights and environmental protection in States where they operate.\(^10\) While the basic contents of BITs have largely remained the same over the years, with investment protection as the core issue, issues affecting public policy concerns such as health and environmental protection have in recent years been more frequently discussed in regards to international investment.\(^11\) At an international level for example, in June 2011 the Human Rights Council of the United Nations, an inter-governmental body within the UN system responsible for the promotion and protection of all human rights around the globe, unanimously adopted the Guiding Principles on Business and Human Rights. The Guiding Principles state that business enterprises of every size and nationality have a responsibility to respect human rights and that this responsibility exists ‘over and above compliance with national laws and regulations protecting human rights.’\(^12\)

According to the Guiding Principles, States should set out clearly the expectation that all business enterprises domiciled in their territory or jurisdiction must respect human rights throughout their operations irrespective of whether the business enterprises is owned, supported or controlled by the state. Business enterprises particularly multinationals are

\(^{9}\) E Aisbett, Bilateral investment treaties and foreign direct investment: correlation versus causation (Department of Agricultural and Resource Economics, UCB, 2007)


expected to conduct due diligence by formally assessing the actual and potential human right impact of their activities.

These Guiding Principles are important in that they point out the State’s duty to protect human rights particularly from multinational corporations and the need to provide access to remedy whether judicial or non-judicial access for the citizens whose rights have been violated as well as the corporate responsibility of the multinationals to respect people’s human rights.\textsuperscript{13} The Guiding Principles are however limited in that they have failed to specify positive obligations for business enterprises or given proper guidance for States on the required standards to follow in setting out this expectation. This means that there is no practical or concise obligation put upon businesses in order to indicate respect for human rights rather than simply having the responsibility to acknowledge them.\textsuperscript{14}

This suggests that the Guiding principles leave the responsibility to the States to determine what the ‘respect’ of human rights by business enterprises means.\textsuperscript{15}

Invariably this implies that developing States with limited State resources and imperfect systems could lack the governmental means to ensure adequate protection of citizens against human rights and environmental abuses caused by powerful multinationals. Where international law contains norms such as rules and principles governing the relations and dealings of nations with one another which could easily be applied to and imposed on private corporations in order to protect human health and environment, the enforcement mechanisms are arguably very inadequate to protect the vulnerable citizens of such developing States.\textsuperscript{16}

\textsuperscript{13} Ibid
\textsuperscript{15} John Ruggie, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises’ (2011) 29 Netherlands Quarterly of Human Rights, 224
\textsuperscript{16} Olivier De Schutter, \textit{The accountability of multinationals for human rights violations in European law} (CHRGJ Working Paper No. 1, 2005)
Another good example is the United Nations Global Compact, a United Nations initiative to encourage multinationals to align their strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and to take actions that advance societal goals.\textsuperscript{17} However, although the Global Compact sets out its guidelines for corporate practices in ten principles that encompass some of the most important aspects of social and environmental corporate impact, the principles are yet too general in terms of content and objectives.\textsuperscript{18} They can be subject to a range of interpretations to suit the wish of individual multinational corporations and do not impose specific and legally enforceable duties on them. Also, they are not binding on the participants and stakeholders, leaving any kind of commitment up to their will and according to their particular interests thus invariably unenforceable.\textsuperscript{19}

In the oil and gas sector particularly, human rights violations and environmental pollutions continue to be a global issue. One could think that, perhaps, developing States that possess oil and gas resources can easily attract foreign investment by their natural resources and can adequately regulate their activities through domestic laws and ensure compliance and would constitute an exception, as potential investors have nowhere to go except where such resources can be found; but as will be further discussed, these States are in other ways even more dependent on the presence of multinational corporations on their territories, because of the intense capital and technology they require to have access to and to exploit such mineral resources.

\textbf{STATEMENT OF PROBLEMS}

\textsuperscript{17} United Nations Global Compact, ‘Our Mission’ accessed from https://www.unglobalcompact.org/what-is-gc on 12 November 2014
\textsuperscript{19} Ibid
Oil and gas exploration continue to be a major cause of human health and environmental degradation in developing States host communities such as the Niger Delta region. Commitments made in trade and investment treaties can potentially protect foreign investors from State actions intended to address human rights concerns such as health and environmental protection. The Nigerian economy is highly dependent on oil and gas and relies greatly on Foreign Direct Investment (FDI) to sustain and develop the sector.

Although Nigeria’s trade regime has been highly-protectionist and distorted in many other sectors,20 for example, agricultural products were subject to high customs duties, between 50 percent and 100 percent in the 1980s.21 Quantitative import restrictions were placed on some 200 agricultural products around the same period, and imports and exports of nearly all agricultural foodstuffs were banned.22 International investment particularly oil and gas investment has been gradually liberalized through several business models and systems such as Joint Ventures (JVs), Production Sharing Contracts (PSCs) and Risk Service Contracts (RSCs).23

Through these systems, the national oil company, Nigerian National Petroleum Corporation (NNPC), partners with foreign owned multinational oil and gas corporations in order to exploit oil and gas resources. With this, the NNPC owns the asset while the multinational company operates and provides the funding, and both parties share in revenue and cost based on their participation interests.24 In order to foster these arrangements as well as arrangements in other sectors Nigeria has completed a total of 27 BITs with a total

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21 EO Ogunkola, ‘Nigeria: From Customs Exceptions to a Regional Trade Policy’ (2010) Grain de Sel Number 51 July-September 2010, also available in French as Le Nigeria, entre exception douaniere et politique commercial regionale, Inter-reseaux Development rural
22 Ibid
24 Ibid
of 13 currently in force. She has also completed a number of other international investment agreements such as with the United States TIFA. With the prominence of the oil and gas industry in Nigeria, most of its BITs and other IIAs have traditionally been with the countries of origin of the major oil and gas multinationals. Some of the biggest foreign investors in the Nigerian oil and gas sector are the United States, present through Chevron, Texaco and ExxonMobil then the Netherlands through Shell, France with Total and Italy with ENI. Chinese firms have also become increasingly involved in the Nigerian oil and gas sector. In late 2004, the Chinese company Funsho Kupolokum and Sinopec signed agreements with the Nigerian National Petroleum Corporation for the exploration of new oil fields and the construction of new refineries. The country continues to attract foreign investment due to its vast oil and gas resources.

Arguably, the activities of multinational companies should impact positively on the Nigerian economy. This is because foreign investment in a developing country such as Nigeria is expected to generate benefits which are not appropriated by the investors. Such benefits may include increase in efficiency and competition and resultant lowering of the price of products and services for the host economy. Such benefits can also be in the form of subsidy granted to the local economy by the host government or transfer of technology and human or managerial resources. This should then have a spill over effect on the development of health and environmental protection measures commensurate with improvement of the economy generally. This however has not really been the case. It

25 Ibid
29 Ibid
30 F Rodriguez and D Rodrik, Trade policy and economic growth: A skeptic’s guide to the cross-national evidence (Cambridge, MA: University of Maryland and Harvard University 2000)
must be pointed out that much of these benefits also depend upon pre-existing social, economic and environmental conditions within the host countries and upon specific national programs and policies that enhance the capacities of its citizens as well as the existence of an effective and efficient legal system.\textsuperscript{31}

The Niger Delta region through the activities of multinational oil and gas corporations has been plagued with, among other problems, the continuous violation of the people’s human rights and environmental degradation. Oil and gas multinational corporations have generated a bad reputation of promoting unsustainable and environmentally damaging or unethical processes, which have drawn the concern of the international community as well as several charities and Non-governmental organisations (NGOs).\textsuperscript{32}

The problem is that while host States are required to regulate corporate activities harmful to human rights and the environment, and to enforce these regulations in cases of corporate violations, they are sometimes constrained by their commitment to companies, particularly multinational corporations, by their commitments in international investment agreements such as BITs. The Nigerian government have demonstrated a desire for the continued expansion and development of the oil and gas sector by encouraging foreign investment through series of investment liberalization policies in the sector, however, Nigeria’s international investment agreements particularly BITs have not indicated any consideration for the protection of the human rights of the people or protection of the environment. The existing BITs essentially did not make any reference to human rights or

\textsuperscript{32} Macartan Humphreys, Jeffrey Sachs and Joseph Stiglitz, The Role of the State in Escaping the Resource Curse (Columbia University Press, 2007) 23-52
Individual efforts by multinationals through means such as Corporate Social Responsibilities (CSR) generally do not seem to be addressing the issue of human rights and the environment substantially in the Niger Delta region.\(^{34}\)

Human rights violations and environmental degradation have been identified throughout the whole process of crude oil extraction, production and development in the Niger Delta region. Human right violations refer to the deliberate and not deliberate abuse of people’s human rights by denying them the freedom to enjoy their rights.\(^{35}\) Different forms of pollution can be identified from oil mining to the transportation crude oil and its associated products to exporters and consumers; at the drilling and completion stage, air is polluted by exhaust fumes from the drilling machine, natural gas flaring and venting, the soils through chemical additives in mud and cuttings, hydrocarbons, salts and metals from the pits sterilizes the soil and underground waters are also polluted by sludge overflow from the pit.\(^{36}\) At the stimulation stage, volatile chemicals can find their way into the atmosphere polluting the air, fracturing chemicals have the capability to contaminate the soil and the water, and the produced water also contains hydrocarbon chemicals like benzene which can escape into the atmosphere posing as a health hazard.\(^{37}\) During the separation and dehydration processes volatile organic compounds are vented and they pollute the air, water and the soils and finally, during the gas compression process, venting

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\(^{33}\) Jorge Eviñuales, Foreign Investment And The Environment In International Law 17-18 (James Crawford & John S. Bell eds., 2012)

\(^{34}\) G Eweje, ‘The role of MNEs in community development initiatives in developing countries Corporate Social Responsibility at work in Nigeria and South Africa, (2006) 45 (2) Business and Society, 93-129


\(^{37}\) Ibid
of gas and exhaust fumes from engines pollutes the air, soils and water. This goes to show that oil and gas processes, from production to consumption, have the potential to cause severe environmental deprivation with far reaching implications on the immediate physical environment, life and health of the affected people.

This research therefore raises the issue that there exists a human right to health and an healthy environment as provided by the International Covenant on Economic Social and Cultural Rights 1976 (ICESCR) Article 12 (1) and (2) and other national and international laws which would be discussed further in the course of this work and discusses whether or not these are human rights properly so-called and the impacts of oil and gas exploration on them if they are indeed human rights. This study aims to establish that health and a healthy environment are indeed human rights albeit economic, social and cultural rights, and to address the negative impacts of oil and gas exploration on the health and environment of the Niger Delta people from a human rights perspective. It argues that Nigeria’s BITs are a means by which the Nigerian State can positively address the continuous violation of such right to health and healthy environment of the people of the Niger Delta by the multinational oil and gas corporations.

In other words, this research aims at exploring the balance between protection of health and the environment and the need to promote and protect and enhance the flow of FDI to the oil and gas sector of the Niger Delta as an example of a resource rich economy by proposing an effective system of BITs which adequately addresses these issues. This research aims to demonstrate that achieving this balance will impact positively on Nigeria’s sustainable development as the violation of human rights and damage to the environment is minimized while a steady flow of investment into the country is maintained in a sustainable

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manner. These problems are critically addressed from a human rights and development perspective particularly a sustainable development perspective.

RESEARCH QUESTIONS

This thesis seeks to address the following research questions:

To what extent does oil and gas extraction impact on the right to health and a healthy environment of the Niger Delta people? To what extent can the Nigerian government address health and environmental protection in its future BITs or can National legislation and local courts provide adequate safeguard for these rights as opposed to addressing them in BITs? And to what extent are foreign investors and multinational corporations legally accountable for the violations of the right to health and a healthy environment caused in host communities under national and international law and will this negatively affect FDI generation?

METHODOLOGY AND JUSTIFICATION OF THE RESEARCH

To answer these research questions, the researcher will critically discuss the ways oil and gas extraction negatively affects the health and environment of the Niger Delta people and the difficulty of obtaining justice under the national law. This thesis, through the utilisation of a ‘desk research’ that involves the critical analysis of relevant primary and secondary data, shows the extent to which the health and the environment of the people living in the Niger Delta region is impacted and whether or not these are indeed human rights and the viability of the inclusion of human rights clauses relating to health and environment in future BITs in order to impose specific obligations on multinational corporations to safeguard such right to health and a healthy environment. The work also adopts a case study approach and the combination of the case study research and the doctrinal research allows for a critique of the relevant issues as generated by the case study. The thesis makes use of the case of the Niger Delta oil and gas sector of Nigeria.
Establishing the connection between economic activities and human rights protection is a complex enquiry and the Niger Delta situation provides a context for addressing these issues. The thesis will discuss some of the difficulties that communities in the Niger Delta go through as a result of these problems, as well as whether or not there are specific evidences of how domestic laws have attempted to address these problems. It will discuss health and healthy environment as a human right and the roles of both the Nigerian government and the foreign oil and gas multinational corporations in safeguarding them in the Niger Delta situation and how the existence of BITs can change the dynamics of these roles. Firstly, through the implications of BITs on national laws and the capability of the host State to regulate the activities of foreign investors; secondly, how BITs can be used to address the problem of access to justice by local communities in domestic courts against human rights violations by foreign investors and thirdly, the implications of BITs on FDI and economic development of the host State.

The choice of the Niger Delta region of Nigeria as a case study for this work was informed by several factors. Firstly, the Niger Delta demonstrates the attitude of resource rich developing countries towards attracting foreign investment by embracing BITs for the purpose of economic growth without due provision for the non-economic consequences such as human rights consequences of such investment liberalization. The relative dependence of the Nigerian economy on crude oil and natural gas exports and Nigerian government’s increased liberalisation of investment for the production and exportation of oil and gas without adequate provision for the resultant negative impacts on people’s health and environment is a global concern amongst stakeholders. Companies such as MOBIL Producing Nigeria, AGIP Energy and Natural Resources, Chevron-Texaco, and Shell Petroleum Development Corporation (SPDC) have moved into the country and are
constantly being criticized for abusing the human rights of the residents of their host communities.

The complex legal system in Nigeria highlights some of the dynamics that arise from the interaction of international and national laws particularly on foreign investment protection and regulating the activities of multinational corporations. The Nigerian oil and gas industry epitomises the reality of current trends in resource rich developing countries and their huge reliance on the resources sector for economic growth and development particularly oil rich developing countries. BITs are a viable regulation of foreign investment guiding the relationship between the host state and the foreign investors’ states.

Secondly, the health and environmental hazards that the indigenous people are exposed to on a regular basis and the failure of domestic regulation coupled with political instability and lack of proper implementation and enforcement of such domestic regulations to duly address the problem require that the issue be addressed at an international level. The difficulty in enforcing economic, social and cultural rights on multinational corporations particularly in developing countries makes the focus of this thesis on the Niger Delta an important academic enquiry.

This research contributes to the literature on how global economic interactions impact on human rights protection particularly addressing government efforts from the perspective of international investment treaties specifically BITs. Existing literatures have tended to concentrate generally on the ineffectiveness of domestic laws in addressing this problem or the lack of enforceable laws at the international level in addressing the problem. The thesis goes further by focusing on the Niger Delta extractive industry in

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40 Mosley Layna and Saika Uno, ‘Racing to the bottom or climbing to the top? Economic globalization and collective labor rights’ (2007) 40 (8) Comparative Political Studies, 923-948; Ruggie John Gerard, ‘Business
order to highlight that BIT as an important source of international investment law can be employed in addressing the obligation of foreign multinationals towards human rights protection.

**STRUCTURE**

This thesis is divided into five Chapters and a general introduction which gives a background into the main issues for consideration and highlights the research questions, methodology, and justification of the research and the structure of the thesis.

The first Chapter critically discusses the concept of BIT, from a broad perspective, looking at the historical development, features and its weaknesses. It traces how BITs became a popular choice of international agreement between countries around the world. The Chapter analyses the emerging trends in BITs particularly as it relates to health and environmental rights drawing a distinction between pre year 2000 BITs and post year 2000 BITs. The Chapter further discusses the right to health, environmental rights and the role of States as the recognised actors in international law to protect these rights. This provides a general background for the issues to be discussed in this work.

Chapter two critically discusses the history of oil extraction of the Nigerian oil and gas sector and how oil and gas extraction has impacted negatively on the right to health and the right to a healthy environment of the Niger Delta People. The third chapter discusses the legislative complications that arise from the existence of BITs in Nigeria and how its treaty obligations impact on domestic laws, showing how the existing legislation on oil and gas are inadequate for safeguarding the right to health and healthy environment of the people and giving a brief history of the oil and gas sector and how health and

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environmental protection issues are connected to BITs in the Niger Delta. The Chapter discusses the history of BITs in Nigeria and critically analyses the interaction between its BITs and health and environmental protection by exploring how Nigeria’s treaty obligations impact on national laws. It highlights the evidences which indicate whether or not Nigeria’s BITs have had any significant effect on the inflow of FDI into the sector and whether or not this justify the commitment of the State to the oil and gas multinationals in the light of the constant negative effects on human health and a healthy environment. Some of the efforts that the country had made in order to attract FDI into the region and whether or not these efforts are channelled into sustainable development are highlighted.

Chapter four focuses on the complications that arise in the Niger Delta as a result of the negative health and environmental impacts of oil and gas extraction in addition to other human rights violations arising from the activities of the oil and gas multinationals. The Chapter further highlights the failure of CSR by multinationals in addressing these problems and explores the impracticability of using the argument of resource control in order to address the health and environmental rights violations in the Niger Delta region. The role of multinational corporations in health and environmental protection under international law is also discussed in this chapter.

The work is concluded in Chapter five and recommendations are made.
CHAPTER ONE

The Concept of BIT, the Right to Health and the Right to a Healthy Environment

1.1 INTRODUCTION

This chapter critically discusses the concept of BIT, from a broad perspective, looking at the historical development, the features and the weaknesses. It traces how BITs became a popular choice of international investment agreement between countries around the world. The chapter analyses the emerging trends in BITs particularly as it relates to the inclusion of agreements that protect health and environmental rights and many other non-economic considerations incorporated into the BIT agreements and which started from around the year 2000. The chapter will further discus the concept of the right to health, environmental rights and the role of States as the recognised actors in international law to protect these rights. This provides a general background for the main issues to be discussed in this work.

1.2 WHAT ARE BITS

BITs are forms of International Investment Agreements (IIAs). IIAs are investment agreements entered into by States to promote, protect and liberalize foreign investments. They are negotiated by two or more States to create rights for individual investors and obligations for governments.41 They could be a multilateral agreement which presupposes the combination of more than two States or bilateral agreement (BITs) which is an agreement between two States. The more common ones are BITs. The United Nations Conference on Trade and Development (UNCTAD) defines BITs as "agreements between

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two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country”.

This definition hints at three different aspects regarding international investments. The first is the encouragement which indicates that BITs are made by countries to encourage and generate investment from one party to the other. The next aspect is the promotion of investment not just from the State that is party to an already concluded agreement but to other investing States as an indication of their commitment towards protecting foreign investment; while the last is the protection that is guaranteed by the treaty.

All of these are key aspects of BITs. BITs generally protect investors from legislative, regulatory or judicial actions of the host State of their investment if those actions are: expropriatory, either directly or indirectly; unfair or inequitable, including actions that violate investors’ legitimate expectations; discriminatory as compared to nationals or investors from other States; or in breach of investment obligations or undertakings of the host State. BITs thus provide a range of substantive rights and protections for entities that invest abroad. More importantly, BITs provide investors with effective recourse to enforce those rights, by claiming compensation before international tribunals from host States that have damaged their investments. BITs are useful tools in creating friendly environment for multinational companies seeking to do business in foreign countries and have become universally accepted instruments for the legal protection of investment relations between States. They have been defined as agreements between

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44 Mercurio (n 41)
two countries that govern the treatment of investments made in their respective territories by individuals and corporations from other countries.\textsuperscript{46}

Given the weaknesses of domestic political and legal regimes in many countries, particularly developing countries, investors seek alternative means of protection for their investment which is tailored to their needs by committing to a basic framework that guides their investment association with the host country. Because of this BITs became very popular among States. They provide clear, enforceable rules to protect foreign investment and reduce the risk faced by investors.\textsuperscript{47} According to the UNCTAD, BITs promote foreign investment through a series of strategies, including guarantees of a high standard of treatment, legal protection of investment under international law, and access to international dispute resolution in the event of violation of the treaty.\textsuperscript{48}

Historically BITs date back to 1959, when the first BIT was signed between the Federal Republic of Germany and Pakistan.\textsuperscript{49} Since then there has been a total of 2805 BITs negotiated across the globe with a total of 2103 currently in force.\textsuperscript{50} The negotiation of BITs proceeded at a moderate pace until the mid-1980s, rarely exceeding twenty new treaties per year. Late in the decade, however, the rate of signings accelerated dramatically, with an average of more than one hundred new treaties a year throughout the 1990s.\textsuperscript{51}

\textsuperscript{47} J Tobin and S Rose-Ackerman, Foreign direct investment and the business environment in developing countries: The impact of bilateral investment treaties (William Davidson Institute Working Paper Number 587, 2003)
BITs allow governments to make credible commitments because they raise the costs of non-compliance above those that might be incurred in the absence of the treaty. They do this by clarifying the commitments of the parties and explicitly stating the expectations, they also enhance enforcement of the agreement by pre-agreeing on the form and system of dispute resolution. By involving the home States of investing multinationals BITs imply that the State parties are equally bound by the good faith treaty observance principle of customary international law and a breach of which will be harmful to the State party’s foreign policy interests and damaging to its international reputation asides from directly breaching the enforceable dispute settlement portion of the treaty.52

From the history of BITs and their popularity, BITs have been useful as tools for protecting foreign investments particularly in countries with weak domestic institutions and high political risks, a category most developing countries fall under. Developed countries remain both the dominating source and the major recipient of FDI.53 Emerging developing economies have been making significant efforts to change this position. BITs have been a means to create favourable environment for FDI in order to generate more FDI and to boost development.

Admittedly, the existing literature is somewhat mixed on the impact of BITs on development. Some studies, including several recent ones, find that BITs have a robust positive impact on promoting FDI flows to countries particularly developing countries.54 For example, Egger and Pfaffermayr, Peinhardt and Allee and Haftel find that BITs consistently increase FDI between the associated countries once they are signed and ratified. Separately, Savant and Sachs argue that foreign investors with exposure to

52 Ibid
extractive industries often rely on BITs because of the historical experience of host
governments behaving in a discriminatory or even predatory fashion. On the other hand,
Busse, Königer, and Nunnenkamp find that BITs rarely substitute or make up for weak
domestic institutions in developing countries to foreign investors. However, several other
studies have found little or no explanatory power between BITs and increased FDI or
resultant economic growth and development particularly for developing economies. For
example, Tobin and Rose-Ackerman found a weak relationship between BITs and FDI. A
number of other authors have also questioned the effectiveness of BITs as tools for
attracting FDI or generating economic growth in host countries.

A common denominator however, is that BITs significantly impact on the
regulatory system of the host State even though domestic legal rules may not substitute for
the commitment and protection offered by entering into a legally binding bilateral treaty.
BITs and their binding investor-state dispute settlement provision for example, can be used
to prevent the host country from exploiting foreign investors after the investment has
already been undertaken. International investment arbitration was meant to avoid the
pitfalls of diplomatic protection, the “politicization” of investment disputes, the risk of
resort to political pressure and even subversion by powerful nations against small countries
for economic reasons. Existing studies demonstrate that the same time BITs flourished in
the 1980s and 1990s, outright expropriations of foreign investments, which were common
during the 1960s and 1970s, practically ceased to take place.

55 Karl P Sauvant and Lisa E Sachs (eds) The Effect of Treaties on Foreign Direct Investment: Bilateral
Investment Treaties, Double Taxation Treaties and Investment Flows (Oxford University Press, 2009)
56 Matthias Busse, Jens Königer and Peter Nunnenkamp, ‘FDI Promotion through Bilateral Investment
Treaties: More Than a Bit?’ (2010) 146 (1) Review of World Economics, 147–177
57 Tobin (n 47)
58 LE Peterson, Bilateral investment treaties and development policy-making (Winnipeg: International
Institute for Sustainable Development, 2004)
59 Sacerdoti Giorgio, ‘Investment protection and sustainable development: key issues’ Bocconi Legal Studies
Research Paper 2445366, 2014
60 Neumayer (n 7)
This has however not curtailed several criticisms of BITs from other authors. Some speculated that perhaps countries entering into BITs are trading sovereignty for credibility.\textsuperscript{61} The extent of interference with domestic regulatory sovereignty countries succumb to in signing BITs is huge as virtually any public policy regulation can potentially be challenged through the dispute settlement mechanism as long as it affects foreign investors and their investments.\textsuperscript{62}

BITs have further been criticised as essentially investor driven which suggests that the investor State dictate the agreements in the treaty and the host States are left in a “take it or leave it” position as they realise that they must compete with other potential hosts and might thus be reluctant to drive for change in core BIT provisions.\textsuperscript{63} The reciprocity of protection in BITs has also been criticised. Although the rights secured in a BIT are stated as reciprocal, such that investors from country A investing in country B are given the same protection as those given to investors from country B investing in country A. However, in practice there is usually tremendous asymmetry in the real life situations as almost all the investment flows covered by BITs are in fact in one direction especially if it involves a developed and a developing country or a resource rich developing country.\textsuperscript{64}

BITs have equally been criticized as being one-sided instruments. They are concerned with limiting the measures that may be taken by governments against foreign investors or foreign-owned investments. The treaties contain a series of rights for inward capital protection against expropriation, guarantees of non-discrimination, and freedom to transfer funds out of a host state but they lack any counter-balancing investor responsibilities. Thus in the event of investor misconduct that impacts on the rights of

\begin{flushright}
\textsuperscript{61} Ibid  \\
\textsuperscript{62} Ibid  \\
\textsuperscript{63} Elkins (n 51)  \\
\textsuperscript{64} Mary Hallward-Driemeier, Do bilateral investment treaties attract foreign direct investment? Only a bit-and they could bite (No 3121 The World Bank 2003)
\end{flushright}
individuals or groups in the territory where the investment takes place, the treaties offer little comfort to those victims because investor protections are not made conditional upon any minimum investor responsibilities, nor do they provide any mechanism for challenging investor wrong-doing.

A number of authors as well as Non-Governmental Organizations (NGOs) have stated that BITs are mostly designed to protect the foreign investors and do not take into account obligations and standards to protect other non-economic factors such as human rights, the environment, social provisions or natural resources and that when such clauses are agreed upon, the formulation is legally very open-ended and unpredictable. BITs are criticised in that they publicly impose obligations on the host State but rarely impose any obligations on the investment exporting State.

Many of these criticisms can however be set straight looking at some of the emerging trends in newer BITs as will be discussed in the next section.

1.3 EMERGING TRENDS IN BITS (EXAMPLES FROM THE USA, CANADA, JAPAN AND COLOMBIA)

By emerging trends, this thesis refers to the new issues that have started to be incorporated into new BITs that were not traditionally addressed in the earlier BITs. By older BITs this research refers mostly to the pre year 2000 BITs and the newer BITs are mostly the post year 2000 treaties. The majority of the older BITs have very similar provisions, forms, patterns and purposes. For instance, these older BITs were normally between a developing country as the host country and a developed country as the investing country usually at the initiative of the developed country.

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65 Wong (n 46)
67 Wong (n 46)
have started to conclude BITs among themselves, and the characteristics of these treaties did not significantly deviate from those concluded with developed States.68

Developed States and emerging economies have also started concluding BITs among themselves.69 Early on, BITs were primarily agreements between countries of starkly varying developmental levels and political traditions, but as is the case with wealth, the “political gap” between new BIT signers has diminished significantly over the past few decades and over time new BIT partners have become more similar both in the level of economic development and political systems.70 Thus both parties to the treaty should negotiate without fear of political pressure and ensure fair and reciprocal protection of both parties in the BIT.

Virtually all BITs cover certain substantive areas such as investment admission, investment treatment, expropriation, and the settlement of disputes.71 The older BITs however were limited in focus to economic considerations only and were simpler and quicker to conclude.72 With the newer BITs there is an emerging trend towards introducing treaty innovations, such as the objectives of clarifying the scope of the definition of "investment" and the meaning of several key obligations, providing greater transparency in rulemaking, provisions on improving the transparency and predictability of dispute settlement procedures and most interestingly spelling out that investment protection should not be pursued at the expense of other essential public policy concerns such as health and environmental protection.73

69 M Busse, J Kёнiger and P Nunnenkamp, ‘FDI promotion through bilateral investment treaties: more than a bit?’ (2010) 146(1) Review of World Economics, 147-177
70 Elkins (n 51)
71 Ibid
73 UNCTAD (n 68)
The criticism of the competitive nature of BITs is no longer viable as both the investing States and the investment receiving States are demonstrating a keenness for transparency and predictability as well as the introduction of non-economic issues into agreements in BITs. The health and environmental protection clauses can particularly be seen in the BITs concluded by countries such as Canada, Colombia, Japan, the Republic of Korea and the United States. Until after year 2000, BITs mostly focus on the protection of the investing State and their investment and until pioneered by the US, BITs do not normally include any consideration for health and environmental protection but only focus on economic considerations. However the evidence below shows that non-economic considerations can rightly be incorporated into BIT negotiations and agreed upon by the treaty parties.

From the example of the countries listed above, in the 2002 BIT between The Republic of Korea and Trinidad and Tobago it was stated in the preamble that: “Both States, intending to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party, based on the principles of equality and mutual benefit… Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application, have agreed as follows…”

There is a direct indication on the part of both parties to the BIT that the economic activities of the investors will be carried out in line with both existing and perhaps future health and environmental protection measures put in place by the host country. Similarly, in the United States’ new model BIT issued in late 2004, references were made to non-

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economic considerations such as human rights. The model BIT demonstrates a significant
new departure from the usual agreements in BITs because it strengthens property rights
protections and includes requirements for signatories to make rules and regulations
transparent, to introduce domestic administrative procedures, and to consider the impact of
investments on environmental and labour conditions. Only the first two elements in this
list, however, can be enforced through arbitration.

In the United States and Uruguay BIT of 2005 provisions recognising the need for
health and environmental protection were duly stated and the BIT went further to extend
such protection to internationally recognised labour rights. The preamble to the BIT states
as follows:

“Desiring to achieve these objectives in a manner consistent with the protection of
health, safety, and the environment, and the promotion of consumer protection and
internationally recognized labour rights; having resolved to conclude a Treaty concerning
the encouragement and reciprocal protection of investment; have agreed as follows…."

Even though these provisions do not water down the purpose of the treaty being
first and foremost for the promotion and protection of the foreign investment, it recognises
the need for the host State to develop policies and regulations for health and environmental
protection as a result of industrial activities which might not necessarily be in the best
interest of the investors but which will be presumably not geared towards indirect
expropriation or bad faith. It is arguable that these provisions in the preamble of these BITs
could be of great help to dispute settlement panels in the event of dispute when interpreting
the protection of the investor’s investment in the light of the treaty obligations of the host
State particularly where health or environmental protection is an issue for determination.

76 S Rose-Ackerman and Jennifer Tobin, ‘Foreign direct investment and the business environment in
developing countries: The impact of bilateral investment treaties’ (2005) Yale Law & Economics Research
Paper 293
A number of disputes have risen from investment treaties where health or environmental protection measures had in fact been an issue for determination in international investment arbitration. An example is the case of Tecnicas Medioambientales Tecmed SA v. United Mexican States\textsuperscript{77} where the government of Mexico refused to renew the operating licence of the Spanish company Tecnicas for environmental protection reasons and pursuant to an environmental regulation. The arbitral panel decided \textit{inter alia} that a measure could be a \textit{de facto} indirect expropriation by its effects when the measure was adopted by the State, whether being of a regulatory nature or not, was permanent and irreversible, and the assets and rights object of such a measure were affected in such a way that was impossible to exploit such assets and rights, thus depriving them of any economical value. The tribunal particularly mentioned that it found no principle stating that regulatory administrative actions are per se excluded from the scope of the investment agreement even if they are beneficial to society as a whole such as for environmental protection, particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value or economic use of its investment without receiving any compensation whatsoever. The Tribunal concluded by granting compensation for the investor in proportion to their loss.

This case highlights that in the event of a dispute between parties although the investment agreement will consequently be subject to the interpretation of the dispute settlement panel as the principle of judicial precedent does not apply to arbitral investment panels.\textsuperscript{78} The presence of a health or environmental clause or exception would have perhaps provided some guidance for the dispute settlement panel in understanding the intentions of the parties on health and environmental protection when deciding the duty and

\textsuperscript{77} (2003) ARB (AF)/00/2
level of protection owed by the host State to the investing party and vice versa. The absence of such clauses suggests that the investment treaty arbitration will not consider health and environmental concerns of states as valid reasons for hampering the investment of the foreign investor in whichever manner. This suggests that the treaty parties ought to agree on substantial and measurable duties for the both parties on health and environmental protection and incorporate such into their BITs.

Nearly all BITs contain clauses that some firms have used to petition governments for damages stemming from government actions such as tax law changes and environmental or health regulations enacted after investment has taken place. Such petitions point out the usefulness of BITs to foreign investors making them viable tools for the adequate protection of their investment and demonstrate the popularity of BITs amongst investing States. Thus BITs will only be truly bilateral and reciprocal if such clauses can be employed by host states in order to protect the health and environmental rights of the local people.

1.4 BIT AND HEALTH AND ENVIRONMENTAL CONCERNS

Ideally, health and environmental concerns should not in themselves be topics of interest when dealing with BITs, however, as was mentioned in the introduction of this work, liberalization of investment often leads to the violation of human rights and environmental degradation through increased industrial activities and the difficulty of host States to enforce new standards of human rights and environmental protection which may not be favourable to foreign investors.

On a general note, while BITs can easily be classified as mere investment agreements between two States which in themselves should not necessarily impact

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80 Rose-Ackerman (n 76)
negatively on health and environmental protection or be turned into human rights negotiations or environmental treaties, situations where such violations occur such as the Niger Delta situation reveals that the host State’s policy of seeking foreign investment may impede efforts to raise health and environmental standards so as to attract such investments$^{81}$ or to duly enforce existing standards in order to accommodate foreign investment protection commitments made by host States’ governments particularly for developing countries. This can be caused in a variety of ways.

Policy makers in investment seeking States can out-rightly re-write human rights and environmental regulations in order to lower the standards to reduce regulatory costs. Regulatory costs include both the direct and indirect costs of making and upholding an effective and efficient regulatory system in a particular sector.$^{82}$ This though mostly borne by the government also impact on individuals and businesses as well as the society at large. Regulatory costs could include compliance costs and even to smaller extents enforcement costs.$^{83}$ It must be added that it will be difficult to give an all encompassing definition of regulatory costs as depending on jurisdiction can take a vast number of shape and form especially indirect regulatory costs. A situation like this might be worst in developing countries like Nigeria where poverty rate is very high. Evidences from previous academic works have shown that higher regulatory costs can lead to higher production costs in the long run particularly for businesses such as foreign multinationals and consequently lead to a slow down of productivity and growth in the host country.$^{84}$ However, re-writing human rights and environmental regulations in order to reduce regulatory costs can generate negative international attention from human rights or environmental groups and civil

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$^{83}$ Ibid

society who may contend that such regulations are insufficient to protect the people’s rights.  

This situation seems to create a conflict of interest in host countries since they seem to be striving to attain a policy level where they do not offend investing countries or increase the suffering of their citizens in order to satisfy investors. The more subtle approach often employed by poor developing States is that the host country will interpret or modify their existing environmental regulations; governments can provide regulatory concessions by interpreting the law in ways that favour businesses, by enforcing laws less vigorously and by constraining regulatory budgets.

At other times, in situations where the host states may wish to regulate the economy, including foreign investors embedded therein, in a manner which seeks to promote or protect certain human rights interests of the citizens to prevent them from having their rights interfered with by foreign investors by putting in place some policy measures designed to set in motion the progressive realization of economic, social and cultural rights, such as health and healthy environment, by being parties to BITs with the host State of foreign investors, foreign investors will have the power to challenge these human rights and environmental rights inspired measures through international investment arbitration if it will in any way hamper their investments. And even if the host state’s duty to protect its citizens is acknowledged, the State might still be liable for adequate compensation of the foreign investors to the extent of their loss of real or potential proceeds from their investment.

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86 Cao and Prakash (n 84)
Although this is without prejudice to the existence of the principle of legitimate expectations of the foreign investors which require the host State to act in good faith towards foreign investors, the existence of clauses such as the fair and equitable treatment clause in BITs may contribute to the host state’s reluctance to “offend” foreign investors. Fair and equitable treatment of foreign investors is an absolute standard of the minimum level of protection accorded foreign investment under international law. The reason being that when such provisions are included in BITs, they can be potentially perceived as an indication of the host State’s willingness to deal with foreign investors on standards which are set by the international community and which are subject to vast number of interpretation in the event of an international investment arbitration. The development of the standard is rooted in the desire of capital exporting states to ensure that their nationals investing in foreign countries are treated with equity and justice. This can be traced as far back as the Havana Charter of 1948 in which its article 11(2) prescribed that foreign investments should be assured ‘just and equitable treatment.’

Fair and equitable treatment provisions in BITs have for instance been described in the case of Técnicas Medioambientales Tecmed SA v Mexico as “treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its

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88 See the case of Tecnicas Medioambientales Tecmed SA v. The United Mexican States (2003) Case No ARB(AF)/00/02
90 Alex Genin and others v. Estonia, ICSID Case No ARB/99/2, Final Award, 25 June 2001
91 ARB(AF)/00/2 (Official Case No) 10 ICSID Rep 130
investments, as well as the goals of the relevant policies and comply with such regulations…”

This suggests that a host country must ensure that it consults foreign investors and properly take into consideration the impact of proposed domestic policy changes on them. As interpreted by arbitral tribunals, the fair and equitable treatment standard raises highly complex and contentious issues as to the types of administrative and governmental action that can be reviewed under the standard and the degree of seriousness of breach that is required to activate a compensable claim. A fair and equitable provision also poses the problem of creating legislative constraints on the host State particularly developing host States in developing and enforcing human rights regulations such as health and healthy environment protection measures. This, in turn, may lead to the undermining of legitimate State intervention for economic, social, environmental and other developmental ends. These provisions equally seem to be creating obligations mainly for the host State to protect the investment and not necessarily the investors unless there are additional qualifications in the provision.

The implications of this further suggest that an unwilling host government or even a poor host government will perhaps choose the easy way out to avoid an international dispute in the first place and may not take the necessary steps to tighten regulations protecting health and environment. A corrupt host State government may for economic reasons and to avoid the chance of a dispute not take necessary regulatory steps and may be necessary for public policy or human rights protection. Even where the host State is acting justly and in the good interest of the citizens, it might be difficult to determine what would

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92 Ibid
95 Ibid
96 I Tudor, The fair and equitable treatment standard in the international law of foreign investment (Oxford University Press on Demand 2008)
constitute unfair treatment of foreign investors and what might generate dispute where necessary radical changes are made to human rights and environmental laws and policies in such host State. Added to this is the cost of international investment arbitration which is usually borne in equal parts by State parties to the dispute and not necessarily subject to the final outcome of the investment arbitration.\(^{97}\) This is because international investment arbitration will not necessarily require the winning party’s arbitration costs to be paid by the defaulting party.\(^{98}\)

In a report by the Global Arbitration Review, excluding a number of extreme results, claimants typically incur considerably greater party costs than respondents. This is not surprising since the claimant bears the burden of proof and the arbitral tribunal holds the discretion for determination and award of costs.\(^{99}\) The 2010 UNCITRAL rules, states in article 42.1 that the costs of the arbitration shall in principle be borne by the unsuccessful party or parties subject to the proviso that the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case. This indicates the unpredictability of recovery of arbitration costs.

The applicable substantive laws within BITs are the principles of international law regulating the contractual relationship between the host State and the home State of the investing multinational corporation operating within the host State. This is distinguishable from the provision and application of environmental principles and standards or the provision and application of human rights regulations and standards operating in the host State. The issue therefore is whether host State’s domestic environmental laws and


\(^{99}\) Ibid
standards and human rights laws are recognised as regulation which the investing State is subject to under international investment protection, or the legitimate implementation of applicable international environmental principles and standards as a consequence of the international legal obligations of the host State. Prospects for the implementation of international human rights and environmental law standards within BITs may depend on the balance in political and economic power between the host State and the investing State involved in the agreement.\textsuperscript{100} This balance is usually weighed in favour of protection for the investing economic actors rather than the application of human rights and environmental standards.\textsuperscript{101}

It is not uncommon for human rights and environmental issues to become part of economic negotiations. For example, human rights play an increasingly important role in the European Economic Area (EEA) and members insist that countries hoping to join the European Union (EU) to obtain economic benefits should be required to respect human rights as well.\textsuperscript{102} Many multilateral trade agreements and associations equally acknowledge human rights and environmental obligations and have incorporated them into their agreements and negotiations. The exception provisions of Article XX of the General Agreements on Tariffs and Trade (GATT) which now forms part of the WTO agreement, for example leaves some room for the consideration of values other than those based strictly speaking on the efficiency of trade or trade rules alone. Article XX (b) allows trading parties to deviate from trade rules in circumstances necessary for the protection of human, animal or plant life or health, provided they do not amount to disguised

\textsuperscript{100} DM Ong, ‘Transnational Investment Law and Environmental Protection: Russian State Intervention in the Sakhalin Ii Project—The Empire Strikes Back?’ (2011) 58 (01) Netherlands International Law Review, 1-42

\textsuperscript{101} Ibid

protectionism.\textsuperscript{103} The WTO and the WHO recognised this nexus and came up with a joint study on WTO agreements and public health issues in 2002.\textsuperscript{104} Another problem that should be considered is whether developing host States will not be overwhelmed or intimidated by the economic might to the developed treaty party in order to initiate such negotiations particularly due to the fact that their inherent objective of being party to a BIT is in order to attract further foreign investment. In regards to issues such as health and environmental protection which require dedication of economic resources for the realisation, host developing States might not be willing to devote the resources and human resources towards, or even allowing a dispute to degenerate into an arbitration in order not to send the wrong signal to potential investors. This inevitably leads to the compromise on health and environmental protection.

The protection of the right to health has been argued to be reliant on available resources due to its many determinants which require the provision of amenities to ensure adequate protection.\textsuperscript{105} It is hardly surprising that health and environmental concerns are now connected with economic considerations. There is the potential use of economic instruments to achieve health and environmental objectives plus developing countries have sought to make acceptance of certain environmental obligations subject to the provision of financial assistance or have sought to ensure that environmental treaties establish effective mechanisms to verify compliance to prevent the competitive economic ill that might flow from non-compliance. The concept of sustainable development is also inherent in many environmental treaties and instruments.\textsuperscript{106}\

\textsuperscript{103} F vanHees, Protection V. Protectionism: The Use of Human Rights Arguments in the Debate for and Against the Liberalisation of Trade (Ekonomisk-statsvetenskapliga fakulteten; ÅboAkademi University, Finland: Citeseer 2004) 1-84 at 26
\textsuperscript{104} WTO Agreements and Public Health: A joint study by the WHO and the WTO secretariat, World Health Organization and World Trade Organization, Geneva, August 2002
\textsuperscript{105} E Durojaye, ‘The approaches of the African Commission to the right to health under the African Charter’ (2013) 1 17 Law, Democracy & Development: Special Issue, 393-418
\textsuperscript{106} P Sands and J Peel, Principles of international environmental law (Cambridge University Press 2012)
Article 4(1) of the German BIT provides that, “Contracting Party shall subject investments in its territory owned or controlled by investors of the other Contracting Party to treatment less favourable than it accords to its own investors.” This definition is similar to the national treatment provisions. The exceptions provisions are however quite different and provide that “...either Contracting Party may grant to its own investors special incentives for development purposes in order to stimulate the creation of local industries, especially small and medium sized industries, provided that they do not significantly affect the investments and activities of investors of the other Contracting Party.” This introduces a development clause or development exception. These clauses have been utilised to provide flexibility, particularly for developing countries, in recognition of the lower level of development of local companies. Such clauses allow governments to grant preferential treatment to national investors where it is considered necessary for economic development.

In this case, its use is however subject to the proviso that it does not “significantly affect” investors of the other Contracting Party. The determination of what constitute “significantly affect” would have to be made on a factual and case by case basis. It would still be a step in the right direction if other State parties to BIT adopt and incorporate such exception provisions or such provisions similar to the Article XX and XXI GATT in their BIT in other to further protect their need for regulation and policy development that may be necessary to protect their citizens’ rights or the environment.

It must be added that the introduction of non-economic clauses into BITs will not be easy, as it will require rigorous negotiations by governments particularly for a developing economy like Nigeria which will without any doubt be more concerned about ensuring the inflow of investment and economic growth. This implies, first of all, that granting the right of making investment, just as market access is provided to products and services, possibly

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in the form of progressive liberalization. As to domestic regulation, issues concerning investment in regulated sectors are more difficult to be tackled through harmonization of standards as is the case in respect of products. Protective clauses such as exception provisions which are rarely found in traditional BITs becomes necessary, an example is the Article XX and XXI GATT-type clauses which have been included in recent BITs by Asian countries such as Cambodia, Thailand and Vietnam,\textsuperscript{108} to parallel similar clauses concerning trade. The provisions of Article XX of the GATT leaves some room for the consideration of values other than those based strictly speaking on the efficiency of trade or trade rules alone.

Article XX (b) allows contracting parties to deviate from trade rules in circumstances necessary for the protection of human, animal or plant life or health, provided they do not amount to disguised protectionism.\textsuperscript{109} It provides that, “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...

(b)Necessary to protect human, animal or plant life or health …”\textsuperscript{110}

It has been argued that this provision does not make a direct reference to or mention of human rights but that it merely states the circumstances where WTO member states may successfully deviate from the core principles of the GATT/WTO agreement.\textsuperscript{111} It is

\textsuperscript{108} B Legume and I Petculescu, ‘GATT Art. XX and international investment law, Improving International Investment Agreements’ (A de Mestral and C Levesque eds.) (Routledge, 2013) 340-362

\textsuperscript{109} F VanHees, Protection Versus Protectionism: The Use of Human Rights Arguments in the Debate for and Against the Liberalisation of Trade (Ekonomisk-statsvetenskapliga fakulteten; ÅboAkademi University, Finland: Citeseer, 2004), 1-84 at 26

\textsuperscript{110} General Agreement on Tariffs and Trade (GATT) 1994 Article XX

needless to argue whether or not the recognition given to human health by Article XX presupposes the introduction of human rights into economic agreements. It should be sufficient that international trade rules give priority to the respect of human life and health in international trade relations. Evidences from the WTO Dispute Settlement Bodies have demonstrated that the dispute settlement bodies have been consistent in employing a narrow and strict application of Article XX and they equally have the obligation to take into account “applicable rules of international law between the parties.”

Article XXI provides for security exceptions allow State parties to deviate from their economic commitment is situations necessary for protecting its security interests. Article XXI (b) provides that, “Nothing in the agreement shall be construed … to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests.”

In an investment agreement, under these provisions the host State may deviate from the main provisions of the treaty on measures taken for certain public purposes or in certain circumstances; a caveat here is that these clauses have not really been tested yet in respect to investments, and they might deprive existing investments from any protection in the face of discriminatory measures, if not well calibrated. This is not to mean that they have not been successfully adopted in BITs. In the BIT between the US and Argentina such measures were adequately adopted and utilised. The clauses included allow the States parties to the BIT to take actions otherwise inconsistent with the treaty when, for example,


112 F VanHees, Protection Versus Protectionism: The Use of Human Rights Arguments in the Debate for and Against the Liberalisation of Trade (Ekonomisk-statsvetenskapligfakulteten; ÅboAkademi University, Finland: Citeseer, 2004), 1-84, 26


114 Treaty Concerning the Reciprocal Encouragement and Protection of Investment United States – Argentina, Article XI 14th November, 1991 (Signed 1993)
the actions are necessary for the protection of essential security, the maintenance of public order, or to restore peace.

1.5 IS THERE A RIGHT TO HEALTH

It is imperative to explain what is meant by the right to health for the purpose of this work. Health is a human right that is indispensable for the enjoyment of other human rights. Every human has the right to the highest achievable standard of health conducive to living a life of dignity. The right to health is a universally recognized human right and it is stipulated in a number of international human rights laws. Also, the protection of the right to health is provided for in most global, regional and national human rights instruments.

The “grund norm” for human rights is the Universal Declaration on Human Rights 1948 (UDHR) and the covenants adopted in 1966, the International Covenant on Economic Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) both of which came into force in 1976. Article 3 of the UDHR though not specifically on health provides for the respect and protection of human life while Article 25 provides that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”\textsuperscript{115} The ICESCR provides in Article 12 that “the States Parties to the Covenant shall know the right of each one to the enjoyment of the highest attainable standard of physical and mental health.”\textsuperscript{116} The African Charter on Human and Peoples’ Rights (ACHPR) Article 16 equally provides for the right to health. It states that every individual shall have the right to enjoy the best attainable state of physical and mental

\textsuperscript{115} WHO World Report on violence and health (WHO Geneva, 2000)
health and that State parties to the charter shall take the necessary measures to protect the
health of their people and to ensure that they receive medical attention when they are sick.

Several questions have been raised on the problem of understanding the content and
extent of the right to health and upon whom the duty for its fulfilment lays especially for
developing States. Some attempts have been made to interpret the right to health in
detail. However, due to lack of uniform standards especially when developing countries
are concerned, it has been suggested by some authors that violations of the right to health
should be judged on the backdrop of the minimum set of governmental duties necessary to
make the right meaningful.

This suggestion presupposes the availability of an ideal government where the
policy makers of a State are committed to the protection of the life and health of citizens
and places on the government the duty to make the right meaningful. It must be pointed out
that the right to health should not be seen as a right to be healthy. The State cannot be
expected to provide all people with protection against every possible cause of ill health or
disability such as the adverse consequences of genetic diseases, individual susceptibility
and the exercise of free will by individuals who voluntarily take necessary or unnecessary
risks, including the adoption of unhealthy lifestyles. Nor should the right to health be seen
as a limitless right to receive free medical care for any and every illness or disability that
may be contracted.

Instead, the right to health should be understood as a right to the enjoyment of a variety of
facilities and conditions which the State is responsible for providing or preserving as being

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117 Centre for Economic and Social Rights, 'Rights Violation in the Ecuadorian Amazon: The Human
Consequences of Oil Development' (1994) 1 (1) Health and Human Rights, 89
118 E Riedel, 'The Human Right to Health: Conceptual Foundations' in A Clapham and M Robinson Realizing
119 Centre for Economic and Social Rights (n 117)
120 Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the
<http://www.unhcr.org/refworld/docid/4538838d0.html> accessed on 13 December 2012
necessary for the attainment and maintenance of good health.\textsuperscript{121} The right to health indicates a definition of health which not only encompasses the mere absence of illness, infirmity and diseases, but also social well-being.\textsuperscript{122}

It will be difficult to compile a comprehensive list of the necessary conditions the State should provide for the attainment and maintenance of the right to health of its citizens, their relevance will depend on a number of variable social and economic factors, such as the extent of avoidable and unavoidable exposure to health hazards in different situations. It will also be difficult to pinpoint exactly what the right to health entails, but specific elements that constitute the core content of this right have been identified by scholars, activists and relevant UN bodies. These include availability of health services, healthy and safe working conditions, adequate housing, and availability of safe drinking water, a pollution free and healthy environment and nutritious food. States must guarantee these elements under all circumstances, in relation to their available resources. They ought to be seen to be taking relevant steps within the available resources to ensure the progressive realisation of the right for their citizens.

The UN treaty monitoring committees on the right to health have given some advice and guidelines as to what the right to health means in practical terms.\textsuperscript{123} The Committee on Economic, Social and Cultural Rights in their General Comment No 14 in 2000 set out in detail what is meant by the right to health. This process of clarification is likely to continue with the result that the scope of the right to health will become still clearer in the future, for example through the development of regional and national case law.\textsuperscript{124} However this

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\textsuperscript{121} Ibid
\textsuperscript{122} B Wilson, ‘Social Determinants of Health from a Rights-Based Approach’ in A Clapham and M Robinson Realizing the Right to Health (Swiss Human Rights Handbook Vol 3,Zulrich, Rüffer& Rub, 2009) 61
\textsuperscript{123} CESC (n 120)
\textsuperscript{124} J Asher The Right to Health: A Resource Manual for NGOs (Commonwealth Medical Trust AAAS Science and Human Rights Program, HURIDOCs, 2004) 1-86, 17
\end{flushleft}
should not be an excuse for States not to take adequate steps to ensure its fulfilment to the best of their economic capabilities.

The Commission on Human Rights Special Rapporteur on the right to health has declared that “the legal content of the right to health is not yet well established.” 125 This is not an indication that the right to health is not a human right properly so called. It merely shows that there are still a lot of clarifications needed in determining the legal implications of most of the contents of the right to health. This does not necessarily mean that there is need for more treaties or national and international documents to expatiate or expound on the content of the right but that the legal content can be further established through judicial interpretations and clarifications.

The respect for the right to health is measured on several essential and interrelated features most of which are related to other economic, social and cultural rights. 126 It has been observed that the laws and documents stipulating the right to health internationally all fail to give a distinct and universally accepted definition of health. Several authors have attempted to define health through classification of the term ‘health’ into different headings or identification of different aspects of the right to health. Erk, for example, argues that health is not a static given but that it can be influenced by different determinants which may be biological, behavioural, social and environmental ones. 127 The physical environment for example is one of the key determinants of human health.128 Health can be influenced by individual choices, actions and behaviours which presuppose that health can be an individual given, the protection of which will be outside the duty of the State.

125 Paul Hunt, The right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Report of the Special Rapporteur submitted in accordance with Commission resolution 2002/31, E/CN.4/2003/58) para 39
127 C Erk, Health, Rights, and Dignity: Philosophical Reflections on an Alleged Human Right (OntosVerlag, 2010) 1-385
128 Centre for Economic and Social Rights, 'Rights Violation in the Ecuadorian Amazon: The Human Consequences of Oil Development' (1994) 1 (1) Health and Human Rights, 83
However, it must be recognised that the other factors such as social and environmental factors are outside the control of the individual and this is where the State holds the duty to ensure that these factors do not hamper the rights of individuals to enjoy good health. The argument thus, is that if the determinants of health are not always within the control or influence of individuals, the State should guarantee the protection and fulfilment for their right to health. Individuals should be able to lay claims to the protection of their rights within the polity. Dworkin opines, for instance, that rights are best understood as trumps over some background justification for political decisions and should be a goal for the society as a whole.\textsuperscript{129} The duty thus falls on the State to ensure that rights are adequately protected from factors or determinants outside the influence of the individual. Mills proposes that human rights such as the right to health should be conceptualised as “something which the State ought to defend individuals or citizens in the possession of” such that society ought to defend the individual in possession of his rights because doing so would bring about the greatest aggregate utility summed across the members of that society.\textsuperscript{130}

Going by these provisions, for the purpose of this work the right to health will be the right to the most achievable standard of physical and mental wellbeing an individual can attain given their individual, environmental and social state necessary for the enjoyment of other human rights.

1.6 IS HEALTHY ENVIRONMENT A HUMAN RIGHT?

In the past few decades, awareness of the damaging effects of environmental pollution on human beings and their quality of life has greatly increased. The Oxford English dictionary defines the natural environment as the surroundings or conditions in

\textsuperscript{129} Ronald Dworkin, ‘Rights as Trumps’ in J Waldron (ed) Theories of Rights (Oxford University Press, 1984) 153-167

which a person, animal or plant lives or operates. These include the air, soil, water, flora and fauna. Environmental pollution broadly encompasses any process that will cause harm to man or the other living organisms within such environment. Protection of the environment became necessary and started generating global awareness due to various human activities such as technological development, industrialization, mining, transportation and significantly fossil fuel energy production and consumption. Waste production, air pollution, and loss of biodiversity are also some of the issues relating to environmental protection.

The society and the natural environment (characterized by the availability of natural resources, orientation of the physical geography and the ease with which the natural conditions can be manipulated for production purposes), to a large extent, are closely linked to each other. The natural environment supports the society by meeting its needs whereas the society is continuously changing the natural environment by carrying out various socio-economic activities on it. All the human activities carried out on the environment, either in small or in large scale, can produce significant amounts of disastrous waste that is disruptive to the environment. The presence of these human-induced substances in the environment, mostly due to their unhealthy chemical composition hinders the functioning of normal natural processes and hence brings about undesirable health and environmental effects. This brings about environmental pollution; the introduction of harmful products or substances to man’s natural environment. These harmful substances contaminate the soil, air, water (underground water, streams and oceans), food and bodies of human beings.

There are a number of academic arguments that there is no generic environmental human right as is the case with other civil and political rights or economic, social and cultural rights. ¹³³ Some others argue that it is a significant part of the right to health.¹³⁴ There is yet another school of thought that argues for the creation of environmental human rights into the ranks of other generic civil and political or economic and social rights.¹³⁵ The environment is mentioned directly in the ICESCR in article 12(2) on the right to health which states that: The steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for . . . (b) the improvement of all aspects of environmental and industrial hygiene.

The African Charter on Human and People’s Rights also states that all peoples shall have the right to a general satisfactory environment favourable to their development.¹³⁶ The Human Rights Council again reacts to issues of climate change in 2012 by emphasising that the adverse effects of climate change have a range of implications, both direct and indirect, for the effective enjoyment of human rights, including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination, the right to development and the right to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence.

These clearly linked environmental protection to human rights and presupposes a right to a safe and healthy environment. Some theorists suggest that environmental issues belong within the human rights category, because the goal of environmental protection is to

¹³³ Simon Caney, Climate change, human rights, and moral thresholds (Climate ethics: Essential readings 2010), 163-177
¹³⁵ R Hiskes, Environmental Human Rights (Handbook of Human Rights 2012), 399
enhance the quality of human life. In the argument of Depledge and Carlarne, without the right to a healthy environment, how can one deliver on the promise of a healthy life?\textsuperscript{137} Other opposing theorists argue, however, that human beings are merely one element of a complex, global ecosystem, which should be preserved for its own sake. A third view, which seems to best reflect current international law and policy, sees human rights and environmental protection as each representing different, but overlapping, societal values. Shelton points out that the two fields share some core common interests and objectives; human rights violations can be linked to environmental degradation and a good example is the right to health. He further argues that likewise, environmental issues cannot always be addressed effectively within the human rights framework, and any attempt to force all such issues into a human rights rubric may fundamentally distort the concept of human rights.\textsuperscript{138} This disjunction perhaps reveals the inadequacies of the current system of rights.\textsuperscript{139} The common consensus amongst the differing opinions however is the recognition of the need for environmental protection either as a human right or policy.\textsuperscript{140}

International treaties and organizations however, seem to regard environmental rights as a human right duly held by all persons. The protection of the environment was first explicitly recognized in the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) in 1972\textsuperscript{141} and subsequently Rio Declaration on Environment and Development of 1992\textsuperscript{142} as nonbinding principles. Although these

\begin{flushleft}
\textsuperscript{137} Michael H Depledge and Cinnamon P Carlarne, ‘Environmental rights and wrongs’ (2008) 42 (4) Environmental science & technology, 990-994
\textsuperscript{139} Depledge (n 137)
\textsuperscript{140} PC Stern, ‘New environmental theories: toward a coherent theory of environmentally significant behavior’ (2000) 56 (3) Journal of social issues, 407-424
\textsuperscript{141} UN Doc A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972)
\textsuperscript{142} UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992)
\end{flushleft}
declarations were not intended to create legal rights and obligations they did contribute to the development of international and national environmental law.  

The Stockholm conference is considered an important starting point in developing environmental law at the global level. Principle 1 of the Stockholm declaration linked environmental protection to human rights norms by stating that, “man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being…. “ The declaration acknowledges the responsibility of all human beings to contribute to the protection of the environment but gives States the greater duty to ensure through regulations, policies and international cooperation that the human environment is adequately protected.

The UN Conference on Environment and Development (UNCED) through the Rio Declaration, although it is not a treaty, also stipulates certain State obligations for environmental protection and sets forth important principles of international environmental law, especially sustainable development. The theoretical understanding of environmental protection either perceived as a human right or not is however not the focus of this work. The focus is towards the recognition of the need by developing resource rich States to protect the environment from the impact of multinational corporations. There has been a continuous development of the theory and practice of environmental laws and regulations.

The UNEP defines environmental laws as a body of law, which is a system of complex and interlocking statute, common law, treaties, conventions, regulations and policies which seek to protect the natural environment which may be affected, impacted or endangered by human activities. These laws can either be regulatory or prohibitive as

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143 D Shelton, ‘Human rights and the environment: What specific environmental rights have been recognized’ (2006) 35 Denver Journal of International Law and Policy, 129
they either regulate the quantity and nature of such human activities or assess the possible impact of such activities before they occur. International environmental law comprises of substantive, procedural and institutional rules of international law that have the primary objective of protecting the environment.\textsuperscript{145}

A number of approaches have been developed in the international community towards environmental protection such as the precautionary principle; the polluter pays principle and the emission trading approach.\textsuperscript{146} An understanding of environmental right and protection is important in order to highlight the role of states both jointly and severally in guaranteeing a safe and healthy environment for all people. Thus discussions on environmental rights and protection including the right to a healthy environment in this work will be limited to aspects of the natural environment that affect people’s lives and health and interfere with the enjoyment of the highest attainable standard of health necessary for living a life of dignity.

\textbf{1.7 THE ROLE OF STATES IN PROTECTING THESE RIGHTS}

The role of States in protecting human rights generally is clearly established under international law.\textsuperscript{147} This could be in the form of regulation through laws, rules and policies. It could also be through adequate enforcement of the regulations and through reforms.\textsuperscript{148} Although human rights norms such as economic social and cultural rights are still evolving, the need for the commitment of States towards their protection is no less emphasised. The responsibility of the State in preventing the continuous violation of the right to health and protecting the environment is recognised by international law.\textsuperscript{149}

\textsuperscript{145} P Sand and J Peel, \textit{Principles of international environmental law} (Cambridge University Press, 2012)
\textsuperscript{146} Ibid
\textsuperscript{147} David P Forsythe, \textit{Human rights in international relations} (Cambridge University Press, 2012)
\textsuperscript{148} Frans Viljoen, \textit{International human rights law in Africa} (Oxford University Press, 2012)
The relationship between a government and its people particularly a democratic State has been described as a social contract in which the social or political institutions are fair and just and responsive to the duty they owe to the people/society whom they are responsible to and from whom their authority is drawn.\textsuperscript{150} By becoming parties to international human rights treaties States indicate their commitment to the rights stipulated in such treaties and commit to taking steps where necessary to make them compatible with and part of their national law.\textsuperscript{151} International treaties further supply various monitoring bodies that work to improve governments’ practice in the specified areas of human rights by collecting and disseminating information, often with nongovernmental organizations’ cooperation.\textsuperscript{152} Although this does not necessarily guaranteed that States that ratify such treaties will be diligent in complying with the protection and promotion of the human right stipulated there in however States hold the judicial power to enforce such human rights norms.\textsuperscript{153}

The right to health like all other human rights create obligations for governments particularly States parties to the ICESCR. Although there has been arguments that determining who holds the duty to provide the necessary resources for the fulfilment of economic social and cultural rights is problematic\textsuperscript{154} especially for developing countries taking into account the wide range of social, economic, organisational, scientific and technical issues that are involved to fulfil the right to health due to the nature of health and its many determinants and the recommendation of the ICESCR for international co-

\textsuperscript{151} Frans Viljoen, International human rights law in Africa (Oxford University Press, 2012)
\textsuperscript{154} JC Arias and K Patterson, 'Relationships between Corporate Social Responsibilities' Promotion and Corporate Performance in the Multinational Corporations', (2009) 2(1) Business Intelligence Journal, 93-113 at 94
operation and assistance by States in achieving the rights through progressive realisation to the extent of their available resources.\textsuperscript{155}

The duty lies on the State to manage the public resources to ensure that the rights and welfare of the people is guaranteed and the socio-economic factors that determine the fulfilment of the right to health are put in place. The commitment was made in Vienna at the World Conference that the promotion and protection of human rights should be ‘the first responsibility’ of governments.\textsuperscript{156} The heads of government at the World Conference agreed that the promotion and protection of human rights is the primary duty of States and more attention should be paid to it in the face of rapid globalisation and co-operation amongst nations.\textsuperscript{157}

Basically what this suggests is that international law gives States the primary duty to promote, protect and fulfil this right both on their own and through co-operation with other States. Under international law, States hold the duty jointly and severally to respect, to ensure and to guarantee the effective enjoyment of the human rights recognized either in a treaty binding on a particular State in question or in any other source of law. The obligation to fulfil the right to health implies that states must effectively protect the right to health by taking concrete and visible steps within its available resources in order to ensure that the right to health is respected and promoted.\textsuperscript{158} State commitment through ratification of treaties alone does not necessarily translate to practical implementation of associated duties and obligations but provides a framework for achieving the targeted goal. Developing countries have the obligation to ensure a balance between their commitments to international trade and to the right to health.

\textsuperscript{155} Article 2(1) ICESCR
\textsuperscript{156} Vienna World Conference on Human Rights Declaration and Programme of Action “Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments” A/CONF.157/23, 1993 Part 1, para 1
\textsuperscript{157} Ibid
\textsuperscript{158} B Wilson, ‘Social Determinants of Health from a Rights-Based Approach’ In Andrew Clapham and Mary Robinson Zulrich Realizing the Right to Health (Switzerland, Rüffer& Rub 2010) 60-79 at 73
The protection of the environment is equally a primary duty of States especially in the face of multilateral or bilateral economic associations or agreements. Although environmental protection is not limited to the responsibility of government agencies, it can be argued that these agencies are of prime importance in establishing and maintaining basic standards that protect both the environment and the people interacting with it.\textsuperscript{159} The State holds the legislative and implementation powers as well as the power to enforce environmental regulations. It is important as part of the aim of political accountability and transparency, that policy makers are aware of health as well as environmental implications of trade and investment agreements so that these cannot be set aside, while the assumed benefits of treaty provisions for national and multinational industries are emphasized and drive negotiation priorities.\textsuperscript{160} Article 19 of the Energy Charter Treaty (ECT) enjoins Member States to, among other goals, ‘strive to take precautionary measures to prevent or minimise environmental degradation’, and to ‘take account of environmental considerations throughout the formulation and implementation of their energy policies.’\textsuperscript{161}

In recent years, there have been a number of academic arguments on the question whether, and to what extent, non-State actors, such as multinational corporations, should be held legally responsible for not complying with rules of international human rights law in the exercise of their various activities. Ruggie,\textsuperscript{162} in his compilation of the Guiding Principles highlights that in meeting their duty to protect human rights, States should:

\begin{itemize}
\item \textsuperscript{159} R Harding, ‘Ecologically sustainable development: origins, implementation and challenges’ (2006) 187 (1-3) Desalination, 229-239
\item \textsuperscript{160} M Koivusalo, ‘Policy space for health and trade and investment agreements’ (2014) 29 (1) Health promotion international, 29-47
\item \textsuperscript{161} T Waelde and A Kolo, ‘Environmental regulation, investment protection and “regulatory taking” in international law’ (2001) 50 (4) International and Comparative Law Quarterly, 811-848
\item \textsuperscript{162} John Ruggie, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises’ (2011) 29 Netherlands Quarterly of Human Rights, 224
\end{itemize}
a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;

d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

Others argue that Non-State actors such as multinational corporations operate proactively in human rights such as health and environmental protection activities when they see the business benefits derived from responsible human rights and environmental image and as such governmental regulatory agencies should focus more on opportunities to influence the environmental practices of corporations and to develop alliances that seek new ways of solving human rights and environmental problems in order to be more effective.163

Although it is obvious that States themselves should have the duty to ensure that their domestic law also offers adequate remedies against human rights violations that may be committed by multinational corporations this is not the same as indicating that these corporations are themselves incurring international legal responsibility for any wrongful acts. This just suggests that development of international law on the legal responsibility of multinational corporations to protect human rights and the environment from unnecessary damage and destruction from their industrial activities is still very inconclusive. General

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comment 14 of the CESCR indicates that all members of society including individuals, local communities, intergovernmental and non-governmental organizations, civil society organizations and private businesses all have responsibilities regarding the realisation of the right to health.

However, there is clear emphasis on the duty of the State in health and environmental protection over and above other non-State actors. States should not assume that businesses invariably prefer, or benefit from State inaction, and they should consider a smart mix of measures, national and international, as well as mandatory and voluntary in order to foster business’s respect for human rights.

It must be mentioned, however, that there may be disparity on the ability of States to carry out this responsibility. While States in developed economies may be at ease to carry out this responsibility owing to their technological advancement, well defined and effective institutions, and effective legal systems, States in emerging and developing economies may find it more difficult to put such measure in place.\textsuperscript{164} It will be more difficult for the government of a developing State to compel huge oil and gas conglomerates to put in place measures to reduce the impact of their activities on the health and environment of the communities in and around regions where their economic activities are carried out.\textsuperscript{165} This can be due to a number of factors. Some of the factors are corruption, ineffective legal systems, availability of human and economic resources and weak institutions.\textsuperscript{166}

The implication of this is that citizens of emerging and developing economies are more open to both violations from State and Non-State actors, particularly multinational

\textsuperscript{164} Susskind Lawrence E and Saleem H Ali, \textit{Environmental diplomacy: negotiating more effective global agreements} (Oxford University Press, 2014)

\textsuperscript{165} AK Ajukobi, ‘The Effectiveness of Criminal Sanctions under Environmental Law in Nigeria’ in Festus Emiri and Gowon Deinduomo (eds.), \textit{Law and Petroleum Industry in Nigeria, Current Challenges} (Malthouse law books; Lagos Nigeria: Malthouse Press Ltd, 2009), 337-346 at 346

\textsuperscript{166} E Berglöf and S Claessens, ‘Enforcement and good corporate governance in developing countries and transition economies’ (2006) 21 (1) The World Bank Research Observer, 123-150
corporations.\textsuperscript{167} Laxity on the part of States in emerging and developing economies in the ability to protect the health and environmental rights of its citizens create a loophole which multinational companies are utilising.\textsuperscript{168} Since complying with numerous rules and regulations increases cost for multinational companies, they may resort to lobbying policy makers in order to influence the host States regulations to protect the health and environmental rights of their citizens. This can also be done by lobbying government agencies and ministries.\textsuperscript{169} Some authors have alluded that multinational oil and gas companies in emerging and developing economies are less committed to monitoring the health and environmental impact assessment of their activities in these economies.\textsuperscript{170} If BITs are used to protect the investment of foreign investors, host States should equally use them to provide effective guidance to business enterprises on how to respect human rights and protect the environment throughout their operations.

Looking at the situation of the Nigerian State in regards to the Niger Delta, the Nigerian government is not unaware of its duty towards health and environmental protection in the region but seems to be failing to curb the violation of people’s right to health in the oil and gas sector so far and the people have resorted to acts of violence and civil disobedience in order to draw global attention to their plight.\textsuperscript{171} This will be further discussed in the following chapter. This is a negative outcome that will, in the long run, hinder the progress of the Nigerian economy. The attitude of the Nigerian government sometimes suggests that they expect multinational corporations or even the indigenous

\textsuperscript{167} Ibid
\textsuperscript{168} Chelsea M Keeton, ‘Sharing sustainability: preventing international environmental injustice in an age of regulation’ (2011) 48 Houston Law Review, 1167
\textsuperscript{170} David L Levy and Ans Kolk, ‘Strategic responses to global climate change: Conflicting pressures on multinationals in the oil industry’ (2002) 4 (3) Business and Politics 275-300
people themselves who are the victims to take the blame for the violation of the right to health occurring in the region.\footnote{172 F Iyayi, ‘Creating an enabling environment for Development in the Niger Delta: The Role of Labour’ (2006) being paper presented at the Labour Seminar on Law, Order, Security and Sustainable Peace organized by SPDC on Friday 8th December, 2008 at Wellington Hotels, Warri}

It can be argued that the attitude of the federal government towards the foreign multinational oil and gas corporations regarding health and environmental protection tends to indicate a neglect of the role of the State through its government officials. Some oil and gas multinationals have indicated that they are implementing measures to address the negative impacts of their activities through corporate social responsibility measures; however such corporate social responsibility activities largely remain piecemeal and short-term.\footnote{173 Olufemi Amao, ‘Corporate social responsibility, multinational corporations and the law in Nigeria: controlling multinationals in host states’ (2008) 52 (01) Journal of African Law, 89-113} Their community engagement is inadequate and requirements for accountability and transparency are either insufficient or not incorporated.\footnote{174 European Parliament Directorate-General for External Policies Policy Department, (2011), ‘The Effects Of Oil Companies’ Activities On The Environment, Health And Development In Sub-Saharan Africa,’ <http://www.europarl.europa.eu/committees/fi/deve/studiesdownload.html?languageDocument=EN&file=42648> Accessed on 20th July 2012}

In Nigeria, the main challenges are the lack of political will and capacity to implement and enforce national regulations, these points towards underlying governance challenges that need to be addressed and which are essentially anti-development and human rights.\footnote{175 Nwabuzor Augustine, ‘Corruption and development: new initiatives in economic openness and strengthened rule of law’ (2005) 59 (1-2) Journal of Business Ethics, 121-138} The United Kingdom for example experience the negative effects of activities of multinational corporations both foreign owned and domestic ones in the North Sea yet does not leave the responsibilities of protecting the health of the of the British people or the protection of the environment entirely to the multinational corporations but take concrete policy steps to address the problem.\footnote{176 Vadi Valentina, Public health in international investment law and arbitration (Routledge, 2012)}
Following several oil spills in 2005 in the Ogoni community, the Nigerian government was accused in *SERAC & Another v Nigeria* of deliberately ignoring the activities of oil companies affecting the right to health as well as other human rights of the people in the oil producing areas.\(^{177}\) Nigeria was found to have violated the right to health and to a healthy environment in this case in that it failed to take reasonable measures to prevent pollution and ecological degradation, contamination of water, soil and air thereby causing short and long term health hazards such as skin infections, gastrointestinal and respiratory ailments, increased risks of cancers, neurological and reproductive problems.\(^{178}\) Shell Petroleum Development Corporation for example reported major oil spills in many communities of the Niger Delta but the cost of cleaning up the environment up to international standards was estimated at several million US dollars which the company may not be willing to spend unless compelled by the state.\(^{179}\)

It must be emphasised that the multinational oil and gas corporations are first and foremost businesses which are operating in the sector to realise profit. This has inspired a lot of academic and economic debate on whether or not the gains from crude oil and natural gas is commensurate with the harms resulting from it particularly when evaluating the disposition of the Nigerian government towards the protection of the human rights of the people in this case the right to health. Therefore, the unethical corporate practices and poor Corporate Social Responsibility (CSR) by multinational oil companies should be a boost for the Nigerian state to intervene in the protection of the human rights of the citizens.

\(^{177}\) Social and Economic Rights Action Centre (Serac) and Another *v* Nigeria, ‘Social and Economic Rights Action Centre (Serac) and Another *v* Nigeria’, *AHRLR* (60: African Commission on Human and Peoples’ Rights, 2001)


\(^{179}\) CO Opukri, and IS Ibaba, Oil induced environmental degradation and internal population displacement in the Nigeria’s Niger Delta’ (2008) 10 (1) Journal of Sustainable Development in Africa, 173-193
It would be impossible for the government to achieve such a feat because crude oil has been a blessing economically to the country and has boosted income generation and capacity building as well as to an extent, facilitated economic development. However, the policy makers may draw from the argument of Sen in the treatise “Development as Freedom” and understand that the concept of development should not be limited to economic growth and development; it must be expanded to issues such as adequate protection of human rights. It might be more beneficial for policy makers to understand that although the Nigerian economy has benefited immensely from international trade in crude oil, most of its citizens in the Niger Delta regions have been reeling from the health effects of international trade. The citizens require the right to health in the same manner as citizens in other areas of Nigeria that have not been adversely affected by international trade in crude oil.

Indeed, the Nigerian constitution in Section 16 (1) enjoins the government to “… within the context of the ideals and objectives for which provisions are made in this Constitution, harness the resources of the nation and promote national prosperity and an efficient, dynamic and self-reliant economy; control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity.” This section pronounces Nigeria as one of the jurisdictions where social welfare services are recognised and it therefore provides a basis for measuring the performance of the country’s resources and the responsibilities of the government towards every citizen irrespective of their social status and or their location within the borders of the state.

On the other hand, from the perspective of health protection, the need to address the violation of people’s right to health through the harm caused by foreign multinationals in

180 AK Sen, *Development as freedom* (Oxford, United Kingdom: Oxford University Press, 1999)
the Niger Delta crude oil and natural gas sector cannot be over-emphasized. The problem itself in not entirely down to liberalisation of investment in the crude oil and natural gas sector but instead to the failure of the Nigerian state to harness its economic activities in a manner whereby the right to health of the people will be respected and the environment adequately protected. This remains an on-going problem which up till date the Nigeria government has not realistically addressed. Instead the attention is being shifted from the violation of the right to health and environmental degradation to the issue of compensation which has come to dominate the oil spills agenda in Nigeria, environmental clean-up has become less of a priority instead establishing who is responsible for the spill and how compensation could be maximized has become the focus.

The oil and gas corporations have often times paid members of the affected community compensation for the violation of their right to health without following the due process of the law while they continue to perform such harmful and dangerous acts knowing they can always pay compensations whenever a health or environmental harm is suffered. These can be properly resolved and put into perspective by the government. The issues affecting the right to health and the environment have been notable particularly in two major areas of economic activities in the oil and gas sector. One, in the process of production or extraction of crude oil and natural gas, and two, in environmental degradation and pollution of the areas where crude oil and natural gas is produced. These will be further analysed below.

Gas flaring for instance, does not only wastes potentially valuable source of energy; it also adds significant carbon emissions to the atmosphere. Gas flaring is harmful to the


health of the people due to strong gaseous emissions that have been linked to cancers, asthma, chronic bronchitis, blood disorders, and other diseases.\textsuperscript{183} Nigeria which began the production of crude oil in 1957 lacked sufficient infrastructure to absorb the gas which resulted from the process. This was why the cheapest and safest thing to do then was to burn off the gas after separating it from the crude oil.\textsuperscript{184} This practice which was expected to end in a very short time has continued unabated with little or no effort being put in place to end the flaring despite huge increase in production over the years.\textsuperscript{185}

In addition to the above arguments, Section 20 of the 1999 constitution of the federal republic of Nigeria mandates the State to protect and improve the environment and safeguard the water, air, land, forest, and in the oil producing regions. This section imposes an obligation on the state to ensure that the environment in oil producing regions is conducive for the health and welfare of the citizens. The section also mandates the state to take concrete steps to improve and safeguard the environment with special mention being made of water, air, land, forests and wild life. All this has been breached in the crude oil and natural gas sector through the activities of the oil companies in the country. In the crude oil and natural gas industry in Nigeria, environmental pollution occurs in various manners, sometimes from acts of deliberate dumping, accidental spills or leakages from pipelines and at other times from leakages at drilling rigs or the disposal of used oils.\textsuperscript{186}

In the conclusion of Sala-i-Martin and Subramanian, they revealed that natural resources such as oil and gas may or may not be a curse to the home country on the balance

\textsuperscript{183} CN Nwankwo and DO Ogagarue, ‘Effects of gas flaring on surface and ground waters in Delta state Nigeria’, (2011) 3 (5) Journal of Geology and Mining Research, 131- 136


\textsuperscript{185} Ibid

\textsuperscript{186} O Akanle, \textit{Pollution Control in the Nigerian Oil Industry} (Lagos Nigeria: Nigerian Institute of Advanced Legal Studies, 2007), 2
but they showed that it can have a seriously detrimental impact on the quality of domestic institutions and through this channel on long-run growth of the economy. \textsuperscript{187}

1.8 CONCLUSION

This Chapter examined the concept of BITs, right to health and environmental protection. The Chapter observed that BITs are instruments that regulate investment agreements between the host country and the investing company. Owing to weaknesses of local laws and the technicalities that may arise from their application, BITs are used to not only secure investments but to remove any issue that may arise from the laws of the host country in the cause of the investment. There are new trends in BITs that aim to suit the particular needs of every party. BITs used to be between developed States and developing countries but developing nations understand the importance of BITs to investment and now use them in treaties amongst themselves. BITs have started focusing on the health needs of the host country as against pure economic interests.

One of the problems affecting the use of BITs is its link to investment and growth and the impact it may have on the economy. States rewrite domestic regulations in order to attract investments. This is due to the fact that complying with environmental regulations is very expensive and the multinationals investing abroad are looking to generate returns for their investment by seeking locations with availability of human and material resources and to considerably reduce their production costs.

The ability of the multinationals to invest in a particular foreign State means that a balance must be reached where compliance is not too expensive, while it is the duty of the State to manage its environmental and health issues. Also, multinational companies are resorting to stabilisation clauses to protect their interests. The essence of stabilisation

\textsuperscript{187} X Sala-i-Martin and A Subramanian, 'Addressing the natural resource curse: An illustration from Nigeria', (National Bureau of Economic Research, 2003), 1-46, 23
clause is to preclude multinational companies from complying with subsequent improvements on domestic rules and regulations.

The chapter highlights that it is the duty of States to safeguard health and environmental rights and observed that the duty of the State to safeguard these rights is supported by international law and concludes that it is the responsibilities of the State through the machinery of Government such as through regulation and its effective implementation to ensure the adequate protection of the right to health and the environment of the citizens and that the Nigerian state is awfully failing in its constitutional duty to protect these rights in the Niger Delta crude oil and natural gas sector. In addition, BITs seem to whittle down the sovereignty of host States, while corruption and weak institutions in developing economies can play into the hands of multinational corporations. This necessitates the need for States to have effective institutions that would have the capability to negotiate mutually beneficial BITs and protect the health and environmental rights of its citizens.
CHAPTER TWO

Impacts of Oil and Gas Extraction on Health and Environment in the Niger Delta Region

2.1 INTRODUCTION

The oil and gas sector possesses its own unique set of problems and creates a distinctive aspect to protecting the right to health and a healthy environment. Health and environmental rights violation is a core problem in oil and gas extraction. Attracting foreign investment has been a very strategic tool for any country in the process of economic development and as such the need for capital inflow into a resource-dependent country like Nigeria is crucial. Since no nation in the world is completely economically self-sufficient, the need to attract resources beyond a country’s border becomes inevitable.

This is particularly pertinent for developing economies such as Nigeria and for developing the oil and gas sector. The role of foreign investment in Nigeria’s oil and gas sector cannot be over emphasized and this indicates the country’s commitment to investment liberalisation in order to attract foreign investors. This chapter analyses the history of the Nigerian oil and gas sector and relevant legislation on the oil and gas sector in the Country. The Chapter examines the history of oil and gas exploration in Nigeria and critically analyses the interaction between oil and gas extraction and foreign direct investment and foreign investors, in order to give meaningful background insight into the effects of these on the adequate protection of the right to health and a healthy environment in the Niger Delta.

2.2 BRIEF HISTORY OF THE NIGERIAN OIL AND GAS SECTOR

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188 Finer M, Jenkins CN, Pimm SL, Keane B and Ross C, ‘Oil and gas projects in the western Amazon: threats to wilderness, biodiversity and indigenous peoples’ (2008) 3(8) PloS one, 2932
Globally, the oil and gas industry as we know it today started with Edwin L. Drake when he drilled a crude oil well at Titusville, Pennsylvania, USA in 1859. From then onwards up to the commencement of large scale oil production, oil was produced and traded by small-scale merchants. Advances in the extraction and distillation technologies extended to Eastern Europe and significantly increased the potential for oil supplies and consequently reduced the prices of crude oil. This ushered in a new era of oil and gas multinational companies.

As technological developments in machinery, communication, mass production and transportation increased, this helped to improve the efficiency of most businesses operating on a large scale. In addition, an increasingly larger number of small-scale businesses evolved into larger firms in order to take advantage of the economies of scale. Firms from the United States were the first ones to take advantage of this initiative by applying methods from the new found knowledge of large scale operations to the capital-intensive oil industry. Edwin L. Drake, John D. Rockefeller and other partners, started an oil producing and refining company based in Cleveland, Ohio, and it was the world’s first organized oil production, processing, transportation and marketing company as by then the US already had the largest oil and gas refinery in the world. It later merged with a few other regional oil competitors to form a joint stock company that would be known as Standard Oil, which is still in existence. Therefore, in the real sense of an oil exploration and producing company, the Standard Oil is considered to be the world’s first oil company.

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193 Ibid
195 Tony Goosling, ‘Bilderberg, Rockefeller and Standard Oil...Rags to Riches’ (2014) <http://www.bilderberg.org/whatafel.htm> accessed on 20 August 14
Presently, based on the combined oil and gas production per day, the following are the main players in the oil industry: Saudi Arabian Oil Company, National Iranian Oil Company, Qatar General Petroleum Corporation, Iraq National Oil Company, Petroleos de Venezuela, Abu Dhabi National oil Company, Kuwait Petroleum Corporation, Nigerian National Petroleum Corporation, National Oil Company (Libya), Sonatrach (Algeria), Gazprom (Russia), OAO Rosneft (Russia), Petro China Company Ltd (China), Petronas (Malaysia), OAO Lukoil (Russia), Egyptian General Petroleum Corporation, ExxonMobil Corporation, Petroleos Mexicanos, BP Corporation (UK), Petroleo Brazilerio S.A, Chevron Corporation, Royal Dutch/Shell, ConocoPhillips (UK), Sonangol (Angola), Petroleum Development Oman LLC, Total (France), Statoil (Norway), ENI (Italy), Dubai Petroleum Company, and Petroleos de Ecuador, amongst others.\(^{196}\) Many of these companies have their operations outside their mother countries.\(^{197}\)

In Nigeria, the first discovery of commercial quantities of oil was in 1956 and currently, the country produces approximately two million barrels per day of crude oil.\(^{198}\) Estimates of Nigeria’s oil reserves vary from sixteen to twenty-two billion barrels, mostly found in small fields in the coastal areas of the Niger Delta.\(^{199}\) According to the Nigerian Constitution, all minerals, oil and gas belong to the Nigerian Federal Government, which negotiates the terms of oil production with international oil companies.\(^{200}\) The oil and gas sector is capital intensive thus the need to generate foreign investment into the sector.\(^{201}\)


\(^{197}\) Ibid


\(^{199}\) Ibid

\(^{200}\) Constitution of the Federal Republic of Nigeria 1999, s 44(3)

Most exploration and production activities in Nigeria are carried out by foreign multinational oil companies some of which operate through joint ventures with the Nigerian National Petroleum Corporation (NNPC), the State-owned oil company which usually owns major shares. Notable amongst them are Shell which operates a joint venture that produces close to a half of Nigeria’s oil production; Mobil, Chevron, Elf, Agip, and Texaco which operate other joint ventures and a range of international and national oil companies operate smaller concessions.\(^{202}\)

By the end of the Biafra civil war in 1970, world oil prices were on the rise and the nation began to significantly benefit from oil production.\(^{203}\) Oil and gas began to play a prominent role in Nigeria’s economic life and development after 1970.\(^{204}\) A significant boom in the economy was recorded. Nigeria joined the Organisation of Petroleum Exporting Countries (OPEC) in 1971 and established the NNPC in 1977. However, this economic boom was short-lived due to series of socio-political factors such as incessant military interventions in its government and its resultant negative impacts on the economy, for example, interruption of regulatory processes, corruption, and mismanagement of resources and embezzlement of public funds.\(^{205}\)

Despite this, the oil and gas sector soon picked up and has remained the fastest growing sector of the Nigerian economy and of great significance to the country’s national income.\(^{206}\) While agriculture was the mainstay of Nigeria’s economy prior to 1956, the discovery of oil led to a gradual neglect of agricultural production to the point where the

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\(^{202}\) JG Frynas, ‘Oil in Nigeria: Conflict and litigation between oil companies and village communities’ (2000) 1 LIT Verlag Münster


\(^{204}\) GO Odularu, ‘Crude Oil and the Nigerian Economic Performance’ (2008) 1 (1) Oil and Gas Business, 1-29, 1

\(^{205}\) Ibid

national revenue consists of about 90 percent of oil and gas income.\textsuperscript{207} The oil and gas sector has attracted massive investment from foreign companies, which has one way or the other contributed to the country’s economic growth.\textsuperscript{208} In the period from the year 2000 to 2010, Nigeria had a growth rate of 6.2 per cent. The greatest form of liberalisation in the oil and gas sector has been in the foreign investment regime.\textsuperscript{209} Nigeria is party to a number of BITs to expand and develop the oil and gas industry with focus on increasing production and export.

With the impact of investment liberalization in oil and gas on Nigeria’s economic performance and the country now being one of the largest exporters of crude oil in the world, the problem of the violation of the right to health and environmental rights have risen to an alarming rate. The focus on the production and exportation of crude oil has led to the destruction of the environment in the Niger Delta region. The environmental damage has equally led to negative health outcomes for the people.\textsuperscript{210} The Nigerian National Bureau of Statistics recorded that the value of crude oil exports increased by about $8,451 million US dollars or 53.4 per cent between the beginning of the year 2005 and the year 2012.\textsuperscript{211} Even though the records of the balance of trade in other exports mostly non-crude oil exports by the year 2012 was nothing to write home about with a record of about 42.2 per cent decrease which was attributed to the decline in the value of non-crude oil exports

\textsuperscript{207} Ibid
\textsuperscript{209} Yao Guimei, ‘Multinationals’ Investment In Africa: An Analysis On The Current Situation’ (2003) Bureau of International Cooperation, Hong Kong, Maco and Taiwan Academic Affairs Office, Chinese Academy of Social Sciences
\textsuperscript{210} Ibabba Samuel Ibabba, ‘Corruption, human-rights violation and the interface with violence in the Niger Delta’ (2011) 21 (2) Development in Practice, 244-254
between the year 2011 and the year 2012. And despite the series of economic problems across the world such as the recent global economic recession, the oil and gas sector in Nigeria continues to grow. Yet, oil wealth has not been converted into comparable improvement in living standards, human rights or environmental protection making Nigeria a typical example of a “resource cursed” economy.

The Nigerian government over the years have consistently taken steps to grow the oil and gas sector and adopts policies that will continue to boost production and encourage increased investment into the sector. However, while this resource is concentrated in a particular region or area, i.e. the Niger Delta, Nigeria’s political authority is concentrated in the federal or central government. Although there are many federal states in the country, the Nigerian Constitution gives the federal government the final decision making authority. This system of government while giving the people the franchise or power to elect the people in government at all levels across the three tiers of government, concentrates the final decision making authority in the federal or central government and allows the federal government to influence decision making at the state and local government levels. The states that make up the federation are not fully autonomous or independent of the federal government and the federal government exhibits a high level of influence on decision making at the grassroots.

In the Niger Delta region, there are eight oil and gas producing federal states while there are 36 federal states in the whole of the country. It is thus, very easy for a region such as the Niger Delta to be marginalised and for the people to have very little influence on governmental decisions affecting their lives. The Niger Delta covers an area of well over

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212 Ibid
214 Constitution of the Federal Republic of Nigeria 1999, s 2(1) and (2)
215 UB Inamete, *Foreign policy decision-making in Nigeria* (Susquehanna University Press, 2001)
70,000 square kilometres, covering the greater part of the South- South region of Nigeria. When compared to the whole country the indigenous population constitutes a minority. It has a total population of about 15 million people as opposed to about 162 million people in Nigeria as a whole.\textsuperscript{217} Each state exercises very minimal independent political power over its affairs whereas the ultimate political authority lies with the federal government.\textsuperscript{218} Any attempt to generate attention towards the continued violation of the right to health or environmental rights plight of the people living within the Niger Delta region is often perceived by the members of the federal government as a threat to the federation or threat to sabotage the production and sales of crude oil and its derivatives and to hamper the income generated for the state from the region.\textsuperscript{219}

Resources generated from the Niger Delta region is deemed by the Nigerian constitution to be for the benefit of the whole country.\textsuperscript{220} The concentration of power in the federal government makes policy makers at the grassroots level almost powerless to effect change and combat human right violations within their individual states.\textsuperscript{221} BITs are entered into by the federal government without much consultation with the state governments or local governments who would likely understand the pros and cons of production activities in affected sectors within their communities better and who may be in a better position to assess the health and environmental impact on the people.\textsuperscript{222} The members of the government at the federal level may not be knowledgeable enough or be fully aware of the implications of trade activities within the region on the right to health of

\textsuperscript{217} Ibid
\textsuperscript{218} EE Osaghae and RT Suberu, \textit{A history of identities, violence and stability in Nigeria} (Centre for Research on Inequality, Human Security and Ethnicity, University of Oxford 2005)
\textsuperscript{220} Constitution of the Federal Republic of Nigeria 1999, s 2(1) and (2)
\textsuperscript{221} Ejibunu (n 216)
the people and the extent of destruction to the environment.²²³ It can be argued that it will be futile to expect any public authority or government to attain an ideal or to wholeheartedly seek an ideal course because such authorities are susceptible to ignorance, to sectional pressure and to personal corruption due to private interests.²²⁴ Therefore the policy makers at the federal level may not be fully informed on the intricacies of the human rights plights and the environmental situation of the people in the region.

Generally, amongst other oil producing countries, countries might either give a special license or a non-exclusive license to a foreign investor for the expansion of their gas and oil resources.²²⁵ In a special license set-up, the country is vested with the total ownership rights of the petroleum resources, and then confers the exclusive licenses for the utilization of the petroleum to multinationals as might meet its expressed criterion; while the multinationals in return pay taxes and royalties to the country.²²⁶ Although the exclusive title to the underlying petroleum vests in the State, oil, once extracted and having flowed into the well drilled by the licensee becomes the property of the Licensee.²²⁷

The second alternative is to engage the multinationals or private Investors in either a non-risk or risk-based contract for the work. A non-risk based agreement for the work necessitates the country, which is vested with the total right over the petroleum resources in its authority, to employ a paid contractor on exclusively technical grounds in order to ensure independent evaluation of risks associated with such production activity.²²⁸ A risk-based agreement for instance, a Petroleum Sharing Agreement engages a country’s

²²³ E Uyigue and M Agho, Coping with climate change and environmental degradation in the Niger Delta of southern Nigeria (Community Research and Development Centre Benin City 2007)
²²⁴ As cited in T Halbert and E Inguli, Law & ethics in the business environment (New York: Routelge 2011), 136
²²⁶ Muhammed Mazeel, Petroleum Fiscal Systems and Contracts (Hamburg: Diplomica Verlag, 2010), 12
²²⁷ Ibid
organization which has either a limited license or a `common authority` for the exploitation or exploration of the country`s petroleum resources, by entering into contractual agreements with the investing multinational for the utilization of oil and gas resources in accordance with the terms of the agreement. Where the petroleum is discovered and then produced, it is shared by both the investing organization and the government establishment according to the terms entered into under the agreement.

In recent years, the tendency in the majority of developed oil-producing nations have been to utilize the exclusive licensing in the expansion of their oil and gas resources; whilst for the developing nations which produce oil, the inclination has been for the risk contracts, such as Petroleum sharing agreements, risk contracts for particular oil and gas development projects, association contracts and risk service contracts as individual countries establish agreements and systems that best meet their needs.

2.3 IMPACT OF OIL AND GAS EXPLORATION ON HEALTH AND ENVIRONMENT: THE NIGER DELTA SITUATION

As is the case with many oil-rich developing countries, oil reserves have proven to be a mixed blessing for Nigeria. Although multinational corporations claim that their operations are carried out according to the required environmental standards, it is indisputable that such operations have had severe impacts on the environment and subsequently on the health of the people. The environmental impact of oil and gas production and some of its profound effects on the health of the Nigerian people will be demonstrated below. One of the reasons for this is the fact that most of the common

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229 Ibid
230 Ibid
231 Taverne (n 225)
diseases prevalent in the oil producing regions of Nigeria such as heart disease and cancer spring from exposure to polluted, unsafe and unhealthy environment.\textsuperscript{233}

Some of the grievances of the local communities of the Niger Delta include:

\textbf{2.3.1 Environmental pollution & Degradation}

The oil and gas multinationals such as Shell till now has received harsh criticisms regarding the negative impacts of the company’s production and exploration in areas where there are tremendous natural biodiversity and an ecosystem which is still providing the vital life necessities for millions of people within the Niger Delta region.\textsuperscript{234} A large percentage of oil spills can be traced to third-party interferences such as oil theft and sabotage.\textsuperscript{235} These criminal acts had arisen out of dissatisfaction and resentment of the multinationals by the local people. The companies have made several promises about their commitment to cleaning up spills as is their responsibility and prescribed by law. Yet many of them have constantly given excuses about the cost of carrying out the high quality clean up that is required under the law.

The provisions of legislation such as EGASPIN prescribed that multinationals make use of advanced methods that are commensurate with international standards in cleaning up oil spills and restoring the environment back to its original state without causing any harm to human animal or plant.\textsuperscript{236} Several incidents have resulted in the Niger Delta waters getting poisoned along with the gradual destruction of agricultural land and vegetation due

\textsuperscript{233} O Nnamuchi \textit{The Right to Health in Nigeria} (Draft Report on Right to Health in the Middle East Project, Law School, University of Aberdeen, 2007) 1-24 at 21 <http://www.abdn.ac.uk/law/hhr.shtml> accessed on 01 November 2011
\textsuperscript{234} A Musa, Y Yusuf, L McArdle and G Banjoko, ‘Corporate social responsibility in Nigeria’s oil and gas industry: the perspective of the industry’ (2013) 3 (2) International Journal of Process Management and Benchmarking, 101-135
\textsuperscript{236} A Hassan and R Konhy, ‘Gas flaring in Nigeria: Analysis of changes in its consequent carbon emission and reporting’ (2013) 37 (2) Accounting Forum, 124-134
to the oil spills that have not been properly and promptly cleaned up by the multinational involved.

From the inception of the oil and gas industry in the Niger Delta which is over 50 years ago the government has not been able to put out any concerted and efficacious efforts towards combating these problems.\textsuperscript{237} A good example is the initial steps taken by the United Nations Environment Programme (UNEP) which went into the Niger Delta region to conduct evaluations on the environmental condition. As UNEP correctly puts it, “rigorous enforcement of the environmental standards and laws” is fundamental. Furthermore, all the applicable legislation in respect of the human rights is there, and only has to be properly enforced.\textsuperscript{238} The most significant environmental problem is pollution arising from oil exploration and production. Residents of communities in close proximity to the sources of such pollution have suffered greatly as a result of the exposure to oil spills, gas flaring, contamination of food and contamination of water sources.\textsuperscript{239}

### 2.3.2 Environmental Conservation

A number of the oil and gas multinationals have become more and more involved in environmental conservation programs in the region. The Niger Delta is widely recognized as quite rich in biodiversity. Shell partnered with the Nigerian federal government and a number of NGOs as well as some of the local communities of the Niger Delta in the year 2006 to develop a conservation plan termed as the Biodiversity Action Plan (BAP) for the protection of the two notably big forest reserves of Urhonigbe and Gele-Gele.\textsuperscript{240} This action plan has contributed immensely to the development and passing into law of the

\textsuperscript{237} Hany Besada and Philip Martin, \textit{Mining Codes in Africa: Emergence of a “Fourth” Generation?} (Ottawa: The North-South Institute 2013)


\textsuperscript{239} Ibid

Biodiversity Law in the following year 2007 by the Edo State government. However, like most of the other oil and gas legislation in force in the Niger Delta the problem of adequate implementation persists coupled with the government’s partial disposition towards the protection of the investment of the multinationals.

2.3.3 Oil spills & Water contamination

Since the inception of oil drilling in 1958, over 13 million barrels of oil have been estimated to have been directly spilled into the Niger Delta land and waters at different times over the years. The Nigerian government estimated over 7,000 times in which oil spills occurred between the period of 1970 and 2000 only. The main causes of these spills include pipeline corrosion and tanker corrosion (responsible for up to 50 percent of total spills recorded), oil product operations (responsible for about 21 percent), sabotage (responsible for about an estimated 28 percent), and inadequate production equipments (responsible for about 1 percent). Several pipelines and facilities were reportedly constructed based on older and out of date standards, and poorly maintained life span.

2.3.4 Loss of mangrove forests

As a result of oil spills there have been major impacts on the Niger Delta ecosystem. Broad tracts of the beautiful mangrove forests are highly susceptible mass destruction from crude oil as the oil spilled are stored deep in the soil and gets re-released annually along with inundation terms and are destroying the forest reserves. Previous research reveals that estimation of about 10 percent of the mangrove ecosystems of the

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243 Ibid
244 Besada (n 237)
245 Ibid
Niger Delta now have been wiped off due to oil spill and human settlement.\textsuperscript{247} Previous data shows that a number of rainforests that have occupied the land space measuring about 7,400 km\textsuperscript{2} may have now disappeared, have viscous properties or have become volatile due to the effect of the presence of petroleum.\textsuperscript{248} The spills occurring close to the drainage basin has equally led to the hydrologic force in tides and rivers forcing the spilled petroleum movements up to the vegetation areas. This not only result in contamination of major sources of drinking water to the local host communities but also result in contamination of coastal environment causing the disturbance of aquatic life and decline in fish production.\textsuperscript{249}

\textbf{2.3.5 Natural gas flaring}

Research shows that the level of natural gas being flared in the Niger Delta is amongst the highest in the world with an estimation of reported annual production of associated gas (AG) at 3.5 billion cubic feet (99,000,000 m\textsuperscript{3}) out of which 2.5 billion cubic feet (71,000,000 m\textsuperscript{3}) that is over 70 percent of total gas produced is flared and wasted.\textsuperscript{250} Although the available data is notoriously unreliable, it is reported that this continuous flaring not only lead to the wastage of AG costing about US $2.5 billion annually but also causes extreme harm to human health as well as the physical environment.\textsuperscript{251}

The multinationals operating in the Niger Delta are known for harvesting the natural gas in terms of the commercial purposes in order to reduce production costs for separating the oil and associated gas that is commercially viable as opposed to employing

\textsuperscript{247} Anslem O Ajugwo, ‘Negative Effects of Gas Flaring: The Nigerian Experience’ (2013) 1 (1) Journal of Environment Pollution and Human Health, 6-8

\textsuperscript{248} Ibid


\textsuperscript{251} Olufemi Amoo, Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries (Routlege, 2011)
environmentally friendly ways and methods that respect the right to health and other
associated human rights of the residents of the host communities which may allegedly be
more expensive to carry out in the short run but cost effective in the long run.\textsuperscript{252} The local
communities are as a result exposed to harmful substances released into the atmosphere
through the process of flaring such as Benzene, which is carcinogenic.\textsuperscript{253} Human exposure
to benzene has been associated with a range of acute and long-term adverse health effects
and diseases, including cancer and anaemia.

Benzene is a notorious cause of bone marrow failure. Substantial quantities of
epidemiologic, clinical, and laboratory data link benzene to aplastic anaemia, acute
leukaemia, and bone marrow abnormalities.\textsuperscript{254} There is no documentation of the quantity of
Benzene in gas flaring in the Niger Delta; however research suggests that benzene exposure
may be leading to 8 new cancer cases annually in the state of Bayelsa alone.\textsuperscript{255} Other
chemicals released through gas flaring are also causing other respiratory problems such as
aggravating the problem of asthma causing pain and complexities in breathing along with
chronic bronchitis.\textsuperscript{256}

Gas flaring, for instance, causes extreme pollution by releasing high levels of
carbon dioxide and methane gases into the atmosphere. These gases do not only affect the
climate pattern but are very harmful to human health.\textsuperscript{257} Gas flaring also result in incidents
of acid rain which is equally dangerous to health and which damages the zinc roofs of the
homes of indigenous residents and causes them to resort to the use of asbestos roofing

\textsuperscript{252} Ibid
\textsuperscript{253} World Health Organization (WHO) Preventing Disease Through Healthy Environments Exposure To
Benzene: A Major Public Health Concern (WHO Switzerland, 2010) 1
\textsuperscript{254} Dennis L Kasper et al, Harrison’s Principles of Internal Medicine (16th ed McGraw-Hill Professional, 2004),
618
\textsuperscript{255} Besada (n 237)
\textsuperscript{256} Musa (n 234)
\textsuperscript{257} Henry Clarck et al, Oil for Nothing: Multinational Corporations, Environmental Destruction, Death And
Impunity In The Niger Delta (U.S. Non-Governmental Delegation Trip Report, September 6-20, 1999)
which although is more resistant to acid rain is not only more expensive but also very
dangerous to human health.\textsuperscript{258}

The flares involve the release of dangerous hydrocarbon mostly methane and others
which include sulphurous oxides and the oxides of nitrogen into the atmosphere.\textsuperscript{259}
The flares raise the temperature of the surrounding environment to temperatures beyond
normal of 13-14,000 degrees Celsius and causing noise pollution around the vicinity of the
flares. The result of this unchecked emission of gases is the release of tons of Carbon
dioxide and methane which contribute to global warming.\textsuperscript{260} Another problem associated
with gas flaring is \textit{Light Pollution}.\textsuperscript{261} Light pollution subjects the living organism around
the vicinity of the flare to 24-hour daylight.\textsuperscript{262} This affects diurnal and night-time patterns
in animals. The flares drive away game and affect the reproduction of fishes as well as
resulting in the migration of fish from fishing areas by sending them to deep sea areas. The
gases released during gas-flaring, mixes with the moisture and other forms of precipitation
in the atmosphere to form acid rain.\textsuperscript{263}

\subsection*{2.3.6 Acid rain}

Several communities in the Niger Delta have experienced acid rain due to nearby
flares. Acid rain corrodes the structures of peoples’ homes particularly with the majority of
homes in the region having zinc-based roofing. This has been the reason for influencing
several people to make use of asbestos-based material for roofing as the material is strong
enough to repel the deterioration of acid rain but which is equally dangerous to health
although is more resistant to acid rain even though it is not only more expensive but leads

\begin{thebibliography}{99}
\bibitem{258} British Lung Foundation, ‘Asbestos’ (2012) 
\bibitem{259} EB Audu, ‘Gas Flaring: A Catalyst to Global Warming in Nigeria’ (2013) 3 (1) International Journal of
Science and Technology, 6-10
\bibitem{260} Ibid
\bibitem{261} SO Aghalino, ‘Gas flaring, environmental pollution and abatement measures in Nigeria, 1969-2001’ 11 (4)
Journal of sustainable development in Africa, 219- 238
\bibitem{262} Ibid
\bibitem{263} Ibid
\end{thebibliography}
to other health problems.\textsuperscript{264} Asbestos materials are now contributing highly towards other health problems of the people and negatively impacting the environment, yet there is no healthy alternative available for the Niger Delta people till date.\textsuperscript{265}

The stipulated draft of the Petroleum Industry Bill (PIB) states that the natural gas must not be vented or flared after the 31st December 2012 date in all the gas and oil operations, offshore, onshore, field or block, or any type of gas facility, only except under a temporary or exceptional situations. This law bill has still not been passed into law. The stumbling blocks have been argued to be governmental bureaucracy and lack of legislative backing.\textsuperscript{266}

\subsection*{2.3.7 Climatic Change}

It has been suggested that the act of gas flaring contributes to climate change.\textsuperscript{267} In other parts of the world such as Western Europe, about 99 percent of all AG obtained from oil and gas production is either utilized or re-injected within the ground.\textsuperscript{268} In the Niger Delta on the other hand about 76 percent of the total gas produced is flared.\textsuperscript{269} In the work of Audu, he demonstrated that gas flaring releases a huge amount of the gas methane which accompanies the emission of carbon dioxide into the atmosphere which contributes greatly to the rising level of global warming and has been linked to climate change.\textsuperscript{270} Other

\begin{thebibliography}{99}
\bibitem{264} British Lung Foundation, (2012), ‘Asbestos,’ Accessed from http://www.blf.org.uk/Page/Asbestos?gclid=CJvO4O35urlCFUUbMtAodXh0A_A on 20/07/12
\bibitem{266} Ajugwo (n 247)
\bibitem{268} Olufemi Amao, Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries (Routlege, 2011)
\bibitem{269} Ibid
\bibitem{270} Audu (n 259)
\end{thebibliography}
scientific research such as Canadell et al, points out that increase in gaseous emissions from fossil fuel is a large contributor to human-induced climate change.271

2.3.8 Agriculture

Gas flaring and oil spillages are both responsible for not only increasing the atmospheric contaminants but also the soil contaminants. The toxins, oxides, chemicals and hydrocarbons in oil and gas are acidifying the air and soil nutrients.272 Previous research has suggested that the crops grown in the region have been experiencing reduction in their nutritional value.273 In certain cases, it has been found that the areas under the impact of oil spillages and gas flaring have no vegetation because of tremendous heat in the soil caused by the presence of acidic components in land.274 The frequent change in temperature due to gas flaring also stunts the growth of crops or causes scotched plants to act as a barrier for younger crops to grow. Even the land that is vegetating is producing less fertile vegetation leading to unsustainable agriculture all because of the soil acidification due to various kinds of pollutants.275

In addition to gas flaring, the issue of onsite oil spills and pipeline leaks has been a source of health hazard. These have been linked to serious respiratory problems as well as skin problems, tumours, gastrointestinal problems and different forms of cancer.276 The United Nations Development Program (UNDP) in a report on the Niger Delta confirms this

274 Ibid
picture. The report highlights the fact that various health indices such as infant and maternal mortality rates are much worse in the Niger Delta than they are in other parts of Nigeria.\textsuperscript{277} These negative effects do not only impact on health directly but also negatively impacts on the various determinants of health such as food and safe drinking water. Incidents of malnourishment are commonly reported ailments in many communities in the Niger Delta region and these have been repeatedly attributed to the spread of kwashiorkor in the communities in this region due to the drastic decline in fish catch and other forms of agriculture because of the pollution of rivers, ponds, sea waters and arable land to be used for farming by oil and gas industry operations.\textsuperscript{278}

\subsection*{2.3.9 Depletion of fish populations}

The occurrences of oil spillages into the Niger Delta Rivers have declined the fish populations and caused loss of habitat. Climate change and pollutions are destroying the ecosystems. The shoreline along the Niger River is important in maintaining the temperature of the water because the slightest change in water temperature can be fatal to certain marine species.\textsuperscript{279} Trees and shrubs also provide shade and habitat for marine species while reducing fluctuation in water temperature. With the loss of habitat and the climate getting warmer, prevention of temperature increase is necessary to maintain some of the marine environments.\textsuperscript{280}

All of the above highlighted problems have generated a huge rift between local host communities and oil and gas multinationals operating in the Niger Delta.

\begin{flushright}
\textsuperscript{280} Ibid
\end{flushright}
The results of several longitudinal studies on the effects of oil exploration in the Niger Delta region suggest that persistent environmental degradation in the Niger Delta region is a direct consequence of oil-related spillage, waste disposal, exploration, and petroleum fires. Jike points out that ever since the discovery of oil and gas in the Niger Delta region, environmental degradation related to oil spillage and oil exploration has been one of the primary factors that have continued to undermine economic development in the Niger Delta region. Thus instead of being a pivot for economic growth oil and gas expansion and development have negatively impacted on economic growth in the region due to the environmental impact.

Wheeler, Fabig, and Boeler argue that expansion of the oil and gas industry in the Niger Delta not only led to the annexation of land that had hitherto been habitats of fish, wild animals, and birds, but it also occasioned the annexation of land that had previously been used for cultivation of agricultural products. This annexation paved further aggravated the degradation of the environment because it gave oil and gas multinational corporations the leeway to sink oil rigs and create oil pipelines that were meant to aid in the transportation of oil from the Niger Delta region to international markets on lands that were not necessarily approved for oil and gas production and opens the local residents up further to the negative health and environmental effects.

At the global level, the long-established concern over the health and environmental impact of the activities of oil and gas multinational corporations has generated a lot of reactions, recommendations and governmental actions. Some examples include the clamour for a move away from the past nearly exclusive dependence on oil, to the amalgamation of

281 Jike (n 265)
282 Jike (n 265)
284 Ibid
other non-traditional substitute energy resources. Following the 1973 Arab oil prohibition and its overstretching impact, the International Energy Agency (IEA) was established in 1972 under the framework of the Organisation for Economic Co-operation and Development (OECD) to amongst other issues, “progress the planet’s energy supply by developing substitute energy resources and thus increase the effectiveness of the energy utilization.”

There has ever since been a mounting drive worldwide towards the development of other substitute resources of energy.

However, venturing into substitute energy comes with its own unique set of challenges especially for a developing economy like Nigeria. Such substitute energy equally necessitates the commitment of enormous funds which is frequently lacking, and will in the case of the Niger Delta be reliant on the revenue generated from oil and gas production activities which is the mainstay of the Nigerian Economy, particularly where such investments are proposed to be funded out rightly with debit capital. Secondly, the condition of the global oil market has greatly transformed over the years from the preliminary monopoly by the ‘intercontinental oil league’ of multinational oil and gas corporations to being dominated by the more organized and regulated Organization of the Petroleum Exporting Countries (OPEC) and the non-existence of such monopolistic supremacy.

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286 Aileen McHarg, Barry Barton, Adrian Bradbrook and Lee Godden, Property and the Law in Energy and Natural Resources (Oxford Scholarship Online, 2010) 4
290 Ibid
There are currently more producers and suppliers of oil and gas, a number of them with significantly sized proven reserves and stocks which can offer even better investment terms and additional stability to investing multinational or government.\textsuperscript{291} this has led to new market competition for oil and gas investments among a number of oil producing nations.\textsuperscript{292} For an increasing amount of expansion of the oil producing nations, they must at this time come to grips with the reality of over-dependence on an exhaustible, non-renewable supply like oil,\textsuperscript{293} and for the others, escalating the domestic demand for gas and oil, and troubles with the sufficiency of the domestic supply.\textsuperscript{294} As may be expected, to remain significant in the cut-throat energy market requires that the Niger Delta must continue to maintain stable oil and gas production and development in order to meet international supply obligations.

Another reaction is the clamour for regional and international environmental laws and guidelines which are intended to achieve increased awareness and protection of environmental rights across the globe.\textsuperscript{295} Because of these reasons, in Russia’s G8 (now G7) summit of 2006 in St Petersburg, the G8 identified a theory for the realization of environmental protection, and asserted that ‘environmentally sound progress and utilization of energy, and the transfer and deployment of cleaner technologies which assist in tackling climate change.’\textsuperscript{296}

Global efforts however, fundamentally acknowledge the responsibility of individual States in ensuring that the goal of environmental protection is achieved. It is the duty of States to set environmental standards which industries and multinational corporations must

\textsuperscript{291} Khalib et al (n 287)
\textsuperscript{292} Omoregbe (n 288)
\textsuperscript{294} Examples of countries grappling with these challenges include China and India
\textsuperscript{295} Kuik, Onno J and Harmen Verbruggen, (eds) In search of indicators of sustainable development (Vol 1 Springer Science & Business Media, 2012)
follow. And where this is not in place already, States ought to step in when the violation of
the health of citizens is apparent in order to ensure that the violation is curbed. This is
clearly recognized by Nigerian law. Section 20 of the 1999 Constitution of the Federal
Republic of Nigeria mandates the State to protect and improve the environment and
safeguard the water, air, land, forest, and in the oil producing regions. This Section of the
constitution imposes an obligation on the State to ensure that the environment in oil
producing regions is conducive for the health and welfare of the citizens. The section also
mandates the State to take concrete steps to improve and safeguard the environment with
special mention being made of water, air, land, forests and wild life. All this has been
breached in the oil and gas sector through the activities of the oil multinationals in the
country. Through the oil and gas industry, environmental pollution occurs in various
manners, sometimes from acts of deliberate dumping, accidental spills or leakages from
pipelines and at other times from leakages at drilling rigs or the disposal of used oils.297

This thesis uses Figures 1 to 5 below to demonstrate the extent to which the
activities of the multinational companies impact on the environment and health of the Niger
Delta Region.

297 Akanle (n 186)
Figure 1: An example of oil spillage in the Niger Delta.

Figure 1 above demonstrates the extent to which oil spillage impact on the environment of the Niger Delta Region. This normally occurs when oil pipelines burst either due to the negligence of the multinational companies or sabotage by local residents. When pipelines burst, local residents try to help themselves with petroleum products. Owing to the high inflammable nature of petroleum, a little spark ignites it. This results to loss of human life and the emission of CO2 into the air, thereby worsening the health condition of the

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Figure 2: Impact of Oil Pollution on Aquatic Lives in Ogoniland

Figure 2\textsuperscript{299} shows how oil pollution impact on the lives of aquatic lives in the Niger Delta. As demonstrated in this Figure, a man holds an oil-drenched shell in an oil polluted Ogoniland, a region in the Niger Delta. It is worth noting that when oil spills to water, it kills not only shells but all aquatic organisms. This subjects the Niger Delta to tremendous hardship since this is mostly a rural area and they depend on fishing and farming for their livelihood.

Figure 3: Gas Flaring in the Niger Delta

\textsuperscript{299} Image from the City Reporters, "FG set to clean up oil-polluted Ogoniland – Petroleum Minister" 2014 <http://www.thecityreporters.com/fg-set-to-clean-up-oil-polluted-ogoniland-petroleum-minister> accessed on 22 October 2014
Figure 3 is an instance of gas flaring in the Niger Delta which occurs when gas exists with oil. Gas flaring is one of the major contributors of air pollution in Nigeria. As demonstrated in this Figure, Nigeria prefers burning off its gas since it does not have sufficient technology to convert its gas reserves to effective use. The implication of this is that air pollution is a regular occurrence in the Niger Delta and this result in premature death and respiratory illnesses such as asthma and respiratory cancers.

**Figure 4: An Instance of Land Pollution in the Niger Delta Region**

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Figure 4\textsuperscript{301} indicates the impact of oil pollution on land. As shown in this Figure, oil spillage polluted land at the Niger Delta. The fact that people from this Region are predominantly farmers means that their means of livelihood has been denied from them. As can be seen in this Figure, the crops are dead, while those already alive are unlikely to survive since their roots can only suck oil instead of water.

**Figure 5: Effects of Oil Spills on the Land of the Niger Delta**

![Figure 5: Effects of Oil Spills on the Land of the Niger Delta](image)

Figure 5\textsuperscript{302} is further evidence of the devastating effect oil spillage may have on farm lands in the Niger Delta. In this Figure, it can be said that oil pollution did not only render the plants useless, but also killed all the living organisms in the land. This goes to show the extent of the sufferings of the Niger Delta people as a result of the activities of the multinational companies in the oil and gas sector. It also demonstrates the need for the State to protect the health and environmental rights of its citizens against the unlawful activities of the multinational companies.


Dommen argues that because of the power and influence of large multinational corporations over the government of their resident States and the fact that they can dedicate more resources than public interest non-governmental groups to lobby the policy makers and influence them to adopt policy options that benefits them and protect their investment, even though such policies may only promote short-term private interests rather than the broad public interest, the public interest may be overlooked by States in favour of economic interests. The campaign for human rights protection and environmental protection particularly in the oil and gas sector has been taken up mostly by non-governmental organisations which may not have any influence, economic or otherwise, on the government. This imbalance from a human rights and environmental perspective is very worrying and calls for action on the part of the State to address the issues as it is the responsibility of the government to ensure that the environment is safe for the people and that their right to health is not compromised in the course of economic activities.

Apart from lobbying, it is pertinent to also consider the treaty obligations of the State to protect the investment of the foreign investors. The State holds the duty to protect health and environment through the establishment of an adequate and up-to-date regulatory framework consisting of laws, policies and rules setting obligations, procedures and standards and creating institutions vested with the responsibilities of monitoring and enforcing compliance.

305 A Ambituuni, J Amezaga and E Emeseh, ‘Analysis of safety and environmental regulations for downstream petroleum industry operations in Nigeria: Problems and prospects’ (2014) 9 Environmental Development, 43-60
THE NIGER DELTA REGION AND FOREIGN INVESTORS

Before delving into the main issues to be addressed in this Chapter, it is important to explain the significant position the Niger Delta occupy in Nigeria. The Niger Delta covers about 20,000 km² in wetlands of over 70,000 km² created mainly by sediment deposition. It is home to about 20 million individuals and some 40 different ethnic groups, and this floodplain makes up 7.5 percent of Nigeria's entire land mass and is the biggest wetland which has the third-largest drainage basin in Africa. The Niger Delta's environment is composed of four ecological zones: the mangrove swamp forests, coastal barrier islands, lowland rainforests and freshwater swamps.

This unbelievably well-endowed ecosystem has one of the highest absorptions of biodiversity globally, and contains abundant fauna and flora, arable landscape that sustains a wide diversity of lumber or agricultural trees, crops, and more species of some freshwater fishes than any other environment in West Africa. The concern about health and environmental protection of the Niger Delta in the light of the oil and gas industry has been a long ongoing process. A statement was issued by the NNPC as far back as 1983 on the problem, prior to when it began to generate more international attention, stating that: “We observed the slow poisoning of the waters of this nation and destruction of agricultural land and vegetation by the oil spills which took place during the petroleum operations.”

But ever since the setting up of the oil industry in Nigeria, at least twenty-five years ago, there has been no effective endeavour on the part of the government, and the oil

307 Ibid
operators, to control the environmental problems which are associated with the oil industry.\textsuperscript{309}

As mentioned in the chapter above, crude oil was first discovered in 1956 by Shell-BP in the Niger Delta village of Oloibiri after about 50 year of exploration.\textsuperscript{310} By 1958 the country has become one of the world producers and exporters of oil and by 1960 several other foreign multinationals were given exploration rights by the Nigerian federal government. By the end of the Biafra civil war in 1970 world oil prices were on the rise and the nation began to significantly benefit from oil production.\textsuperscript{311} Oil and gas began to play a prominent role in Nigeria’s economic life and development after 1970.\textsuperscript{312} A significant boom in the economy was recorded. However, this economic boom was short-lived due to series of socio-political factors such as incessant military interventions in its government and its resultant effects on the economy, for example, interruption of regulatory processes, corruption, and mismanagement of resources and embezzlement of public funds.\textsuperscript{313}

Despite these, the oil and gas sector has remained the fastest growing sector of the Nigerian economy and of great significance to income generation in the country. Oil reserves are mostly located in the Niger Delta region.\textsuperscript{314} By the year 2004 a total rejuvenation of oil and gas production was recorded and production rose to a record level


\textsuperscript{311} Ibid

\textsuperscript{312} O Odularu, ‘Crude Oil and the Nigerian Economic Performance’ (2008) 1 (1) Oil and Gas Business, 1-29

\textsuperscript{313} Ibid

of 2.5 million barrels per day. Several development strategies were adopted and aimed to further increase production to a target of 4 million barrels per day.\textsuperscript{315}

The Nigerian National Bureau of Statistics recorded that the value of crude oil exports increased by about $8,451 million US dollars (1,293.3 billion naira) or 53.4 per cent between the beginning of the year 2005 and the year 2012.\textsuperscript{316} Even though the records of the balance of trade in other exports mostly non-oil exports by the year 2012 was nothing to write home about with a record of about 42.2 per cent decrease which was attributed to the decline in the value of non-oil exports between the year 2011 and the year 2012.\textsuperscript{317} Despite the series of economic problems across the world such as the recent global economic recession the oil and gas sector continues to grow.\textsuperscript{318}

Currently, the Niger Delta region is besieged with series of problems which impact negatively on the enjoyment of the right to health and a healthy environment by the Niger Delta people as discussed above and has become one of the greatest sources environmental pollution in Nigeria.\textsuperscript{319} Unfortunately, with the continuous liberalisation of investment into the sector the Nigerian government have not shown any clear signs of having any strategy or visible plans of taking any concrete steps to mitigate the problems in the region. The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN), explains the regulations for keeping environmental pollution down to the lowest possible whilst extracting oil. Yet there have been a number of cases in which multinational corporations do not observe these rules rigorously enough and the federal government had failed to adequately address the issue, and circumstances in which oil

\begin{itemize}
\item \textsuperscript{315} Nigerian National Petroleum Corporation (n 310)
\item \textsuperscript{317} Ibid
\item \textsuperscript{318} Ibid
\end{itemize}
spills and other forms of environmental pollution are not adequately cleaned up by oil and
gas multinationals abound in the Niger Delta region.320

This has led to a very unpredictable relationship between the people of the Niger Delta and the foreign multinationals. The current system of BITs consist strictly of international agreements between the state parties and include little or no reference to the residents or recognition of host or affected local communities in formal legal arrangements.321 Multinational corporations in the region have taken some steps through their CSR activities to reach out to the local communities and the residents of the region however evidences reveal that although CSR have benefitted some communities in the region in one way or there other it has not made much difference in the areas of health and environmental protection. This will be further discussed in subsequent chapters.

2.5 CONCLUSION

This Chapter explored the effects of Nigeria’s investment liberalization in the oil and gas sector on health and environment in the Niger Delta. It examined the history of oil production in Nigeria. Oil was first discovered in commercial quantity in Nigeria in 1956 and according to the Constitution of Nigeria, all minerals, oil and gas belong to the Federal Government. Currently, revenue from oil and gas constitute about 90 percent of Nigeria’s revenue. The oil and gas sector have been growing tremendously but not a lot have been done to mitigate the negative impacts of such growth on the people’s enjoyment of their right to health and a healthy environment. This thesis used Figures 1 to 5 to explore the extent to which oil exploration impact on the health and environment of the Niger Delta people.

320 DA Omoweh, Shell Petroleum Development Company, the state and underdevelopment of Nigeria’s Niger Delta: a study in environmental degradation (Africa World Press 2005)
CHAPTER THREE

LEGISLATIVE COMPLICATIONS OF BILATERAL INVESTMENT TREATIES ON NIGERIAN NATIONAL LAWS

3.1 INTRODUCTION

This chapter discusses how BITs in themselves contribute to the problem of human rights and environmental rights violations in the Niger Delta region through their implications on national laws and the economic development of the region. This chapter discusses the evidences which indicate whether or not Nigeria’s BITs have had any significant effect on the inflow of FDI into the sector and whether or not the rising FDI is contributing towards the sustainable development of the region.

3.2 HISTORY OF BIT IN NIGERIA

The challenge faced by Nigeria like the majority of developing oil producing countries was that a large fraction of the potential oil and gas bearing sites were comparatively under-explored. The key concern from this was how to promote increased foreign investments for the exploration of these unexplored sites.322 Unfortunately, the tribulations of dictatorship, political instability, corruption and lack of the energy infrastructure, domestic militancy, armed conflict, terrorism, and piracy, which were prevalent in the country and posed a challenge for the pursuit for attracting bigger international oil and gas investments.323

Cases of irresponsible leadership, political turbulence, and biased judicial and weak legal processes, which was often the case in Nigeria had culminated in severe potential

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323 D Yergin, The prize: The epic quest for oil, money & power (Simon and Schuster 2011)
risks and investment risks for the investing multinationals, far more than the common business risks linked with oil and gas investment, or investing in a developing country and far further than the general risks intrinsic in long term investment as can exist in other jurisdictions. For Nigeria to ensure it gets sufficient foreign investment for the development of the oil and gas industry she began to offer liberalisation incentives to attract foreign investors and this led to the proliferation of BITs. The general expectation was that liberalising the oil sector would improve the domestic production of oil and gas and meet the increasing demand for petroleum products across the globe.

BITs are useful in protecting the interests of the multinational investors by limiting any administrative and legislative powers of the Nigeria government as a host State that are intended at the unilateral termination and modification of the original treaty entered into by the entities, without the prior consent of the foreign investor. Evidence from previous studies show that the position of multinational investors on the matter of investment safeguards and stability in order to decide if to invest in Nigeria or not was to acquire express guarantees from the government that their investments will be protected in the form of BITs.

Nigerian has entered into 27 BITs with 13 currently in force.

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<td>Signed (not in force)</td>
<td>19/01/2004</td>
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</tr>
<tr>
<td>8</td>
<td>Finland</td>
<td>In force</td>
<td>22/06/2005 20/03/2007</td>
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<td>9</td>
<td>France</td>
<td>In force</td>
<td>27/02/1990 19/08/1991</td>
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<td>10</td>
<td>Germany</td>
<td>Terminated</td>
<td>25/06/1979 04/02/1986</td>
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<td>11</td>
<td>Germany</td>
<td>In force</td>
<td>28/03/2000 20/09/2007</td>
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<td>27/09/1990 22/08/2005</td>
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<td>14</td>
<td>Korea, Republic of</td>
<td>In force</td>
<td>27/03/1998 01/02/1999</td>
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<tr>
<td>15</td>
<td>Kuwait</td>
<td>Signed (not in force)</td>
<td>23/03/2011</td>
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<td>16</td>
<td>Netherlands</td>
<td>In force</td>
<td>02/11/1992 01/02/1994</td>
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<td>17</td>
<td>Romania</td>
<td>In force</td>
<td>18/12/1998 03/06/2005</td>
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<td>Signed (not in force)</td>
<td>24/06/2009</td>
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<td>In force</td>
<td>18/04/2002 01/12/2006</td>
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<td>22</td>
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<td>In force</td>
<td>30/11/2001 01/04/2003</td>
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<td>In force</td>
<td>07/04/1994 07/04/1994</td>
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<td>24</td>
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<td>Signed (not in force)</td>
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<td>25</td>
<td>Turkey</td>
<td>Signed (not in force)</td>
<td>02/02/2011</td>
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Table 1\textsuperscript{327} shows the number of BITs entered into by Nigeria from 1979 to 2014, the date they were signed and the date they entered into force.

The oldest treaties still in force were concluded in 1990 with France, Italy and the United Kingdom and from all the 13 currently in force, a number of common features can be seen. These features include a preamble which generally recognises the desire of the parties to enter into the treaty and their wish to foster investment promotion and protection. There is also usually a definition of investment which mostly includes assets such as movable or immovable properties, shares, etc. Most of the BITs contain substantive rights such as fair and equitable treatment, national treatment (NT), Most Favoured Nation (MFN) treatment, full protection and security, protection from expropriation and other umbrella clauses for investment protection.

Fair and equitable treatment of foreign investors is an absolute standard of the minimum level of protection accorded foreign investment under international law.\textsuperscript{328} This is an indication of the host states’ willingness to deal with foreign investors on standards set by the international community. The development of the standard is rooted in the desire of capital exporting states to ensure that their nationals investing in foreign countries are treated with equity and justice.\textsuperscript{329} This can be traced as far back as the Havana Charter of 1948 in which its article 11(2) prescribed that foreign investments should be assured ‘just and equitable treatment.’ The national treatment clause on the other hand refers to equal


\textsuperscript{329} Alex Genin and others v. Estonia, ICSID Case No ARB/99/2, Final Award, 25 June 2001
treatment of both foreign and national investors in a host State.\textsuperscript{330} This means that the host government is not allowed to discriminate between domestic and foreign firms and guarantees that all investors are subject to the same regulatory treatment irrespective of their nationality.\textsuperscript{331} Most favoured nation clause, however, is basically the provision whereby treatment accorded by the host State to the investing State must be the same level of treatment accorded by the host state to any other third party State with which the host State has a similar relationship.\textsuperscript{332} The difference between these two is that which national treatment provisions refers to expectations of equal treatment with domestic investors, the most favoured nation provision refers to expectations of equal treatment with other foreign investors other than the investing State that is party to the treaty in which the clause is included.

Finally BITs usually contain clauses on transfers of funds, dispute settlement, compensation for loses, duration of the treaty and often amendment and revision clauses.\textsuperscript{333} All of which seems to be tailored mostly towards the promotion and protection of the investment of the investing State even though the BITs usually states that they were created for the reciprocal protection of investors in the territory of the treaty parties. This calls for the question of maintaining a balance between the rights of investors and the Nigerian State. Although there is a presumption of equality of bargaining powers, the content of some of these BITs seem to suggest otherwise.

An example can be seen from the United Kingdom and Nigeria BIT of 1990 which provides in Article 2 (1) that:

\begin{itemize}
\item \textsuperscript{330} AP Newcombe and L Paradell, Law and practice of investment treaties: standards of treatment (Kluwer Law International, 2009)
\item \textsuperscript{331} W Kohler and F Stähler, 'The Economics of Investor Protection: ISDS versus National Treatment' (2016) CESIFO Working Paper No 5766, Category 8, 1-36
\item \textsuperscript{332} AF Rodríguez, 'The Most Favoured Nation Clause in International Investment Agreements: A tool for Treaty Shopping?' (2008) Journal of International Arbitration
\end{itemize}
The agreement shall to the extent that a written approval is required for an investment, only extend to investment, whether made before or after the coming into force of this agreement which is specifically approved in writing by the contracting party in whose territory the investment has been made or is subject to the laws in force in the territory of the contracting party concerned and to the conditions if any, upon which such approval shall have been granted.\(^{334}\)

Provisions such as these make the foreign investors subject to the laws in force in the host country but equally suggests that if any laws or regulations come into force after the completion and coming into force of the agreement, it will only apply to the foreign investors and their investment to the extent to which the law is favourable to the investor. Any law that hampers the investment of the foreign investor can easily be challenged by the investor through the agreed dispute settlement method and the investor can demand for compensation for losses. This indicates an imbalance.

The National Treatment obligations and the Most Favoured Nation provisions included in BITs also seem to be contradictory to the law in Nigeria. The requirement of national treatment and most favoured nation principle often reflected in most BIT requiring that Nigerian investors are not to be accorded preferential treatment in relation to their investments over the nationals of the investing countries is not necessarily consistent with some of the laws in Nigeria. The Nigerian Oil and Gas Industry Local Content Development Act 2010, for example, appear to be inconsistent with the national treatment obligations under the various BITs. The Act is designed to enhance the level of participation of Nigerians and Nigerian companies in the country's oil and gas industry. With the promulgation of the Act, the Government clearly established its intention to increase indigenous participation in the industry in terms of human, material and economic

\(^{334}\) BIT between the United Kingdom and Nigeria, 1990, Article 2 (1)
resources. The implementation of the Act is expected to significantly change the current business and operating structure in the Nigerian oil and gas industry, particularly for the multinational oil and gas corporations. This is because the Act imposes a number of prejudicial obligations on foreign companies which are not imposed on local companies. These include submission of a Nigerian content plan, compliance with minimum Nigerian content specifications such as employment and training of Nigerian personnel and expatriate quota regulations, research and development obligations, transfer of technology obligations, etc.

This implies that a foreign investor that is not happy with the requirement of the Act would have a right to refer the dispute for resolution under the relevant international arbitration regime. Foreign operating companies would have a right to claim in relation to the right of "first consideration" granted to Nigerian operators in relation to the award of oil blocks. And the suppliers of foreign goods and services would have a right to claim for a breach of the national treatment obligations under the various BITs in relation to these local content instruments.

It must be stated however that some countries in their BIT provides for exceptions to the national treatment provisions. In Nigeria’s BIT with Germany which entered into force in 2007 the treaty included an exception to the national treatment clause to the effect that the applicability of national treatment can be excluded from German investors in order to facilitate economic development for Nigeria. The development exception granted under the German BITs will be applicable as long as the conditions of that exception can be shown to be fully met by the Act such that where this is the case, German companies discriminated against may not be able to initiate a dispute against Nigeria for failure to be accorded national treatment.
On the other hand, health and environmental issues were not indicated in any of the other Nigerian BITs. The Netherlands is the leading European Investor in Nigeria and Nigeria is Africa’s largest Netherlands’ trading partner. Netherlands has an embassy in Abuja, Nigeria and a trading office in Lagos and Nigeria has an embassy at The Hague, Netherlands. The European Union and in particular, the Netherlands have regular dialogues with Nigeria focusing on energy (gas and oil extraction) and agriculture, economic issues, security and peace in Nigeria and the entire West African region, law enforcement as regards to human trafficking and the general human rights laws (encompassing the freedom of religion, among others), counterterrorism, the environment, good governance and migration. Dutch oil companies, with Shell BP Corporation leading, play a very important role in the investment, exploration, prospecting, extraction and trading of oil and gas products in Nigeria and in the International market.

The Federal Republic of Nigeria and the Kingdom of the Netherlands’ first formal Investment Agreement and currently relevant and enforceable is the “Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Federal Republic of Nigeria” of 1992 that came into force the same year it was signed. The treaty focuses on the promotion of economic cooperation between the two countries, protection of the investments and nationals of the two contracting parties equal to the privileges accorded the resident nationals and their investment, the fiscal policies and exemption favouring the nationals of one party shall also apply to the other, transfer of payment between the two countries should be without any restrictions, prohibition of direct or indirect deprivation and expropriation of the nationals of either of the contacting parties whist in either country, fair compensation of losses, subrogation of

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insured non-commercial risks, guidelines for settlements of disputes for the investment and nationals of either of the contracting parties whilst in the territories of the other, the terms of applicability of the agreement, consultation forum for any of the issues addressed in the agreement, dispute settlement arising from disagreements of any of the clause(s) contained within the agreement, the territorial scope and applicability of the agreement, provisions for the amendment of the agreement and provision for the duration and possible termination of the agreement.\textsuperscript{336}

From article I to article XV of the agreement, like all of the other BITs, there was no reference made to human rights or how to tackle environmental degradation that may arise from the investment activities of the investing party within the territory of the host party. It only aims to safeguard the lives of the nationals of the Kingdom of the Netherlands and their Investment and assets which they invest in the Federal Republic of Nigeria. The treaty in essence, despite the obvious impact of oil and gas extraction on health and environment did not address such matters.

All the other BITs that Nigeria had signed with other countries (France, China, South Africa, The UK, among others), had little, if any, provisions for the protection and prevention of environmental degradation that have a direct consequence upon the health of the people exposed to the investment activities. The treaties are mostly centred on protecting the assets and nationals of the other party that Nigeria has entered into BITs with. Although the BITs have provisions which state that the investment activities of the other contracting party’s activities must observe the Nigerian domestic legislation, the Nigerian enforcement authorities have done very little to enforce these rules whenever they are broken. Also the fees levied as a punishment for breaking these rules are arguably

\textsuperscript{336} Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Federal Republic of Nigeria of 1992
insignificant when compared to the damage caused on the health and environment of the people inhabiting the Niger Delta Region of Nigeria.

### 3.3 IMPLICATIONS OF NIGERIA’S TREATY OBLIGATIONS ON ITS NATIONAL LAWS

The existence of BITs can create a situation whereby domestic regulations may not be able to adequately offer protection for people against multinational corporations as they can significantly impact on the regulatory system of the host State particularly developing host States such as Nigeria.\(^{337}\) The extent of interference with domestic regulatory sovereignty developing countries succumb to in signing BITs is enormous. In fact, virtually any public policy regulation can potentially be challenged through the dispute settlement mechanism as long as it affects foreign investors.\(^{338}\) Often, foreign investors need not have exhausted domestic legal remedies and can thus bypass or avoid national legal systems, reaching straight for international arbitration.\(^{339}\)

The Constitution of the Federal Republic of Nigeria 1999 is the grund norm for laws in Nigeria, from which all other laws derive their validity. Section 1(1) of the Constitution states that the “Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.” The Constitution clearly stipulate the position of international treaty entered into by the Nigerian government. Under Section 12, a treaty ratified by the Federal Government of Nigeria would not have the force of law, except to the extent to which any such treaty has been enacted into law by the National Assembly through the process of domestication.

This means that international treaties do not automatically have the force of law at ratification but until domestication. However, this does not absolve the government of


\(^{338}\) Neumayer (n 7)

\(^{339}\) Ibid
taking responsibility for international agreements it is signatory to. In the provision of Article 27 of the Vienna Convention on the Law of Treaties, a State “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. On the other hand, States are free to choose their own modalities for effectively implementing their international legal obligations, and for bringing national law into compliance with these obligations.

The Nigerian system is an example of the dualist system, whereby municipal law and international law are different legal systems. Municipal law is supreme, and for municipal judges to be competent to apply international treaty rules, for instance, these have to be specifically adopted or transposed into domestic law by an Act of the National assembly through the process termed as “domestication”. The legislation which seeks to make international law enforceable in the Country which is Section 12 of the 1999 Constitution of the Federal Republic of Nigeria provides that, ‘No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.’

This dualist system makes it possible for the country to be part of international treaties and even ratify them without being bound by the provisions of such treaties until they are domesticated. The process of domestication makes the status of treaties which have been ratified but not enacted into law by the national assembly difficult to establish. In some countries, such as the United States, international treaties become part of the municipal or domestic law upon ratification and the constitution of the U.S. regards it as part of the supreme law of the land. While in some other countries, such as Germany and

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340 1999 Constitution of the Federal Republic of Nigeria Section 12 (1)

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Italy, international treaties are given constitutional status and take precedence over national legislation.\textsuperscript{343} This might explain why Nigeria, like many other developing countries would enter into international agreements and may not necessarily fulfil the obligations therein or implement it within their territory for several months or even years.\textsuperscript{344} How a sovereign state adopts and applies international law is generally a function of its discretion.

However, this may be different from what is obtainable in reality with BITs. The signing of a BIT requires a significantly different pattern of obligation. Arguably, where BITs are entered into, irrespective of the provisions of national laws, the notion of national laws being supreme becomes mere academic. Unlike most international treaties where a dualist country like Nigeria can be a party to but not necessarily domesticate the obligations contained in such treaties and would not be legally accountable for breach of the content of such treaties, BITs do not require the process of domestication as it does not become a part of the national law of the treaty parties but is essentially a binding agreement between both States.

BITs afford the foreign investor the legal backing of international investment arbitration or a pre-decided dispute settlement system thus ensuring the commitment of the host state to the protection of their investment upon the coming into force of such BIT. The implication of this is that in situations of conflict between BIT obligations and other obligations of the host state such as protection of the citizens’ rights, States, particularly developing States, might not want to incur the costs of a dispute settlement process as stipulated in an investment treaty.

\textsuperscript{343} Article 25 of the Basic Law of the Federal Republic of Germany; Article 94 and 95 of the Dutch Constitution 1986; Article 10 of the Italian Constitution, 1947
\textsuperscript{344} Oji (n 341)
This then results in the host States neglecting to protect the health and environmental rights of its citizens as can be seen in the case of Nigeria.\textsuperscript{345} This therefore highlights the problem of inadequacy of national laws and whether they are sufficient to protect the rights of the people from obligations arising from the international investment agreement. The current laws in the oil and gas sector will be discussed below to show the manner in which national law is instead made to accommodate the excesses of multinational corporations instead of protecting the people.

3.4 INADEQUACY OF CURRENT OIL AND GAS LAWS IN NIGERIA

Oil and gas legislation in Nigeria can be classified into three categories: the colonial legislation, the post-colonial legislation and the legislation enacted during the oil boom and post oil boom phases. This classification is important because it reflects the political and legal history of Nigeria and gives a clear indication of its foreign policy. It equally shows the current state of the regulatory framework particularly as it affects the health and environment of the Niger Delta people and further highlights the implications of BITs on national legislation.

The colonial legislation consists of the laws enacted during the colonial period before Nigeria gained independence from Britain in 1960. Notable colonial legislation were; the 1914 Mineral Oils Ordinance, the 1925 Mineral Oils Act, the 1959 Mineral Oil Act (which was an amendment of the Mineral Oils Act of 1925) and the Petroleum Profits Tax Ordinance of 1959.\textsuperscript{346} The Mineral Oils Act of 1914 principally excluded non British subjects from gaining access to the oil rights in Nigeria.\textsuperscript{347} This meant that it was only the British companies and those of their subjects that had exclusive rights to explore and


\textsuperscript{347} Idris Medugu, \textit{Crude oil Discovery in Nigeria and matters Arising} (Environmental Synergy 2012)
extract the mineral oil resources of Nigeria. The Mineral Oils Act (Ordinance) was
amended thrice; in 1925, 1950 and 1958. None of these amendments acknowledged the
local peoples’ rights or the consequent environmental degradation occurring as a result of
the direct oil mining activities in their area.

The post-colonial legislation commenced at the independence of the country in
1960. The Petroleum Profits Tax Ordinance of 1959 was retained by the Nigerian Federal
Government after independence in 1960. Its main focus was on maximizing the
government’s revenue accrued from oil minerals.

Within the first decade of attaining independence in 1960, the now Independent
Nigeria enacted a number of oil and gas related laws. Prominent among these is the
Petroleum Act of 1969 which was a replacement of the repealed colonial Mineral Oils
Ordinance of 1914. Other laws passed were the Oil Terminal Dues Act 1965, and the Oil in
Navigable Waters Act 1968, the Petroleum (Drilling and Production) Regulations 1969, the
these were the oil boom and post oil boom legislation which introduced a number of
dimensions into the oil and gas legislation. These include Petroleum (Amendment) Decree
No. 22 1998, Pipelines Regulations 1995, Mineral Oils (Safety) Regulations 1995, and
Petroleum (Drilling and Production) Regulations [Cap 350] LFN 1990, Oil in Navigable

Interestingly during this period, most of the laws were enacted as the human rights
and environmental impact of the oil and gas activities had become notable. Other
environmental laws include the Environmental Protection Agency Act Decree No. 58 1988,
Environmental Impact Assessment Act 1992, and Environmental Standards and Guidelines

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The latest legislative step being taken by the Nigerian government in relation to the oil and gas sector is the proposed Petroleum Industry Bill 2012 (PIB) currently before the National Assembly. When passed into law, it aims to ensure that the management and allocation of petroleum resources in Nigeria and its derivatives are conducted in accordance with the principles of good governance, transparency and sustainable development in Nigeria.349 This law might perhaps help to improve the Niger Delta’s huge potential for getting prosperity and development. It is arguable that the fruits of the consequent development can be enjoyed fully only if the resulting human rights abuses and the environmental pollution is adequately addressed. If the current version of the PIB is passed into law, it will impose some huge changes in the industry. Its objectives, inter alia includes, repealing not less than nine petroleum industry legislation and creating a single statute instead of the repealed legislation for the industry.

The bill aims to restructure and reorganise the industry’s institutions and regulatory framework by breaking up the NNPC into different legal entities each with power to do different things including regulation, investments and dealings in gas; allowing for a partial privatization of the National oil company through a floatation of at least 30 percent of its shares on the Nigerian Stock Exchange; creating a new fiscal regime for the oil industry; making corporate social responsibility compulsory by requiring upstream petroleum producing companies to make monthly contributions into a fund established for petroleum host communities; and deregulating the downstream sector. The Federal Government set up a committee in 2007 to work out the modalities of the proposed bill which will be promulgated for the singular objective of making far reaching changes and ensuring the fundamental transformation of Nigeria’s crude oil and natural gas industry, to bring it “in

line with 21st century global industries.” However, until this is passed into law the existing laws remains the *status quo*.

The existing laws in themselves have created problems for health and environmental protection. The lacunas and contradictions in the laws particularly give room for multinational corporations to take undue advantage of the weak regulatory systems to undermine these rights. This is a typical demonstration of the theory of regulatory capture. For example, the law allows the multinational oil and gas corporations to carry out activities which are harmful to the health of people such as gas flaring and discharge of waste waters in areas habited by people upon the approval of the Minister in charge of oil and gas.351

The Associated Gas Re-injection Act 1979 allows the Oil and Gas Minister to approve that a corporation can carry out acts during their production which may be harmful to health and greatly damaging to the environment such as gas flaring if the corporations can show that it is impracticable or impossible at the time to comply with the requirement of the same piece of legislation requiring them to re-inject natural gas instead of flaring it.352 The Oil and Pipelines Act 1956 imposes on the oil and gas corporations the requirement of taking all reasonable steps to protect the human rights of the people within their areas of operation without stating exactly what reasonable steps actually means or stipulating the required steps that constitute reasonable steps.353 This legislation subjects the determination of “reasonable steps to protect the human rights of the people” to the discretion and interpretation of the oil and gas multinationals themselves. In cases where human rights

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351 Ibid
352 Ibid
353 Oil and Pipelines Act 1956, Laws of the Federation of Nigeria 1990, s 5
were mentioned there was no emphasis on individual rights such as the right to health which is directly affected by such explorative, mining and production activities of the oil and gas corporations.  

The provision that terminated the flaring of natural gas in Nigeria also allowed for the extension of the actual stopping of flaring and related activities by the oil and gas companies by the oil and gas minister. The Associated Gas Re-injection Act that regulates gas flaring activities by oil and gas companies permits individual firms to apply to the minister for the extension of the period they can continue to flare gases as they make arrangements for alternative processes. However, for the firms to get an extension, they must adduce evidence to demonstrate that it will be impossible and impracticable to completely stop the act of gas flaring by the time stipulated in the legislation. This has caused the termination of flaring and the reinjection of natural gas to be shifted and allowed from 1979 up to the year 2008. Currently, corporations in the Niger Delta region are still engaging in gas flaring activities. This is succinctly demonstrated in Figure 3 above and is arguably an example of the theory of regulatory capture.

Regulatory capture is a theory associated with George Stigler, a Nobel laureate economist. It is the process by which regulatory agencies eventually come to be dominated by the very industries they were charged with regulating. Regulatory capture happens when a regulatory agency, formed to act in the public’s interest, eventually acts in ways that benefit the industry it is supposed to be regulating, rather than the public. Regulatory capture is a form of government failure in that it creates an opening for firms to behave in

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354 Ibid
355 Associated Gas Re-injection Act 1979, s 3
357 Ibid
358 Edmund Amann (ed) Regulating Development: Evidence from Africa and Latin America (Edward Elgar Publishing 2006)
ways injurious to the public.\textsuperscript{359} The regulatory capture theory provides insight into the close connection that tends to arise between a government regulatory agency and the industry it is charged with regulating. Federal, state, and local governments commonly create agencies designed to oversee and regulate specific industries. Problems however arise when a regulating agency acts in the best interests of regulated industry to the detriment of the general public as is seen in the Niger Delta oil and gas industry situation. Evidence of the influence of the multinational oil and gas corporation is vividly evident in the regulation and enforcement of health and environmental violation in the sector.

The regulation on ownership of land is equally confusing and contradictory. Currently, the provisions in the Land Use Act 1978 and the Land (Title Vesting) Act 1993 regarding ownership of land vest all ownership of land in Nigeria on the State and vest the power to grant occupancy of any parcel of land on the chief executive at each level of government whether Federal, State or Local Government that is, the President at the Federal level, the State Governors at the State level and the Local Government Chairmen at the local government level.\textsuperscript{360} This power to grant occupancy includes the entire property and control of all minerals, mineral oils and natural gas in under or upon all land in Nigeria.\textsuperscript{361}

By virtue of the Constitution of the Federal Republic of Nigeria, the Exclusive Economic Zone Act (EEZA) and the Petroleum Act of 1969, control and ownership of oil and gas in Nigeria in its entirety (including under its continental shelf and territorial waters) is vested in the Federal Government of Nigeria.\textsuperscript{362} Section 44(3) specifically provides that:

\textsuperscript{360} Land Use Act 1978, Laws of the Federation of Nigeria 1990, s 1(1)
\textsuperscript{361} Constitution of the Federal Republic of Nigeria 1999, s 44 (3)
“(…)the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.”

Under the Petroleum Act, the minister in-charge may grant qualified entities the right to explore, prospect and produce oil and gas by issuing them with an Oil Exploration Licence (OEL) through which the holder possesses non-exclusive rights to explore oil and gas within the specified area in the grant. The Oil Prospecting Licence (OPL) entitles the holder to exclusive rights to explore, dispose of and transport, store or sell the oil during the prospecting period of exploration within the specified area as stated in the grant. The Oil Mining Licence (OML) on the other hand confers exclusive rights on the licensee to carry out prospective and exploration operations within the leased area and in the process to explore, get, store, export, transport or otherwise treat the oil discovered within the leased area as they please.

Under the provisions of OML, the State is vested with the power to convey the right to occupy and carry out mining and production activities onto multinational corporations at the discretion of the President in conjunction with the National Assembly. That means that the current law in Nigeria allows the State to grant the permit to the multinational corporations and to revoke such at the discretion of mainly the executive arm of government and the legislature with little recourse to the judicial arm of government. If the oil and gas corporation that has been granted a permit abuses the conditions set in the permit and the executive arm of government refuses to revoke the permit, the multinational

363 See also Section 1 of the Minerals and Mining Act, No. 34, Laws of the Federation of Nigeria, 1999 and the Petroleum Act, Cap 350, Laws of the Federation of Nigeria, 1990
364 Tominiyi Owolabi, Wolemi Esan, Damilola Salawu and Olaniwun Ajayi, Oil and gas regulation in Nigeria: overview (Practical Law 2014)
corporation will continue to lawfully use the parcel of land even if it is used to perpetuate the violation of the rights of the people or in breach of environmental regulations.

On the whole the regulatory frameworks in Nigeria regarding the oil and gas sector focus more on the technical issues and little or no inference can be drawn for the protection of health and environment. For example, though amended in some instances along the way, the Petroleum Act (1969) remains a forty-five year old document that was designed for the industry at its infancy. Similarly, the NNPC Act (1977) despite the various amendments is an out-dated piece of legislation that is out of tune with contemporary global business realities. The legislation evaluated above have obviously not been able to adequately safeguard the right to health of people against the activities of the oil and gas corporations. In other words, the current legislation cannot be relied upon to protect the health and environmental rights of the Niger Delta people of Nigeria, hence the need for an effective and up-to-date regulation as well as the need to include specific agreements in BITs with home countries of oil and gas multinationals.

Effective regulation will ensure that the responsibility for the restoration of the environment can be put on the polluters as a means of curbing pollution. A good example can be seen in the actions of the Australian government, which implemented a law that imposes stiff taxes against companies that pollute the Australian environment on a regular basis. The Australian government implemented the Clean Energy Act, 2011 in a bid to compel the greatest polluters of the countries environment to put in place measures

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367 Government of Australia, Securing a clean energy future: The Australian government’s climate change plan (Queensland, CanPrint Communications Pty Ltd 2012) 34
that enable them to bear the burden for their continued pollution of the environment.\textsuperscript{368}

Under this law, the Australian government introduced a carbon tax regime that made it mandatory for these companies to pay an annual tax that was charged on the basis of the level of carbon emitted into the earth’s atmosphere.

The Nigerian environmental laws equally contain provisions which impose duties to safeguard the environment on both individuals and corporations as well as the government, however many of them have been compromised in regulatory capture and lack of adequate implementation. The Environmental Impact Assessment Act (EIAA) for instance requires an assessment of public or private projects likely to have a significant negative impact on the environment.\textsuperscript{369} An Environmental Impact Assessment (EIA) is an assessment of the potential impacts, usually negative, of a proposed project on the natural environment as prescribed by the Nigerian law.

The EIAA deals with the considerations of environmental impact in respect of public and private projects in order to prevent an environmental emergency. It stipulates several steps to be taken by any agency or corporation carrying out any project that might significantly affect the environment such as making an application in writing to the Agency before embarking on projects for their environmental assessment to determine approval of such projects.\textsuperscript{370} The Act however gives the Agency the power to determine, following the submission of a report, whether the project is not likely to cause significant adverse environmental effect or any such effect can be mitigated or justified in the circumstances.

The investment climate in the Niger Delta is completely receptive of investments considered as necessary to drive growth in the oil and gas sector. This has unwittingly made the country a dumping ground for obsolete technologies. Prohibitive costs are often

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\textsuperscript{368} Ibid
\textsuperscript{369} Environmental Impact Assessment (EIA) Act CAP E12, LFN 2004 Section 2 (1)
\textsuperscript{370} Environmental Impact Assessment (EIA) Act CAP E12, LFN 2004 Section 2 (4)
cited as disincentives to importing up-to-date technologies that meet international environmental standards and justifications for allowing projects that negatively impact on the environment and Government, going by some of the provisions above appear willing to grant waivers thus diluting the effect of the EIA Act in a clear demonstration of regulatory capture.³⁷¹

The Harmful Waste (Special Criminal Provisions) Act is another legislation which prescribes both civil and criminal liabilities of any person or corporation who without lawful authority, carry out any dumping or depositing of harmful waste in the air, land or waters of Nigeria.³⁷² But like most of the Nigerian legislation applicable also to the Niger Delta region, the laws give greater discretion and power to the government agency in charge of overseeing the implementation of the Act over and above the powers of the Judiciary thus watering down the effect of the law and making it easy for corrupt State officials to influence their application especially when some of the provisions are very vague they result in inconclusiveness.

3.5 IMPLICATIONS OF BITS ON FDI

BITs, as discussed in the introductory chapter of this work, are entered into by an investing state and a host state for the reciprocal protection of investors from legislative, regulatory or judicial actions of the host state affecting their investment if those actions are expropriatory, unfair or discriminatory as compared to investment by nationals or investors from other states.³⁷³ The ultimate mission of the BIT is to look after the investments of the

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³⁷² Harmful Waste (Special Criminal Provisions) Act CAP H1, LFN 2004, s 6 and 12
investors and to encourage further investment into the host state. The host country thereby gain surplus of capital leading to improvements in infrastructure.\textsuperscript{374}

The mechanisms by which BITs may attract FDI are not straightforward, in the argument of Nuemayer and Spess BITs have a spill over effect on FDI flows particularly when a developing country signs a BIT with a developed capital exporting country such as the USA or Germany.\textsuperscript{375} This is because the signing of BITs sends out a signal to potential investors that the developing country is generally serious about the protection of foreign investment.\textsuperscript{376} Similarly, Nuemayer and Spess find that the more BITs a country signs, the greater the FDI flows to that country. They also suggest that BITs serve as a substitute for domestic institutions.\textsuperscript{377}

The encouragement of FDI flows has also been argued not be restricted to investors from developed countries that are BIT partners of the developing country only but that it will extend to investors from other countries both developed and developing across the globe as the host state indicates that it is providing a favourable investment climate.\textsuperscript{378} Because BIT provides safety for investment it is only logical to infer that factors that guarantee safety and profitability of investments with great reductions in uncertainties and which provide for these guarantees better than most other regions known to the investors would likely induce foreigners to invest in a particular location\textsuperscript{379} as one of the factors that are important determinants of FDI flow is certainty. BITs guarantee to the investors the fact that their investment will not be expropriated by the host State and that in any case that is

\textsuperscript{374} Ibid
\textsuperscript{375} Neumayer (n 7)
\textsuperscript{376} Ibid
\textsuperscript{377} Ibid
\textsuperscript{378} Poulsen Lauge Skovgaard, ‘Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis’ (2010) 30 The North-western Journal of International law and business, 101
\textsuperscript{379} Aryeetey Ernest, Court Julius and Nissanke Machiko (Eds) ‘Asia and Africa in the Global Economy’ (JPN, United Nations University Press, 2003) 248
the situation they will be entitled to adequate compensation for their investment.\footnote{Egger Peter and Valeria Merlo, ‘BITs Bite: An Anatomy of the Impact of Bilateral Investment Treaties on Multinational Firms’ (2012) 114 (4) The Scandinavian Journal of Economics, 1240-1266} This certainty reduces the risk of investors losing their investment in a foreign country.

This argument has however been subject of varying academic views in the existing literature. Sornarajah for instance, insists that in reality, attracting foreign investment depends more on the political and economic climate for its existence rather than on the creation of a legal structure for its protection.\footnote{Sornarajah Muthucumaraswamy, The international law on foreign investment (Cambridge University Press, 2010)} This suggests that being party to BITs may not necessarily significantly influence the inflow of foreign investment into a region nor contribute significantly to sustainable development.

Hallward-Driemeier analyzes bilateral FDI flows from OECD member countries to developing countries and finds little evidence of a connection between BITs and FDI flows.\footnote{Hallward-Driemeier Mary, Do bilateral investment treaties attract foreign direct investment? only a bit and they could bite (World Bank Policy Research Working Paper 3121, 2003)} She further finds that countries with weak domestic institutions do not get significant additional benefits from signing BITs with OECD countries. For example, where such BITs exist, foreign multinationals may still hold the right to repatriate capital and profits back to their parent companies or their investing States as opposed to re-investing it back into the host State’s economy.\footnote{Allan M Rugman and Thomas I Brewer eds The Oxford Handbook of International Business (Oxford University Press, 2001)} Although the theory suggests capital inflows, in practice, FDI may just be capital which passes through the economy yet becomes a drain on foreign exchange. This is because foreign firms may be more likely to import materials and foreign firms may hold the right to remit profits.

More broadly, with the existence of BITs there is considerable concern that the interests of foreign firms will diverge from social development objectives or constrain

\begin{thebibliography}{99}
\footnote{Sornarajah Muthucumaraswamy, The international law on foreign investment (Cambridge University Press, 2010)}
\footnote{Hallward-Driemeier Mary, Do bilateral investment treaties attract foreign direct investment? only a bit and they could bite (World Bank Policy Research Working Paper 3121, 2003)}
\footnote{Allan M Rugman and Thomas I Brewer eds The Oxford Handbook of International Business (Oxford University Press, 2001)}
\end{thebibliography}
governments’ ability to promote economic development. For any foreign investment project, the ability to repatriate income and capital, to pay foreign obligations in another currency, and to purchase raw materials and spare parts from abroad is crucial to a project’s success. For this reason, capital-exporting states in BIT negotiations have pressed for unrestricted freedom for investors to undertake these monetary operations. Thus where BITs are able to generate FDI they may not be able to make them beneficial to the country or contribute significantly towards sustainable development.

Egger and Merlo in their study introduced the element of time in determining the impact of BITs on FDI. They carried out an empirical study using a dynamic ratified BIT model and determining its effects on FDI into OECD countries and conclude that there was a significant difference in the short-term effects of BIT on FDI and the corresponding long-run effect. Other literatures have attempted to distinguish between the types and forms of BITs in order to determine their impact on FDI.

Haftel in his study further distinguished between signed BITs and mutually ratified BITs and concluded that BITs in force substantially increase FDI inflows, but signed yet un-ratified BITs do not. In his argument this is because foreign investors are more concerned with time-inconsistency problems than uncertainty regarding the host government’s general economic orientation at the time of the initial investment and that only a mutually ratified investment treaty constitutes a credible commitment by the parties to the treaty as only then do they carry strong legal obligations and capable of penalizing non-compliance.

In all it is evident that BITs does influence the generation of FDI however to make the impact of BIT on FDI significant and credible the host State must have necessary domestic institutions in place in order to further attract foreign investment and encourage the steady flow of FDI. This may not happen in the short term however and may require a considerable amount of time and a dynamic system before any noticeable impact is felt.

Practically the oil and gas situation of the Niger Delta may not be as straightforward as indicated in the arguments above. The oil and gas sector has evolved with the focus on augmenting indigenous contribution into the sector through FDI.\textsuperscript{389} The preambles of the thousands of existing BITs state that the purpose of BITs is to promote the flow of FDI and, undoubtedly, BITs are so popular because policy makers in developing countries such as Nigeria believe that signing them will increase FDI. It now remains to determine whether or not BITs do contribute towards the generation of such foreign capital or not in the Niger Delta situation. Do these treaties fulfil their stated purpose and attract more FDI to developing countries such as Nigeria?

Despite the large and increasing number of BITs concluded, there exists very little concluding evidence answering these questions. The Nigerian situation raises some interesting dimensions. FDI has grown progressively in Nigeria over the past few decades. Basically, Nigeria receives a considerable amount of inflow of foreign investment in the oil and gas sector much more than into any other sector of the economy.\textsuperscript{390} The oil and gas sector was developed with the focus on augmenting indigenous contribution in to the

\textsuperscript{390} Ekperiware M, 'Empirical Analysis Of The Relationship Between FDI, Technology Transfer And Economic Growth In Nigeria' (2013) 3 British Journal of Management & Economics
sector. Thus investment was liberalized and the sector opened to foreign multinationals much so that the sector is dominated by foreign multinationals and investors.\textsuperscript{391}

This became a cause for agitation by local communities and led to the development of a number of Federal Government initiatives such as the local content development initiative which involves creating incentives for increasing the local participation by domestic companies in the sector and ensuring that companies that are indigenous have a part in the sector.\textsuperscript{392} This was so much so that the federal government had to introduce the Nigerian local content policy into the Oil and Gas Development Act 2010 and establish the Nigerian Content Monitoring Board (NCMB).\textsuperscript{393}

Some of the efforts made by the Federal Government to attract foreign investors were by the signing of investment agreements with foreign governments and creating an enabling investment process for multinational corporations.\textsuperscript{394} The Nigerian Investment Promotion Commission Act laid out the framework for Nigeria’s investment policy. Under the Act, 100 percent foreign ownership is allowed in all industries except for oil and gas, where investment is constrained to existing joint ventures or new production sharing agreements.

Investment from both Nigerian and foreign investors were only prohibited in a few industries crucial to national security such as the production of arms and ammunition, and military uniforms.\textsuperscript{395}

\begin{enumerate}
\item \textsuperscript{392} Balouga Jean, ‘Nigerian local content: challenges and prospects’ (2012) International Association for Energy Economics, 23-26
\item \textsuperscript{393} LA Atsegbua, ‘The Nigerian Oil and Gas Industry Content Development Act 2010: an examination of its regulatory framework’ (2012) 36 (4) OPEC Energy Review, 479-494
\item \textsuperscript{394} Falola T and Achberger J, The Political Economy Of Development And Underdevelopment In Africa (Routledge 2013)
\item \textsuperscript{395} Nigerian Investment Promotion Commission Act Chapter N117 (Decree No 16 of 1995) Laws of the Federation of Nigeria
\end{enumerate}
The act also allows investors to repatriate 100 percent of profits and dividends.\textsuperscript{396} The Act creates a quick and easy system of registration of foreign companies such as a one-stop shop for incorporation and registration of foreign companies in Nigeria. The consolidation of banking has also greatly enhanced the injection of foreign investment in the country for the increment in capital reserves by the Central Bank of Nigeria.\textsuperscript{397} A number of uncompleted and not yet ratified BITs being made by the State also points to the strong attraction of the country to foreign investment. The country is in the 10th position in the rankings of the world’s largest oil producers, and is also the third largest in the African continent and a notable oil producer in Sub-Saharan Africa.\textsuperscript{398} These indicate that there has been a considerable flow of foreign capital into the country particularly the Niger Delta region.

The growth of the oil and gas sector over the years and the increased dependence of the State’s economy on the Sector also suggest that FDI generation into the sector remains strong. The economy of the entire Nigerian country is hugely dependent on the oil and gas sector, which generates over 90 percent of the total earnings from its foreign exchange.\textsuperscript{399} The Nigerian Federal government holds the exclusive rights to ownership and control of land and mineral resources as stated in the Nigerian constitution and thus makes laws and regulations that are influenced by the investment climate.\textsuperscript{400} The oil and gas sector is divided into the upstream and downstream sub-sectors and the upstream subsector currently generate the most foreign investment\textsuperscript{401} despite the many challenges associated with the Niger Delta region and Nigeria as a whole, such as corruption, political instability, human

\textsuperscript{396} Ibid
\textsuperscript{399} GO Odularu, ‘Crude oil and the Nigerian economic performance’ (2008) Oil and Gas business, 1-29
\textsuperscript{400} Constitution of the Federal Republic of Nigeria 1999, s 44(3)
\textsuperscript{401} Heum, Per, et all ‘Enhancement of local content in the upstream oil and gas industry in Nigeria: A comprehensive and viable policy approach’ (2003) Research Report, Bergen Open Research Archive
rights and environmental rights violations, the vast availability of petroleum resources continue to draw foreign investors into the region.

The upstream sub-sector entails the search, discovery, quantification and exploration of crude either beneath the surface of the ground or sea for processing.\textsuperscript{402} Downstream subsector however deals with the marketing of finished products from the refining of extracted crude oil by oil marketing companies.\textsuperscript{403} It is difficult to fully determine if FDI is generated by the proliferation of BITs or the fact that the existing agreements can be said to be more for the benefit and protection of the investing party due to the presence of natural resources in the host State and the promise of investment protection on the part of the Nigerian State without much obligations or expectations placed on foreign investors or the investment exporting State.

Different arguments seem to lead to different aspects of these speculations. The Niger Delta region despite its enormous profitability opportunities and availability of oil and gas resources, because of the relatively high degree of uncertainty in the region, which exposes firms to a number of risks and uncertainties, cannot be described as the most conducive environment for foreign investment.\textsuperscript{404} Uncertainty in the Niger Delta region manifests itself in different ways, some of which will be further addressed in the next chapter, such as political instability due to the high incidence of violence, militant activities, kidnapping, sabotage of infrastructure such as oil pipelines, and religious and ethnic conflicts.\textsuperscript{405}

However the presence of abundant natural resources introduces a significantly different dimension to the discussion as it can be argued that it may contribute to the

\textsuperscript{403} Ibid
willingness of foreign investors to take a higher risk with their investment in order to invest in resource rich countries. The availability of mineral resources coupled with active liberalization of investment by the State has made the Niger Delta an attractive hub for foreign investment into Africa.\textsuperscript{406} According to UNCTAD the majority of FDI to the developing countries is through natural resource investment.\textsuperscript{407} The presence of natural resources in a country is expected to attract foreign investment regardless of other factors that would usually attract or discourage investors.\textsuperscript{408} Despite the other social and economic factors that may pose as barriers to FDI the oil and gas sector continues to attract foreign investment. It is arguable therefore that BITs do impact on FDI particularly to developing countries with less defined regulatory systems and unstable political situations as it offers the foreign investors the platform of protection which encourages them to invest in key sectors such as the oil and gas sector of the Niger Delta.

Asiedu and Lien argue that FDI in natural resource rich countries tend to be concentrated in the natural resource sector and while natural resource exploration requires a large initial capital outlay, the continuing operations may require a smaller cash flow. Thus, after the initial phase, the inflow of FDI may slow down.\textsuperscript{409} This is evident in the Niger Delta situation where oil and gas multinationals make initial huge investment into their operations but slow down on investment as operations continue and also demonstrate laxity in keeping equipment and infrastructure up to date and in line with current international standards.\textsuperscript{410}

\textsuperscript{407} UNCTAD, Bilateral Investment Treaties 1959-1999 (Geneva, United Nation, 2001)
\textsuperscript{408} Ibid
\textsuperscript{409} E Asiedu and D Lien, ‘Democracy, foreign direct investment and natural resources’ (2011) 84 (1), Journal of International Economics, 99-111
\textsuperscript{410} Kadafa (n 242)
Another argument is that BITs create greater obligations for the host country regarding the treatment of foreign investment but not corresponding level of obligations for the foreign investors. The tone of the articles in most of its BITs, as is the case in most BITs, directly place a certain degree of responsibility on the Nigerian States such as the protection from expropriation. In the argument of Saceroti, BITs generally have not been conceived as policy instruments but rather as a framework of minimum standards expressing both in general and generic terms, a pro-investment liberalisation approach and that for host States’ governments to ensure its contribution to the attainment of a certain economic and social development objectives they will require an approach that goes well beyond the status quo.411

The fundamental drive of States toward the completion of BITs is to generate investment and this may impede efforts to bargain for a truly mutually beneficial investment treaty in order to attract such investments412 or to duly enforce existing standards such as to accommodate foreign investment protection commitments made by them to the investment exporting treaty parties.

3.6 RATIONALE FOR FOREIGN DIRECT INVESTMENT

FDI has been an important element of international economic integration for States. Globally, the growth of FDI has been recorded to be faster than the growth of international trade since the 1980s.413 FDI has been defined by various authors in different ways. One of these definitions is that FDI is the investment made in order to acquire management interest in a foreign country.414 Another definition is that FDI refers to the investment made into a

412 Vandevelden (n 81)
413 S Contessi and A Weinberger ‘Foreign direct investment, productivity, and country growth: an overview’ (2009) 91 Federal Reserve Bank of St. Louis Review
foreign economy which grants to the investor a significant degree of influence on the management of the enterprise resident in the other economy. Such investment involves both the initial transaction between the two entities and all subsequent transactions between them and among foreign affiliates, both incorporated and unincorporated. In other words it is the investment which is made by an investor from a foreign country into another country to carry out certain businesses nationally or globally and it can include investment in shares of a company situated in another country, acquisition of property in the foreign country, a merger or joint venture, etc.

The OECD defines FDI as investment that adds to, deducts from or acquires a lasting interest in an enterprise operating from outside the country in order to have an effective voice in the management of the enterprise. And in the event that a foreign investor does not have an effective voice in the management of the company, then the investment is classified as portfolio investment. A natural question to ask of this definition is what constitutes an effective voice in a company? Continuing the OECD benchmark definition of FDI, an effective voice in a company is when a firm in one country has a foreign investor controlling 10 per cent or more of the equity capital or voting power in that firm. An exception to this is when the 10 per cent is insufficient for the investor to have control in the management of the firm, or conversely when the investor has management control in the firm even though it owns less than 10 per cent of the equity capital. These suggest that FDI refers to the flow of capital from the investors’ country into the country of

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416 Ibid
418 Ibid
419 Ibid
investment and not only provide much needed capital for investment but at the same time also enhance managerial skills, job creation and technology transfer.\textsuperscript{420}

For developing countries like Nigeria FDI creates a huge access to foreign capital, which is not only important for raising the productivity of the existing labour and human resources but can also play a pivotal role in creating employment for new labour force.\textsuperscript{421} The possibility of significant creation of employment should be a boost to the economy of the host country as investment determines the accumulation rate of physical capital and it may play a vital role in the growth of productive capital. Hence, increasing foreign direct investments is perceived as one of the most important channels towards increasing aggregate investment.\textsuperscript{422}

FDI can be classified into three types, these include Export-platform FDI, Upright FDI and Horizontal FDI.\textsuperscript{423} Export-platform FDI can be defined as the establishment of production facilities in a foreign country and output from those facilities are used as a whole or in part to serve a third country or other countries.\textsuperscript{424} It therefore refers to the export of a single product line, where these exports are not necessarily traded back to the parent country.\textsuperscript{425} Vertical FDI occurs when the stages of production occur in more than one country; and horizontal FDI when the same stage of production occurs in more than one country.\textsuperscript{426} Foreign investment in the Niger Delta region is mostly export-platform by oil and gas multinationals. FDI can be made through different means such as by owning a

\textsuperscript{421} Ewelukwa Ofodile, 'Managing Foreign Investment In Agricultural Land In Africa: The Role Of Bilateral Investment Treaties And International Investment Contracts' (2014) 7 Law and Development Review
\textsuperscript{422} Ibid
\textsuperscript{425} Ibid
\textsuperscript{426} Ibid
company in the host country through incorporation, acquiring shares in an existing
company in the host state or by becoming a joint owner of a company in the host country.

In poor, high-risk environments FDI is likely to be the major source of investment funds. Regardless of the inconclusive results concerning the pros and cons of FDI developing countries view it as a primary means for increased economic growth. Thus, host country governments work to attract FDI. They offer incentives to multinational corporations designed to attract FDI from competing countries and to offset potential risk factors that might deter investment.\textsuperscript{427} Likewise, MNCs employ strategies to reduce the potential risk of investing in unstable environments. In order to encourage foreign investment host states sometimes give concessions to the foreign investors such as concessions on tax, creating economic zones and derogation from strict non-investor friendly rules and regulations.

Developing countries believe that the increase in the FDI will give rise to the economic growth of the host country through the development of the country’s infrastructure and human resources.\textsuperscript{428} This will also give chances to local companies to gain access to the international market.\textsuperscript{429} Dupasquier and Osakwe identified several factors as possibly responsible for poor record of FDI in developing economies. Such factors include economic and political instability, low record of economic growth, in adequate infrastructure, lack of good and accountable governance, regulations that are inhospitable to foreigners, and ill- conceived investment promotion strategies. \textsuperscript{430} Adequate infrastructures are another factor that influences the flow of FDI to a developing country. The absence of adequate supporting infrastructure such as telecommunication, transport, power supply and

\textsuperscript{427} Rose-Ackerman (n 76)
\textsuperscript{428} M Ekperiware, ‘Empirical Analysis Of The Relationship Between FDI, Technology Transfer And Economic Growth In Nigeria’ (2013) 3 British Journal of Management & Economics
\textsuperscript{429} Ibid
skilled labour, discourage foreign investment because it increases transaction costs. Poor infrastructure reduces the productivity of investments thereby discouraging inflows.\textsuperscript{431}

It has been argued that there can be a connection between the growth of FDI and the growth of the economy of a host state.\textsuperscript{432} To analyse the rationale for FDI, an important analytical question is whether it really matters much for the industrialisation and growth of the host State. There are a number of sides to this argument. First, it must be noted that FDI is not without some shortfalls. Even though it has important benefits to the host country, it will also have possibly significant costs. An important question is whether the benefits of FDI significantly outweigh its costs to warrant the emphasis on it. Second, if the net positive effects are compelling, would the FDI likely occur in the quantum and quality needed to make a difference?\textsuperscript{433}

FDI can have both positive and negative effects in regards to the economic growth and the sustainable development of a state. Ackerman and Tobin argue that both theoretical and empirical evidence provide mixed results on the benefits versus the costs of FDI.\textsuperscript{434} Both the type of FDI and the mode of entry affect FDI’s impact on host countries. Oke argues that the positive includes the creation of a favourable environment by the inflow of more investment into the country, which leads to increase in the productivity and technological improvement of the country.\textsuperscript{435}

Dupersquier suggests that FDI can play a significant role in the area of employment generation and growth. By providing additional capital to a host country, FDI can create new employment opportunities resulting in higher growth. It can also increase employment

\textsuperscript{431} Ibid
\textsuperscript{432} Zimny Z and El-Kady H, \textit{The Role Of International Investment Agreements In Attracting Foreign Direct Investment To Developing Countries} (United Nations 2009)
\textsuperscript{433} Aryeetey Ernest, Court Julius and Nissanke Machiko (Eds) ‘Asia and Africa in the Global Economy’ (JPN, United Nations University Press, 2003) 248
\textsuperscript{434} Rose-Ackerman (n 76)
\textsuperscript{435} BO Oke, JE Ezike, and SO Ojogbo, ‘Locational Determinants of Foreign Direct Investments in Nigeria’ (2012) International Business Research
indirectly through increased linkages with domestic firms. More specifically, the location of a foreign firm in a host country generally leads to the establishment of domestic firms that provide inputs to it thereby increasing the demand for labour in the economy.\textsuperscript{436} She further adds that foreign multinationals typically make significant investments in research and development through the transfer of modern technologies and consequently they tend to have superior technology relative to local firms in developing countries.\textsuperscript{437}

FDI can give developing countries cheap access to new technologies and skills thereby enhancing local technological capabilities and their ability to compete on world markets. It can also help to raise the skills of local manpower through training of workers and learning by doing and thereby increasing their productivity level.\textsuperscript{438}

The positive also leads to the invention of new ideas and the transfer of skills, knowledge and expertise of workers from around the world through the introduction of diverse management arrangements for enhancing the productivity and enhancing the cordial inter-relation between the investor country and the host country.\textsuperscript{439} The productivity-enhancing importance of FDI is acknowledged widely.\textsuperscript{440} Many developing nations including Nigeria due to availability of natural resources and liberalization of investment encourage an inflow of foreign direct investments in order that it will boost production and subsequently the economic growth of the country in form of some spill-overs such as managerial and marketing expertise, technology transfers and addition of

\textsuperscript{436} Dupasquier (n 430)
\textsuperscript{437} Ibid
\textsuperscript{438} Ibid
\textsuperscript{439} Ibid
\textsuperscript{440} Jeon Yongbok, Byung Il Park and Pervez N Ghauri, ‘Foreign direct investment spill over effects in China: Are they different across industries with different technological levels?’ (2013) 26 China Economic Review, 105-117
capital which as a result will stimulate economic development and reduce the balance of payment. 441

The job of achieving growth and productivity to the level in which a spill over can be reflected in the level of growth across sectors and the economy as a whole however will require some policy and administrative input from the host State as well. 442 By incorporating the principles of sustainable development in all their objectives and operations, domestic authorities equally have to play a crucial role in establishing an enabling framework for foreign investment to enhance economic growth. The benefits of such innovations should also have spill-over effect on health protection, reduction in environmental pollution, creation of new markets, reduced energy use and conformance with standards and regulation.

The negative effects on the other hand includes the misconception of other rules and regulations in the host state which may not be directly related to the investment of the foreign investor but still affect their operations as a part of the host society. Other negative effects are environmental degradation and over-utilization of resources which occurs when foreign investors only complying with the minimum human rights and environmental standards of a developing host state as opposed to the usually higher and stricter standards of a developed investing state. 443 It is a difficult empirical task to fully evaluate the net impact of FDI on the host countries. It has been argued for example that FDI could, for instance, hurt the balance of payments due to an increase in the import of inputs by subsidiaries or to payments of dividends and royalties abroad. 444 And that foreign firms

442 Tobin Jennifer L and Susan Rose-Ackerman, 'When BITs have some bite: The political-economic environment for bilateral investment treaties' (2011) 6 (1) The Review of International Organizations, 1-32
444 Ibid
could merely be exploiting local labour and make no contribution to the wider economy, either through creating jobs, training workers, or in using local suppliers.\footnote{445}

Other authors have argued that when FDI is analysed on different parameters of development it seems that FDI promises more than it delivers,\footnote{446} other cases in which FDI might not be beneficial to the recipient country include, for instance, when such investment is geared toward serving domestic markets protected by high tariff or nontariff barriers.\footnote{447} Under these circumstances, FDI may strengthen lobbying efforts to perpetuate the existing misallocation of resources. There could also be a loss of domestic competition arising from foreign acquisitions leading to a consolidation of domestic producers, through either takeovers or corporate failures.\footnote{448}

In the Niger Delta however the impact of FDI on economic growth remains inconclusive. Ayashagba and Abachi carried out an empirical investigation on the effects of foreign direct investment on economic growth in Nigeria. The result presented showed that foreign direct investment had significant impact on economic growth in Nigeria. They therefore concluded that the presence of foreign direct investment in the LDCs particularly in Nigeria is totally useful.\footnote{449} Akinlo on the other hand also investigated the impact of FDI on economic growth in Nigeria, for the period between 1970 and 2001. His results showed that both private capital and lagged foreign capital have small, and not a statistically significant effect, on the economic growth of the country.\footnote{450} He however distinguished his

\footnote{445} {Ibid}
\footnote{447} {Ibid}
\footnote{448} {Ibid}
\footnote{450} Akinlo, AE ‘Globalisation, International Investment and Stock Market in Sub-Saharan Africa’ (Institute of Developing Economics, Jetro, Japan, 2003)
results and seems to support the argument that extractive FDI might not be growth enhancing as much as manufacturing FDI.\textsuperscript{451}

Obadan addressed the issue more clearly in both conceptual and empirical contexts by positing that the desirability or otherwise of foreign capital depends on the use to which such capital is put.\textsuperscript{452} Foreign capital, if channelled into productive uses, as against consumption, can be highly desirable, as it will bring about the much needed economic growth and development.\textsuperscript{453} All of these arguments indicate that FDI can contribute towards economic growth and development either out rightly or through proper management of the foreign capital by the host state but in varying degrees depending on the pre-existing situation of the host State.

These arguments point to the fact that addressing non-economic issues such as the right to health and a healthy environment in BITs ought to be backed up by further actions by policy makers in the host State as the pre-existing conditions of the host State will further improve the end result of such actions for the society at large.

3.7 IMPLICATIONS FOR DEVELOPMENT, HEALTH RIGHTS AND ENVIRONMENTAL PROTECTION

Although in the interest of sustainable development States should always strive to create a balance between profitability and other non-economic issues such as the protection of health and environmental rights.\textsuperscript{454} With globalization and liberalization, States have become so interconnected and interdependent in that they need FDIs from one another in

\begin{thebibliography}{99}
\bibitem{451} Ibid
\bibitem{452} MI Obadan, ‘Globalization of finance and the challenge of national financial sector development’ (2006) 17(2) Journal of Asian Economics, 316-332
\bibitem{453} Ibid
\bibitem{454} Ekins Paul, \textit{Economic growth and environmental sustainability: the prospects for green growth} (Routledge, 2002)
\end{thebibliography}
order to achieve maximum developmental potentials.\textsuperscript{455} The need to create this balance becomes more necessary as no nation can exist and develop in isolation.

One of the ways to achieve this balance is through properly managing the legitimate expectations of the foreign investors and understanding the potential negative effects of investment liberalization on the lives and economy of the host country and properly indicating this in the BITs and other international investment agreements. The Niger Delta situation indicates a lack of harmony between the obligations owed by the host State towards the investing multinationals particularly as it emanates from their investment treaty obligations and the expectations of the host communities.\textsuperscript{456}

BITs are created to be mutually beneficial and foreign investors are drawn to the availability of natural resources in addition to the investment conditions.\textsuperscript{457} While BITs encourage foreign investors to invest in a particular economy and brings with it the negative environmental impacts associated with increased production, industrialization and other economic activities which put a strain on resources, human health and the environment, as seen from the Niger Delta case, increased FDI and economic activities however may not automatically translate to economic development for a developing state. The host state needs to take necessary and adequate steps to regulate FDI and to use FDI as a development tool in order to achieve sustainable development. This cannot be done unless such issues are duly addressed in BITs themselves.

Sustainable development refers to development that meets the needs of the present without compromising the ability of future generations to meet their own needs.\textsuperscript{458} The concept is generated from the Bruntland Commission Report titled “Our Common

\textsuperscript{455} Ibid
\textsuperscript{456} Ngomba-Roth Rose, Multinational companies and conflicts in Africa: the case of the Niger Delta-Nigeria (Vol. 149, Lit Verlag Münster, 2007)
\textsuperscript{457} Ahluwalia Milan, Policy implications of the changing sources and forms of international investment: an overview (Diss. Auckland University of Technology, 2013)
Heritage” in 1987. Principle 4 of the RIO Declaration affirms that the concept is aimed at incorporating environmental concerns and protection into economic strategies for development. Some of the concerns on the influence of BITs on sustainable development relate to whether BITs are largely vehicles for the protection of investors without due consideration for the development concerns of developing countries or just bridges to conceal the lack of an interconnection between international investment policies and other policy areas such as human rights to health and environmental protection.\(^{459}\) The empirical arguments on this remain inconclusive as well, most especially for developing countries where environmental standards are still developing and resources for adequate protection are scarce.\(^{460}\)

Development in the broad sense is often times a crucial background on which all issues affecting developing countries can be linked to.\(^{461}\) It can be argued that development as a concept should not be limited to economic development alone. In the argument of Sen, the concept of development should not be delimited to economic growth and development alone but also to the guarantee of other rights, liberties or, in other words, freedoms of the people.\(^{462}\) Although this forms a large or major aspect of the concept of development, the argument has been countered that there cannot be development in any sense if there is “economic backwardness” in a country.\(^{463}\) Sears posits that the fulfilment of human potentials requires more than can be specified in economic terms alone.\(^{464}\) Thus other

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\(^{459}\) Becky Carter, ‘The influence of international commercial and investment law and procedure on foreign investment and economic development/growth’ (Helpdesk Research Report, 2013)


\(^{461}\) Scheyvens Regina, (ed) *Development fieldwork: A practical guide* (Sage, 2014)

\(^{462}\) AK Sen, *Development as freedom* (Oxford, United Kingdom: Oxford University Press 1999)

\(^{463}\) MK Pal and SK Jana, (Eds), *Development in Developing Economies* (Concept Publishing Company, 2012) 1-163, 1

determinants of development such as health and environment protection need to be put into consideration. This is because a government cannot claim to be developing a country merely because of the increase in national income if such increase is not sustainable.

Many countries currently lack any coherent, long-term and sustainable development agenda for their health systems, environmental sustainability, provision and maintenance of social amenities, etc. Thus the principle of sustainable development has become a crucial aspect of economic association of States. In the argument of Costello et al, environmental degradation has worse and far reaching effects on poorer countries because of the implications on the social determinants of health and thus such impacts is exacerbated in developing economies and poorer regions due to their capacity to respond to the negative health effects.

It will be beneficial for developing host States to factor these negative implications in their investment agreements in order to ensure that the rights of the citizens are not compromised and that the inflow of foreign investment is properly channelled into areas key for development and growth such as infrastructure development because without basic infrastructure for example host developing countries are condemned to export a narrow range of low-margin primary commodities based on the available natural resources which are the key fascination of foreign investors rather than a diversified set of exports based on technology, skills, and capital investments. In such circumstances, globalization can have significant adverse effects such as brain drain, environmental degradation and capital flight rather than bringing benefits through increased foreign direct investment inflows and technological advances which would positively impact on development.

465 Ibid
466 P Ashok, Trade Liberalisation: Impact on Growth and Trade in Developing Countries (Singapore, World Scientific Publishing Co PTE Ltd 2007) 1-309
3.8 CONCLUSION

The first BIT by Nigeria can be traced to that signed between Nigeria and Germany in 1979. BITs in Nigeria aim at promoting foreign investment in the oil and gas sector and as can be seen in Table 1, Nigeria has had 27 BITs from 1979 to 2014. 13 of the BITs are currently in force, 13 signed but not in force, while that between Germany and Nigeria has been terminated. In as much as the Nigerian Constitution is the *grund norm* in Nigeria, the chapter discusses how BITs have succeeded in making the supremacy of the Nigerian Constitution to be merely academic. The agreements in BITs makes it difficult for the State to enforce new legislation that might impact on foreign investors unfavourably in order to address health and environmental problems most especially with the right of foreign investors to compensation and direct arbitration in the event of regulation that hampers their investment. The chapter further suggests that the state of the legislation on oil and gas in Nigeria needs to be addressed urgently as they are outdated and as such does not reflect the interests of the Niger Delta people. It has been argued that implementation and enforcement are also great constraints in addition to the regulations themselves for instance, the Nigerian federal government has passed laws to curtail gas flaring, but real efforts towards the implementation of the laws have either have not been made or are slow in effecting changes to the *status quo*.

Looking at the history of FDI into the oil and gas sector, it is demonstrated in this chapter that FDI had consistently grown over the past six decades of oil and gas extraction in the region and empirical arguments are inconclusive on the extent of the contribution of existing BITs to this growth. It is equally difficult to conclude beyond the academic arguments on the benefits of FDI that FDI has contributed significantly towards sustainable development in the region. It is therefore up to policy makers to take deliberate steps both nationally through steps such as adequate and up to date regulation and internationally
through steps such as negotiating on essential human rights protection clauses in future BITs to channel the flow of investment towards development.

Health and environmental protection should be perceived as a global issue which ought to be addressed by both developed and developing countries. It is needful for multinationals to acknowledge the importance of both human and material resources in the long-term survival of businesses and factor in health and environmental protection into their expectations when investing in foreign States particularly in resource rich States. This will encourage and promote taking steps to facilitate efforts to reduce the negative impacts of their activities on human health and environment. To promote sustainable development States need to demonstrate their responsibility towards resource management by adopting protection standards.

This will inform firms on strategies to improve their efficiency and conservation of natural resources. Businesses should operate in a way that benefits individuals, shareholders and the society at large both now and in the future. Sustainable development should inform the organizational components of ‘when and how’ to respond to changes in operational standards and creating strategies for managing these demands. The focus for developing investment receiving States should not just be generation of foreign investment but more importantly channelling such investments in ways that aid their development agenda and minimize negative impacts on the citizens.
CHAPTER FOUR
OTHER IMPACTS OF OIL AND GAS EXTRACTION ON HUMAN RIGHTS AND ENVIRONMENTAL JUSTICE IN THE CONTEXT OF THE NIGER DELTA

4.1 INTRODUCTION

This Chapter discusses the effects of continuous human rights and environmental rights abuses on the Niger Delta people and the implications of this problem on obtaining justice for health and environmental abuses by the Niger Delta people. This Chapter will focus on the complications that arise in the Niger Delta as a result of human rights violations arising from the activities of the foreign oil and gas multinationals. The Nigerian Government’s policies do not seem to be addressing the problem of human rights violations and environmental pollution in the region nor elevating the welfare of the people in the area.468

Although the DPR (the Department of Petroleum Resources) issued standards and guidelines on the oil and gas operations in the Niger Delta in 1991, these legal mechanisms have not been strong or effective enough to address the needs and challenges of the people in the Niger Delta in view of oil and gas extraction activities by the foreign multinational corporations.469 This has subsequently led to environmental degradation, dilemmas of sustainable development and social disequilibrium caused by human rights violations in the area.470 These issues led the Niger Delta people to resort to other means to address their human rights and environmental concerns. These means include protests, petitions and riots notably the activities of the ‘Ogoni Nine’ and those of the militia men.

470 Jike (n 468)
The efforts of the Niger Delta people to compel the Nigerian Government and the multinational companies to address environmental and health concerns as well as other human rights concerns have come at a cost which invariably impact negatively on the Nigerian economy. Many multinationals such as Shell have asserted to their CSR efforts as means through which they have demonstrated respect for health and environment in the Niger Delta.\(^{471}\)

The Chapter highlights the failure of CSR by multinationals in addressing these problems and explores the impracticability of using the argument of resource control in order to address the health and environmental violations in the Niger Delta and critically discusses the role of multinational corporations in health and environmental protection under international law and how an effective and efficient BIT can aid in ensuring that multinationals perform these roles.

### 4.2 Responsibilities of Multinational Corporations in Health and Environmental Protection Under International Law

The growing awareness of human rights abuse and the popularity of the campaign for addressing global warming have further put pressure on business practices and made health and environmental sustainability to become more and more popular in today’s international investment and trade scenes.\(^{472}\) Many companies particularly multinational corporations with the added pressure of operating in foreign States have identified strategies and tactics that are crucial in facilitating the corporations’ international success.

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\(^{471}\) Gabriel Eweje, ‘The role of MNEs in community development initiatives in developing countries Corporate Social Responsibility at work in Nigeria and South Africa’ (2006) 45 (2) Business & Society, 93-129

\(^{472}\) P Newell, ‘Civil society, corporate accountability and the politics of climate change’ (2008) 8 (3) Global Environmental Politics, 122- 153
such that they gain brand presence in the host communities and are identified by their contribution towards the socio-economic life of the host communities.\(^{473}\)

Multinational corporations can be defined as business enterprises operating in more than two countries.\(^{474}\) They are usually but not necessarily managed from the home country. They can also be referred to as Multinational enterprises (MNEs) or Transnational Corporations (TNCs). Under international law, the obligation of multinational firms to respect and protect health and environmental concerns in their operations is the subject of vast academic debate.\(^{475}\) Although sovereign States are the primary entities recognized by international law to be responsible for protecting and promoting human rights, multinational corporations have risen to become global powers that are a force to reckon with in human rights and environmental discussions.\(^{476}\)

A lot of emphasis is being placed on the key position multinational corporations hold in the international community.\(^{477}\) Their influence is reflected in their activities in some of the most dynamic sectors of national economies such as the extractive industry, food sector, telecommunication, information technology and banking.\(^{478}\) The underlying question therefore is to what extent can they be made legally accountable for health and environmental violations in the communities in which they operate? Do they really hold the duty and responsibility under international law to be made accountable for such violations?

In order to further establish the argument for the need for States to agree in their BITs on health and environmental protection requirements in the face of international


\(^{477}\) Ruggie (n 474)

\(^{478}\) Ibid
investment and to address the tension between investment protection and health and environmental concerns particularly on what legal mechanisms and arguments may be employed to assure a harmonious interface of the two, it is pertinent to critically discuss the responsibilities and the limits to the role of multinational corporations in health and environmental protection in international law. In order to do this, it is pertinent to properly establish the status of multinational corporations in international law. Are they subjects of international law?

Firstly, the interests of the shareholders remain a key component in the policies of a multinational firm. Global economic factors such as uncertainty and instability in monetary policy, international financial markets, foreign currency fluctuations, and unstable commodity markets in developed countries sometimes negatively impact on their operational policies and influence their choice of foreign location and investment. Multinational firms experience varied social and cultural interests, for example, changes in the demography of the international markets will have direct consequences on social systems, goods consumption, education, wealth distribution, and market availability.

With increasing concerns on sustainability, human rights impacts and environmental degradation, the role of multinational corporations in the welfare of the society, coupled with increased expectations from the host communities, makes it inevitable that corporations are bound to sometimes conflict with their profit making interests when it comes to determining what they should do to engage in responsible

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479 P Davidson, ‘Liquidity vs. efficiency in liberalized international financial markets: a warning to developing economies’ (2000) 20 (3) Revista de Economía Política, 79
480 D Kinley and J Tadaki, ‘From talk to walk: The emergence of human rights responsibilities for corporations at international law’ (2004) 44 (4) Virginia Journal of International Law, 931-1023
business practices when dealing with different cultures and in addressing societal needs such as health and environmental protection.\footnote{ML Barnett, ‘Stakeholder influence capacity and the variability of financial returns to corporate social responsibility’ (2007) 32 (3) Academy of Management Review, 794-816}

Although some multinationals value the insights of other stakeholders as they help in shaping their sustainability and social awareness, they have been greatly criticized as investing overseas in order to exploit the opportunity to maximise profit.\footnote{D Weissbrodt and M Kruger, Business and Human Rights, in Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjorn Eide (Morten Bergsmo ed, 2003)} Non-governmental organizations are also taking steps to encourage multinationals to use their influence to promote and protect human rights and environmental rights in countries in which they are doing business.\footnote{BA Frey, ‘Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights,’ (1997) 6 The Minnesota Journal of Global Trade, 153}

In international law however, multinationals are barely recognized whether with respect to human rights such as the right to health or with environmental rights as there are no directly enforceable legal obligations imposed on them.\footnote{David Kinley and Junko Tadaki, ‘From talk to walk: The emergence of human rights responsibilities for corporations at international law’ (2004) 44 (4) Virginia Journal of International Law, 931-1023} This is because international human rights laws are developed to protect individuals against abuse from States and gives States the duty to protect and fulfil human rights. It equally relies on States to employ domestic law in implementing international law provisions and where there is a violation of such provision by a non-state actor such as multinational corporations, it is addressed at first instance by domestic law which operates within the jurisdiction of such violation because multinationals are not recognized as “subjects” in international law.\footnote{Andrew Clapham and Scott Jerbi, ‘Categories of Corporate Complicity in Human Rights Abuses’ (2001) 24 Hastings International and Comparative Law Review, 339}

This should not be confused with international rights and duties multinationals posses as legal entities and their ability to recognise and respect such rights. For example their rights under international investment law to national treatment in foreign countries or
their right to compensation and non-discrimination. Subjects under international law are recognized as organs whose duties and obligations stem out of their active consent as the source of obligation in the international scene. In the argument of Guzman, modern international law is based on the principle of State consent. This is because States act on behalf of their population while entering into international agreements but still maintain exclusive control over their territories. It is important to state that there has been a lot of jurisprudence on the theory of consent regarding the types of consent and how it is exercised as well as a lot of criticisms.

For instance, treaties and custom are not the only sources of international law. Article 38(1) (c) of the Statute of the International Court of Justice accepts the “general principles of law recognised by civilised nations” as a source of international law. This helps the judges to develop the content of international law suggests that consent may not always be necessary for international law to become functional. A striking example is paragraph 6 of Article 2 of the United Nations Charter, which provides that the United nations is to ensure that non member states shall act in accordance with the principles of the Charter so far as may be necessary for the maintenance of international peace and security. However, it is still generally accepted that consent is a vital constituent of international law.

International law contains non-binding rules, regulations and processes which reflect the position of general customary international law on health and environmental respect and protection for multinational corporations. The OECD Guidelines for Multinational Enterprises 2000 amended in 2011 and the UN Human Rights Norms for

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486 Lauterpacht Hersch, Recognition in international law (Vol 3 Cambridge University Press, 2012)
488 Ibid
<http://dx.doi.org/10.1787/9789264115415-en> accessed on 24th September 2013
Transnational Corporations and other Businesses 2003 are some of such processes that address the issue at the international level.\footnote{Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), accessed from <http://www.unhchr.ch/html/menu2/2/55sub/55sub.htm> on 15th September 2014} The OECD Guidelines provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. It places on multinationals the duty to respect human rights and makes respect for human rights the global standard of expected conduct for multinationals independent of States’ abilities or willingness to fulfil their human rights obligations even though it does not diminish those obligations.\footnote{OECD (n 488) para 32}

It specifically addresses human rights and the protection of the environment and highlights six duties for multinationals in regards to human rights. These are:

1. Respect human rights, which mean they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.

3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.

4. Have a policy commitment to respect human rights.

5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.

6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.
These duties can be summarised into the responsibility to Protect, Respect and Remedy human rights in the communities in which they operate.

The UN Human Rights Norms help fill a major gap in the international human rights system, which mostly addresses the responsibilities of governments and individuals as opposed to multinational corporations in regards to human rights. The Norms provide companies that want to be socially responsible with an easily understood and comprehensive summary of their obligations under such systems as human rights law, humanitarian law, international labour law, environmental law, consumer law, and anticorruption law.\textsuperscript{493} The Norms extend the duty of multinationals in human rights protection to small and big domestic businesses by recognising their links to multinationals through supply chains.\textsuperscript{494} The Norms call upon businesses to adopt their substance as the minimum standards for the companies' own codes of conduct or internal rules of operation and to adopt mechanisms for creating accountability within the company.

Another international initiative is the European Union Green Paper on CSR which encourages firms to volunteer in making an improved society and a cleaner environment. Corporate social responsibility should nevertheless not be seen as a substitute to regulation or legislation concerning social rights or environmental standards, including the development of new appropriate legislation. In countries where such regulations do not exist, the Green Paper recommends that efforts should focus on putting the proper regulatory or legislative framework in place in order to define a level playing field on the basis of which socially responsible practices can be developed.\textsuperscript{495}

\textsuperscript{493} Ibid
\textsuperscript{494} Draft UN Code, op cit note 10, para 1 (a)
\textsuperscript{495} European Commission Directorate-General for Employment, Promoting a European Framework for Corporate Social Responsibility (Green Paper, Office for Official Publications of the European Communities, 2001) 366, para 22
In an analysis done by Welford, the Green Paper highlights the need for forming collaborations among key stakeholders, especially the relationships between various firms in the supply chain. He maintains that many companies rely on developing economies for raw materials and low wage labour and with globalization create relationships at different levels of the supply chain. It is therefore the duty of the firm to ensure the maintenance of the same standard of operation along the different tiers. Multinational organizations particularly are looked upon to ensure that their supply operations are not detrimental to the sustainability of the natural environment and the society. They are expected to respect sustainability principles as they conduct their business. In ensuring sustainability, multinational corporations will be under an express duty to include health and environmental concerns.

However, it is the multinational’s prerogative on how they plan to implement such health and environmental concerns in their business operations and while interacting with their stakeholders.

Social responsibility towards human health and environmental preservation and protection remains a non-binding law particularly in an enforceability sense, but has become an integral part of the multinational business scene. One of the ways by which multinationals can demonstrate their respect for health and environment as well as other human rights is by adopting modes of investment and production which addresses health violations and environmental pollution in the long run particularly with the employment of contemporary scientific and technological innovations.

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497 Ibid
498 CV Baxi and Ajit Prasad, eds, Corporate Social Responsibility: Concepts and Cases: The Indian Experience (Excel Books India, 2005) 7
499 Ibid
500 Ibid
This has been one of the driving forces for developing countries’ efforts to attract foreign investment and to commit to BITs. Moreover, contemporary scientific and technological innovations encompass introduction of new products and services that have incredible significance to the society. In order for companies to stay afloat and maintain a competitive advantage, they have devised creative approaches to boost their performance and improve quality, particularly on the use of natural resources.

The production of eco-friendly cars, for instance, aids in keeping the environment clean and healthy due to the significant reduction of harmful emissions. In the example of eco-friendly vehicles, they are designed with the aim to reduce carbon emissions. Thus the producers of vehicles are incorporating this into their modes of operation. Alternative fuelled cars have proven to generate low levels of harmful emissions, which keep the environment clean and healthy. Carbon emissions emanating from gas-driven vehicles are harmful to the population. The use of electricity and hydrogen-based fuel leads to a low-cost mode of transport and reduced carbon emission. As a result, this reduces environmental pollution. Globally, environmental pollution is recognized as a potential disaster that can be easily mitigated when measures are put in place to address the issue and such measures are incorporated into investment and production systems for the benefit of the society at large.

Various organizations have come up with a variety of strategies to deal with this relation of societal needs, business imperative, and the natural environment. Matters dealing with corporate social responsibility have of late gained prominence in the current

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504 Ibid
business world. This has shifted focus to corporate social performance, stakeholder management, business ethics, and global corporate management.\textsuperscript{505}

For this to be achievable, several academics have argued for significant engagement and collaboration with stakeholders at different levels. Ki-Hoon and Ji-Whan carried out a study on the Korean electronics sector and posit that products in the electronics manufacturing sector include a range of materials, which in turn involves a number of suppliers. There are also collaborating companies that are responsible for checking adherence to environmental and social matters. They found that Korean electronics companies have started supervising their suppliers on environmentally and socially responsible initiatives and this has significantly influenced the industry.\textsuperscript{506} For instance, Sony Electronics launched a ‘green partnership’ with their suppliers and Samsung Electronics initiated the S-partnership for environmentally safe acquisition and business-to-business under "Samsung Standards” calling for tighter environmental policies at the international stage. They concluded that the popularity of these initiatives across all the different levels of production and involving all the stakeholders have made the need for health and environmental protection initiatives to become a highly regarded practice in the business community and other businesses are emulating such practices.\textsuperscript{507}

Amaeshi, Osuji and Nnodim posit that the responsibility of a firm towards the local community is a way by which companies develop and strengthen their brand acceptance in the society. They argued that many companies have been involved in establishing their corporate identity through branding which has significantly contributed to such entities’

\textsuperscript{507} Ibid at 143
competitive edge and resultant success.\textsuperscript{508} If a company proceeds to get involved in a positive cause in addition to their branding, these will enable the company to differentiate its products and services while enhancing the company’s responsibility image for its corporate identity to be prominent in consumers’ interests.\textsuperscript{509} Such undertakings by a company reflect its guiding principles, culture, and shared values that are carried within its operations and are adopted as a way to match the organization with community values.

Another example is the food and drinks industry which has been subjected to a lot of scrutiny from the rising cases of diabetes and obesity.\textsuperscript{510} Firms are investing heavily on research and development to continuously develop and produce health friendly products. The health and environmental concerns are significant aspects of the food and drinks industry. It is said that the sugary drinks, for instance, are catalyst of lifestyle diseases such as obesity. Coca-cola as a leading multinational in this sector has made various efforts in a bid to address the issue.\textsuperscript{511}

Among the efforts made is establishing none or low calorie beverage option. The company has also committed to providing the calorie information on its product packs even in countries where these aren’t express legal requirements as well as sponsor physical activity programs in most of the countries where the company operates.\textsuperscript{512} This demonstrates the responsibility towards mitigating the health challenges that emanate from the consumption of such products.

International law recommends that multinational firms make commitments towards taking a leadership position in addressing the environmental and health protection in the

\textsuperscript{509} Ibid
\textsuperscript{510} A Karnani, ‘Corporate Social Responsibility Does Not Avert the Tragedy of the Commons. Case Study: Coca-Cola India’ (2014) 3 Economics, Management, and Financial Markets, 11-23
\textsuperscript{511} Ibid
\textsuperscript{512} Ibid
communities in which they operate. At the same time, those areas of law which are more relevant to the activities of multinational corporations, including trade and investment law, corporate law and private international law, primarily pursue different and at times conflicting objectives to the protection of human rights and the environment which can lead to horizontal and vertical policy incoherence. Multinationals ought to take proactive steps in putting into place of preventive measures as opposed to acting after incidents occur and becomes sensitized by the international community. The stakeholders across the world are giving more attention to prevention of rights violations and environmental preservation as opposed to finding solutions after such has occurred.

4.3 THE FAILURE OF CORPORATE SOCIAL RESPONSIBILITY IN THE NIGER DELTA

In the current business environment, multinational corporations are more obliged to come up with sustainable solutions. Such approaches encourage multinationals to respect both health and environment in their operations. They also include consideration of other matters of social concern such as mitigation of environmental pollution, poverty reduction initiatives, education, health, customer satisfaction, protection of endangered species, etc. In the argument of Backer, corporate privilege can only be legitimate if the corporation serves the community from which the factors of production of its wealth are derived. Social responsibilities are not just kind gestures by multinationals wanting to

516 Nidumolu Ram, Coimbatore K Prahalad and MR Rangaswami, ‘Why sustainability is now the key driver of innovation’ (2009) 87 (9) Harvard business review, 56-64
improve their brand image and reputation with the stakeholders in order to improve their profitability. It is a requirement for good business practices, good corporate leadership and governance as well as sustained operation and profitability. This is a responsibility that a company takes to operate in an ethical manner, contributes to the socioeconomic development of the society, and be accountable to the business environment for both the shareholders and the stakeholders. This policy demands that a business operates as a social investment for the good of the society.

Nowadays, corporations are adopting a new approach to business operations due to the changing global economic dynamics. These changes have been necessitated by the global clamour for high standards in business practice. Some new approaches have been developed such as more concentration on social responsibilities that focuses more on the interests of the stakeholders who include the local communities, employees, clients and the government. Stakeholders nowadays demand high level of quality, transparency in the market and a sustainable business that contributes to the welfare of the society. Stakeholders in an organization include employees, providers of finance, government, community and environment, consumers of the organization's products and special interest organizations or groups.

CSR has made companies operate in high standards that are socially, economically, and financially valuable. The general importance of CSR is distinguishing the efforts of the stakeholders while maintaining the core objectives of the business. The realization of the importance of social responsibilities has given rise to new and innovative ideas of doing business. The basis for social responsibilities has been gaining significance considering the

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519 Ibid
521 Ibid
variations that are taking place in international business and investment operations. It is more likely that such responsibilities have significant influence on social and economic responsibilities with which multinationals base their international investment and trade successes on.

CSR is a major argument consistently proffered by multinational oil and gas investors in the Niger Delta to show their respect for human rights and their contribution towards environmental protection.\(^{522}\) CSR is a self-regulatory mechanism whereby a business entity monitors and ensures its active compliance with the spirit of the law, ethical standards and international rules.\(^{523}\) CSR actions are usually geared towards either some or all of the following: the employees of a firm, the community, the environment or generally towards adding value to the society at large outside of the firm’s profit making strategies.

The business dictionary defines CSR as a company’s sense of responsibility towards the community and environment (both ecological and social) in which it operates.\(^{524}\) CSR has further been defined as the theory or idea stating that the companies hold a big duty to its society and people beyond the primary legal obligations towards the owners or shareholders and this is termed as a voluntary act.\(^{525}\) Companies express their citizenship (1) through their waste and pollution reduction processes, (2) by contributing educational and social programs and (3) by earning adequate returns on the employed resources.\(^{526}\) A vast number of models have been presented on the form and mode CSR should take. With some models, a firm's implementation of CSR goes beyond legal or regulatory compliance but includes actions that appear to further some social good, beyond

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\(^{522}\) Gabriel Eweje, ‘The role of MNEs in community development initiatives in developing countries Corporate Social Responsibility at work in Nigeria and South Africa’ (2006) 45 (2) Business & Society, 93-129


\(^{524}\) Ian Brookes and Sandra Anderson, Corporate Social Responsibility Def 1 (Collins Pocket Business Dictionary Glasgow: Collins, 2012)

\(^{525}\) O Amao, ‘Corporate social responsibility, multinational companies and the law in Nigeria: Controlling multinationals in host state’ (2008) 52 (1) Journal of African Law, 89-113

\(^{526}\) Brookes (n 524)
the interests of the firm and that which is required by law.\textsuperscript{527} With some other views CSR is an important aspect of management which requires going beyond the interest of shareholders to ensure the ‘greater good’ of the firm on the society.\textsuperscript{528} This view supports arguments that activities benefitting the society can directly or indirectly benefit the firm as well but not necessarily the shareholders who are more concerned with the bottom line.\textsuperscript{529}

It has been argued that particularly for foreign multinationals, CSR can be used to transform the relationship between the foreign firm and the host state from a relationship marred with conflict into one of co-operation if the local residents perceive the foreign firm as contributing to the economic growth and welfare of the society at large.\textsuperscript{530}

CSR however have many problems which affects its effectiveness in combating human rights and environmental issues. Some of these will be discussed below. This will be done by discussing the general problems first and then narrowing down to the specific problems inherent in the Niger Delta oil and gas region.

One of the problems with CSR initiatives most especially for foreign businesses is that they are voluntary with weak or no enforcement mechanisms and this makes them unreliable particularly when they are further complicated by being initiated by a multinational corporation in a foreign country.\textsuperscript{531} There is minimal enforceable rules governing CSR of business enterprises this makes the system loose and unpredictable. Companies own the discretion and the extent to which they carry out CSR activities in any given host community. Dickerson, following the argument of Friedman indicated that CSR

\begin{footnotesize}
\begin{itemize}
  \item Sumantra Ghoshal, ‘Bad management theories are destroying good management practices’ (2005) 4 (1) Academy of Management Learning & Education, 75-91
  \item Ibid
  \item Joanna Tochman Campbell, Lorraine Eden, and Stewart R Miller, ‘Multinationals and corporate social responsibility in host countries: Does distance matter’ (2012) 43 (1) Journal of International Business Studies, 84-106
  \item Virginia Haulner, \textit{A public role for the private sector: Industry self-regulation in a global economy} (Carnegie Endowment, 2013)
\end{itemize}
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can arguably be outside of the legal and social responsibility of business enterprises and that managers who opt for goals other than shareholder profit maximization may inadvertently hurt the economy, and are arrogating to themselves powers granted only to the government because efficiency considerations should prevent corporate management from spending corporate funds for general social purposes.532

This efficiency consideration can however be counter argued to mean more that mere profit maximization but be perceived in a wholesome manner that transcends the basic existence of the corporation which includes contributing to the overall good of the society in which the corporation can thrive in the long run. CSR is arguably a relative concept because social demands vary from time to time even within the same group of stakeholders. Therefore, there will always be some ambiguity in the concept. This is because individual Corporations would have to indicate the area of social needs it is interested in meeting, taking into account its changing environment. It is not easy to provide managers with rules of thumb as evidence shows that social demands are different in every society.533

The inclusion of CSR in organizations as an essential part of corporate business policy has been an issue under numerous contradictions. There are those who argue that CSR should be an integral part of an organization’s business strategy and corporate identity.534 Some others argue that the extent to which companies carry out CSR activities is dependent on enforcement of state regulations, health of the economy and the financial

conditions of the organization.\textsuperscript{535} A number of operational models surged from the concept of CSR standards, an example of which is the Sullivan Principles and theoretical models such as the European Union’s Green Paper.\textsuperscript{536} It remains to be determined whether the rationale behind some companies being involved with CSR is informed by their sceptical view of marketing or is based on genuinely generous attribution to engage in socially responsible business practices.

This leads to another problem regarding the issue of accountability. Will the public be able to influence the content of CSR or ensure that the corporations uphold their end of a one-sided bargain?\textsuperscript{537}

According to Frynas there is mounting evidence of a gap between the stated intentions of business leaders and their actual behaviour and impact in the real world.\textsuperscript{538} Due to self-interest motivations while involved in CSR activities, corporations are less like to consider pressing interests in the society at the expense of the organization’s self interest. The organization’s opinion of the interests of the larger society may equally be distorted by its self-interest motivations.\textsuperscript{539} A corporation’s lack of consideration for the views of other stakeholders is a demonstration of this self-interest motivation. It can be argued that an organization will not be able to achieve the optimum beneficial value of its CSR activities if it fails to consult the recipients. It will at best only demonstrate an effort made by an organization to deploy their resources in a way that helps the organization build a mutually

\begin{footnotesize}
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\item \textsuperscript{535} R Welford, ‘Corporate Social Responsibility in Europe and Asia: Critical Elements and Best Practice’ (2004) The Journal of Corporate Citizenship, 31-47
\item \textsuperscript{536} WL Tate, LM Ellram and JF Kirchoff, ‘Corporate Social Responsibility Reports: A Thematic Analysis Related To Supply Chain Management’ (2010) Journal of Supply Chain Management, 19-44
\item \textsuperscript{537} Haufler (n 531)
\item \textsuperscript{538} Jedrzej George Frynas, ‘The false developmental promise of corporate social responsibility: Evidence from multinational oil companies’ (2005) 81(3) International affairs, 581-598
\item \textsuperscript{539} Nagib Salem Bayoud, Marie Kavanagh and Geoff Slaughter, ‘Corporate social responsibility disclosure and corporate reputation in developing countries: the case of Libya’ (2012) 7 (1) Journal of Business and Policy Research, 131-160
\end{itemize}
\end{footnotesize}
productive and sustainable business relationship between them and the communities with which they do business.

The aspect of self-interest in relation to CSR has been a controversial topic of discussion. Moralists have faulted this concept by regarding it as an essential part of the makeup that is a characteristic of organizations aimed at ensuring survival.540 A number of economic arguments have also been made to support the self interest motivation of CSR. Economic argument tends to be in favour of the concept of self-interestedness, which advance that human beings as inherently self-interest motivated and that dealings motivated by self-interest can benefit the society.541 With respect to traditional business perspectives, companies justify CSR in terms of self-interest. One of the ways that companies do so is by arguing that contributions that they make to the community ensures that the community will be able to thrive and that such contributions can only be made by corporations who can afford such initiatives.542 This has been supported by arguments that those who are motivated have a higher chance of acting morally while those that are not normally involved in CSR do so only because it fits their own ends.543 These problems are applicable in any sector of an economy and can be seen demonstrated in the Niger Delta situation. In order to address CSR issues, firms must engage the society in their efforts. By demonstrating their commitment and interest in CSR initiatives such as recycling, energy, and water conservation, companies build a good reputation and Stakeholder confidence can

542 ME Contreras, Corporate social responsibility in the promotion of social development : experiences from Asia and Latin America (Washington: Inter-American Development Bank 2004)
only be enhanced with good corporate practices where there is accountability and transparency.\textsuperscript{544}

It is important to add that countries that seek foreign investment are looking for multinationals that contribute foreign much needed capital to develop the various sectors of its economy and contribute positively towards economic growth and development of the society at large. The interaction between multinational corporations and their environments is dependent on the foundations such as the cultural values and behaviours that govern and shape the interests of the society.

The Niger Delta situation is particular in that CSR is further influenced by socio-economic factors prevalent in the Niger Delta region.\textsuperscript{545} The CSR practices within the oil and gas industry in this region are most prominent yet yielding very little result. The major CSR tools include community development projects, voluntary social reporting and corporate code of conduct.\textsuperscript{546} The oil and gas companies carry out several CSR initiatives such as creation of social amenities, promotion of employees’ welfare, human rights promotion initiatives, pioneering labour issues, supporting environmental protection initiatives, etc.\textsuperscript{547} It is quite evident that the Nigerian economy is primarily and widely dependent upon the oil sector but it is the Niger Delta wherein the oil multinational corporations have been maintaining a substantial presence which is hampering the life, health and wellbeing of the people as well as the environment.

The local communities have become hostile to multinationals due to the several negative impacts of their activities such as gas flaring, conflicts, oil spills, violence.

\textsuperscript{544} JW Weiss, Business ethics: a stakeholders and issues management approach (Mason, OH: South-Western Cengage Learning, 2009)
\textsuperscript{546} Musa (n 234)
environmental pollution, and other negative social impacts.\textsuperscript{548} The oil and gas multinationals are faced by hostilities such as protests through the groups of civil society as well as groups of individuals from local communities.\textsuperscript{549} This phenomenon is well known and prominent throughout the world. Some international examples include the highly publicized oil tanker accidents like the Exxon-Valdez oil spills leading to wide range of protests.\textsuperscript{550} The damaging media reports of human rights abuses by the BP in Colombia is another example.\textsuperscript{551}

These incidents generated great media attention and this has placed specific pressure over the multinational oil companies like BP and Shell operating in these countries due to the threat posed to their brand names and images.\textsuperscript{552} The Nigerian oil and gas industry is experiencing similar pressures for managing the relationship with its host communities regarding human rights such as health and environment. However it is arguable that CSR activities in the region have not measured up to the expectations of the Niger Delta people and are not addressing health and environmental problems created by the multinationals.\textsuperscript{553}

The oil and gas industry has shown little evidence of demonstrating their commitment to recognizing the variables required for integration of their industrial operations in the local communities regarding the purpose of bridging the expectation gaps that are evident between the general public (including consumers) and their shareholders

\textsuperscript{548} J Muthuri, J Moon and U Idemudia, ‘Corporate innovation and sustainable community development in developing countries’ (2012) 51 (3) Business & Society, 355-381
\textsuperscript{550} Musa (n 234)
\textsuperscript{551} S Beder, ‘BP: Beyond Petroleum?’ (Faculty of Arts-Papers. 2002), 49
\textsuperscript{552} Musa (n 234)
For CSR to be effective and beneficial the CSR activity must align with the community or nations objectives and be articulated in a coherent and sustainable manner in which a proper balance is maintained between how the CSR activity affect the workforce, management and production procedure in the form of internal variables of the organization and the quality of beneficial impact on the society in the form of external variables.

The past and the present experiences of the local communities in the Nigeria Delta have been negative in terms of wider environmental destruction, violation of human rights and little or no economic development. Thus, the Niger Delta population is highly untrusting of the oil and gas companies. Due to this, the pressure on multinationals to ensure effective CSR acts that demonstrate that they are truly responsible towards society and environment is further heightened. As a result of this there is plethora of the CSR activities within the Niger Delta area along with other parts of Nigeria. The most popular are the construction of hospitals, markets, schools, and the provision of pipe borne water. This must have made some academics to argue that CSR processes are duly entrenched in the oil and gas sector of Nigeria.

However the contention is that these CSR initiatives are not being carried out appropriately and effectively in a coherent and sustainable basis which matches the expectations of the local communities and which can have lasting impact on the society. The issue is that despite several CSR mechanisms adopted in the Niger Delta, the oil-

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production communities are either receiving proportionately lower levels of the advantages in comparison to the rising environmental and social costs of the extractive activities as there is minimal contributions towards the communities affected by the oil and gas production within the Niger Delta,\textsuperscript{558} or the minimal contributions are made in a one-off basis and are not made in a continuous and sustainable fashion. These indicate a lack of success in CSR activities in the region.

\textbf{4.4 THE ISSUE OF RESOURCE OWNERSHIP AND CONTROL}

Resource control has remained a contentious issue in Nigeria and has generated a lot of controversy regarding the Niger Delta. The general idea behind resource control is that since Nigeria operates a federal system, the States within the Federation should be allowed to manage their resources while they pay certain percentage of their income to the Federal Government.\textsuperscript{559} Adopting this view goes against the exclusive right of the Federal Government of Nigeria over oil and gas hence, its opposition by the Federal Government and the non-oil endowed regions. Instead, it was suggested in 1995 that 13 percent of ‘derivation’ be allocated to Niger Delta Communities to “financially empower (them) to tackle headlong the colossal neglect, exploitation and degradation arising from the federal presence and the insufficient resource allocation to the region”.\textsuperscript{560} This suggestion was accepted under the 1999 Constitution. It is worth noting that from 1979 to 1981, the Niger Delta Region did not get any derivation, while they got 1.5 percent derivation from 1982 to 1992.\textsuperscript{561} Thus, the revision of this trend in 1999 could be said to have been a welcomed development. However, the question worth asking is whether 13 percent derivation formula can be of any effective benefit to the states within the region particularly in addressing the

\textsuperscript{558} Amao, (n 525)
\textsuperscript{561} Okpi (n 559)
health and environmental rights violations of the Niger Delta people as well as other human right violations still evident in the region.

The answer to this question will likely be in the negative owing to a number of factors. The revenues from oil and gas exportation represents 95 to 99 percent of the country’s export revenues,\(^{562}\) one might expect the Niger Delta region to be a prosperous region. But, according to the World Bank, just about one percent of the revenues in reality reach the host communities.\(^{563}\) The main reason for this uneven distribution has been traced to the issue of resource ownership and control. It is arguable that this resource allocation is urgently required by the local communities to be spent on acquiring clean and safe drinking water, food, health care, reconstruction and environmental protection.\(^{564}\) In order to properly address this problem there is a need for the system of resource ownership and control to be critically analysed and understood.

By virtue of the constitution of the Federal Republic of Nigeria,\(^ {565}\) the Exclusive Economic Zone Act (EEZA) and the Petroleum Act of 1969, control and ownership of oil and gas in Nigeria in its entirety (including under its continental shelf and territorial waters) is vested in the Federal Government of Nigeria.\(^{566}\) Under the Petroleum Act, the minister in charge may grant qualified entities the right to explore, prospect and produce oil and gas by issuing them with either an Oil Exploration License (OEL) through which the holder possesses non-exclusive rights to explore oil and gas within the specified area in the grant, or an Oil Prospecting License (OPL) which entitles the holder to exclusive rights to explore, dispose of and carry away the oil saved and won during the prospecting period of exploration.

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\(^{563}\) World Bank, ‘Nigeria Poverty-Environment Linkages in the Natural Resource Sector’ Africa Environment and Social Development Unit, World Bank Institute, June 2003

\(^{564}\) Universal Declaration of Human Rights Article 12 (5), 24 (6) and 25 (7); International Covenant on Economic Social and Cultural Rights Article 25

\(^{565}\) 1999 Constitution of the Federal Republic of Nigeria s 44 (3)

within the specified area as stated in the grant and finally, or an Oil Mining License (OML) which confers exclusive rights on the licensee to carry out prospective and exploration operations within the leased area and in the process to work, get, win, carry away, store, export, transport or otherwise treat the oil discovered within the leased area as desired.\(^{567}\)

The constitution also states that “control of all minerals, mineral oil and natural gas in, under or upon the territorial waters shall be managed in such manner, as may be described by the National assembly.”\(^{568}\) In this regard, the national assembly (of the Federal Republic of Nigeria) has been granted full autonomy by the constitution to manage and be custodian of the oil and gas that is within the territories of the Federal Republic of Nigeria. This system of ownership is not universal but only practiced by a few countries in the world, other oil producing States operates under different systems. Some examples of such theories have been proffered below to explain these ownership patterns.

### 4.4.1 The National Theory of Ownership

Besides Nigeria, this theory is operating in a number of other countries such as Bolivia, South Africa, China and Venezuela. According to the theory, total and complete ownership and control of the Oil and Gas resources is vested in the government of any given country.\(^{569}\) This theory is very effective in boosting the economy of a country through foreign direct investments (FDIs). It is makes it easier to negotiate for the BITs between countries.\(^ {570}\)

### 4.4.2 Absolute Ownership Theory

Absolute ownership theory holds that mineral resources such as oil and gas as is the case in the Niger Delta are fully pre-owned in a place before extraction and conversion to

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\(^{568}\) 1999 Constitution of the Federal Republic of Nigeria Section 44 (3)


\(^{570}\) Ibid
possessions.\textsuperscript{571} It is derived from the English Law that grants right to land owners to fully utilize the underground resources on their lands according to their wish and desires and for whatever reasons they choose.\textsuperscript{572}

This means that the land owners are granted all the exclusive ownership rights to enjoy their possessions and dispose of all or part at will without any restrictions.\textsuperscript{573} In this case the landowners have exclusive right to extract mineral resources through a well within the subsurface of his/her land even though it is emanating from the subsurface of another landowner whom he/she cannot be deemed to be the co-owner of the resources or of the well.\textsuperscript{574} This theory operates in many States of the United States and the ownership of oil and gas in such States are guided by it. The resource belongs to the landowner and is privately owned.\textsuperscript{575} This however, implies that any environmental degradation or human rights violation resulting from the extractive or production activities arising from such land will be directly the landowners’ responsibility. BITs will not have any impact on the relationship between the landowners and the State or local communities in this sort of situation. This is because, enforcement of any legislation or agreement occurs at a lower level such as individual to individual level, individual to oil and gas multinationals level as opposed to the State to State level.

\textbf{4.4.3 Qualified Interest Theory}

This theory is also referred to as the rule of capture. In this theory, petroleum resources are likened to wild animals (\textit{ferae naturae}). Before a wild animal is captured and kept under the exclusive custodian of the captor, the captor has no legal claims to its

\textsuperscript{574} Aileen McHarg, (ed) \textit{Property and the law in energy and natural resources} (Oxford University Press, 2010)
\textsuperscript{575} Ibid
ownership and it is still considered to belong to the wild; anybody can capture and possess it. Wild animals are not owned until captured. In this case, the oil and gas resources are rightfully the landowner’s. He/she has exclusive right to take possession of it. However, should somebody be the first one to drill for oil and gas in the adjacent field and it flows to their well and it is extracted from there, under the rule of capture, the second person has exclusive right to the ownership of the resources and is not entitled to give the first landowner any fee or leasehold. This is because the theory of qualified interest provides that whoever is the first person to capture a certain resource is entitled to it and is the owner.

As the theory of qualified interest developed as was applied to more complex situations other than mere ownership dispute resolution, its nature became modified in a number of significant ways. For example, in the US, the states of Kentucky and Indiana limited the application of the rule in their legislative structures by taking into consideration the correlation rights of others to capture the resources emanating from a common source of supply. With this modification to the rule of capture, the State began to hold some landowners liable for their activities regarding the resources, such as landowners who used artificial methods in extracting oil and gas from the common source of supply, landowners who negligently wasted the petroleum resources and negligently drilled into the common source of supply. Also the enactments of petroleum conservation policies have significantly impacted negatively on the landowners’ ability to drill for oil and gas resources.

576 Omuli Iwere, ‘What Effect Does The Ownership Of Resources By The Government Have On Its People: A Case Study Of Nigeria?’ (2011/2012) 11 CAR (CEPMLP Annual Review)
578 BM Kramer and OL Anderson, ‘Rule of Capture- An Oil and Gas Perspective’ (2005) 35 The Environmental Law, 899
579 Ross H Piffer, The Rule of capture in Pennsylvanian Oil and Gas Law (Penn State Dickson School of Law, 2013)
Therefore, various jurisdictions have had to modify and subdivide the qualified interest theory into the following three subcategories according to the nature of the case, namely: the fair share rule or correlative rights, proration orders and well spacing rules. The fair share rule or correlative rights rule requires equal and reasonable opportunity for every landowner to capture the possible amount of recoverable petroleum resources under the surface of his or her land. However, under this modified rule, it does not imply that the landowner actually has the right to that very amount of the petroleum resources.

Diligence is required of the landowner when drilling wells on his or her land lest others drain the petroleum resources beneath his or her land according to the requirements of the theory of qualified interest. However, if all the landowners use the same diligence in drilling for the crude oil, then all the landowners will end up capturing the required amount of the petroleum resources beneath their lands. On the other hand, proration orders require the State through its regulatory mechanism to set production rates and limits from individual wells.

These production rates and limits prevent some landowners from extracting the petroleum resources at a faster rate than others, and hence aid in protecting every owner’s fair share of the resources. This rule also helps in protecting the petroleum resources from overproduction which would otherwise impair the total recovery of the petroleum resources from the reservoir.

Finally, the well spacing rules helps to reinforce the weakness of the proration orders whereby under a proration order, production rate is limited to a certain value, this is because some landowners could drill more than one well (or more than others) and hence

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580 Aileen McHarg, Barry Barton, Adrian Bradbrook and Lee Godden, Property and the Law in Energy and Natural Resources (Oxford Scholarship Online, 2010)
581 Ibid
582 Ibid
583 T Daintith, The Rule of Capture: The Least Wors Property Rule for Oil and Gas in A McHarg, Barry Barton, Adrian Bradbrook and Lee Godden (eds.), Property and the Law in Energy and Natural Resources (Oxford University Press: Oxford 2010)
end up capturing more oil than his or her fair share. Therefore under this rule, the state law may set some regulations specifying the area of coverage that one well may occupy per drilling unit.\textsuperscript{584} It is only a single well that is allowed to be drilled within the range of a single drilling unit. The rule helps to keep in control the use of multiple wells which could result in over-production and to put a check on the drilling of many wells when only one would drain the same area. This way no landowner can produce more than the others or infringe on the other landowners fair share.

\textbf{4.4.4 Non-Ownership Theory}

According to this theory, also known as ownership in place theory, the unproduced oil and gas (still in the ground) belongs to nobody but the landowner has a reserved right to drill well and extract it.\textsuperscript{585} Its application is limited to few jurisdictions. The theory holds that the landowner does not have an immediate right to possess the petroleum products underneath his or her land, but has only the right to search for, extract, and use it in whatever ways he or she wants.\textsuperscript{586} Under this theory, nobody is really the rightful owner of the petroleum resources under the earth’s surface so long as the petroleum resources underneath has not been severed by the landowner directly above the oil reserves and he or she has an exclusive right of capture to the oil and instead of ownership, he or she really has what is called a profit.\textsuperscript{587} This theory holds that the land owner is entitled to profit from the mineral below his land as he or she holds the exclusive right to search for, extract and produce the mineral but not the possessory interest right to the mineral in place.\textsuperscript{588}

\textbf{4.4.5 Control of Oil and Gas Resources in the Niger Delta}

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\textsuperscript{584} Ibid
\textsuperscript{585} John S Lowe, Oil and Gas Law in a Nutshell (5th ed West Academic Publishing 2009)
\textsuperscript{586} Ibid
\textsuperscript{587} Ibid
\textsuperscript{588} Mark K Glasser and Scott Humphrey, ‘The Assignment of Oil & Gas Leases: Conditions, Constraints, and Consequences’ Centre for American and International Law, \textit{Sixty-second Annual Institute on Oil and Gas Law} (Matthew Bender, 2011)
From the foregoing, it is indicated that the Federal Government of Nigeria has complete powers over the entire petroleum industry. The control is vested in the Federal Government which also owns the property and land that include the natural resources within the land. This has proven to be a key source of conflict in the Niger Delta. The government has control over the lands for public purposes which override any other right to occupy or use the land by virtue of the Land Use Act 1978.\textsuperscript{589} These powers are exercised mainly through four government institutions; the Presidency (consisting the President and his advisors), the Department of Petroleum Resources, the Ministry of Petroleum (also sometimes referred to as the Ministry of Mines, Energy and Power) and the Nigerian National Petroleum Corporation (NNPC). The Nigerian president, the minister for Petroleum, sometimes subordinated with a junior minister for petroleum, the president’s petroleum-related senior advisors and the Nigerian National Petroleum Corporation (NNPC) top ranking leaders constitute the major oil and gas decision making body.\textsuperscript{590}

The Department of Petroleum Resources’ main function is to act as the official oil and gas industry regulator; it is mandated to play a supervisory role in all the activities of all the oil and gas companies licensed to operate in the oil and gas industry within the federation, NNPC included. It also has the following responsibilities; processing of all licenses and leases applications for within the petroleum industry, enforcing environmental and safety standards, ensuring compliance of all applicable good oil producing practices and national regulations to all oil companies, filling all petroleum industry records of operations, ensuring adequate and timely payment of all royalties and rents to the government by all the oil companies, provision of technical advice to the government on oil and gas-related matters and monitoring and promoting progress towards the enhancement

\textsuperscript{589} Nigerian Land Use Act 1978 s 1 (1)
\textsuperscript{590} Omolara O Akanji, \textit{Oil And Gas Management In Nigeria: Lessons For Ghana} (Institute Of Chartered Economists Of Ghana, 2010)
of indigenization of the oil industry.\textsuperscript{591} However, the Department of Petroleum Resources has been under the Nigerian National Petroleum Corporation (NNPC). It is paradoxical how it was to play its regulatory role to even NNPC when it was a subordinate organ under it.\textsuperscript{592}

The Petroleum National Petroleum Corporation is the business and commercial agency of the federal government in the oil and gas sector. Its major projects in the petroleum industry majorly involve joint venture arrangements with the major oil companies in the country and production sharing partnerships with one or more multinational oil companies.\textsuperscript{593} NNPC’s arrangement and involvement with oil multinationals is divided into two broad categories; production and exploration.

Firstly, concessionary arrangements; either a Memorandum of Understanding or a Joint Venture, are governed primarily by taxation and royalty with the inclusion of government majority (NNPC) participation interest. The federation revenues (through gross and price of petroleum production) are majorly paid in form of royalty payments, bonuses, profit taxation and participation of equity interest. The major drawback with the joint venture structure has been the recurring failures of Nigerian National Petroleum Corporation to find its operating expenses and share of capital. Coming second after this is the contractual fiscal agreement (which includes the Service Contracts and Production Sharing Contracts).

Under the Production Sharing Contracts, the multinational oil company funds the development and exploration of offshore operations and the profit accrued shared according to the prior agreed arrangements following the permitted company costs recovery, subject

\textsuperscript{591} Department of Petroleum Resources, The Organization Roles < https://dprnigeria.com/dpr_roles.html> Accessed on 17th October 2014

\textsuperscript{592} Department of Petroleum Resources, History Accessed from < http://dpr.gov.ng/index/about-dpr/history-of-dpr/> on 17th October 2014

\textsuperscript{593} AC Madichie, The Functions, Powers and Role of NNPC in Nigeria’s Oil and Gas Industry (NNPC, 2012)
to prior specified limit of cost recovery. The contractual instruments and terms included cost of oil recovery limit of 40%, petroleum profit tax of 55% and an agreed oil profit share system with the government taking the bigger share.\textsuperscript{594}

A recent Nigerian Extractive Industries Transparency Initiative which carried out an audit of the oil and gas industry uncovered longstanding criticisms and concerns regarding the Federal Government’s executive capacity, the Department of Petroleum Resources and the Nigerian National Petroleum Corporation in their effective execution of their management and administrative roles within the oil and gas industry.\textsuperscript{595} The shortcomings highlighted included; weak Department of Petroleum Resources managerial and administrative capacity, the Nigerian National Petroleum Corporation’s intrusion into policy-making and regulatory functions, lack of accountability and oversight of the Nigerian National Petroleum Corporation in identifying weak performance and efficiency incentives all of which continue to contribute towards health and environmental rights abuses for the local residents.\textsuperscript{596}

4.5 ENVIRONMENTAL AND HEALTH ISSUES BROUGHT ABOUT BY THE LEGAL NATURE OF OIL AND GAS OWNERSHIP IN THE NIGER DELTA

The Niger Delta oil and gas industry was founded on a centralized governance framework, following the national ownership theory discussed earlier at the beginning of the chapter. This is prescribed by the Nigerian constitution and other related laws of the land.\textsuperscript{597} This governance framework leaves the communities in oil-bearing regions with no statutory or constitutional rights, way of expression on matters touching on their lives.

\begin{references}
\textsuperscript{594} Omolara.O Akanji, \textit{Oil And Gas Management In Nigeria: Lessons For Ghana} (Institute Of Chartered Economists Of Ghana, 2010)
\textsuperscript{595} M Akpo, \textit{The challenges of true federalism and resource control in Nigeria}, (quadro impressions limited, 2002)
\textsuperscript{596} Ibid
\textsuperscript{597} 1999 Constitution of the Federal Republic of Nigeria, s44 (3); Land Use Act 1979 s1 (1)
\end{references}
related to oil or even with any consent on petroleum industry projects within their communities.

This centralized form of governance is extended to even the decisions regarding the acquisition and use of land for the petroleum industry, which “are completely taken out of the hands of those who have lived on and used such lands for centuries.” This scenario of total exclusion from participation of the Niger Delta communities in petroleum decision-making has combined with the socio-economic, environmental denials of the region led to embittered campaign for local and regional petroleum resource control in the Niger Delta.599

The oil and gas multinationals with operations in the Niger Delta are in a constant denial of the linkage between their activities and environmental degradation in the region by asserting that they conduct their activities to the highest possible environmental standards, and by maintaining that the impact of oil pollution on the environment in the Niger Delta is negligible.600 On the same scale, environmental groups and activists also accuse the oil companies of double standards of operation by allowing such damaging practices in the Niger Delta that would otherwise never be tolerated in other parts of the world such as Europe or North America. Evidences suggest that the oil companies deny these allegations, Shell B.P, for example, clamoured for the idea of national environmental standards rather than international ones.

This claim can be derived from the group’s chairman John Jennings’s statement where he was quoted as saying that double standards charges against them are mistaken as the notion of absolute environmental standard cannot be single, and as far as their bid for

598 Human Rights watch, The Oil Companies and the Oil producing Communities (Human Rights Watch Publications, 2008 ) 4
599 Wumi Iledare and Rotimi Suberu, Oil and Gas Resources in the Federal Republic of Nigeria (Conference on Oil and Gas In Federal Systems, 2010)
600 E Courson, ‘Movement for the Emancipation of the Niger Delta (MEND) -Political Marginalization, Repression and Petro-Insurgency in the Niger Delta’ Discussion paper 47, Nordiska Afrikainstitutet, Uppsala 2009
improvement of the situation in the Niger Delta is concerned, it is unavoidable to apply varying standards. On the same note, the then Group’s Managing Director, and now president of Shell Inc Cornelius Herkströter at another parallel annual meeting in the Netherlands, said that should they be forced to apply the western-style of higher environmental standards, the local economies would be harmed.

This argument my seem to be at par with Principle 11 of the 1992 U.N. Rio Declaration on Environment and Development which states that “Environmental standards, management objectives and priorities should reflect the environmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.” However, in the Niger Delta situation this may seem presumptuous. Nigerian law at many points explicitly refers to international standards and requires companies operating in Nigeria to respect those standards. Under pressure from the national and international environmental groups and activists, Shell finally agreed to bring its Niger Delta operations (with the exception of gas flaring) in line with the Nigerian law requirements, which mostly refers to international environmental standards as from the start of the year 1999.

In the process, however, the multinational corporation, like most of the other multinationals operating in the region is in admittance that its facilities in the Niger Delta are in dire need of upgrading; as most of its facilities were constructed in the 1960s through the 1980s to the prevailing standards of the time which are a far cry from current international standards or requirements. There is no evidence to suggest that currently

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602 Quoted in PIRC Intelligence, vol.11, issue 3, March 2007 (published in London by Pensions Investment Research Consultants)
603 Environmental Guidelines and Standards (EGAS) of 1991; Oil Pollution Act (OPA) of 1990
this has been put in place whereas there is plethora of evidences indicating the continued pollution of the environment in the region.

Unfortunately, the Nigerian federal government’s evaluations of environmental damage have not provided any conclusive data nor have provided any useful tool for assessing the environmental damage in order to achieve a conclusive and universal result.\(^{606}\) Most of the environmental studies in the Niger Delta were carried out by private consultancies or Nigerian Universities which lacked enough industrial or technical exposure and expertise and hence were majorly problematic, unreliable and unrealistic.\(^{607}\)

Currently, there is little publicly available credible information about the situation of the environment in the Niger Delta due to oil production and related operations. Despite the many years of oil and gas production and exploration, neither the Nigerian Government nor the oil and gas multinationals operating in the region have provided adequate funding for a scientific research in the Niger Delta region that would pave way for the mitigation of the oil production and exploration damages caused. This has further aggravated the strained relationship between the local people and the multinationals operating in the area. Some writers have argued that when such health and environmental harms occur, the victims have the right to be compensated by the defaulting multinational.\(^{608}\)

However, the issue of compensation has remained a thorny and complicated one in the Niger Delta. This arises out of the complications inherent in the Nigerian legal system as a whole. It is required by Nigerian law that a holder of a mining license should be responsible for the payment of compensation for damages it might cause to a third party. Amongst these damages in the oil and gas industry is pollution due to leakages in oil

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\(^{607}\) Ibid

\(^{608}\) Oyeniyi O Abe, ‘Utilisation of Natural Resources in Nigeria: Human Right Considerations’ (2014) 70 (3) India Quarterly: A Journal of International Affairs, 257-270
pipelines and oil spills. The law provides that the holder of the mining license should pay adequate and fair compensation. However, in the event of such occurrence, understanding the extent of this “fairness” to both the oil multinational and the victims of the oil pollution remain unclear.

Even when there is outright significant pollution, polluting multinationals must be compelled to pay by courts. This will require long and expensive litigation procedures before the courts decide on who shall be paid and how much is to be paid. The law does not define the extent of compensation they are supposed to make nor give clear guidance in regards to the determination of fair and adequate compensation. This is merely at the discretion of the courts.

The affected local residents are further disadvantaged in that during the time of litigation, the polluting oil multinationals can afford the best and most expensive legal representation and experts to contend the extent of compensation to be paid, whereas the affected local residents are not in such financial position and their ability to obtain justice is limited due to financial resources.

Apart from legal costs, the litigation process takes a long time and the outcomes are usually unpredictable. The delays are due to many cases filed in courts and regular adjournment of cases required by the lawyers. Such situation was clearly evident in the case of Ogiale and others v Shell, the plaintiffs sued the defendants at the High Court of Oleh, Delta State for N3.5 million (about 20 000 US Dollars) as the amount for compensation for the alleged damage to the plaintiff’s farmland. The plaintiff sought six witnesses. Two of them were experts who tendered their reports and the expert reports were tendered as evidence. The defendant denied the allegations and called one expert witness

610 Ibid
who tendered his report as well. The two expert reports were conflicting. It was held that
the case lacked scientific analysis and soil test evidence to back it. Therefore the trial Judge
dismissed the case.\footnote{Delta State Law Report (1996: 64-110)}

Some other cases of compensation are even more complicated. For instance, for the
original occupiers who hold the right of occupancy of the land, the law recognizes the
rights of the occupiers to the surface interests, and provides for payment of compensation
to such holders, in the event that their land is required for mining or other public
purpose.\footnote{1999 Constitution of the Federal Republic of Nigeria S. 162 (2)} The oil and gas multinationals acquire the land from the Nigerian Federal
government who owns the land under the Nigerian Constitution and who can revoke the
rights of the local inhabitants and give the land to the multinationals for mining purposes.
In theory the residents are due to be paid compensation for such acquisition by the
government who is expropriating their land but in practice the oil and gas multinationals
are made to make the payment, thus the reluctance and the necessity of long and tedious
litigation processes to compel them to make such adequate compensation.\footnote{Bronwen Manby, The Price of Oil: Corporate Responsibility and Human Rights Violations in in Nigeria’s Oil Producing Communities (Human Rights Watch, 1999)}

Revenues are supposed to trickle down from the Federal government to the states
and local communities to boost development. The Nigerian constitution requires that 13 per
cent of the revenue raised from natural resources, oil and gas inclusive, be paid to the states
from the federation accounts.\footnote{Ibid} It however, does not clearly specify how the local people
whose land and resources have been taken are to benefit fairly and adequately. For this
reason, the local people particularly the Ijaws and Ogonis, who are some of the ancient
occupiers of the Niger Delta, feel that that this law limits them in the control over what they consider as their resources and wealth.  

4.6 THE OGONI NINE AND THE DIFFICULTY OF OBTAINING JUSTICE FROM LOCAL COURTS

Host states such as Nigeria in negotiating Bilateral Investment Treaties generally seek to put economic considerations ahead of domestic human rights or environmental considerations. Nigeria has demonstrated complicity in human rights and environmental rights abuses in the Niger Delta. Legally, actions (or inactions) on the part of a host state in such circumstances violate national or international human rights and environmental laws and the residents of the host communities should be entitled to seek relief through local courts or, in some instances, ultimately through international mechanisms such as the African Commission on Human and People’s Rights as was seen in the case of SERAC and Another v Nigeria. However, efforts to bring investors to account for human rights breaches remains quite difficult, as it is generally States, and not non-state actors, which are accountable for upholding the rights contained in international human rights instruments.

As a non-state actor, an allegation of violation of human rights through a local court process would be more likely to find an investor liable for torts or criminal violations in relation to its role in the state’s perpetration of human rights abuses. If on the other hand the state was not complicit in an investor’s conduct, it might be expected that the state authorities would wish to use the criminal law to sanction investor misconduct. Such sanctions would clearly be in furtherance of human rights or environmental interests. If an investor sought to challenge these criminal sanctions through investment treaty arbitration,

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616 Social and Economic Rights Action Centre (SERAC) and Another v Nigeria AHRLR (60: African Commission on Human and Peoples’ Rights, 2001)
the case might not even be suitable for arbitration. But, in any case, such an exercise of criminal law would clearly fall within the police powers of a state.

Unfortunately not all host states are keen to enforce human rights compliance of foreign investors. Where the state is recalcitrant, other actors might seek to act. Some public interest groups have mounted a specialized form of litigation which seeks to hold multinational corporations liable for grave human rights breaches committed abroad, through actions such as those available under their home State laws. Other non-state actors include non-governmental organisations and social groups.

It is undisputedly the duty of States to protect the health and environmental rights of its citizens. Whether or not CSR contributes to alleviating these problems, national and international law gives the primary duty to the State to protect the people’s human rights and to enforce environmental laws. This is clearly demonstrated in the Niger Delta case. The Nigerian Constitution being the grund norm means that it is superior to all laws operating in the Country. Arguably, the Nigerian Government has all the coercive powers it needs to achieve compliance with the provisions of the Constitution through the machinery of law enforcement and implementation of policies but have failed to do this.

The Nigerian government have becomes business partners with foreign investors at the expense of the people’s right to health and a healthy environment. The Niger Delta masses therefore resorted to using their voices to air their frustrations. This started out in the form of peaceful protests and petitions in the National Dailies. However, these failed to

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618 Ibid
achieve the desired changes, the masses then resorted to riots and other violent means to drive home their points.621

Owing to the negligent activities of the oil and gas multinationals in the Niger Delta and the difficulty encountered by the local residents in prosecuting them under national laws and the local courts, some indigenes of the Ogoni community formed an association called the Movement for the Survival of Ogoni People and is also called the ‘Ogoni Nine.’622 The association successfully attracted international attention to the human rights violations occurring in the Niger Delta particularly the health and environmental concerns. The formation of this Movement was a response to the unconcerned attitude of the Nigerian Government to the sufferings of its citizens and the disregard of their health and environmental right amongst other rights by foreign multinationals such as Shell.

Shell was accused of not demonstrating its respect for the human rights of the Niger Delta people.623 The Ogoni Nine incidence indicates the way obtaining redress against multinational oil and gas companies in the atrocities they commit in the Niger Delta is near impossible in local courts under national laws. Owing to the involvement of Shell, it is pertinent for this thesis to explore briefly the connection between Shell and the Ogoni people.

According to a 2011 report, gas flaring has had acknowledged effects on the Ogoni people and the violation of their environment.624 For instance, itching, noise pollution, and skin rashes, the black soot and dust and the discomfort generated by the light that settles in the people’s homes and on clothes and food demoralize their quality of life and the right of

622 Ibid
the people in the Niger Delta to live in a healthy environment. As regard people’s health, gas flaring causes acid rain which acidifies the streams and lakes and damages the vegetation and crops.\textsuperscript{625} Acid rain also corrodes roofs and is an identified carcinogen that affects human health, in addition to causing congenital malformations and miscarriages. It also increases the incidence of respiratory cancers and other illnesses that have caused the death of hundreds of Niger Delta people. Its sulphur content affects farming by causing reduced crop yields, thereby putting the rural Niger Delta people at risk of starvation, not to mention the economic loss of their main source of livelihood.\textsuperscript{626}

Thus, it did not come as a surprise when the indigenes of these regions took it upon themselves to safeguard their health and environmental rights when they felt they could not rely on the Federal Government to do this for them. Shell’s environmentally destructive practices in these communities have impacted negatively on almost every aspect of the life and wellbeing of the Niger Delta people.\textsuperscript{627} Oil spills have destroyed fish ponds and farmland and polluted their sources of drinking water as has been demonstrated in the Figures above. Between 2004 and 2007, oil spills from Shell destroyed farmlands and fish ponds in the Goi and Bodo communities.\textsuperscript{628}

In 2004, there was a huge oil spill from the Trans-Niger pipeline, which runs through the Ogoniland to the Bonny Export Terminal. Chief Barizaa Dooh, was one of the petitioners in the case, had a poultry coop, fish-ponds, and a bakery. The oil spill damaged all his fish-ponds along with other agricultural lands.\textsuperscript{629} Oil spills rendered this area almost uninhabitable. In 2005, the Oruma people in the Bayelsa State experienced an oil spill from

\textsuperscript{625} Ibid
\textsuperscript{626} UNEP, \textit{Environmental Assessment Report on Ogoniland: One Year of Inaction} (ERA/FoEN Newsletter July 2012)
\textsuperscript{628} Peter Benenson House, \textit{Petroleum, Pollution and Poverty in the Niger Delta} (Amnesty International Publications 2010)
\textsuperscript{629} Ibid
Shell’s facility which ruined farms and trees, and fish-ponds, and many were exposed to health and environmental hazards. In the 2007 Ikot Ada oil spill case, the village suffered from the pollution of their ponds, farmlands, and community land.

The activities of Shell attracted litigations from outside the country before justice could be attained. ERA/FOEN and its sister association Milieudefensie which is based in the Netherlands had to take Shell to The Hague Court, to seek for environmental cleanup and some compensation for the victims’ total loss of their livelihood, including the destruction of fish ponds and farmlands in the Oruma, Goi, and Ikot Ada Udo communities and for the health complications suffered. The Dutch Court however ruled that Shell BP and its subsidiary, the SPDC, were not to blame for the spills that happened at Goi, Oruma, and Ikot Ada Udo between the years 2004 and 2007. SPDC was nevertheless held legally responsible for not doing enough to avert the damage that resulted in the oil spill. The court made a ruling that in the case of the oil spill at Ikot Ada Udo, SPDC might have prevented the damage by plugging the oil well at a prior stage. This decision was overturned in 2015 by a higher court in The Hague and it was ruled that Shell can be held responsible for the spills.

Several contradictory reports were given on the degree of oil spills that occurs in the region. The Department of Petroleum Resources approximated that 1.89 million barrels of petroleum were spilled into Niger Delta between the years 1976 and 1996 from a full amount of 2.4 million barrels of the oil spilled in some 4,835 incidents. A UNDP report stated that there was a total of 6,817 oil spills between the 1976 and 2001, which accounted for a loss of some three million barrels of oil, of which more than 70 percent was never

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631 Ibid
633 Ibid
634 That is approximately 220 thousand cubic metres
Half of all oil spills are due to tanker and pipeline accidents, while oil production operations accounts for 21 percent. Other causes include sabotage which accounts for 28 percent of oil spills, with 1 percent of the oil spills being due to non-functional and inadequate production equipments. The corrosion of tankers and pipelines causes the rupture or leak of the old production infrastructures that frequently do not get regular maintenance and proper inspection. The reason why corrosion accounts for such a high percentage of all oil spills can be traced to the lack of use of environmentally friendly and durable materials.

There is a widespread network of oil pipelines between the oil fields, and several small networks of flow-lines or thin diameter pipes that carry the oil from the well-heads to the oil flow stations which increases the chances for oil leaks. In the onshore regions, most flow-lines and pipelines are positioned above the ground. The oil pipelines, which have an approximate life-span of nearly fifteen years, are old and hence vulnerable to corrosion. A large number of the oil pipelines are older than twenty to twenty-five years.

Shell acknowledges that "the majority of the oil facilities were build between the 1960s and the early 1980s to the existing standards of the time. Shell Petroleum and Development Company cannot construct them that way at present.” Sabotage is executed first and foremost through what is identified as "bunkering", whereby the saboteurs endeavour to tap the oil pipeline. In the procedure of extracting oil, at times the pipeline is destroyed or damaged. Oil spillage has had a major impact on the environment where it is released and might contribute to ecocide. Immense expanses of the mangrove forests, which are particularly vulnerable to oil, mainly because it is stored in the soil and re-released yearly during the inundations, have been damaged. Approximately 5 to 10 percent

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636 AJ Alawode and IO Ogunleye, ‘Maintenance, Security and Environmental Implications of Pipeline Damage and Ruptures in the Niger Delta Region’ (2011) 12 (1) *The Pacific Journal of Science and Technology*
637 Ibid
of the Nigerian mangrove ecosystems have been destroyed by either oil or settlement. The rainforest which formerly occupied not less than 7,400 km² of land has vanished as well. The consumption of the dissolved oxygen by bacteria which feed on the spilled hydrocarbons also contributes to the demise of fish. In the agricultural communities, frequently a year's supply of food maybe damaged instantaneously.

Owing to the nature of oil operations in the Niger Delta, the environment is increasingly becoming uninhabitable. On 30th January 2013, a Dutch court gave a ruling that Shell was legally responsible for the significant amount of pollution in the Niger Delta. It is worth noting that BP Oil Spill at the Gulf of Mexico was estimated at 4.9 million barrels and exposed BP to $29.5 billion in fines, clean up costs, and settlements. In fact, it is said that BP may face $18 billion extra fine after it failed in its bid to reclaim settlement payments from workers through legal process.

The oil spill in the Gulf of Mexico is like ‘a drop of water in an ocean’ compared to what Shell and other multinational companies have done to the Niger Delta and yet they could not be equally compelled to pay due compensation to affected residents or to adequately restore the environment by the Nigerian Courts.

Shell has undertaken to extinguish its gas flaring activities in the Niger Delta due to pressure from the Nigerian people, environmental organizations and nongovernmental organizations. However, Shell is yet to keep these promises, and it instead exerts its economic and political influence on the national government so that it agrees in shifting the goal posts of the stipulated end date for gas flaring in the Nigerian laws. This has made

639 Ibid
640 See “A commentary on the $5 billion Fine imposed on Shell Nigeria Exploration and Production Company by NOSDRA”, available at <CommunityVanguardngr.com/forum/topics/a-commentary-on-the-5-billion-imposed-on-snepco-by-nosdra> accessed on 20th November 2014
641 Ibid
the Nigerian Courts powerless to address the health and environmental violations being suffered by the Niger Delta people. According to the UNEP report\textsuperscript{642} Shell does not observe its own in-house regulations or the national regulations, and this makes it imperative to establish a global binding method.

A movement to end gas flaring led by the Environmental Rights Action (ERA) and the Friends of the Earth (FoE) was established in the bid to ensure that the Nigerian courts addressed the problem of gas flaring in the Niger Delta and it culminated in a nationwide court case instituted by a partnership of local and international NGOs and the Iwherekan community of the Niger Delta against Shell.\textsuperscript{643} A case of instituted at the Federal High Court and the court sitting in Benin City on 14th November 2005 gave an order for a stop to gas flaring, and declared it a “gross violation of the essential human rights to dignity and life, which comprises of the right to a clean, pollution-free, healthy and poison-free environment.”\textsuperscript{644} The judgement however could not be adequately enforced and although gas flaring was declared illegal by the courts, Shell and other multinationals continued to carry out this damaging operation.\textsuperscript{645}

In spite of the established decisions against gas flaring in Nigeria, owing to the shifting of deadlines to bringing the practice to an end, the activity was still carried out with its grave health consequences for the people living near the oil fields.\textsuperscript{646} This failure of the Nigerian Government and the multinational companies to take into consideration and respect and protect the health and environmental rights of the Niger Delta people is equally

\begin{itemize}
  \item \textsuperscript{643} Gbemre v Shell (2005) heard in the Federal High Court of Nigeria, Benin Judicial Division, Suit No FHC/B/C/153/05 delivered on 14 November, 2005
  \item \textsuperscript{644} Ibid
  \item \textsuperscript{646} Temitope Rhuks, ‘The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India’ (2010) 3 NUJS L. Rev, 423
\end{itemize}
traceable to the emergence of militia groups. With the realisation that justice was not duly obtained from the Nigerian courts the surge of the militants began as the local communities decided to take the law into their own hands and illegally enforce their wishes on the State. This is discussed in more detail in the next section of this Chapter.

4.7 MILITANT MOVEMENT AND THE FEDERAL GOVERNMENT’S INABILITY TO MANAGE FOREIGN INVESTORS

The Ijaw Youth Council (IYC), the revolutionary faction which created the much more structured militant faction and the Movement for the Emancipation of the Niger Delta (MEND) came into prominence in 2006 after claiming responsibility for the capture of four foreign oil workers. There is up to date no specific information available as to who coined its name or started the group but it almost immediately became obvious that MEND was a viable militant faction waging a war in the Niger Delta. MEND targeted and attacked the oil infrastructures mercilessly and sabotaged the pipelines. The strategic terrorist assaults by MEND gave them an abrupt national acknowledgment and provided them with the opportunity to make their voices to be heard. MEND has remained a persistent threat to the Federal Government and it is relevant to examine how it has been effective in carrying out its activities.

MEND demonstrates its grievances towards foreign investors particularly the lack of respect for human rights and the resultant results in loss of lives and earnings by its confrontational approach towards foreign oil corporations. Thus, it resorts to kidnapping of

648 Ibid
650 It is worth noting that this threat led the Federal Government to offer the militants amnesty and payments in exchange for their weapons
foreigners and bombing of oil installations. The essence of bombing oil installations is to disrupt oil output. The activities of MEND generated a significant amount of concern from the international community such as the USA which expressed concerned that they have the capability to disrupt world oil supply. According to Bloomberg, MEND succeeded in cutting oil production in Nigeria by 28 percent from 2006 to 2009. Arguably, the 2008 global financial crisis played to the hands of MEND and made their impact in the region seem greater than expected and caused the Nigerian government to decide to negotiate with them. Added to this fear is the secretive and fragmented nature of MEND, and their habit of making their points through violent acts as opposed to through dialogue.

MEND also created an effective communication channel that aids in quick dissemination of information to the international community. They generated a steady stream of fund through ransoms from kidnapped oil workers and money from bunkering activities. Nigeria’s huge dependence on oil and gas implies that such activities as MEND’s can significantly impact on its national income thus it made it imperative for the federal government to act. The actions however did not address the crux of the grievances but merely provided short term solutions. Thus, it can be seen that the failure of the Federal Government to safeguard the health and environmental rights of the Niger Delta people resulted in a number of negative externalities for the Niger Delta people.

It can be contended that respecting and protecting the health and environmental rights of the local people will go a long way in addressing many of the problems that stems

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652 Ibid
653 Ibid
654 Hanson (n 647)
656 Hanson (n 647)
out of the grievances of the host communities towards foreign investors. In the first instance, there will not be loss of life and property through the violent acts of the militants since militants will be nonexistent. The local communities will be confident that their grievances can be duly addressed by the local courts and other law enforcement agencies regardless of the economic might and political influence of the defaulting multinational corporation. This will create an enabling environment that will enhance the proper protection of foreign investments in the long run.

The federal government has indeed taken some domestic steps in addressing the grievances of the Niger Delta people particularly in health and environmental violations. Some of the efforts are broadly channelled towards the protection of the right to health and other socio-economic rights of the people which constitutes determinants of the right to health. In one sense, these conflicts should not solely be blamed on Nigeria’s internal maladministration, because looking at the wider picture, the foreign pressure on developing countries to adopt a set of policies to foster economic goals at the expense of environmental degradation and violation of human rights should also be scrutinised. In the other sense, however, the Nigerian government is still the primary custodian of the people’s human rights and carries the burden to protect and promote them.

Pursuant to this, some of the steps the Nigerian government has adopted in the bid to lessen the harm suffered by the Niger Delta people in the past will be examined below. All of them directly or indirectly relate to the health and environmental concerns of the local people in the host communities. The Niger Delta is one of the poorest regions in Nigeria, with an average poverty rate of 83.3% compared with the national average of 78.3%.\textsuperscript{657} The Nigerian government in conjunction with the oil and gas multinationals operating within the region have responded to the protest of the people living in the region

by taking steps such as creating development projects and they have utilized public
relations methods in dealing with some of the crisis that arose from such protests.\textsuperscript{658} Some
oil and gas funded development projects that relates to health were created. These include
carrying out environmental impact assessments, cleaning up oil spills and building gas
plants for harnessing flared gas for commercial purposing instead of releasing it into the
environment.\textsuperscript{659} It must be added that the development projects created for the region may
require more efforts than what will be required in other parts of the country.

Some positive strides in the field of anti-corruption have already been taken by the
Nigerian government itself. For instance, a bill described as “a fiscal responsibility bill
which institutionalises the use of an oil price-based fiscal rule (OPFR), with earnings above
a conservative estimate of the global oil price saved in an excess crude account” was
proposed at the National Assembly and passed into law in 2007.\textsuperscript{660} The Fiscal
Responsibility Act, 2007 was promulgated to provide for prudent management of the
Nation’s resources; ensure long-term Macro-Economic stability of the National Economy,
and to secure greater accountability and transparency in Fiscal operations within the
country.\textsuperscript{661} The Act also established the Fiscal Responsibility Commission, which is
saddled with the responsibility of ensuring the promotion and enforcement of the country’s
economic objectives.

There are also several cases in which Nigerian State officials have been trailed for
corruption and money laundering charges, amongst them, Olabode George, Chieftain of the
People’s Democratic Party was convicted for financial crimes, Diepreye Alamieyeseigha,

\textsuperscript{658} JG Frynas, 'Corporate and State Responses to Anti-Oil Protests in the Niger Delta', (2001), 100 African
Affairs, 27-54, 28

\textsuperscript{659} R Boele, H Fabig, and D Wheeler, ‘Shell, Nigeria and the Ogoni: A study in unsustainable development:

\textsuperscript{660} G Perry, O Ogunkola, M Olivera and B Fowowe, ‘Oil and Institutions ”Tale of two cities”: Nigeria and

\textsuperscript{661} Proviso to the FISCAL RESPONSIBILITY ACT, 2007 ACT No. 31
former Governor of Bayelsa State, and James Ibori, former Governor of Delta State. Corruption is mentioned because it has been one of the acclaimed problems of the State in addressing the health and environmental problems of the Niger Delta.

Unfortunately, these internal steps enumerated above have not been able to facilitate the much needed change on the realisation of the right to health and protection of the environment in the Niger Delta. For example in the case of gas flaring, a practice which was expected to end in a very short time has continued unabated with little or no effort being put in place to end the flaring by building enough gas plants despite huge increase in production over the years. Stronger and more sustainable efforts backed by law and agreed with home States of foreign investors are needed to bring about effective changes for the Nigerian people.

4.8 CONCLUSION

Having examined the various steps the government had taken in the past to address the continued negative impacts on health and environment in the Niger Delta, it is obvious that these steps were not sufficient for achieving to a great extent the realisation of these rights, BITs can be employed for more than mere minimal, static protection of investments and investor’s rights. They are meant to not only stimulate mutual investment flows, just as is the case for trade and other forms of economic cooperation but to strengthen the interrelationship between contracting States towards the achievement of mutually beneficial goals in the long run.

The failure of the Federal Government and the multinational oil and gas corporations to address the concerns of the Niger Delta people set in motion a chain of

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events that is paralysing to the whole economy. The Ogoni Nine was the result of the atrocities of foreign multinationals, notably Shell, committed in Ogoni land. Shell, in disregard to human life and the safety of the environment engaged in activities that polluted the water, farm lands and the atmosphere of the Ogoni people leading to a series of health and environmental hazards. The multinational, Shell demonstrated its lack of respect for the human rights and environmental rights of the local residents and the national courts and laws enforcement agencies were unable to protect the people and grant them justice against the multinational corporation.

The militant groups that came into existence in 2006 adopted a frightening approach that was remarkably different from the more peaceful approach of the Ogoni Nine. Such militant groups as MEND resorted to kidnapping and bombing of oil installations to make their voice heard. They were able to disrupt oil production in Nigeria and force the Nigerian Government to negotiate with them on steps to be taken to address the human rights and environmental ills. The agitation of the Niger Delta people thus reignited the arguments on resource ownership and control. The argument on resource control is that Nigeria as a Federation should allow States within the Federation to manage their resources and pay tax to the Federal Government. This view was rejected by non-oil-States who instead agreed that a certain percentage of derivation be allocated to the Niger Delta people to enable them put right the wrongs that has been done to their Region. An examination of Nigerian laws indicate that ownership and control of all land and mineral resources therein is vested in the Federal government which has absolute authority over it over and above the communities that reside in the land.

Environmental and health problems have been on the rise due to the exploration activities of the oil and gas multinationals as the federal government have failed to adequately addressed the issue with foreign investors. Multinationals have been exploiting
the weak regulatory system in Nigeria as a whole over the years and are not putting in
efforts to adequately avoid environmental damage and violation of the right to health of the
people. This thesis opines that respecting the environmental and health rights of the Niger
Delta people is not only prudent, but will create a ‘win win’ situation for all parties.

Overall, the system for management, planning and execution of CSR activities in
this sector calls for governmental action by employing strict and advanced techniques with
the governments playing a more central role in ensuring coherent and sustainable CSR
activities that adequately address the concerns and meet the expectations of the local
communities.

This chapter argues that effective monitoring and enforcement as well as
international cooperation is required so that the abundant natural and human resources in
the Niger Delta will ultimately have an impact on the protection of the right to health and
the environment. It is opined that BITs should be structured in such a way that the
environmental and health needs of the Niger Delta people are taken into consideration.
Adopting this view creates a ‘win-win situation’ whereby the environmental and health
needs to the people are met and an enabling environment for the foreign multinationals to
protect their investment is promoted.
CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 GENERAL CONCLUSION

This work critically discussed the concepts of BITs, right to health and a healthy environment and observed that BITs are agreements that protect and promote investment between two countries. Owing to weaknesses of local laws and the technicalities that may arise from their application, BITs are used to not only secure investments but to remove any issue that may arise from the laws of the host country in the course of the investment which may hamper the investment of a foreign investor and lead to a loss of investment or necessary benefit of such investment. BITs became popular amongst States investing abroad and States looking to attract foreign investment in order to boost their economic growth.

The work highlights some new trends in BITs that indicate a deviation from the traditional formats of BITs such as the introduction of non-economic considerations and a deviation from the previous systems when BITs used to be mostly between developed countries and developing countries. The work identified some of the problems affecting the use of BITs such as its link to investment and growth and the impact it may have on the economy of the host State. States rewrite domestic regulations in order to attract investments. This is due to the fact that complying with environmental regulations is very expensive and the multinationals investing abroad are looking to generate returns for their investment by seeking locations with availability of human and material resources and to considerably reduce their production costs.

The ability of the multinationals to invest in a particular foreign State means that a balance must be reached where compliance is not too expensive, whereas it is the duty of the State to assure its citizens’ health and environmental rights no matter the cost.
The work highlights that it is the duty of host States to safeguard health and environmental rights and observed that the duty of the State to safeguard these rights is supported by international law and affirming that it is the responsibility of the host State through the machinery of Government such as through regulation and its effective implementation to ensure the adequate protection of the right to health and the environment of the citizens. In addition, BITs seem to whittle down the sovereignty of host States, while corruption and weak institutions in developing economies can play into the hands of multinational corporations. This necessitates the need for States to have effective institutions that would have the capability to negotiate mutually beneficial BITs and protect the health and environmental rights of its citizens.

This work pointed out that the Nigerian state is awfully failing in its constitutional duty to protect these rights in the Niger Delta crude oil and natural gas sector. It further explored the effects of oil and gas extraction on health and environment in the Niger Delta. It examined the history of oil production in Nigeria. Oil was first discovered in commercial quantities in Nigeria in 1956 and according to the Constitution of Nigeria, all minerals, oil and gas belong to the Federal Government. In fact, revenue from oil and gas constitute about 90 percent of Nigeria’s revenue. The oil and gas sector have been growing tremendously but they have not been impacting positively on the Nigerian economy especially in the area of health and environmental protection. This thesis explored instances in which oil exploration have impacted negatively on the health and environment of the Niger Delta people and the particular need to generate FDI into the oil and gas sector.

BITs are international treaties binding on both the State of Nigeria as a whole and the nationals of the States who are parties to them investing in the country and as can be seen in this work negatively impacts on the enforcement of local legislation on foreign investors. In as much as the Nigerian Constitution is the *grund norm* in Nigeria, the work
discusses how BITs have made the supremacy of the Nigerian Constitution to be merely academic. Some agreements in BITs make it difficult for the State to enforce new legislation that might impact on foreign investors unfavourably in order to address health and environmental problems most especially with the right of foreign investors to compensation and direct arbitration in the event of regulation that hampers their investment. The work demonstrates that the state of the legislation on oil and gas in Nigeria needs to be addressed urgently as they are outdated and as such does not reflect the health and environmental interests of the Niger Delta people.

The thesis further discussed the disposition towards foreign investors and obtaining justice from local courts on health and environmental rights violations by foreign investors either alone or in conjunction with the Nigerian federal government. It is suggested that BITs can be used to address the health and environmental concerns of the Niger Delta people and that the failure of the Federal Government in their association with the multinational oil companies to address the concerns of the Niger Delta people set in motion a chain of events that is negatively impacting on the economy. The Ogoni Nine was the result of the atrocities of foreign multinationals, notably Shell, committed in Ogoni land. Shell, in disregard to human life and the safety of the environment engaged in activities that polluted the water, farm lands and the atmosphere of the Ogoni people leading to a series of health and environmental hazards. The multinational, Shell demonstrated its lack of respect for the human rights and environmental rights of the local residents and the national courts and laws enforcement agencies were unable to protect the people and grant them justice against the multinational corporation.

The militant groups that came into existence in 2006 adopted a frightening approach that was remarkably different from the more peaceful approach of the Ogoni Nine. Such militant groups as MEND resorted to kidnapping and bombing of oil installations to make
their voice heard. They were able to disrupt oil production in Nigeria and force the Nigerian Government to negotiate with them on steps to be taken to address the human rights and environmental ills. The agitation of the Niger Delta people thus reignited the arguments on resource ownership and control. The argument on resource control is that Nigeria as a Federation should allow States within the Federation to manage their resources and pay tax to the Federal Government. This view was rejected by non-oil-States who instead agreed that a certain percentage of derivation be allocated to the Niger Delta people to enable them put right the wrongs that has been done to their Region. An examination of Nigerian laws indicate that ownership and control of all land and mineral resources therein is vested in the Federal government which has absolute authority over it over and above the communities that reside on the land.

Health and environmental problems have been on the rise due to the exploration activities of the oil and gas multinationals and the federal government have failed to adequately address the issue by not regulating the activities of foreign investors. Multinationals have thus been exploiting the weak regulatory system in Nigeria as a whole and are not taking necessary actions to avoid environmental damage and violation of the right to health of the people.

Overall, the system for management, planning and execution of CSR activities in this sector calls for governmental action by employing strict and advanced techniques with the governments playing a more central role in ensuring coherent and sustainable CSR activities that adequately address the concerns and meet the expectations of the local communities. The work argues that effective monitoring and enforcement as well as international cooperation is required so that the abundant natural and human resources in the Niger Delta will ultimately have an impact on the protection of health and the environment. It is opined that BITs should be structured in a way that the health and
environmental needs of the Niger Delta people are taken into consideration. Negotiations of international investment agreements particularly BITs should be made with adequate consultation at the grassroots and the peculiarities of individual host States should be properly understood and protected to ensure that foreign investors are accorded fair and equitable treatment in the host State and the human rights of the citizens are not jeopardized.

Evidences suggest that there is no significant economic growth attained in the Niger Delta region over the years of oil and gas development. Looking at the history of FDI into the oil and gas sector, FDI had consistently grown over the past six decades of oil and gas production in the region. Thus, it is difficult to conclude beyond the academic arguments on the benefits of FDI that FDI has contributed significantly towards development in the region.

The work concludes that health and environmental protection should be perceived as a global issue which ought to be addressed by both developed and developing countries. It is needful for multinationals to acknowledge the importance of both human and material resources in the long-term survival of businesses. This will encourage and promote the respect for health and healthy environment and encourage efforts to reduce the negative impacts of their activities on human and environment. To promote sustainable development firms need to demonstrate their responsibility towards resource management by adopting protection standards. This will inform firms on strategies to improve their efficiency and conservation of natural resources. Businesses should operate in a way that benefits individuals, shareholders and the society at large both now and in the future. Sustainable development should inform the organizational components of when and how to respond to changes in operational standards and of creating strategies for managing these demands.
Agreements in BITs should be negotiated to reflect these factors in order to be mutually beneficial to the parties to the BITs.

5.2 RECOMMENDATIONS

Against this background, it is averred that clauses safeguarding human health and environmental rights in BITs and indeed all international investment agreements are vital for addressing the violations of the right to health and a healthy environment in the states that produce oil and gas in the Niger Delta, insomuch as the Nigerian State recognizes that sustainable development rests not only on generating foreign investment but on the State’s capability to protect the human rights and environment of the citizens by taking precautions against the negative impacts of oil and gas extraction activities in the Niger Delta and by extension facilitating an enhanced and sustainable development.

A very vital issue for growth in the oil and gas sector of the Niger Delta was attracting appropriate foreign investment in order to generate technical knowledge and funding necessary for the utilization and development of their oil and gas resources.\textsuperscript{665} The commitment of technology, innovation and capital under a BIT particularly with developing resource rich countries such as oil and gas with the expected associated risk of health and environmental rights violations as well as violation of other human rights makes it imperative for treaty parties to ensure a fair and equitable agreement, particularly with the difficulty of the host country changing the terms of a BIT after foreign investors had committed assets and funds in furtherance of such agreements which are frequently of an indefinite tenure and can lead to the institution of an international investment arbitration against the host State\textsuperscript{666} or on the other hand, lead to the negotiation of new investment agreements.


\textsuperscript{666} Paul Stevens, ‘National oil companies and international oil companies in the Middle East: Under the shadow of Government and the resource nationalism cycle’ (2008) 1 JWELB 2008, 1
agreements with other potential investing States without jeopardising the chance of encouraging such investments.

This is because a subsequent endeavour by the host States to affirm greater power over the treatment of the environment, or the realisation that the investment exporting State is summarily better placed at the time of negotiating a proposed BIT may create greater problems for the host State. Once an investment agreement has been completed and foreign investments committed to the host State, the parties are bound by international law to honour the agreement or face the long and painful process of international investment arbitration.\(^\text{667}\)

Given the history of unstable political and economic environment of Nigeria and its effects on the Niger Delta region, entering into BITs in order to attract foreign investments is crucial. However it has been averred that for such investment to be beneficial in the long run to the region and to the country as a whole and to generate sustainable development other non-economic considerations such as health and environmental protection must be tactically addressed in such BITs. They should include health and environmental protection clauses which will clearly address the health and environmental impact of their activities and the necessary steps to be taken to address such violations. This will indicate the expectations of the local communities of foreign multinationals and demonstrate the responsibility of the Nigerian State as the host State towards the protection of its citizens in situations of conflict or dispute arising from the loss of investment on the part of foreign multinational corporations.

This will at the very least offer some protection for host States in a situation where a dispute arises between the host State and the investors. States and multinational

corporations, through international investment arbitration on the basis of BITs, have claimed compensation for impacts from health and environment-related public policy measures.\footnote{668} This presupposes that human rights and environmental protection issues can rightfully be addressed in international investment arbitrations and other forms of investment dispute settlement.

Positive steps toward this will include the adoption of due consultation by the federal government with different stakeholders and the government at the grassroots as well as citizens whose lives and wellbeing will be impacted by the economic activities that follow international investment at the point of negotiating Bilateral Investment Treaties. Effective negotiations on complex investment agreements require significant technical and institutional capacity. Public authorities alone may not be equipped with all the needed information particularly in a federal state like Nigeria to ensure an effective and efficient negotiation of BITs which put into consideration citizens’ needs and rights and how such investment relations might affect their lives and environment. BITs should be entered into by the federal government after due consultation with the state governments and local governments who would likely understand the pros and cons of production activities in affected sectors within their communities better and who may be in a better position to assess the health and environmental impact on their people.\footnote{669} The members of the government at the federal level may not be knowledgeable enough or be fully aware of the implications of trade activities within the region on the right to health of the people and the extent of destruction to the environment.


It was highlighted in the course of this work that the effectiveness of BITs depend upon pre-existing social, economic and environmental conditions within the host countries and upon specific national programs and policies that enhance the capacities of its citizens as well as the existence of an effective and efficient legal system and legislation. The Nigerian government needs to continue to take positive steps in the overall improvement of policies, rules, regulations and laws both in the Niger Delta region and nationally. Legislative gaps identified in the oil and gas legislation of the State, for example, needs to be addressed. In other for agreements in BITs not to constrain this it would be beneficial for host States to protect their right to regulate with clauses in the BIT itself. Actions taken by host States in other to improve regulations to protect public interests will then not necessarily be interpreted as indirect expropriation or conflict with investment protection standards embodied in investment treaties example if new environmental or human rights regulations increase operating costs or undermine investment prospects. And not allow BITs to undermine the sovereign right of States to regulate activities within their jurisdiction and their duty to do so, for example when necessary to protect human rights and environment from interference by foreign multinationals.

Thus the State’s right to regulate both on human rights and the environment needs to be protected. A BIT should clearly indicate the State’s intention to continue to develop and update laws and policies that are targeted towards the protection of human life and health and the environment without prejudice to foreign investors. The arguments on the right of States to regulate in international trade and investment regimes stem out of the arguments that indirect expropriation may be applicable to regulatory measures aimed at protecting the environment, health and other welfare interests of society. The question that arises is how a government, through regulation, either general in nature or by specific

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670 UNDP (n 31)
actions in the context of general regulations, for a legitimate public purpose negatively impact on the foreign investment and not be in breach of investment treaty agreements.

State actions that are essential to the fundamental functioning of the State and its primary duty to the citizens must be protected by all means and this is recognised in international law. Investment treaties must be drafted in a way that such treaties will not undermine these duties. For instance, it is an accepted principle of customary international law that where economic injury results from a *bona fide* non-discriminatory regulation within the police powers of the State, compensation is not required. A state measure will be discriminatory if it results in an actual injury to the alien and was *inter alia* done with the intention to harm the aggrieved alien.\(^{671}\)

The right of States to perform these basic duties should not be limited by their economic associations with other states through investment treaties; instead States must ensure that in performing the duties the protection of foreign investment is not compromised. In the same vein investment treaties should not restrict the States right to regulate and this ought to be properly addressed in such treaties.

The inclusion of Article XX and XXI GATT-like provisions in BITs is a good way to establish human rights and environmental concerns in investment treaties. These could be made as exception clauses to other core BIT provisions such as the fair and equitable treatment provisions where such exist in a BIT. They could also be made as clauses which other core provisions of the BIT are subject to. Provisions similar to the exception provisions of Article XX and XXI GATT leaves some room for the consideration of values other than those based strictly speaking on the efficiency of trade or trade rules alone. Article XX (b) particularly allows trading parties to deviate from trade rules contained in

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\(^{671}\) M Sornarajah, *The international law on foreign investment* (Cambridge University Press, 2010) 208
the GATT/WTO law in circumstances necessary for the protection of human, animal or plant life or health, provided they do not amount to disguised protectionism.

Applying this to an international investment setting, Article XX and XXI GATT-like provisions in a BIT will negate the assumption that BITs obstruct the host State’s effort in pursuing its sustainable development goal, or the ability to retain its regulatory flexibility to pursue public interest objectives and indicate the host States responsibility to refrain from unlawful expropriation. It will simply codify in BITs the rules already recognised in customary international law and as part of international trade and investment jurisprudence.

It will be important for such clauses to adequately fulfil three main purposes as suggested by Sabanogullari:

1. Indicate the “permissible policy objectives” such as the protection of human, animal, or plant life or health, or the conservation of natural resources.

2. Give a nexus requirement which denotes the required link between a state measure and a permissible policy objective. Frequently used nexus requirements include “necessary for,” “relating to,” and “designed and applied for.”

3. And indicate the prohibition of discriminatory or arbitrary application.672

Exception clauses are already being introduced in multilateral and regional agreements such as the Canada–European Union Comprehensive Trade and Investment Agreement (CETA) and the ongoing negotiations of the Transatlantic Trade and Investment Partnership Agreement between the United States and the European Union (TTIP). When host States and the investing States agree on standards of health and healthy environment as an exception to the body of agreements contained in a BIT the investors from the investing States clearly understand that any activity or private agreement they engage in within the territory of the host State is subject to such standards. Regulatory or

672 L Sabanogullari, ‘The merits and limitations of general exception clauses in contemporary investment treaty practice’ (2015) IISD publications
policy actions taken by the host State to realise such standards will not out rightly be
demed expropriatory. Such exception provisions will contribute towards managing the
expectations of both parties to the treaty by providing guidance for interaction with foreign
investors.

BITs particularly by resource rich developing countries should be drafted to address
environmental concerns such as the treatment and utilization of natural resources, waste
production and pollution. Experts say that ever since the Industrial Revolution and the
increased quest for development, through the burning of coal, oil extraction and natural gas
flaring, humans have emitted about 450 billion tons of carbon dioxide most of which
remains in the atmosphere and are causing climatic changes. These climatic changes have
adverse effects on human life, animals, ecosystems and environment. The world is
experiencing climatic changes because of temperature increase within the earth’s
atmosphere due to natural and man-made causes. These climatic changes are in effect
causing unpredictable weather patterns and conditions in the world. The high concentration
of greenhouse gases in the atmosphere due to greenhouse effect is a major contributor to
global warming. The greenhouse effect leads to an increase in the atmospheric temperature
on earth by ensnaring heat and light rays from the sun. Depletion of natural resources is
detrimental to both multinational corporations and the society.

It is important for States to ensure that multinational corporations utilize adequate
technologies to ensure that natural resources are used and treated in a health and
environmentally friendly manner. The use of water for example has been linked to severe
devastation for community living especially those that their livelihoods are reliant on
agriculture. Measures relating to the management of resources such as policy guidelines for
industrial operations and best practices are crucial. Numerous studies and reports cited in
this work have blamed multinational corporations for severe negative health and
environmental impacts of their activities on the host communities. Developing and
developed nations contribute differently to global environmental pollution, thus respond to
different standards of environmental protection.

A good example is the adoption of the “polluter pays” principle, first by the
Australian Government in 1991 and later by some other counties in other to make
multinationals and other corporations responsible for environmental pollution responsible
for the cost of undoing the damage done to the environment. It is recognised as a principle
of international environmental law and is a fundamental policy of the Organisation for
Economic Co-operation and Development and the European Union, and their member
states. The Australian Government enforces it mostly through taxation policies which
encourage environmental responsibility.

Applying the “polluter pays” principle in economic theory suggests that
the polluter should pay the full cost of environmental damage caused by their activity. This
would create an incentive to reduce the damage caused, at least to the level where the
marginal cost of pollution reduction is equal to the marginal cost of the damage caused by
such pollution. In situations where pollution is caused mostly by foreign investors it would
be wrong to expect host state government through tax paid by citizens to be saddled with
the responsibility of bearing the grunt of cleaning up the environment. This should be a
fundamental aspect of investment negotiations between states in other to avoid disputes
between host states and foreign investors.

Various countries are at different levels in terms of economy, policy and
environmental activities and laws. BITs are a great means through which States can agree
on expected and acceptable standards of environmental protection irrespective of the level
already achieved by the host State at the time the treaty is negotiated. Waste production and
pollution arising thereof is a major problem in the oil and gas sector and a significant area
in which multinationals are defaulting in their responsibility towards the host communities especially in developing countries where environmental standards are often lower than the standards in developed countries or not effectively implemented, and pollution control techniques are not yet fully developed. BITs offer not just the platform for investment of capital but the importation of the investors’ adequate safety planning and importation of skilled technical personnel to maintain proper facilities. This will further promote shared responsibility and co-operative efforts between parties to BITs most especially where the host State is a developing economy.

Bearing in mind that legal structures for safeguarding the environment and human health are not always adequate in most of the developing countries, if they exist at all. Even in countries where stringent laws do exist, the mechanisms for implementing and enforcing them may be lacking, and enforcement officials can be corrupt. It has been identified that large multinationals contribute significantly to waste production and pollution and as demonstrated in this work can be hard to prosecute under local laws and in local courts. Thus it is important to bind them to their responsibility in a BIT.

Finally, BITs must be recognized by both parties to it as a tool that not only protect the investing party but also the host party. Thus they should not be drafted as a minimum standard or guide for the relationship between investing States and host States but as a comprehensive guide to manage the long term relationship between parties and to boost a healthy economic relationship where sustainable development is fostered. Investing parties should agree to fulfil their obligations of respecting human rights particularly economic, social and cultural rights such as the right to health and a healthy environment taking into consideration the many determinants of health and ensuring that parties duly respect and protect them. State parties to BITs need to discard the notion of following similar patterns or generic clauses of BITs to move towards BITs that are tailored towards the real life
conditionality and situation of the treaty parties involved in the BIT. International investments are made into sectors in host communities where societies are impacted by the outcomes of such treaties. Host States need to recognise that with the existence of BITs their national legislations may not be able to duly protect citizens from potential health and environmental impacts of the activities of powerful foreign multinationals.
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